DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, the Grand Traverse Band of Ottawa and Chippewa Indians makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO

June 10, 2003

Riyaz Kanji

Riyaz A. Kanji
KANJI & KATZEN, PLLC
The First National Building
201 South Main Street
Suite 1000
Ann Arbor, Michigan 48104-2177
(734) 769-5400
Counsel for the Grand Traverse Band of Ottawa and Chippewa Indians

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Grand Traverse Band I	*Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan, 46 F. Supp.2d 689 (W.D. Mich. 1999)*
Grand Traverse Band II	*Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan, 198 F. Supp.2d 920 (W.D. Mich. 2002)*
RE	Record Entry (District Court Docket Number)
State	State of Michigan
State Br.	Brief of Intervenor—Appellant State of Michigan

JURISDICTION AND ORAL ARGUMENT

The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1362. The court entered final judgment on April 22, 2002, and Appellant State of Michigan (the "State") timely filed a Notice of Appeal on May 17, 2002.

The State failed, however, to file an opening brief in accordance with the August 7, 2002 deadline established by this Court. Nor did the State request an extension of that deadline or move to cure its deficiency promptly. Accordingly, on September 3, 2002, with "[a]ppellant having previously been advised that failure to satisfy specified obligations would result in dismissal of the case for want of prosecution," Order of September 3, 2002, this Court dismissed the State's appeal. On October 21, 2002, the State moved to reinstate the appeal. Appellee Grand Traverse Band of Ottawa and Chippewa Indians (the "Band") opposed the motion. On March 3, 2003, this Court reinstated the appeal without opinion.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

The Band concurs in the State's request for oral argument.

STATEMENT OF THE CASE

I. Nature of the Case

This case presents a single issue of statutory interpretation under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA" or "the Act"). Section

2719 of the Act allows tribes to conduct gaming operations on lands placed into trust for them after the Act's effective date of October 17, 1988 (sometimes referred to as "after-acquired lands") in a variety of circumstances, including where the lands were "taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii) (the "restored lands provision"). The sole question on this appeal is whether the Band is a tribe "that is restored to Federal recognition." For if it is, the State concedes that the after-acquired lands on which the Band's Turtle Creek Casino sits were placed into trust as part of the restoration of the Band's lands, such that gaming on those lands would be lawful under IGRA.

The court below, and at least two other district courts, have concluded that the statutory phrase "an Indian tribe that is restored to Federal recognition" should be interpreted according to its plain meaning, such that a tribe like the Band that once enjoyed federal recognition, was stripped of that recognition by the federal government, and then regained it, falls squarely within its terms. The two federal agencies charged with implementing IGRA and with administering Indian affairs more generally (the National Indian Gaming Commission and the Department of the Interior) concur, and no contrary authority exists. The State, however, argues otherwise.

II. Factual Background

For centuries, the Grand Traverse Ottawas and Chippewas have resided on the lands surrounding Grand Traverse Bay in the northwestern portion of Michigan's Lower Peninsula. (RE 168 Opinion (*Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney,* 198 F. Supp.2d 920), pg. 7, JA42). As non-Indians spread into what is now the State of Michigan, the United States and the Grand Traverse Band established a "government-to-government relationship" through a "series of treaties," including the 1795 Treaty of Greenville, 7 Stat. 49, the 1815 Treaty of Spring Wells, 7 Stat. 131, the 1836 Treaty of Washington, 7 Stat. 491, and the 1855 Treaty of Detroit, 11 Stat. 621. (RE 168 Opinion, pg. 5, JA40); (RE 137 Pretrial Order (Uncontroverted Fact No. 2), pg. 13, JA79); (RE 150 Trial Transcript Volume I, pg. 67 (Treaty of Greenville, Treaty of Spring Wells, Treaty of Washington)); (RE 150 Trial Transcript Volume I, pg. 67 (Treaty of Detroit), JA170-177). In those treaties, the United States recognized the Grand Traverse Ottawas and Chippewas as a distinct political entity and forged agreements with them on the critical issues of the day, including the establishment and preservation of amicable relations, land title and usage, usufructuary rights, and the Band's repeated and ultimately successful insistence that it remain in the State of Michigan. (RE 150 Trial Transcript Volume I, pg. 40-

41 (McClurken Testimony), JA268-269); (RE 150 Trial Transcript Volume I, pg. 67 (McClurken Report, pgs. 3-5)).

In 1872, however, "then-Secretary of the Interior, Columbus Delano, improperly severed the government-to-government relationship between the Band and the United States, ceasing to treat the Band as a federally recognized tribe." (RE 168 Opinion, pg. 5, JA40); *see also* (RE 137 Pretrial Order (Uncontroverted Fact No. 4), pg. 14, JA80), ("The United States unilaterally ceased to treat the Band as a federally-recognized tribe commencing in 1872, when Secretary of the Interior Columbus Delano improperly severed the government-to-government relationship between the United States and the Band."). The Secretary interpreted the 1855 Treaty of Detroit as providing for the dissolution of the tribe once the annuity payments it called for were completed in the spring of 1872, and hence decreed that upon the finalization of those payments "tribal relations will be terminated." (RE 150 Trial Transcript Volume I, pg. 67 (Letter from Secretary of the Interior Delano to Commissioner of Indian Affairs Walker, pg. 3), JA183); (RE 150 Trial Transcript Volume I, pg. 67 (McClurken Report, pgs. 7-8)); (RE 150 Trial Transcript Volume I, pgs. 41-43 (McClurken Testimony), JA269-271). The Secretary's action, which the State has conceded was "based on an incorrect reading of the 1855 Treaty," State Br. at 5-6; (RE 137 Pretrial Order (Uncontroverted Fact No. 4), pg. 14, JA80), ushered in a period of more than a

century during which the Band lacked federal recognition and experienced "increasing poverty, loss of land base and depletion of the resources of its community." (RE 168 Opinion, pg. 5, JA40); (RE 150 Trial Transcript Volume I, pgs. 70-72, 77-78 (Chambers Testimony), JA252-254, 255-256); (RE 150 Trial Transcript Volume I, pgs. 94-98 (Burtt Testimony), JA242-246); (RE 150 Trial Transcript Volume I, pgs. 121-122 (Kewaygoshkum Testimony), JA257-258); (RE 152 Trial Transcript Volume III, pgs. 105-106 (Petoskey Testimony), JA292-293).

The Band did not simply disappear after 1872, however. "Between 1872 and 1980, the Band continually sought to regain its status as a federally recognized tribe. The Band's efforts succeeded in 1980 when it became the first tribe acknowledged by the Secretary of the Interior pursuant to the federal acknowledgment process." (RE 168 Opinion, pg. 5, JA40); State Br. at 6; (RE 137 Pretrial Order (Uncontroverted Fact No. 5), pg. 14, JA80); (RE 150 Trial Transcript Volume I, pg. 67 (McClurken Report, pgs. 8-10)); (RE 150 Trial Transcript Volume I, pg. 67 (1934 Petition for Recognition under the Indian Reorganization Act)); (RE 150 Trial Transcript Volume I, pg. 82 (Notice of Determination for Federal Acknowledgment)).

This case arose because, after it succeeded in regaining federal recognition, the Band sought to rebuild itself as a viable entity. One of the Band's first priorities was to re-establish its land base. (RE 150 Trial Transcript Volume I, pgs.

111-12 (Burtt Testimony), JA250-251). Between 1980 and 1988 the Band was stymied in this task by "a protracted dispute with the Department of the Interior over the terms of its constitution. During this period, the Secretary of the Interior refused to take further land into trust for the Band." (RE 168 Opinion, pg. 6, JA41); (RE 150 Trial Transcript Volume I, pgs. 108-12 (Burtt Testimony), JA247-251). Once the dispute was resolved in March of 1988, the Band was able to move forward with its land restoration efforts. From that date until July 1990, "the Band engaged in significant efforts to acquire land [and the] United States took into trust [the] multiple parcels of property that continue to constitute the majority of [the Band's] trust lands." (RE 168 Opinion, pg. 6, JA41); (RE 151 Trial Transcript Volume II, pgs. 8-9 (Kewaygoshkum Testimony), JA262-263).

One of the parcels acquired during this period of time is now the focal point of this litigation. On April 20, 1989, the Band acquired fee simple title to land located in Whitewater Township, Grand Traverse County, Michigan that is commonly referred to as the "Turtle Creek site." (RE 168 Opinion, pg. 6, JA41); (RE 137 Pretrial Order (Uncontroverted Fact No. 8), pg. 14, JA80). The United States placed the land into trust for the Band on August 8, 1989, or ten months after IGRA's effective date. (RE 168 Opinion, pg. 6, JA41); (RE 137 Pretrial Order (Uncontroverted Fact No. 9), pg. 14, JA80).

The site, which is located on the east shore of Grand Traverse Bay is "at the heart of the region that comprised the core of the Band's aboriginal territory and was historically important to the economy and culture of the Band . . . . The site is at the heart of a region providing [the Band with] a range of important natural resources for food, shelter, tools and medicine." (RE 168 Opinion, pg. 7, JA42); (RE 150 Trial Transcript Volume I, pg. 67 (McClurken Report, pgs. 10-11, 66-67)) ("The land where Turtle Creek Casino now stands was at the economic core of Grand Traverse Band society and polity"); (RE 150 Trial Transcript Volume I, pgs. 48, 60 (McClurken Testimony), JA272, 282). The site and the surrounding area supported a dense variety of floral and faunal resources that Band members used to sustain themselves and their way of life. (RE 150 Trial Transcript Volume I, pg. 67 (McClurken Report, pgs. 3, 14-16, 66)); (RE 150 Trial Transcript Volume I, pgs. 48-52 (McClurken Testimony), JA272-276). Indeed, even the limited amount of archaeological work done to date has revealed the presence of a tribal village and an important trail segment directly adjacent to the site. (RE 150 Trial Transcript Volume I, pgs. 55-59 (McClurken Testimony), JA277-281); (RE 150 Trial Transcript Volume I, pg. 67 (McClurken Report pgs.17-20)); (RE 150 Trial Transcript Volume I, pg. 47 (Map, W.B. Hinsdale, Distribution of the Aboriginal Population of Michigan)). *See also* (RE 168 Opinion, pg. 7, JA42).

