

DCTAC Comments on the Prairie Band Shabbona Casino Project

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Introduction

The Prairie Band Potawatomi has submitted an application to have their land outside Shabbona, Illinois taken into trust for the purpose of building a class II casino. At face value, this application would seem to be farfetched, for the following reasons:

- The Prairie Band's existing reservation in Kansas is 400 miles away
- The proposed casino would be adjacent to one of the few larger natural areas near Chicago
- The proposed casino would wreak economic havoc on DeKalb County and its rural neighbors
- The proposed casino would disrupt the local community and, very likely, bring increased crime
- The Prairie Band's existing Kansas casino is doing quite well

All these points are elaborated below.

The Prairie Band has long claimed that the real justification for their casino project is that their land outside Shabbona still has status as a reservation. In the usual telling of this story, when Chief Shabehnay lost the use of the land in question in 1849, somehow Congress never got around to reversing that part of the 1829 Treaty of Prairie du Chien that granted Shabehnay his land.

But this is myth. There is no reservation now for the simple reason that there never was one. As DCTAC's historical research by James Lynch has shown, no treaty-recognized title was created by the 1829 Treaty of Prairie du Chien granting Chief Shabehnay the “use” of the land. The land is **not** a reservation in the sense of the definition in 25 CFR §292.2.

There is no reservation

While the Prairie Band's land-into-trust application may nominally be under 25 CFR §151.11 – Off-Reservation Acquisitions – we are concerned that the Prairie Band will argue, implicitly or explicitly, that the claimed reservation status of their property should still play a role in the decision. **This must not happen: there has never been a reservation.**

The Prairie Band's 25 CFR §151.11 application must proceed under exactly the same terms as if the property they had purchased were located closer to DeKalb, Illinois, or within the Chicago metropolitan area. We grant that the Prairie Band has some historical connection to the Shabehnay parcel, but they have nearly the same connection to all of northern Illinois.

Additionally, their application must proceed under exactly the same terms as if another tribe at a comparable distance were to apply to have land taken into trust. §151.11 does not allow consideration of a tribe's past historical connections to the land in question. Even if such past connections were to be

taken into account, there are many other tribes with comparable historical connections to northern Illinois.

None of the parties involved in the Shabehnay land issue in the 1840's and 1850's understood there to be treaty-recognized title, that is, a reservation. The US Federal understanding, following a letter written by US Attorney General Roger Taney in 1833, was that Shabehnay's land was simply a "hole", or an exception, in the Potawatomi cession of much of northern Illinois, retaining, at best, only so-called "Indian", or aboriginal, title. For details, see the attached document titled *Analysis of Shabehnay's 1829 Title*. The Potawatomi (together with other tribes) ceded in 1829 all of northern Illinois *except* for the land near present-day Shabbona (and two other parcels). It has long been accepted that aboriginal title is extinguished through abandonment in any form, including physical departure but also attempts at sale and death.

Although the understanding of Chief Shabehnay himself was that he had title personally, in fee simple, and he could sell the land as he chose, he was mistaken. Congress had struck from the treaty the fee-simple ownership provision originally agreed to. In light of this misunderstanding, any claim must be limited to monetary compensation only. There is no "land claim" at stake here in the sense of IGRA §2719(b)(1)(B)(i).

Finally, Shabehnay's band appears to have had the same understanding of the 1829 treaty as Shabehnay himself. The 1833 Treaty of Chicago required most Potawatomi in Illinois and Wisconsin to move to Kansas. Shabehnay's band did not argue, as they might have, that they were entitled by the 1829 treaty to stay, and departed voluntarily from Illinois in 1837.

Complete details are in the following attached documents:

- *An Ethno-historical Evaluation of Land-holdings at Shabbona's Grove, DeKalb County Illinois*, by James P Lynch (the "Lynch Report", submitted to the National Indian Gaming Commission in October 2007 as part of the NIGC's legal analysis of the Prairie Band reservation claim)
- *Analysis of Shabehnay's 1829 Title*, revised edition, by Peter Dordal

Distance

25 CFR §151.11(b) addresses the "distance between the Prairie Band's reservation and the land to be acquired".

The Prairie Band's existing reservation at Mayetta Kansas is over 500 miles (driving distance) from Shabbona Illinois; the great-circle distance is 397 miles.

