

Second, as Mazurek's argument on appeal confirms, the information he sought to procure through discovery and to present during an evidentiary hearing relates to the propriety of the FTA's investigation under French civil tax law. His document requests reflect this same focus. Producing evidence that may demonstrate the bad faith of a French tax agency purely as a matter of French civil tax law is irrelevant to the only good faith issue under *Powell*, i.e., the good faith of the IRS in honoring the French request. And, Mazurek does not seek to discover, or allege that he needs to discover, information that would impugn the good faith of the IRS in issuing the summons or enforcing it in compliance with the FTA's request.

District courts are afforded wide leeway in fashioning the scope of discovery in summons enforcement proceedings because ultimate issues of responsibility are not decided in these proceedings. Given this broad discretion and Mazurek's misdirected discovery requests, we are satisfied that the district court acted well within its discretion in denying discovery and an evidentiary hearing.

III.

CONCLUSION

For the foregoing reasons, Mazurek's appeal from the denial of his motion to quash the IRS's summons is denied. The district court's rulings are, in all respects,

AFFIRMED.



available in summons enforcement proceed-

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS; Grand Traverse Band of Ottawa and Chippewa Indians; Keweenaw Bay Indian Community; Hannahville Indian Community; Bay Mills Indian Community, Plaintiffs,

**Lac Vieux Desert Band of Lake Superior Chippewa Indians,
Plaintiff-Appellee,**

**Saginaw Chippewa Indian Tribe of Michigan, Intervening
Plaintiff-Appellee,**

v.

**John M. ENGLER, Governor,
Defendant-Appellant.**

No. 00-1277.

United States Court of Appeals,
Sixth Circuit.

Argued: June 15, 2001.

Decided and Filed: Nov. 7, 2001.

State moved to compel compliance with consent judgment which had settled dispute between state and Indian tribes. The United States District Court for the Western District of Michigan, Douglas W. Hillman, J., 93 F.Supp.2d 850, ruled that tribes' obligation to pay portion of net proceeds to state had terminated when compact allowing non-party tribes to operate games in state became effective. State appealed. The Court of Appeals, Boyce F. Martin, Jr., Chief Judge, held that tribes' exclusive right to operate games ended when non-party tribes obtained necessary permissions to operate similar games.

Affirmed.

ings only in extraordinary situations.'')).

1. Courts ⇨99(6)

In continuing enforcement of consent judgment, considered an extension of original lawsuit, under Michigan law, district court's illumination, in original case, of meaning of key phrase "exclusive right to operate," was law of the case.

2. Federal Courts ⇨776

Court of Appeals construes consent judgment de novo.

3. Judgment ⇨91

Under Michigan law, consent judgments are binding contracts, subject to ordinary rules of contractual interpretation.

4. Federal Courts ⇨420

Court of Appeals interprets consent judgment formed in Michigan under Michigan law.

5. Contracts ⇨147(1)

Under Michigan law, primary goal in construction or interpretation of any contract is to honor intent of the parties.

6. Contracts ⇨147(2)

Court of Appeals, when interpreting any contract under Michigan law, looks for intent of the parties in the words used in the instrument.

7. Judgment ⇨855(1)

Under Michigan law, continuing enforcement of a consent judgment is rightfully considered an extension of the original lawsuit.

8. Federal Civil Procedure ⇨2397.5

Indian tribes' obligation to pay State a percentage of gambling proceeds, in accordance with terms of prior consent judgment, terminated when two non-party

tribes' compact with State became valid and non-party tribes' gaming regulatory ordinances were approved by National Indian Gaming Commission, giving non-party tribes right to lawfully operate electronic games of chance in State; consent judgment required payments to State only so long as party tribes had exclusive right to operate electronic games of chance in State. Indian Gaming Regulatory Act, §§ 2-22, 25 U.S.C.A. §§ 2701-2721.

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Keith D. Roberts (argued and briefed), E. Michael Stafford, Asst. Attorney General, Office of the Attorney General of Michigan, Lottery and Racing Division, Lansing, MI, for Appellant.

Before: MARTIN, Chief Judge;
NELSON, Circuit Judge; RICE, Chief
District Judge.*

OPINION

BOYCE F. MARTIN, JR., Chief Judge.

The plaintiffs in this case are seven Indian tribes with casinos on their Michigan reservations. Under an agreement, they are required to pay the state of Michigan a sum of money representing revenue lost

*The Honorable Walter Herbert Rice, Chief United States District Judge for the Southern

District of Ohio, sitting by designation.

by the state before other casinos obtained the right to operate. The question presented is when the Seven Tribes stopped having exclusive casino operating rights.