The Band viewed the re-acquisition of the site in 1989 as a high priority because it desired a central location on the east shore of Grand Traverse Bay from which it could administer governmental services to the many Band members who continued to reside in the region. It further viewed the property as a potential site for future economic development endeavors that might provide jobs to those members. (RE 168 Opinion, pg. 6, JA41); (RE 151 Trial Transcript Volume II, pg. 29 (GTB Resolution 89-727 at p. 1 and Parcel 13 Narrative p. 3)); (RE 151 Trial Transcript Volume II, pgs. 25-30 (Petoskey Testimony), JA283-288).

In addition to land acquisition, economic development had become a central focus for a Band that, as of the early 1990s, had "significant unmet economic and non-economic needs." (RE 168 Opinion, pg. 9, JA44). On August 20, 1993, in compliance with IGRA's requirements, the Band and the State entered into a gaming compact broadly authorizing the Band's conduct of casino-style (or what the statute terms Class III) gaming. (RE 168 Opinion, pg. 8, JA43); (RE 137 Pretrial Order (Uncontroverted Fact No. 10), pg. 15, JA81); (RE 151 Trial Transcript Volume II, pg. 63, (Compact, State of Michigan and Grand Traverse Band)). The Compact was approved by concurrent resolution of the Michigan House of Representatives on September 21, 1993, and of the Michigan Senate on September 30, 1993, and became effective on November 30, 1993, when the Secretary of the Interior published his approval in the Federal Register. (RE 168

Opinion, pg. 8, JA43); (RE 137 Pretrial Order (Uncontroverted Fact Nos. 10-12), pg. 15, JA81); 58 Fed. Reg. 63262 (1993).

On June 13, 1994, the National Indian Gaming Commission (the "NIGC"), a federal agency established under IGRA to oversee Indian gaming, approved the Band's Gaming Code pursuant to 25 CFR §§ 522.6 and 522.8. (RE 168 Opinion, pg. 9, JA44); (RE 137 Pretrial Order (Uncontroverted Fact No. 13), pg. 15, JA81). The Grand Traverse Band Gaming Commission then issued a license authorizing gaming at the Turtle Creek site under the terms of the Gaming Code, and the Band opened the Turtle Creek Casino (or "Casino") on June 14, 1996. (RE 168 Opinion, pg. 9, JA44).

The Casino quickly became the Band's economic lifeblood. It has played an important role in restoring a measure of self-sufficiency and economic dignity to the Band, and in allowing the Band to establish a strong tribal government and an essential array of social services for its members. The Casino "accounts for a substantial portion of the Band's revenues." (RE 137 Pretrial Order (Uncontroverted Fact No. 19), pgs. 16-17, JA82-83). Those revenues fund the Band's governmental operations and a critical "variety of governmental programs, including health care, elder care, child care, youth services, education, housing, economic development and law enforcement." (RE 168 Opinion, pg. 9, JA44); (RE 137 Pretrial Order (Uncontroverted Fact No. 19), pgs. 16-17, JA82-83). The

Casino also "employs approximately 500 persons, approximately half of whom are tribal members . . . . [These are] some of the best employment opportunities in the region." (RE 168 Opinion, pg. 9, JA44); (RE 151 Trial Transcript Volume II, pgs. 14-16 (Kewaygoshkum Testimony), JA264-266). The local economy has benefited to a great extent as well from the Casino's operation, because the Casino "provides revenues to regional governmental entities and provides significant side benefits to the local tourist economy." (RE 168 Opinion, pg. 9, JA44); (RE 151 Trial Transcript Volume II, pg. 17 (Kewaygoshkum Testimony), JA267); (RE 151 Trial Transcript Volume II, pg. 7 (Evidence of Payments to Local Governments from Casino Revenues)). And there exists no dispute that the Band has generated this wide array of benefits to its members and the surrounding community while at all times operating the Casino in full compliance with the NIGC's regulatory requirements. (RE 151 Trial Transcript Volume II, pg. 7 (NIGC Compliance Reports)).

III. Course of Proceedings

On June 14, 1996, the day the Band commenced operations at the Turtle Creek Casino, it brought this action against the United States Attorney for the Western District of Michigan. The Band, proceeding on the basis of a decision by Judge McKeague that, irrespective of section 2719's requirements, a tribe may game on after-acquired lands wherever a valid state-tribal compact is in place and

does not prohibit such gaming, *see Keweenaw Bay Indian Community v. United States ("KBIC")*, 914 F. Supp. 1496 (W.D. Mich. 1996) and 940 F. Supp. 1139 (W.D. Mich. 1996) (denying motion for reconsideration), *rev'd*, 136 F.3d 469 (6th Cir. 1998), sought a declaration that the conduct of Class III gaming operations at the Turtle Creek site was lawful. (RE 168 Opinion, pg. 2, JA37); (RE 1 Complaint (June 14, 1996)). At the same time, it informed the district court that if this Court were to reverse the *KBIC* decision, it would move to amend its complaint to allege that the Turtle Creek site nevertheless satisfied section 2719's requirements. (RE 168 Opinion, pg. 3, JA38).

On July 25, 1996, the State moved to intervene in the action. (RE 3 Motion to Intervene (July 25, 1996)). The Band and the United States Attorney stipulated to the State's motion, (RE 7 Stipulation (August 13, 1996)), and on August 15, 1996 the district court granted it. (RE 9 Order (August 15, 1996)). In its complaint in intervention, the State alleged that section 2(C) of the state-tribal gaming compact provided the Governor of the State with an absolute veto over gaming on after-acquired lands. Given that the Governor had not approved gaming at the Turtle Creek Casino, the State sought an injunction against further activity there. (RE 10 Intervenor's Complaint (August 15, 1996)).

The district court stayed the proceedings pending this Court's resolution of the *KBIC* matter on appeal. (RE 168 Opinion, pg. 3, JA38); (RE 20 Order

(November 8, 1996)). On May 28, 1998, after this Court reversed in *KBIC*, *see* 136 F.3d 469 (6th Cir. 1998), the district court lifted the stay. (RE 23 Supplemental Case Management Order (May 28, 1998)).

The Band then filed its First Amended Complaint, (RE 26 First Amended Complaint (June 15, 1998)), and the United States, acting in the stead of the United States Attorney, moved for a preliminary injunction against the continued conduct of gaming operations at the Turtle Creek site. (RE 31 Motion for Preliminary Injunction). In opposing the motion, the Band principally relied upon section 2719's restored lands provision, and on March 18, 1999 the district court issued an Opinion and Order denying the United States' motion for a preliminary injunction. (RE 68 Opinion (*Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan, 46 F. Supp.2d 689 (W.D. Mich. 1999)* ("*Grand Traverse Band I*")). *See also* (RE 168 Opinion, pgs. 3-4, JA38-39). The court held that the United States had failed to demonstrate a likelihood that it could prevail on the restored lands issue. *Grand Traverse Band I,* 46 F. Supp.2d at 699, 702-04. At the Band's request, the Court then stayed the action and referred the matter to the NIGC for its views on the applicability of the restored lands provision to the Turtle Creek site. *Id.* at 705-08.

The State appealed the district court's denial of preliminary injunctive relief to this Court but the appeal was dismissed for lack of standing due to the State's

failure to join in the United States' request for such relief before the district court. (RE 88 Sixth Circuit Order in No. 99-1584, JA71-73).

On August 31, 2001, the NIGC responded to the district court's referral in the form of an opinion letter from Kevin K. Washburn, General Counsel for the National Indian Gaming Commission, to Honorable Douglas H. Hillman, Senior United States District Judge ("NIGC Opinion"). (RE 151 Trial Transcript Volume II, pg. 36 (NIGC Opinion), JA213-237). In that letter opinion, the NIGC observed that "the clear import of acknowledgment of the [Band] under federal acknowledgment procedures was to 'undo' the effect of the improper administrative action and to resume a proper government-to-government relationship between the [Band] and the federal government . . . . Accordingly, it is difficult to argue that the [Band] is not a 'restored tribe' if the term should be interpreted according to its plain meaning." (RE 151 Trial Transcript Volume II, pg. 36 (NIGC Opinion, pg. 10), JA222). The NIGC further observed that as the Band had "regain[ed] its beneficial use . . . [of] land that has been at the heart of the Band's culture throughout history and particularly within the context of its restoration process . . . the Turtle Creek site constitutes land that has been not merely obtained but, in some sense, 'restored' to the Band under Section 2719(b)(1)(B)(iii)." (RE 151 Trial Transcript Volume II, pg. 36 (NIGC Opinion, pg. 19), JA231). The Department of the Interior concurred in the NIGC's

Opinion. (RE 151 Trial Transcript Volume II, pg. 36 (NIGC Opinion, pg. 1), JA213); *see also* (RE 168 Opinion, pg. 4, JA39).