Granting the Prairie Band permission to open an off-reservation casino in Illinois would up-end settled precedents, opening up Illinois to off-reservation-casino requests from tribes in Wisconsin, Minnesota, Michigan and Iowa.

In 2009 the BIA denied the request by the Menominee tribe for an off-reservation casino in Kenosha, Wisconsin, at a great-circle distance of 164 miles from the Tribe's reservation. The letter from George Skibine, [GS09], cited, as a secondary consideration, this distance:

In particular, operating a Class II gaming facility on trust land so far from the Tribe's reservation could exacerbate, not diminish, the effects of termination the Tribe has suffered by encouraging

the splintering of the tribal community. The Tribe has not convincingly demonstrated why the potential negative impacts on reservation life from taking land into trust beyond a commutable distance are outweighed by the positive financial benefits of tribal ownership in a distant gaming facility.

That denial was reversed in 2013 (this reversal hinged primarily on the dire economic circumstances of the Menominee in Wisconsin; see below). The letter from Assistant Secretary Kevin Washburn [KW09] states

Admittedly, allowing an off-reservation casino located more than 150 miles from a reservation headquarters might not be appropriate in any other state....

This remarkable 400-mile distance is sufficient alone to disqualify the Prairie Band's proposal. Not only is the proposed Shabbona casino not in the same state as the Prairie Band's reservation, but Illinois and Kansas are not even contiguous.

The Prairie Band in Kansas

25 CFR §151.3(a)(3) requires that the development be “**necessary to facilitate tribal ... economic development.**”

The PBPN has a thriving casino in Kansas. The new casino would not be an economic necessity. In 2013, the Menominee Indian Tribe of Wisconsin finally succeeded in their land-into-trust application for property at Kenosha, Wisconsin; the approval letter from Assistant Secretary Kevin Washburn to Gov Scott Walker makes clear that a crucial factors in the Menominee's otherwise-borderline application were the “Federal Termination in the 1950s” and “a high poverty rate”. The Prairie Band, while facing legitimate Tribal needs, cannot claim a similar poverty rate. The following data are from census.gov/quickfacts:

County	per capita income	poverty rate
Menominee Co, Wi	\$15,201	29.1%
Jackson Co, KS	\$25,030	10.3%

In addition, the 2013 approval refers to the federal termination of the Menominee Tribe in the 1950's (that Tribe regained recognition in 1973), and the difficulty the Tribe has had recovering from this event. The Prairie Band has faced no such termination.

A look at the Prairie Band's current economic development projects (at pbpindiantribe.com/vision-of-development.aspx) suggests that, while the Tribe still has significant needs, they are not of the sort driven by “a high poverty rate”:

[Basic] projects have included Internet access, fiber optic, and distance-learning programs. In the Indian community these are considered luxuries, but now they will have become a central requirement for conducting business. In 2004, the installation of a cellular tower to expand cellular service on the reservation has promoted better cellular reception.

These are important projects, but not comparable with the needs that led to the reconsideration of the Menominee casino in Kenosha.

As a final point, it is unlikely that more than a small handful of the 400 jobs the Prairie Band has assured the DeKalb County Board the casino would create would go to tribal members.

The DeKalb County Community

25 CFR §292.13(c) (from 25 USC §2719(b)(1)(A)) requires that “the **gaming establishment ... would not be detrimental to the surrounding community.**”

The core economic difficulty the casino would bring to DeKalb County is simply that it would pump several times as much money out of the county as it would bring into it.

At the August 4 2015 meeting of DeKalb County's Economic Development Subcommittee, members were presented with data indicating that the casino would hire 400 employees, with a total payroll of \$17 million. But a 2003 study of the Prairie Band's Kansas casino by Seitz and Darling [SD03] states that in 2002, "937 employees received wages and benefits totaling \$17.4 million". Accounting for inflation, the proportional Shabbona casino payroll would be under \$8 million.

At the January 26, 2016 scoping hearing, the Prairie Band presented a tentative drawing suggesting the casino would have 27,000 square feet of gaming space. The Foxwoods casino in Connecticut allows about 40 square feet per slot machine (or “electronic bingo machine”); the Hollywood Casino in Aurora allows slightly more space. These numbers suggest the Shabbona casino, in its initial phase, would have 550-700 machines. For simplicity, we will estimate 600 machines.