Under slightly different circumstances, we have confronted this same question before. See *Sault Ste. Marie v. Engler*, 146 F.3d 367 (6th Cir.1998) (*Sault Ste. Marie I*). Both disputes arose out of the Seven Tribes' even earlier suit against Governor Engler for failing to negotiate gaming compacts with them "in good faith," as required by federal law. The parties settled that 1990 case. The settlement provided that Michigan would enter into gaming compacts with the Seven Tribes. In exchange, the Seven Tribes agreed to make semi-annual payments of eight percent of the net win from their casinos' electronic games of chance, so long as the Seven Tribes collectively enjoyed the "exclusive right to operate" those types of games within the state. The district court entered a consent judgment to this effect on August 20, 1993. *Sault Ste. Marie I* decided when the exclusive right terminated in light of Michigan's 1996 legalization of casinos in downtown Detroit. We held then that the payments must continue until the state granted someone a license for a Detroit casino, regardless of when such a casino might ultimately open its doors. See *id.* at 373.

In the meantime, Michigan negotiated gaming compacts with four more Indian tribes, the Nottawaseppi Huron Band of Pottawatomi, the Little River Band of Ottawa Indians, the Pokagon Band of Pottawatomi, and the Little Traverse Bay Band of Odawa Indians. The Seven Tribes now claim that these compacts' effective date, February 18, 1999, ended their payment obligation a little more than five months before Michigan awarded MGM Grand the first Detroit license on July 28 of the same year. Moving to compel the Seven Tribes'

compliance with the consent judgment, Governor Engler counters that these new compacts have no practical effect on what the Seven Tribes must pay. He stresses our prior statement that "the [Seven] Tribes maintain their exclusive right until another group receives a casino license," *id.*, and notes that none of the New Tribes actually licensed gaming on their reservations until after July 28 had passed. The district court denied Governor Engler's motion.

We agree with the district court that licenses per se do not bear upon this case. The licenses in *Sault Ste. Marie I* were dispositive because they officially conferred Michigan's permission to conduct gaming activities inside the state boundaries. This is not the function of the licenses involved in tribal gaming, which basically serve to (1) identify casino employees who have passed a background check, see 25 U.S.C. §§ 2710(b)(2)(F) and 2710(c)(1)-(2), and (2) identify each casino's geographic location, see 25 U.S.C. §§ 2710(d)(1)(A)(ii) and 2710(b). Furthermore, the tribal gaming licenses are issued by the New Tribes themselves, not by the state. Thus, the tribal gaming license requirements are comparable to the regulatory conditions state licensed casinos must meet after their licenses are issued. Governor Engler's equation of state licenses with tribal gaming licenses amounts to mere "linguistic slight-of-hand" and is not dispositive.

[1-7] The district court correctly recognized that Governor Engler's motion compels another construction of the 1993 consent judgment. We do so de novo. *Huguley v. General Motors Corp.*, 67 F.3d 129, 132 (6th Cir.1995). Consent judgments are binding contracts, subject to the ordinary rules of contractual interpretation. *Brown v. Neeb*, 644 F.2d 551, 557 (6th Cir.1981). Because this contract was

formed in Michigan, we interpret it under Michigan law. *Sawyer v. Arum*, 690 F.2d 590, 593 (6th Cir.1982). "The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v. Chrysler Corp.*, 445 Mich. 109, 517 N.W.2d 19, 29 n. 28 (1994). We "look for the intent of the parties in the words used in the instrument," *Michigan Chandelier Co. v. Morse*, 297 Mich. 41, 297 N.W. 64, 67 (1941), and the key words we must examine remain "exclusive right to operate." However, the continuing enforcement of a consent judgment is rightfully considered an extension of the original lawsuit. Thus, to the extent that *Sault Ste. Marie I*'s illumination of the phrase's meaning can apply here, we concur with the district court that it should be honored as the law of the case. *See Consolidation Coal Co. v. McMahon*, 77 F.3d 898, 905 (6th Cir.1996).