As a result of the conclusion by the NIGC and the Department of the Interior that the Turtle Creek Casino complies with the requirements of section 2719, the United States abandoned its opposition to the Casino and the parties stipulated to its withdrawal from this litigation. (RE 168 Opinion, pg. 4, JA39); (RE 134 Stipulation and Order of Dismissal (December 27, 2001)). The district court then "permitted the Band to amend its complaint for the second time, so as to conform the pleadings to those issues which were actually litigated between the parties since 1998 and remained for trial, specifically the restored-lands exception and the State's compact claim." (RE 168 Opinion, pgs. 4-5, JA39-40); *see* (RE 138 Second Amended Complaint, JA26-34). The matter then proceeded to a bench trial before Judge Hillman in January of 2002.

On April 22, 2002 the district court issued a comprehensive opinion in which it rejected each of the three arguments raised by the State at trial in opposition to the Casino. First, the district court held that under the plain meaning of the term, the Band is a "tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). It reasoned that the Band's "undisputed history . . . of recognition by Congress through treaties (and historical administration by the Secretary), subsequent withdrawal of recognition, and yet later re-acknowledgment

by the Secretary – fits squarely within the dictionary definitions of 'restore' and is reasonably construed as a process of restoration of tribal recognition." (RE 168 Opinion, pgs. 22-23, JA57-58). The district court rejected various arguments advanced by the State as insufficient to overcome the strong presumption in favor of construing statutory language according to its plain meaning, *id.* at 14-23, JA49-58, and concluded that even if it was wrong and the statutory language was unclear, the canon of construction counseling that ambiguities in statutes dealing with tribes should be resolved in favor of the tribes would nevertheless require resolution of the issue in the Band's favor. *Id.* at 23, JA58.

Second, the district court concluded, again under the plain language of the statute, that the Turtle Creek site had been "taken into trust as part of . . . the restoration of lands" for the Band. 25 U.S.C. § 2719(b)(1)(B)(iii). The court rested this holding on two principal findings: (1) "[T]he Band's evidence clearly established that the parcel was of historic, economic and cultural significance to the Band. The State provided no contrary evidence." (RE 168 Opinion, pg. 26, JA61); and (2) "[T]he evidence supports the conclusion that at the time of its acquisition, the parcel was intended to be part of a restoration of tribal lands." *Id.* at 27, JA62 (record citations omitted). The State does not challenge this holding on appeal.

Third, the district court rejected the State's argument that section 2(C) of the state-tribal gaming compact provides the State with an absolute veto over tribal gaming on after-acquired lands, regardless of whether IGRA's requirements for such gaming are satisfied. The court found that both the plain language of section 2(C) and the extrinsic evidence introduced at trial regarding the parties' intentions at the time they negotiated the Compact flatly contradicted the State's argument. *Id.* at 28-33, JA63-68. Again, the State does not challenge this holding on appeal. As a result, the sole issue for this Court's consideration is whether the Band is a "tribe that is restored to Federal recognition."

SUMMARY OF ARGUMENT

Unless strong evidence exists that Congress intended otherwise, the ordinary meaning of statutory text governs its interpretation. As the court below, two other federal district courts, the Department of the Interior, and the National Indian Gaming Commission have all concluded, the ordinary meaning of the phrase "an Indian tribe that is restored to Federal recognition," 25 U.S.C. § 2719(b)(1)(B)(iii), is readily discernible. According to normal usage, a tribe that once enjoyed federal recognition, was then stripped of that status, and ultimately regained it, is a tribe restored to federal recognition. In such instances, the tribe has been returned to or put back into its former state of recognition, which is precisely how the term "restored" is ordinarily defined. As IGRA contains no definitional section or

legislative history indicating that Congress intended the restored tribe provision to be interpreted other than according to its plain meaning, and as there is nothing absurd about such a construction, the plain meaning should control.

There is no dispute that the Band squarely satisfies the plain language definition of a restored tribe. The parties stipulated below, and the district court found, that (1) the Band enjoyed federal recognition through a series of treaties it signed with the United States between 1795 and 1855; (2) the United States ceased to treat the Band as a federally-recognized tribe commencing in 1872, when the Secretary of the Interior declared the 1855 Treaty of Detroit to have terminated the Band; and (3) the Band regained recognition in 1980 through the congressionally sanctioned federal acknowledgment process. This undisputed history brings the Band squarely within the ambit of the restored tribe provision.

The State argues that this Court should rewrite the provision so that it applies only to tribes first terminated and then restored to federal recognition through the federal legislative process. The State offers three reasons in support of its suggested departure from the statutory text, none of which survives even a cursory inspection.

First, the State argues that only Congress can terminate the federal recognition of a tribe, such that administratively terminated tribes do not in actuality lose their federal recognition, and hence have no need to be restored to

recognized status. This is a new argument, raised for the first time on appeal, and this Court should accordingly refuse to consider it. The argument, moreover, flies in the face of the State's stipulation below that "[t]he United States unilaterally ceased to treat the Band as a federally-recognized tribe commencing in 1872, when Secretary of the Interior Columbus Delano improperly severed the government-to-government relationship between the United States and the Band." (RE 137 Pretrial Order (Uncontroverted Fact No. 4), pg. 14, JA80). The Band's undisputed history leaves no doubt that from 1872 onwards the United States refused to deal with the Band as a political entity and that the lack of recognition had stark consequences for the Band and its members. There is simply no way to square the State's argument with that history.

Nor does the State's argument find any support in the law. It rests on the faulty premise that tribes inherently enjoy federal recognition and that only Congress can alter that status. In truth, the federal government must take affirmative steps—either legislatively or administratively—to recognize a tribe, which it can then undo in corresponding fashion. And the government must further maintain a continuing relationship with a tribe in order for the tribe to retain recognized status. The Secretary of the Interior, who receives great deference in these matters, read the 1855 Treaty of Detroit as reversing the previous treaty-based recognition of the Band, and accordingly ended the government's

relationship with it. The United States then adhered to the Secretary's decision for the next 108 years. That course of events sufficed as both a legal and a practical matter to render the Band a non-recognized entity between 1872 and 1980.

Second, the State argues that Congress has treated the phrase "restored to Federal recognition" as a term of art applicable only to legislatively terminated tribes, such that it would not have intended the courts to adhere to the ordinary meaning of the term. That conclusion is impossible to sustain in light of the clear evidence that Congress has used various terms surrounding the recognition and restoration of tribes interchangeably, and in particular that Congress has spoken unequivocally of restoring administratively terminated tribes to federal recognition.

Third, the State argues that to adhere to the plain meaning of the restored tribe provision would render other text in IGRA surplusage. The district court easily dispensed with this assertion, and it should not detain this Court for long. It is simply not necessary to read IGRA's provisions other than in their natural sense in order to preserve independent spheres of operation for them.

Finally, even if the State's arguments do suggest to this Court that the restored tribe provision is ambiguous, a conclusion that the Band strenuously resists, the Indian canon of construction would require this Court to resolve the ambiguity in the Band's favor.

ARGUMENT

I. Standard of Review

This Court reviews "issues of statutory interpretation *de novo*." *United States v. Miami University*, 294 F.3d 797, 806 (6th Cir. 2002). Ordinarily, if this Court arrived at the same definition of a "tribe that is restored to Federal recognition" as did the district court, it would then review the factual findings of the district court to determine whether the Band satisfied that definition. That review would be for clear error. *PDV Midwest Refining, L.L.C. v. Armanda Oil and Gas Co.,* 305 F.3d 498, 505 (6th Cir. 2002), *cert. denied,* 123 S. Ct. 901 (2003). Here, however, the State does not challenge the district court's factual findings and those findings conformed to the factual stipulations entered into by the parties below.

II. Under the Plain Meaning of the Term, the Grand Traverse Band is a "Tribe that is Restored to Federal Recognition."

"[I]n all cases involving statutory construction, [the] starting point must be the language employed by Congress." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (internal quotation marks and citation omitted). Unless Congress has defined the statutory terms at issue, their ordinary meaning, as evidenced by their common dictionary definitions, serves as the key to their construction. "We give the words of a statute their ordinary, contemporary,

common meaning, absent an indication Congress intended them to bear some different import." *Williams v. Taylor*, 529 U.S. 420, 431-32 (2000) (referring to Webster's dictionary definitions to determine meaning of statutory term) (internal quotation marks and citations omitted); *United States v. Moses*, 137 F.3d 894, 899 (6th Cir. 1998) ("Where a statute does not define a term, it receives its common meaning. The Act does not define [the contested terms]. For their common meanings, we turn to [the dictionary].") (citation omitted).

IGRA does not define the term "restored." (RE 168 Opinion, pg. 12, JA47); *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States*, 78 F. Supp.2d 699, 706 (W.D. Mich. 1999) (*"Sault Ste. Marie Tribe"*), *remanded on other grounds by* 2001 WL 549409 (6th Cir., May 16, 2001) (subsequent history omitted). Nor does its legislative history. *Sault Ste. Marie Tribe*, 78 F. Supp.2d at 706. However, as the district court held, the plain meaning of that term is readily discernible.

Webster's Third New International Dictionary provides the following principal definitions of "restore":

> 1: to give back (as something lost or taken away): make restitution of: return . . . 2: to put or bring back (as into existence or use) . . . 3: to bring back to or put back into a former or original state . . . .

(RE 168 Opinion, pg. 13, JA48) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1936 (G. & C. Merriam Co. 1976)).[1] Hence, according to the ordinary definition of the term, a "tribe that is restored to Federal recognition" is one that previously enjoyed such recognition, lost it, and then experienced a re-institution of recognized status. In such instances, the tribe has been "return[ed]" to or "put back into" its "former . . . state" of enjoying federal recognition.