In 2005, Foxwoods earned about \$110,000 on every slot machine (http://www.das.state.ct.us/Digest/Digest_2005/Special%20Revenue,%20Division%20of.htm); adjusting for inflation that would be about \$130,000 per machine today. That number may reflect unusual success; we will assume a more modest \$100,000 per machine. For Shabbona, that works out to about \$60 million per year of net house winnings.

The Prairie Band would like to attract customers from the Chicago area (and, to a lesser extent, from the city of Rockford). To this end, they will no doubt do whatever they can to arrange for convenient bus transportation for patrons. The bulk of casino profits, however, comes from regular customers; that is, customers within the “feeder radius” of, typically, 35 miles [JK03]. Even allowing for casino-sponsored transportation, it is an inexorable consequence of geography that it will be difficult for the Shabbona casino to attract more than limited numbers of regular customers from the Chicago area: twenty-five miles due east of the Shabbona site lies the Hollywood Casino in Aurora, Illinois. Any gambler from the Chicago metropolitan area pretty much has to drive *past* this Aurora casino, and then half an hour further. The Shabbona casino may attract a surge of initial interest, but attracting repeat business from Chicago will be very difficult. Who will become a regular, drawn by the Tuesday night specials? Nobody from east of Route 47. The casino's marketing will therefore need focus intensively on the locals.

It is a conservative assumption that half the Shabbona casino's revenue will come from the *rural* areas within a radius of 35 miles. That's \$30 million, which is almost four times the casino payroll. Given the lack of nearby population centers to the west and south, we estimate that at least \$24 million – three times the payroll – will come from DeKalb County, including students from Northern Illinois

University. From another perspective, if we assume 3-5% of DeKalb County's 105,000 residents become problem gamblers contributing 60% of this \$24 million (a typical rate; see [WW04]), that works out to \$50-100 per week per affected family. This would amount to a severe economic burden on DeKalb and adjoining counties.

Faced with these economic data, the DeKalb County Board amended its agenda at its August 19, 2016 meeting to **strike** consideration of a resolution in support of the casino:

Mr. Jones shared that item R2015-66: Resolution to Support the Prairie Band Potawatomi Nation's "Land in Trust" Request has created a lot of question and controversy and after lengthy discussions, it has become very apparent that the Board does not have a good grasp on this topic or the ramifications of this resolution passing or failing. He continued that the Prairie Band Potawatomi Nation has been considered as a good neighbor. And therefore in fairness to them and the citizens of this County, he suggests that the Board remove the resolution from tonight's agenda so they can all become better educated on exactly what the effects of this resolution are.

The DeKalb County Board has never returned to consideration of this or any similar resolution. This refusal to endorse the casino speaks quite clearly. The resolution in question had been unanimously recommended by the County Board's Executive Committee on August 4, before DCTAC presented its economic data.

It is important to note that the argument framed here is not against gambling *per se*, but rather simply against the idea that the Shabbona casino would draw largely from urban areas. The existing proposal would draw patrons primarily from local areas.

There is one way for the Shabbona casino to achieve a broad customer base and thus to avoid the need for predatory marketing to those within the local radius: that is to grow to the point that it becomes a sprawling "destination" complex. At that point, however, the impacts on the community and the adjacent State Recreation Area become devastating; see the following section.

Furthermore, while a casino might benefit one or two local businesses, it will be catastrophic for local restaurants and bars. The casino's restaurant space will likely be partially underwritten by the gambling operations, meaning that casino bars and restaurants will be able to undercut local enterprises. The town of Shabbona lost its hardware store a few years ago to competition from big-box stores twenty miles away. Two Shabbona restaurant-bars closed during the recent recession, leaving only one remaining. A big-box casino restaurant will shut down competing businesses not only in Shabbona but also in neighboring towns such as Waterman.

Environmental Concerns and Shabbona Lake State Recreation Area

The proposed casino site is immediately adjacent to the Chief Shabbona Forest Preserve and the Shabbona Lake State Recreation Area. The latter is one of a half dozen larger Illinois natural areas within an hour's drive from the Chicago area (along with Illinois State Beach, Chain O' Lakes, Goose Lake, Kankakee River and the Channahon/Des Plaines area). Shabbona Lake currently attracts about half a million visitors a year; the **first phase** of the Shabbona casino is expected to draw an additional million visitors, *tripling* traffic. This traffic will bring congestion, litter, runoff and 24-hour lighting, along with a pervasive urbanization that is exactly what people today come to Shabbona Lake to *avoid*.