We find it helpful to define "exclusive right to operate" using two distinct inquiries: First, what exactly is the *right* to operate? And second, when does an entity besides the Seven Tribes also have that right? *Sault Ste. Marie I* expressly addresses the second of these questions—the Seven Tribes' exclusivity ends when another group "possess[es], control[s], or use[s]" the right, *see Sault Ste. Marie I*, 146 F.3d at 372–73—but answers the first with less precision. Nevertheless, we determined there that the Seven Tribes' exclusive right to operate electronic games of chance ended on the date that Michigan issued a license because, at that instant, another entity would possess the same right. Possession was enough. *See id.*

[8] So what is the nature of a "right"? Lacking other legal authority, we turn to dictionary definitions of "right." *See BLACK'S LAW DICTIONARY* (7th ed. 1999) ("a power, privilege, or immunity secured to a person by law"); *OXFORD ENGLISH DICTIO-*

NARY (2d ed. 1989) ("a justifiable claim, on legal or moral grounds, to have or obtain something, or to act in a certain way"). These definitions place both parties on an equal footing. Thus the Seven Tribes and the winning bidder in Detroit would find themselves on an equal footing. This case thus reduces to when one of the New Tribes can be said to have attained an equivalent position. We find that two of them, the Little River Band of Ottawa Indians and the Little Traverse Bay Band of Odawa Indians, attained it on February 18. We highlight that date for two reasons. First, these tribes' tribal-state compacts then became valid. Second, the tribes had also passed proper comprehensive gaming regulatory ordinances, which were approved by the chairman of the National Indian Gaming Commission, as the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721, requires. *See, e.g.*, 64 Fed. Reg. 4722, 4723 (Jan. 29, 1999). The February 18 aggregation of these two events ended the Seven Tribes' exclusivity by putting the two tribes where MGM Grand was on July 28. Therefore, February 18 brought the Seven Tribes' exclusivity to an end.

The New Tribes could not lawfully operate electronic games of chance until Michigan gave them permission to do so in the compacts. This of course required the compacts to take effect. Pursuant to their own plain terms, this happened on February 18. The parties do not dispute this conclusion. The compacts' only barrier to "permitting the initiation of any Class III gaming (which includes electronic games of chance, *see* 25 U.S.C. §§ 2703(7)(B)(ii) and 2703(8)) on eligible Indian lands," is enacting the ordinance. As we have pointed out, two of the New Tribes already had done so. Additionally, this was sufficient to comply with federal law, which allows Class III gaming if it is "(A) authorized by

an ordinance or resolution . . . ; (B) located in a State that permits such gaming . . . and; (C) conducted in conformance with a Tribal State compact . . . ” *Id.* § 2710(d)(1). Beginning February 18, the only thing prohibiting the two tribes we have identified from operating electronic games of chance was the tribes. We are satisfied that they thus possessed the right to do so as of that date.

In summary, *Sault Ste. Marie I* instructs that these two entities possessed the right to operate games of chance once they had satisfied all the contractual and legal prerequisites for offering those games to the public. Once another entity possessed that right, the Seven Tribes stopped owing Michigan the disputed payments. The district court correctly denied Governor Engler’s motion.

Judgment **AFFIRMED**.



**James H. HINKLE, Petitioner–
Appellee/Cross–Appellant,**

v.

**Michael RANDLE, Warden, Respon–
dent–Appellant/Cross–Appellee.**

Nos. 00–3506, 00–3889.

United States Court of Appeals,
Sixth Circuit.

Argued June 7, 2001.

Decided and Filed Oct. 11, 2001.

Following affirmance of his conviction of rape on direct appeal before the Ohio Court of Appeals, petitioner sought habeas relief. The United States District Court for

the Southern District of Ohio, Algenon L. Marbley, J., conditionally granted writ. State appealed, and petitioner appealed from order denying him release pending appeal. The Court of Appeals, Batchelder, Circuit Judge, held that: (1) habeas petitioner could not show cause and prejudice to excuse procedural default on claim of prosecutorial misconduct during closing argument; and (2) defense’s counsel’s failure to object to prosecutor’s rebuttal argument was not ineffective assistance.

Reversed.

1. Habeas Corpus ⇄422

Rejection of claimed error by Ohio appellate court under contemporaneous objection rule constitutes an adequate and independent state ground that bars federal habeas review absent a showing of cause and prejudice. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⇄423

State appellate court’s review for plain error is enforcement of a procedural default for purpose of determining availability of habeas review. 28 U.S.C.A. § 2254.

3. Habeas Corpus ⇄422, 431

In determining whether state courts have relied on a procedural rule to bar review of a claim, habeas court looks to the last reasoned opinion of the state courts and presumes that later courts enforced the bar instead of rejecting the defaulted claim on its merits. 28 U.S.C.A. § 2254.

4. Habeas Corpus ⇄431

Habeas petitioner has the burden of showing cause and prejudice to overcome a procedural default. 28 U.S.C.A. § 2254.

5. Habeas Corpus ⇄406, 409

Habeas petitioner could not show cause and prejudice to excuse procedural default on issue of prosecutorial miscon-