There is no question that the Band qualifies as a "tribe that is restored to Federal recognition" under this plain language definition. The district court found – and the State conceded below – that the Band "maintained a government-to-government relationship with the United States from 1795 until 1872, and is a successor to a series of treaties with the United States in 1795, 1815, 1836 and 1855." (RE 168 Opinion, pg. 5, JA40); (RE 137 Pretrial Order (Uncontroverted Fact No. 2), pg. 13, JA48). In the referenced treaties, the federal government recognized the Grand Traverse Ottawas and Chippewas as a distinct political entity. (RE 150 Trial Transcript Volume I, pg. 67 (1795 Treaty of Greenville,1815 Treaty of Spring Wells, 1836 Treaty of Washington)); (RE 150 Trial Transcript Volume I, pg. 67 (1855 Treaty of Detroit), JA170-177); (RE 150 Trial Transcript

[1] The 1986 edition of Webster's Third, issued shortly prior to the enactment of IGRA, contains an identical set of principal definitions. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1936 (G. & C. Merriam Co. 1986).

Volume I, pgs. 40-41 (McClurken Testimony), JA268-269); (RE 150 Trial Transcript Volume I, pg. 67 (McClurken Report, pgs. 3-5)).

The district court further found – as the State again conceded – that "[i]n 1872, then-Secretary of the Interior, Columbus Delano, improperly severed the government-to-government relationship between the Band and the United States, ceasing to treat the Band as a federally recognized tribe." (RE 168 Opinion, pg. 5, JA40); (RE 137 Pretrial Order (Uncontroverted Fact No. 4), pg. 14, JA80); (RE 150 Trial Transcript Volume I, pg. 67 (Letter from Secretary of the Interior Delano to Commissioner of Indian Affairs Walker, pg. 3), JA183). As the State stipulated below, "[t]he Secretary's action was based on an incorrect reading of the 1855 Treaty of Detroit," (RE 137 Pretrial Order (Uncontroverted Fact No. 4), pg. 14, JA80) and his mistake ushered in a period of more than a century during which the Band lacked federal recognition (RE 168 Opinion, pg. 5, JA40).

Finally, the district court found, and the State has once again conceded, that "[b]etween 1872 and 1980, the Band continually sought to regain its status as a federally recognized tribe [and its] efforts succeeded in 1980 when it became the first tribe acknowledged by the Secretary of the Interior pursuant to the federal acknowledgement process." (RE 168 Opinion, pg. 5, JA40); State Br. at 5; (RE 137 Pretrial Order (Uncontroverted Fact No. 5), pg. 14, JA80).

Given this undisputed history, the Band is, as the district court held, a tribe "restored to Federal recognition" in any ordinary sense of the term. The Band once enjoyed federal recognition, lost that status in 1872, and was returned to recognition a century later:

> This history — of recognition by Congress through treaties (and historical administration by the Secretary), subsequent withdrawal of recognition, and yet later re-acknowledgment by the Secretary — *fits squarely within the dictionary definitions of "restore" and is reasonably construed as a process of restoration of tribal recognition. The plain language of subsection (b)(1)(B)(iii) therefore suggests that this Band is restored.*

(RE 168 Opinion, pgs. 22-23, JA57-58) (emphasis added) (internal citation omitted). The NIGC, with the concurrence of the Department of the Interior, came to this same conclusion:

> The clear import of acknowledgment of the GTB under federal acknowledgment procedures was to "undo" the effect of the improper administrative action and to resume a proper government-to-government relationship between the GTB and the federal government. *The result was "restoration" under the plain meaning of that term. Accordingly, it is difficult to argue that the GTB is not a "restored tribe" if the term should be interpreted according to its plain meaning.*

(RE 151 Trial Transcript Volume II, pg. 36 (NIGC Opinion, pg. 10), JA222) (emphasis added).[2]

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[2] After finding that, under the plain meaning of the term, the Band is a tribe "restored to Federal recognition," the NIGC nevertheless went on to conclude that the restored tribe clause is ambiguous (and then resolved that ambiguity in favor of the Band on the basis of the Indian canons of statutory construction). It deemed

The Solicitor of the Interior has interpreted the plain meaning of the restored tribe clause in the same manner in concluding that three other Michigan tribes whose histories are "essentially identical," (RE 168 Opinion, pg. 24, JA59), to that of the Band's are restored tribes. (RE 151 Trial Transcript Volume II, pg. 36 (Opinion Regarding the Pokagon Band of Potawatomi Indians, September 19, 1997 ("Pokagon Opinion"), pgs. 3-7), JA194-198); (RE 151 Trial Transcript Volume II, pg. 36 (Opinion Regarding Gaming on Trust Land Acquired in Emmet County, Michigan, for the Little Traverse Bay Bands of Odawa Indians, November 21, 1997 ("Little Traverse Opinion"), pgs. 4-7), JA203-206); (RE 151 Trial

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the clause ambiguous because it thought that its "language does not itself offer a clue as to whether Congress intended the plain meaning approach or thought it was using a term of art . . . ." (RE 151 Trial Transcript Volume II, pg. 36 (NIGC Opinion, pg. 12), JA224). However, as the cases discussed in the text below demonstrate, the courts presume that Congress intends the language it employs to be interpreted according to its plain meaning – no additional interpretive "clue" is necessary. As the district court concluded, then, resort to the Indian canons of construction is unnecessary to decide this case. (RE 168 Opinion, pg. 21 n. 2, JA56).

In two opinions issued subsequent to the district court's decision in *Grand Traverse Band,* the NIGC, again with the concurrence of the Department of the Interior, has concluded that the restored tribe clause should indeed be interpreted according to its plain meaning. *See* Letter from Acting General Counsel to Chairman of the NIGC re the Mechoopda Indian Tribe of the Chico Rancheria, March 14, 2003, pg. 7 ("In short, like the Grand Traverse Band, the Tribe has been recognized by the federal government, terminated, and again recognized. Accordingly, we find that the Tribe qualifies as an 'Indian tribe that is restored to Federal recognition' under 25 U.S.C. § 2719(b)(1)(B)(iii)."), *found at* www.nigc.gov/nigc/nigcControl?option=LAND_DETERMINATIONS; Letter from Acting General Counsel to Chairman of the NIGC re the Bear River Band of Rohnerville Rancheria, August 5, 2002, pg. 9 (same), *found at* www.nigc.gov/nigc/nigcControl?option=LAND_DETERMINATIONS .

Transcript Volume II, pg. 36 (Opinion Regarding Gaming on Proposed Trust Acquisition in Manistee County, Michigan, for the Little River Band of Ottawa Indians, March 16, 1998 ("Little River Opinion"), pg. 1), JA210). In his Little Traverse Opinion, for example, the Solicitor opined as follows:

> Returning a tribe to its former status as a recognized tribe ought to be considered a "restoration" of the tribe, and such tribes ought to be considered "restored" regardless of the exact terms used. The LTBB Act returned the LTBB to its previous status as a federally recognized tribe. We think this is sufficient to bring the tribe within the "restored tribe" provision of [IGRA].

(RE 151 Trial Transcript Volume II, pg. 36 (Little Traverse Opinion, pg. 7), JA206); *see also* (RE 151 Trial Transcript Volume II, pg. 36 (Pokagon Opinion, pg. 7), JA198); (RE 151 Trial Transcript Volume II, pg. 36 (Little River Opinion, pg. 1), JA210).

In the case of the Pokagon Band and the Little Traverse Bay Bands, two district courts have affirmed the Solicitor's conclusion that the tribes are restored tribes. *See TOMAC v. Norton*, 193 F. Supp.2d 182, 193-94 (D.D.C. 2002); *Sault Ste. Marie Tribe*, 78 F. Supp.2d at 705-07. These are the only other judicial decisions issued to date that address the restored tribe clause in any detail.[3] Both

[3] In *City of Roseville v. Norton*, 219 F. Supp.2d 130, 158 (D.D.C. 2002), the court found the United Auburn Indian Community to be a restored tribe, but did not find it necessary to engage in much analysis of the issue. In *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt,* 116 F. Supp.2d 155, 161-64 (D.D.C. 2000), the parties agreed that the plaintiff was a restored tribe. The question was whether the lands at issue had been taken into trust as part of the

agree with the conclusion of the court below that the restored tribe clause should be interpreted according to its plain meaning. *TOMAC,* 193 F. Supp.2d at 193-194; *Sault Ste. Marie Tribe*, 78 F. Supp.2d at 705-07. And both find that, with respect to tribes like the Band that were treated with by the United States, had their federal recognition terminated by the Secretary of the Interior, and were then recognized anew, that plain meaning is amply satisfied. *Id.*

That the Band accordingly qualifies as a "tribe that is restored to Federal recognition" under the plain meaning of the statutory text should be the end of the matter. The Supreme Court and this Court have repeatedly held that there exists a very strong presumption that Congress intends its statutory terms to be interpreted pursuant to their ordinary meaning: only clear evidence of a contrary intent may override the presumption. "[W]e assume that the legislative purpose is expressed by the ordinary meaning of the words used. Thus absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Patterson,* 456 U.S. at 68 (internal quotation marks and citations omitted); *see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6 (2000) ("[W]e begin with the understanding that Congress says in a statute what it means and means in a statute what it says there . . . . *[W]hen the*

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restoration of lands to the tribe. The court found that they had been, and quoted at length from the analysis contained in *Grand Traverse Band I* on that point. No judicial decision that the Band is aware of takes issue with the holdings of the court below regarding either restored tribes or restored lands.

statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.") (emphasis added) (internal quotation marks and citations omitted); *United States v. Choice,* 201 F.3d 837, 840 (6th Cir. 2000) ("The language of the statute is the starting point for interpretation, and *it should also be the ending point if the plain meaning of that language is clear.*") (emphasis added and citation omitted). As noted above, Congress has provided no indication – through a definitional section, in IGRA's legislative history, or by any other mechanism – that it intended the term "restored to Federal recognition" to be interpreted other than according to its plain meaning and there is nothing absurd about such a conclusion. There exists no warrant, then, for departing from the ordinary meaning of the statutory text. *See* (RE 168 Opinion, pgs. 22-23, JA57-58); *Sault Ste. Marie Tribe*, 78 F. Supp.2d at 706 ("Because Congress has not given the term any special meaning, the [restored tribe clause] should be construed according to its ordinary meaning.").