But the casino will face an ineluctable choice: to feed mostly from the local rural community, or to expand. In 2003, the Prairie Band floated a proposal to build an enormous destination complex, complete with hotels, an amusement park, and shopping. This would largely fill the 128-acre site, and spur further development of adjacent farmland. If built, this might reduce the need for marketing to the locals, but at dire cost to Shabbona Lake, which will at that point have become an urban park.

One approach to addressing growth-related increases in casino-visitor impact on Shabbona Lake is to give the DeKalb County Board some oversight in future casino expansion; there is no provision for this in the existing Tribe-County Intergovernmental Agreement. Alternatively, the BIA has the option of approving a much smaller acreage for the casino, so that the Prairie Band would have to submit a new land-into-trust application if, at some future date, they wanted to expand.

However, a much more effective protection for Shabbona Lake is simply to **relocate** the proposed casino project to another site entirely – preferably to one that is far removed from any natural areas. An alternative site could also address the alcohol issue (below), if it had the existing infrastructure – a combination of hotels and public transportation – to provide patrons with options to driving while intoxicated. The Prairie Band chose the existing site because of the reservation claim; as that claim is not valid, they could relocate the project simply by purchasing other property elsewhere and submitting a new land-into-trust application.

The heavily forested Chief Shabbona Forest Preserve wraps around the west and south border of the Prairie Band property. This is a relatively narrow strip of land, less than a quarter of a mile wide. On the far side of the Forest Preserve lies the Shabbona Lake State Recreation Area. During the October-January deer-hunting season in the Recreation Area, the Forest Preserve serves as a refuge for deer; hunting is not allowed there. There are no other comparable wooded refuge areas adjacent to the Recreation Area. A casino even at the northeast corner of the Prairie Band property – the point furthest from the Forest Preserve – would still be close enough to drive the deer from the Forest Preserve's protection, into the open-prairie hunting zones of the Recreation Area.

In the spring of 2016, a pair of bald eagles established a nest within the borders of the Shabbona Lake State Recreation Area, about a mile from the Prairie Band's property. The casino would certainly have an impact on them; the entire casino property is well within the eagles' typical feeding range. According to the US Forest Service website www.fs.fed.us/database/feis/animals/bird/hale/all.html, bald eagles “choose [nesting] sites more than 0.75 miles (1.2 km) from low-density human disturbance and more than 1.2 miles (1.8 km) from medium- to high-density human disturbance”.

The entire Prairie Band property drains into Lake Shabbona. The Prairie Band has negotiated with the Village of Shabbona to build a sanitary sewer, but not a storm sewer; runoff from the casino will all flow into the lake. This problem will become increasingly severe as more and more space is devoted to parking and construction.

Crime

Many authors have drawn a connection between casinos and crime. The influential paper by Grinols and Mustard [GM06] identifies several factors related to an increase in crime after a casino opens. For the Village of Shabbona, the likely sources are casino visitors and the increased anomie and urban alienation that will be consequences of casino-induced population shifts tied to a minimum-wage economy.

Grinols and Mustard note that "...visitors to national parks do not increase crime. Therefore, if casino visitors induce crime, it is because they are systematically different from national park visitors...." (or, we might add, from State Park visitors). Their paper then goes on to demonstrate convincingly that casinos *do* bring increased rates of violent and property crimes.

The current rate of violent crime and property crime in the Shabbona community is exceptionally low; even a small increase in crime would be felt keenly. The Village of Shabbona currently does not have a police department (though they do contract with the county to supply a part-time constable). Most residents are long-term residents, and know most other residents. Many do not see a need to lock their doors at night. If the casino is built, this will change; the influx of low-wage employees and their families will, at a minimum, unravel the tight-knit fabric of the community.