III. The State's Arguments For Departing From the Plain Meaning of the Statutory Text Do Not Withstand Scrutiny.

Struggling mightily to evade the force of IGRA's language, the State asks this Court to rewrite it. The State contends that, instead of allowing for after-acquired gaming on lands restored to any "tribe that is restored to Federal recognition," the provision only allows for such gaming if – to formulate the State's argument in statutory terms – the gaming is conducted by a "tribe first

terminated and then restored to Federal recognition through the federal legislative process." The reasons proffered by the State for recrafting the restored tribe clause in this fashion fall far short of overcoming the presumption of respect that the Supreme Court and this Court accord to Congress's language.

A. The State's Theory That Administratively Terminated Tribes Do Not Lose Their Federal Recognition is Barred on Appeal and Lacks Both Legal and Factual Merit.

The State first argues that administratively terminated tribes like the Band do not lose their federal recognition because only Congress can withdraw such recognition. Thus, such tribes cannot have federal recognition restored to them. State Br. at 15-17. This is a new argument, made for the first time on appeal, and this Court should accordingly refuse to consider it. Even if this Court does consider the argument, it is utterly devoid of merit.

Prior to and at trial, the State did not attribute any significance for purposes of IGRA to the manner in which tribes *lost* federal recognition. Its claim instead was that tribes need to *regain* federal recognition through the legislative rather than the administrative process in order to qualify as restored. Indeed, as discussed above, the State stipulated unequivocally before trial that federal recognition of the Band had been terminated in 1872:

> The United States unilaterally ceased to treat the Band as a federally-recognized tribe commencing in 1872, when Secretary of the Interior Columbus Delano improperly severed the government-to-government relationship between the United States and the Band.

(RE 137 Pretrial Order (Uncontroverted Fact No. 4), pg. 14, JA80). Only in its post-trial brief did the State first attach any significance to the manner of a tribe's termination, but even there it did not raise the argument that administratively terminated tribes do not in fact lose their federal recognition – it simply contended that as a matter of usage the tribes that Congress has described as "restored tribes" are those that have been legislatively terminated and restored:

> *[T]he State argues for the first time in its post trial brief* that a tribe may only be considered to be restored when its recognition was legislatively, rather than administratively, terminated. *In support of this argument, the State does no more than point to a number of tribes whose recognition was legislatively terminated and subsequently legislatively restored.*

(RE 168 Opinion, pg. 14, JA49) (emphasis added).

In *Estate of Quirk v. Commissioner of Internal Revenue*, 928 F.2d 751 (6th Cir. 1991), this Court flatly rejected an appellant's efforts to raise new theories for the first time on appeal in circumstances closely paralleling those of this case. There, a taxpayer had stipulated below to having received a certain amount of distributions upon retiring from a partnership. The question litigated in the trial court had been whether those distributions were to be treated as ordinary income or the return of capital.

On appeal, the taxpayer argued for the first time that certain items that he had stipulated to as distributions did not, as a legal matter, constitute distributions at all. This Court refused to consider the argument:

> [A]s a threshold question, we must consider whether Quirk's new arguments challenging the tax court's factual findings and legal conclusions, which are based upon new legal theories not advanced below and upon Quirk's attempt to have us reconsider stipulated facts, are properly before this court . . . . It is well-settled that, absent exceptional circumstances, a court of appeals will not consider an argument by an appellant that was not presented to or considered by the trial court. Propounding new arguments on appeal in attempting to prompt us to reverse the trial court – arguments never considered by the trial court – is not only somewhat devious, it undermines important judicial values . . . . In order to preserve the integrity of the appellate structure, we should not be considered a "second shot" forum where secondary, back-up theories may be mounted for the first time.

Estate of Quirk, 928 F.2d at 757-58 (citations and quotation marks omitted); *see also Michigan Bell Telephone Co. v. Strand*, 305 F.3d 580, 590 (6th Cir. 2002) (same); *White v. Schotten*, 201 F.3d 743, 754 (6th Cir. 2000) ("When a party fails to present an argument to the district court, we have discretion to resolve the issue only where the proper resolution is beyond any doubt, or where injustice might otherwise result.") (internal quotation marks and citations omitted).

The *Quirk* Court rejected the taxpayer's assertion that his new argument was not in fact new because it "involve[d] the same statutory scheme," noting that the taxpayer easily could have raised the argument in the trial court, and that the argument was "in exact contradiction" to the taxpayer's stipulations below. *Id.* This Court also rejected the taxpayer's assertion that he should not be bound by his trial stipulations because they raised questions of law as well as fact:

> [N]arrowing disputes to the essential disputed issues is the primary function of stipulations. It would seem that if parties could challenge their prior stipulations at will, stipulations would lose much of their purpose. In this

> case, [the taxpayer] does not raise any exceptional circumstances for why he and his wife should be permitted to rescind their previously asserted legal and factual positions at trial for the first time on appeal.

Id.

This case is on all fours with *Quirk.* Like the taxpayer in *Quirk,* the State cannot identify any exceptional circumstances that would have precluded it from raising its new theory in the district court. That new theory, moreover, directly contradicts the State's stipulation below that the Band's federal recognition was terminated in 1872. Accordingly, this Court should refuse to consider the argument. But to the extent that the Court disagrees, the Band will brief the issue here.

The State continues to acknowledge that as a factual matter the Secretary of the Interior ended federal recognition of the Band in 1872. *See, e.g.,* State Br. at 5-6 ("The facts of this case, insofar as they are relevant to the issue presented by this appeal, are not in dispute . . . . [B]eginning in 1872 the Secretary of the Interior ceased to treat the band as a federally recognized tribe") and at 17 ("[the Band's] federal recognition had been improperly suspended by administrative action of the Secretary"). To that extent, it has not retreated from its stipulation below. But it now argues that the Secretary's action was without legal effect, and that the Band accordingly remained federally recognized in the period from 1872 until 1980.

The premise of the State's argument is that Indian tribes inherently possess federal recognition and that such recognition is hence "not dependent upon any grant from the United States, let alone any formal acknowledgment by the Secretary of the Interior." State Br. at 16. As a result, the State claims that while Congress may terminate federal recognition of a tribe in the exercise of its plenary power over Indian affairs, the executive branch may not.

This premise is seriously flawed. As the very sources upon which the State relies demonstrate, the State is confusing two very different concepts. Federally recognized Indian tribes do indeed possess attributes of inherent sovereignty, as Chief Justice Marshall famously elaborated upon in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832). It is simply not correct, however, that all Indian groups in this country inherently possess federal recognition. Instead, as the very nature of the concept suggests, for an Indian group to enjoy federal recognition as a tribe, the federal government must first take some affirmative step to recognize it.

The leading treatise on federal Indian law, which the State cites to repeatedly in its brief, makes this point very clearly, "Although there is broad federal authority to recognize tribes, the question may arise *whether that power has been exercised in a particular instance.*" Cohen, Handbook of Federal Indian Law

(1982 ed.) at 6 (emphasis added). The Cohen treatise then goes on to lay out a test for determining whether a tribe has in fact been federally recognized:

> Normally a group will be treated as a tribe or a "recognized" tribe if (a) Congress *or the Executive* has created a reservation for the group by treaty, agreement, statute, executive order, or valid administrative action; *and* (b) the United States has had some *continuing political relationship* with the group, such as by providing services through the Bureau of Indian affairs.

Id. (emphasis added).

In *Mashpee Tribe v. Secretary of the Interior,* 820 F.2d 480 (1st Cir. 1987), the First Circuit applied this test in rejecting the claims of five Indian groups that they were entitled to a declaration confirming their status as recognized tribes. After quoting the Cohen test, then-Judge Breyer, writing for the court, concluded that none of the documents cited by the groups as establishing their tribal status "provide[d] evidence of a 'treaty, agreement, statute, executive order, [or] valid administrative action,' or of a continuing relationship between the Indian groups and the United States." *Id.* at 484.

Under the State's theory, of course, the First Circuit should never have engaged in this analysis. According to the State, the groups inherently possessed federal recognition, and hence should have been entitled to their declaration, unless evidence existed that Congress had stripped them of their recognized status. But as the *Mashpee* decision makes clear, that is simply not the law. Other Courts of Appeals have likewise rejected claims of Indian groups to federal recognition

where those groups could not identify affirmative federal acts recognizing them as tribes. *See, e.g., Pit River Home and Agricultural Cooperative Association v. United States,* 30 F.3d 1088, 1095 (9th Cir. 1994) ("Even if we assume that the Association is a tribe or band, we find it has not been 'duly recognized' by the Secretary. No statute or treaty identifies the Association as a federally recognized tribe."); *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1056-58 (10th Cir. 1993) (citing Cohen test in denying claim of Indian group to tribal status).[4]

As the Cohen test makes clear, moreover, either congressional or executive action has historically been deemed sufficient to confer federal recognition on a tribe. Thus, treaties, executive orders, and other "administrative action[s]" have all operated to confer recognized status on Indian groups. Cohen at 6; *see also* Procedures for Establishing That An American Indian Group Exists As An Indian Tribe, 59 Fed. Reg. 9280, 9296 (1994) (evidence of previous federal acknowledgment as a tribe includes "[e]vidence that the group has had treaty

[4] In addition to the Cohen treatise, the State cites to *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), in support of its baseline premise. Like the treatise, however, that case does not stand for the proposition that tribes inherently possess federal recognition. Instead, it simply holds that the Passamaquoddy Tribe is a "tribe" within the meaning of the Indian Nonintercourse Act, 25 U.S.C. § 177, a question that the First Circuit viewed as entirely separate from the issue whether the Passamaquoddy Tribe was federally recognized. "[T]he absence of specific federal recognition in and of itself provides little basis for concluding that the Passamaquoddies are not a 'tribe' within the Act." 528 F.2d at 378.

relations with the United States" or "[e]vidence that the group has been denominated a tribe by act of Congress or Executive Order").[5]

Accordingly, depending on the circumstances, either congressional or executive action, or some hybrid of the two, has likewise sufficed to terminate federal recognition of a tribe. Basic principles of constitutional law dictate, of course, that the executive acting alone may not undo legislative action. However, the State's assertion that "a tribe's trust relationship with the United States can be extinguished only by Congressional action and not by administrative action," State Br. at 16, is far too broad, and fails to account for those situations historically where a tribe was recognized other than through legislative action in the first instance, and then had its recognition withdrawn in corresponding fashion.

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[5] The State relies on this Federal Register notice for the proposition that acknowledgement under the Interior Department's current procedures does not confer federal recognition on a tribe, but simply confirms that such recognition already exists. State Br. at 17. To this end, it quotes the statement in the notice that "the purpose of the acknowledgment process is to acknowledge that a government-to-government relationship exists between the United States and tribes which have existed since first contact with non-Indians." 59 Fed. Reg. 9280, 9281 (1994). But the State seriously misreads this statement, which refers to tribes as having existed since first contact, not government-to-government relationships. Both the 1994 regulations and the 1978 regulations that were in place when the Band was acknowledged make it clear that "[a]cknowledgment of tribal existence by the Department is a *prerequisite* to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 59 Fed. Reg. 9280, 9294 (1994); 43 Fed. Reg. 39361, 39362 (1978).

Perhaps the most obvious example of this type of situation has been that of treaty-based tribes whose termination was then provided for by subsequent treaty, as happened not infrequently in the nineteenth century. *See, e.g.,* Treaty with the Ottawa of Blanchard's Fork and Roche De Bouef, Article I, 12 Stat. 1237 (1862) ("The Ottawa Indians . . . having become sufficiently advanced in civilization, . . . it is hereby agreed and stipulated that their organization, *and their relations with the United States as an Indian tribe* shall be dissolved and terminated at the expiration of five years from the ratification of this treaty.") (emphasis added); Treaty with the Wyandot, Article I, 10 Stat. 1159 (1855) ("[I]t is hereby agreed and stipulated, that the [Wyandot] organization, *and their relations with the United States as an Indian tribe* shall be dissolved and terminated on the ratification of this agreement.") (emphasis added); *see also* Cohen at 811.

The Band, as described above, was federally recognized through a series of treaties that it signed with the United States in the late eighteenth and nineteenth centuries. The last of those treaties, the Treaty of Detroit, provided that "[t]he tribal organization of said Ottawa and Chippewa Indians, except so far as may be necessary for the purpose of carrying into effect the provisions of this agreement, is hereby dissolved." (RE 150 Trial Transcript Volume I, pg. 67, (Treaty of Detroit, Article 5, pg. 729) JA175). That same year, the United States entered into a treaty with the Chippewas of Saginaw, also located in Michigan, that contained a

virtually identical provision. Ten years later, the Supreme Court, in *United States v. Holliday*, 70 U.S. 407 (1866), held that the Secretary was entitled to great deference in interpreting the Saginaw Chippewa provision and its effect on federal-tribal relations:

> The facts in the case . . . show distinctly that the Secretary of the Interior and the Commissioner of Indian Affairs have decided that it is necessary, in order to carry into effect the provisions of said treaty, that the tribal organization should be preserved. In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

Id. at 419 (quotations omitted). A mere seven years after that, the Secretary construed the dissolution language in the Treaty of Detroit as calling for the termination of the Band. While it is now widely agreed that the Secretary misinterpreted the treaty language, (RE 137 Pretrial Order (Uncontroverted Fact No. 4), pg. 14, JA80), no authority exists for the proposition that the Secretary was *per se* barred from assessing the effect of the treaty language on the status of

the federal government's relationship with the treating tribes, and *Holliday* directly refutes any such contention.[6]

The Cohen treatise makes it clear, moreover, that in order to enjoy federal recognition a tribe must not only have been recognized in the first instance by executive or congressional action, but that the United States must have "some continuing political relationship with the group, such as by providing services through the Bureau of Indian affairs." Cohen at 6. Here, it cannot be gainsaid that, whatever the propriety of Secretary Delano's action, the effect of that action was to sever the political relationship between the United States and the Band – the United States quite simply ceased to deal with the Band as a political entity from 1872 onwards.

Hence, when the Department of the Interior published a list of federally recognized tribes in 1979, it did not include the Band on the list. 44 Fed. Reg. 7235 (1979). By contrast, after the Band was acknowledged in 1980, it was placed on the list and has remained there ever since. 67 Fed. Reg. 46328, 46329 (2002); 46 Fed. Reg. 35,360, 35,361 (1981). It is difficult to think of a simpler manifestation of the fact that the Band was stripped of its federal recognition by Secretary Delano's actions and that it did not have that recognition restored until

[6] The passages that the State cites from the Cohen treatise stand simply for the proposition that Congress can terminate federal recognition of tribes. They do not suggest that the executive branch always lacks such authority.

after it completed the acknowledgement process. *Cf. Western Shoshone Business Council,* 1 F.3d at 1057 ("The Department is further required to publish and update a list of all Indian tribes that are recognized and receiving services from the BIA . . . . [T]he Tribe's absence from this list is dispositive.").

It is also clear that the consequences of Secretary Delano's 1872 decree were no less stark for the Band and its members than if the Band had been legislatively terminated. As the district court found, "[f]ollowing termination of the relationship, the Band experienced increasing poverty, loss of land base and depletion of the resources of its community." (RE 168 Opinion, pg. 5, JA40).

A vivid illustration of the effects of the Secretary's termination of the Band is provided by the events following the passage of the Indian Reorganization Act in 1934, 25 U.S.C. § 461 *et seq.* ("the IRA"). The IRA "was part of [Commissioner of Indian Affairs John] Collier's attempt to encourage economic development, self-determination, cultural plurality, and the revival of tribalism." Cohen at 147 (footnote omitted); *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 & n. 17 (1983) ("both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes [including the IRA])"; *State of Florida Department of Business Regulation v. United States Department of the Interior*, 768 F.2d 1248, 1256 (11th Cir. 1985) ("Through [the IRA], Congress sought to foster and

encourage self-government among the various Indian tribes."). But because the federal government did not recognize it as a political entity, the Band could not reap the benefits of the Act. Hence, when the Band's leaders and various Congressmen on their behalf petitioned the Interior Department for the right to take advantage of the Act's provisions, Commissioner Collier flatly rejected their request. (RE 150 Trial Transcript Volume I, pg. 67 (Memorandum of Commissioner Collier, May 29, 1940), JA190-191); *see also* (RE 150 Trial Transcript Volume I, pg. 67 (Letter from Congressman Albert Engel to Commissioner Collier), JA188-189).

In the meantime, the federally recognized tribes in Michigan, with considerable assistance from Washington, utilized the provisions of the IRA to revitalize their governments and to participate in various federal programs. A tremendous disparity between conditions at Grand Traverse and those found at the various federally recognized tribes resulted, with Band members who remained in their traditional territory typically living in conditions of abject poverty. *See* (RE 150 Trial Transcript Volume I, pg. 94 (Burtt Testimony), JA242) ("[T]here was no comparison. Things were very, very almost desperate at the Grand Traverse Band's location vis-à-vis the [federally recognized] tribes."); *see also* (RE 150 Trial Transcript Volume I, pgs. 77-78 (Chambers Testimony), JA255-256).

A second illustration of the very real effects of Secretary Delano's decree arises out of the Band's efforts to vindicate its cherished treaty fishing rights. Almost forty years after the passage of the IRA, in 1973, the United States commenced fishing rights litigation on behalf of the Bay Mills Indian Community against the State of Michigan. *United States v. Michigan*, 471 F. Supp. 192, 203 (W.D. Mich. 1979), *aff'd*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). At the time, Bay Mills was the only successor to signatories of the 1836 Treaty of Washington, 7 Stat. 491, *see* (RE 150 Trial Transcript Volume I, pg. 67 (1836 Treaty of Washington)) that was federally recognized. In 1975, another successor tribe, the Sault Ste. Marie Tribe of Chippewa Indians, was organized under the provisions of the IRA, and the United States amended its complaint to state claims on behalf of that tribe as well. *United States v. Michigan,* 471 F. Supp. at 204, 218.

In 1979, after the district court had issued a decision vindicating the usufructuary rights of the recognized tribes under the 1836 Treaty, but before the Band had been acknowledged by the Department of the Interior, the Band sought to assert its own treaty rights. The United States vigorously opposed that effort in terms that again confirm – in the clearest possible language – that the Band lacked federal recognition after 1872, and that this lack of federal recognition had very clear, stark consequences for the Band:

> The problem with fishing rights for Ottawas is that *there is no federally recognized Ottawa tribal entity. Without such an entity, the federal government must oppose the assertion of treaty fishing rights by individual Ottawas or unrecognized Ottawa groups....*
>
> [I]f the Grand Traverse Band petition [for acknowledgment] were granted, it would then be a tribe eligible to exercise the treaty fishing right ....
>
> Because treaty fishing rights are tribal rights, and there currently are no federally recognized Ottawa tribal entities, there are no Ottawa fishing rights currently exercisable under the Treaty of 1836. *The United States must oppose all attempts by individuals of Ottawa ancestry to establish such rights, since their rights depend upon membership in a tribe possessing the rights, and there is no such tribe of Ottawas.*

Memorandum of the United States Relating to Treaty Fishing Rights of Ottawa Indians, Docket No. 355, *United States v. Michigan*, (W.D. Mich., Case No. 2:73 CV 26, September 6, 1979) (Addendum 1) (emphasis added). It was not until the Department of the Interior issued its findings proposing the Grand Traverse Band for acknowledgment as a federally recognized tribe that the Band was able to intervene in *United States v. Michigan* and seek protection of its treaty heritage. Temporary Restraining Order, Docket No. 394 (*United States v. Michigan*, W.D. Mich., Case No. 2:73 CV 26, October 26, 1979).