Intergovernmental Agreement with DeKalb County

In 2008 the Prairie Band negotiated an Intergovernmental Agreement with DeKalb County. That agreement was negotiated under duress at a point when the Prairie Band was claiming that they held reservation title outright. DeKalb County had very limited bargaining power, resulting in an agreement that offers inadequate protection to community interests. This is particularly evident in terms of waivers by the Prairie Band of sovereign immunity. As a first example, the Prairie Band has not agreed to be sued by the County, except to enforce the results of binding arbitration; this greatly limits the County's ability to respond to what it sees as emergency or safety-related situations. Second, the Intergovernmental Agreement includes a property-values guarantee for homeowners within approximately a mile of the casino, but this guarantee is unenforceable as the Prairie Band did not waive immunity to lawsuits by these homeowners. Third, any casino patrons suffering physical injuries would have to seek justice in Tribal court, which, while well-intentioned, represents a decided conflict of interest. The casino would not be bound by Illinois non-smoking rules.

There are two rather more serious issues:

First, the Prairie Band has accepted no **dram-shop liability**; that is, they have not waived sovereign immunity for alcohol-related accidents caused by patrons. Every other Illinois establishment that serves alcohol has such liability; this has been a significant contributor to reducing drunk driving.

The proposed rural location makes this a particularly critical issue, as roads are all two-lane and there is no public transportation anywhere near Shabbona. There is not even taxi service. The nearest motel is in DeKalb, almost twenty miles away. Over-served patrons literally have no options.

The second issue is that the Prairie Band has not agreed to participate in state-mandated **problem-gambling programs**. Indeed, the very purpose of 24x7 gambling is to attract problem gamblers, and then hang on to them until their money is gone; in 2013 the Illinois Gaming Board considered but then rejected this option.

The State of Illinois maintains a voluntary self-exclusion program for problem gamblers; this is voluntary on the part of gamblers but mandatory for state-licensed casinos. The Shabbona casino would, however, be exempt. Other proposals for addressing problem gambling include restrictions on ATM and cash-advance availability at casinos, identification of at-risk gamblers through systems such as iGAP [WW04], time limits for play, and accurate posting of the odds of winning. The Prairie Band would have no incentive to implement any of these.

In Section 10 of the existing Intergovernmental Agreement with the County, the Prairie Band has agreed to “make annual contributions in the amount of \$5,000” for problem-gambler programs. Given the typical 3-5% problem-gambler rate, this might barely cover postage for two mailings to such gamblers in the County per year. This is evidence of a lack of commitment on the part of the Prairie Band to addressing problem gambling.

Conclusion

It is very difficult to justify the land-into-trust process given that the casino would be 400 miles (500 miles if driving) from the Tribe's reservation. Furthermore, there is no valid claim of reservation status for the Shabbona site.

It is in the best interests of the Prairie Band, the local Shabbona community and the Shabbona Lake State Recreation Area to locate the casino elsewhere. The original proposal is tied to the Shabbona property only by the invalid reservation claim. The Prairie Band would benefit from more efficient access to the Chicago market, and Shabbona Lake and the local community would not have to endure a casino as an immediate neighbor.

We recognize the Prairie Band paid several times the going rate for farmland for their 128-acre parcel, in the mistaken belief that the land would be declared a reservation by the NIGC. But it is not for the BIA to reward the Prairie Band for a speculative investment of the past. The Prairie Band casino proposal does not come close to meeting the established criteria for a land-into-trust acquisition.

References

[GM06] Earl Grinols and David Mustard, *Casinos, Crime and Community Costs*, The Review of Economics and Statistics, February 2006.

[JK03] John Warren Kindt, *Diminishing or Negating the Multiplier Effect: The Transfer of Consumer Dollars to Legalized Gambling: Should a Negative Socio-Economic “Crime Multiplier” Be Included in Gambling Cost/Benefit Analyses*”, Michigan State DCL Law Review, Issue 2, 2003.

[SD03] Mark Seitz and David Darling, *The Role of Harrah's Prairie Band Casino Property in the Area Economy: Jackson and Shawnee Counties in 1998-2001*, CD Study Report #212, Kansas State University Research and Extension, 2003.

[GS09] George Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development, letter dated January 7, 2009, to The Honorable Lisa Waukau, Chairperson, Menominee Indian Tribe of Wisconsin.

[KW09] Kevin Washburn, Assistant Secretary – Indian Affairs, letter dated August 23, 2013, to the Honorable Scott Walker, Governor of Wisconsin.

[WW04] Robert Williams and Robert Wood, *The Demographic Sources of Ontario Gambling Revenue*, prepared for the Ontario Problem Gambling Research Centre, June 23, 2004.