Accordingly, the distinction the State attempts to forge between legislatively and administratively terminated tribes flies in the face not only of the plain language of the restored tribe provision, but of reality as well. In light of the very real consequences suffered by the Band and its members at the hands of Secretary Delano, the State's theoretical argument that the Band never lost its federal

recognition must be viewed as little more than a "cruel joke." *United States v. John,* 437 U.S. 634, 653 (1978). It is not surprising, then, that the courts in *Sault Ste. Marie Tribe* and *TOMAC* flatly rejected claims that the administratively terminated tribes before them could not be restored to federal recognition:

> The LTBB Act was enacted to correct the government's wrongful termination of the LTBB's tribal status. Because the LTBB was being treated as though it had been legislatively terminated, the Court finds no basis for treating it differently than those tribes that were in fact legislatively terminated. *Plaintiff has not articulated any reason why Congress would treat a tribe that was administratively terminated any differently than a tribe that was legislatively terminated. The impact on the tribe — lack of federal recognition and the rights and privileges that go with federal recognition — is the same.*

Sault Ste. Marie Tribe, 78 F. Supp.2d 699, at 707 (emphasis added); *see also TOMAC,* 193 F. Supp.2d at 193-94. If this Court reaches the merits of the State's argument, it should do the same.

B. No Evidence Exists That Congress Intended the Courts to Construe the Phrase "Restored to Federal Recognition" Contrary to its Plain Meaning.

The State next argues that Congress has evinced an understanding that the phrase "restored to Federal recognition" is a term of art that only applies to legislatively terminated tribes. Of course, as discussed above, the evidence would have to be very strong to warrant concluding that Congress intended the courts to interpret the language it chose to use other than according to its plain meaning. *See, e.g., Patterson,* 456 U.S. at 68 ("[W]e assume that the legislative purpose is

expressed by the ordinary meaning of the words used. Thus absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.") (internal quotation marks and citations omitted). No such evidence exists in this case.

It is certainly true, as the State points out, that Congress has used terms such as "restore" or "restoration" in re-instituting federal recognition of tribes previously terminated by federal legislation. State Br. at 18. However, Congress has certainly been far from consistent in this usage. When Congress reversed its legislative termination of the Menominee Tribe, for example, it provided that "Federal recognition is hereby *extended* to the Menominee Indian Tribe of Wisconsin." 25 U.S.C. § 903a(a) (emphasis added). Congress likewise provided that "Federal recognition is hereby *extended or confirmed* with respect to the Wyandotte Indian Tribe of Oklahoma, the Ottawa Indian Tribe of Oklahoma, and the Peoria Indian Tribe of Oklahoma," 25 U.S.C. § 861(a) (emphasis added), even though each of those tribes had been legislatively terminated. *See* 25 U.S.C. § 861(b) (citing termination acts). Hence, as the Solicitor of the Interior, who has considerable expertise in these matters, has put it, "restoration statutes use a variety of synonymous and descriptive words, *rather than a single formulation or term of art*, to reestablish a federal-tribal relationship." (RE 151 Trial Transcript Volume II, pg. 36 (Pokagon Opinion, pg. 5), JA196). *See also* (RE 168 Opinion, pg. 16,

JA51). ("the State has failed to demonstrate that Congress consistently and exclusively used only the word 'restore' when restoring Indian tribes through legislative action").

More fundamentally, in none of the statutes where Congress has used restoration language in connection with a legislatively terminated tribe has it suggested that because it was acting to accord recognition anew to tribes it had previously terminated, and was using restoration terminology in doing so, only such tribes can be considered restored tribes. "Congressional use of the words appears to have occurred in a descriptive sense only, in conjunction with action taken by Congress to accomplish a purpose consistent with the ordinary meaning of the words. In no sense has a proprietary use of 'restore' or 'restoration' been shown to have occurred." (RE 168 Opinion, pg. 17, JA52).

To the contrary, Congress has made clear its understanding that tribes that have been administratively terminated can be restored to federal recognition. In this regard, the very examples cited by the State serve as direct refutation of its claim. Thus, when Congress legislated with respect to the Pokagon Band in Michigan, the key report of the Senate Committee on Indian Affairs that accompanied the legislation spoke unequivocally about how the purpose of the statute was to restore not just federal services but also federal recognition to the administratively-terminated Pokagons:

> *The Committee concludes that the Band was not terminated through an act of the Congress, but rather the Pokagon Band was unfairly terminated as a result of both faulty and inconsistent administrative decisions* contrary to the intent of the Congress, federal Indian law and the trust responsibility of the United States . . . . The Band's claim of rights and status as a treaty-based tribe, *and the need to restore and clarify that status*, has been clearly demonstrated.

S. Rep. No. 103-266 at 6 (1994) (emphasis added); *see also* (RE 151 Trial Transcript Volume II, pg. 36 (Pokagon Opinion, pg. 4), JA195) (discussing the Senate Report). The Senate Committee of Indian Affairs' Report that accompanied the legislation by which the administratively-terminated Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians regained their federal recognition likewise stated that "[t]hese tribes' claim of rights and status as treaty-based tribes, *and the need to restore and clarify that status,* has been clearly demonstrated." S. Rep. No. 103-260 at 5 (1994).

In light of these unequivocal statements by the Senate Committee with principal jurisdiction over Indian affairs, it is impossible to sustain the State's assertion that Congress "has carefully refrained from using the term restored to describe tribes such as [the Band] that have been wrongfully denied the benefits of tribal status by administrative action of the Secretary of the Interior." State Br. at 21. Congress has spoken of restoring not just services but also federal recognition to administratively terminated tribes. Once again, then, the State's argument

provides no justification for departing from the plain language Congress employed in IGRA.[7]

C. Adherence to the Plain Meaning of the Restored Lands Provision Does Not Render Other Language in IGRA Surplusage.

The State's final justification for rewriting the plain language of the restored tribe provision is no more compelling than the rest. The State argues that such rewriting is necessary to avoid rendering a separate clause of Section 2719 redundant. Besides contemplating gaming on after-acquired lands under the restored lands provision, section 2719 also contemplates gaming on such lands if they were taken into trust as part of "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." 25 U.S.C. § 2719(b)(1)(B)(ii) (the "initial reservation provision"). The State suggests that, in order for both the restored lands and initial reservation provision to enjoy effect, they have to be treated as mutually exclusive, such that tribes like the Band

[7] The State also cites to the Paiute Indian Tribe of Utah Restoration Act, 25 U.S.C. § 761 *et seq.*, and seeks to make much out of the fact that the statute restores recognition to four Indian Bands that had been legislatively terminated while restoring or confirming recognition with respect to a fifth. State Br. at 18-20. However, the fact that Congress drew such a distinction is hardly "striking." State Br. at 19. It was clear that the four Bands had been terminated by Act of Congress. Congress' understanding of the history of the fifth Band, including whether either the legislative *or the executive branch* had declared that Band terminated, was much less clear. Congress's use of the term "restored or confirmed" therefore made sense, and fell far short of establishing that Congress has at all times and places treated "restored" as a term of art that applies only to legislatively terminated tribes.

that have been acknowledged by the Secretary and therefore may have an initial reservation cannot also avail themselves of the restored lands provision. State Br. at 22-24. As the district court concluded, this is patently not so.

The district court simply did not hold, as the State contends, that "any tribe that has been 'acknowledged' is also 'restored' for purposes of [the restored lands provision]." State Br. at 24; *see also* State Br. at 10 (stating that district court held that an acknowledged tribe is *per se* also a "restored" tribe). To the contrary, the court reasoned very clearly that "not all tribes acknowledged under the federal acknowledgment process could also be described as restored. It is readily apparent that a tribe may be acknowledged which had never previously been recognized. *See* Aroostook Band of Micmacs, 137 CONG. REC. H9653 (1991). *See also* 25 C.F.R. §§ 83.7(a) and 83.8." (RE 168 Opinion, pg. 20, JA55). Such a tribe might avail itself of IGRA's "initial reservation" provision, but it cannot also take advantage of the restored lands provision.

At the same time, it is clear that tribes previously enjoying government-to-government relations with the United States can have those relations reinstated either as the result of administrative action, as in the case of the Band, or of legislative action, as in the case of the Little Traverse Band, the Little River Band, and the Pokagon Band. The latter category of tribes is able to take advantage of the terms of the restored lands, but not of the initial acknowledgment, provision.

Accordingly, the fact that a few tribes like the Band might conduct gaming under both the initial reservation and restored lands clauses does not render one provision or the other surplusage, because the separate provisions are necessary to address the distinct situations of many other tribes:

> [I]t is perfectly sensible that "acknowledged" and "restored" tribes may on occasion overlap. Acknowledgment is a specifically defined term under the IGRA, because the statute expressly references a federal administrative process, 25 C.F.R. Part 83, by which the agency acknowledges the historical existence of a tribe. In contrast, a tribe is "restored" when its prior recognition has been taken away and later restored. Those processes may overlap . . . . But not all tribes acknowledged under the federal acknowledgment process could also be described as restored. It is readily apparent that a tribe may be acknowledged which had never previously been recognized . . . [Similarly], [t]hose tribes restored by way of legislative action are not eligible to exercise the initial acknowledgment provision. The fact that a subset of tribes like the Band might conduct gaming under both the initial-reservation and restored-lands clauses does not render one provision or another superfluous . . . .
>
> *In sum, . . . the words "acknowledged" and "restored" are separate and have spheres of independent meaning, but may nonetheless overlap in some instances. Giving ordinary meaning to the words used by Congress does not render any portion of the statute mere surplusage. Absolutely nothing in the statute suggests that Congress prohibited such a result and the statute is perfectly harmonious without this court imposing a specialized meaning on the term.*

(RE 168 Opinion, pgs. 19-20, JA54-55) (emphasis added) (citations omitted); *see also Confederated Tribes*, 116 F. Supp.2d at 163-64 ("Not all tribes acknowledged under the federal acknowledgment process could be considered 'restored to federal

recognition.' Thus, although there might be some overlap, section 2719(b)(1)(B)(ii) would continue to have independent bite.") (citation omitted).[8]

To conclude otherwise, as the district court correctly reasoned, would yield absurd results. In addition to allowing for gaming on after-acquired lands under its restored lands and initial reservation clauses, section 2719(b)(1)(B) contains a third provision allowing for gaming on after-acquired lands whenever those lands "are taken into trust as part of . . . a settlement of a land claim." 25 U.S.C. § 2719(b)(1)(B)(i). If the provisions of section 2719(b)(1)(B) must be read as mutually exclusive, then restored and acknowledged tribes would not be able to take advantage of the settlement of a land claims provision, whereas long-established tribes would. As the State itself acknowledges, State Br. at 23, there is nothing to indicate that Congress intended such a result, which flies in the face of

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[8] It is decidedly not the case that a tribe like the Band reaps a windfall from being able to take advantage of both the initial reservation and restored lands provisions. The State has taken the position that the Band's initial reservation is confined to the first piece of land that was taken into trust for it subsequent to acknowledgment. This was nothing more than a 12.5 acre plot of land. 49 Fed. Reg. 2025 (1984). Moreover, as the district court noted, "[a]t the time the acknowledgment process was used by the Band in the instant case..., the size and location of the initial reservation land had no extra-acknowledgment consequences. Fully eight years after the Band was acknowledged under the process, the IGRA created an exemption for lands initially acknowledged by the Secretary. The State's proposed interpretation of exclusivity would impose an additional, unanticipated consequence of having used the acknowledgement process rather than Congressional action for obtaining recognition – that the tribe would be limited under IGRA to the first land taken into trust following acknowledgment. Such a *post facto* consequence is unreasonable if Congress has not clearly expressed such an intent." (RE 168 Opinion, pg. 19, JA54).

the "unequivocal and unrestricted language" that Congress chose to use. (RE 168 Opinion, pg. 20, JA55). *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.") (citations omitted).

Once again, then, the State's argument provides no warrant for departing from the plain language of the statutory text.

IV. Even if This Court Deems the Meaning of the Restored Tribe Provision Ambiguous, That Ambiguity Must Be Resolved in the Band's Favor.

The Band firmly believes, as discussed above, that the meaning of IGRA's restored lands provision is plain, and that the statutory issue in this case can accordingly be resolved on the basis of that plain meaning. However, should this Court disagree, and deem the meaning of the provision ambiguous, the Indian canon of statutory construction would still require that the ambiguity be resolved in the Band's favor.

The Supreme Court has frequently stated that "'statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit.'" *Chickasaw Nation v. United States*, 122 S.Ct. 528, 535 (2001) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)); *see also Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). This canon is "rooted in the unique trust relationship between the United States and the Indians." *Blackfeet Tribe,* 471 U.S.

at 766 (internal quotation marks and citations omitted). Because of that trust relationship, Congress is generally presumed to act with the interests of tribes in mind when it enacts legislation, such that it would not intend any lack of clarity in its drafting to result in prejudice to the tribes. *Chickasaw Nation,* 122 S.Ct. at 538 (O'Connor, J., dissenting); *Cobell v. Norton,* 240 F.3d 1081, 1101-02 (D.C. Cir. 2001); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997).

Accordingly, while this Court has not had to address the issue, other Courts of Appeals have not hesitated to apply the canon when they have perceived a provision of IGRA to be ambiguous. *See, e.g., United States v. Megamania Gambling Devices*, 231 F.3d 713, 723 (10th Cir. 2000); *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999).[9] Thus, even should this Court deem the restored lands provision ambiguous, the canon would counsel resolving that ambiguity in favor of the Band.

There is no countervailing principle of statutory interpretation applicable in this case to offset the force of the Indian canon. The State argued below that the principle that exceptions to the general thrust of a statute should be construed narrowly supported its constricted reading of the restored lands provision. Far from assisting the State, however, that canon only lends further support to the

[9] *Chickasaw Nation* is not to the contrary. There, the Court refused to apply the canon to the interpretation of section 2719(d)(i) of IGRA where it could not "say that the statute is fairly capable of two interpretations, [or] that the Tribes' interpretation is fairly possible." *Chickasaw Nation*, 122 S.Ct. at 535.

Band's position. One does not have to rummage through the legislative history of IGRA to discern the general policy underpinning the statute, as Congress spelled that policy out in the text of the statute itself:

> The purpose of the chapter is—
>
> > (1) to provide a statutory basis for the operation of gaming by Indian tribes *as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments*;
> >
> > (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, *to ensure that the Indian tribe is the primary beneficiary of the gaming operation*, and to assure that the gaming is conducted fairly and honestly by both the operator and players; and
> >
> > (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and *to protect such gaming as a means of generating tribal revenue.*

25 U.S.C. § 2702 (emphases added).

The basic thrust of IGRA, then, is to promote Indian gaming in a manner that will redound to the benefit of Indian tribes. As such, section 2719's presumptive bar on after-acquired gaming constitutes the exception to the general policy embodied in the statute. It is that presumptive bar that should therefore be construed narrowly, with the many caveats to it, including the restored lands provision, correspondingly interpreted broadly.

The State's attempt to infuse ambiguity where Congress has spoken clearly is therefore unavailing. The same result should obtain in this case whether Congress's words are read in their plain and natural sense, or deemed subject to more than one interpretation.

CONCLUSION

The decision of the district court should be affirmed.

Respectfully submitted,

John Petoskey
Matthew Fletcher
Grand Traverse Band
Legal Department
2605 N.W. Bayshore Drive
Peshawbestown, Michigan 49682
Phone: (231) 271-7279

Riyaz A. Kanji
Counsel of Record
Phillip E. Katzen
KANJI & KATZEN, P.L.L.C.
201 South Main Street, Suite 1000
Ann Arbor, Michigan
Phone: (734) 769-5400

Counsel for Grand Traverse Band of Ottawa and Chippewa Indians

Appellee's Designation of Joint Appendix Contents

Appellee Grand Traverse Band, pursuant to Sixth Circuit Rules 28(d) and 30(b), hereby designates the following portions of the record below for inclusion in the Joint Appendix:

Description of Entry	Document Date or Date Entered into Record	Lower Court Record Number
Civil Docket for Case No. 96-CV-466	May 21, 2002	
Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney, 198 F. Supp.2d 920 (W.D. Mich. 2002)	April 22, 2002	168
Treaty of Detroit, 11 Stat. 621	July 31, 1855	150, page 67
Letter from Secretary of the Interior Delano to Commissioner of Indian Affairs Walker	March 27, 1872	150, page 67
Letter from Congressman Albert Engel to Commissioner Collier	September 21, 1935	150, page 67
Memorandum of Commissioner Collier	May 29, 1940	150, page 67
Solicitor's Opinion Regarding the Pokagon Band of Potawatomi Indians	September 19, 1997	151, page 36
Solicitor's Opinion Regarding Gaming on Trust Land Acquired in Emmet County,	November 21, 1997	151, page 36

Michigan, for the Little Traverse Bay Bands of Odawa Indians		
Solicitor's Opinion Regarding Gaming on Proposed Trust Acquisition in Manistee County, Michigan, for the Little River Band of Ottawa Indians	March 16, 1998	151, page 36
National Indian Gaming Commission Opinion	August 31, 2001	151, page 36
Sixth Circuit Order, No. 99-1584	May 1, 2001	88
Pretrial Order, Uncontroverted Facts	December 28, 2001	137
Second Amended Complaint	December 28, 2001	138
McClurken Testimony	January 14, 2002	150, pages 40-43, 48-52, 55-60
Chambers Testimony	January 14, 2002	150, pages 70-72, 77-78
Burtt Testimony	January 14, 2002	150, pages 94-98, 108-112
Kewaygoshkum Testimony	January 15, 2002	150, pages 121-122; 151, pages 8-9, 14-17
Petoskey Testimony	January 15 & 16, 2002	151, pages 25-30; 152, pages 105-106

Addendum Table of Contents

UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF MICHIGAN, et al., Defendants.	)	Civil Action No. M 26-73

MEMORANDUM OF THE UNITED STATES
RELATING TO TREATY FISHING RIGHTS OF OTTAWA INDIANS

This memorandum addresses the fishing rights of persons of Ottawa Indian ancestry under the Treary of 1836, in light of this Court's decision in United States v. Michigan, 471 F.Supp. 192 (W.D. Michigan 1979). This Court has indicated an interest in having this issue addressed by the United States at this time.

I. The Ottawas were party to the Treaty of 1836 and secured fishing rights thereunder.

United States v. Michigan formally involved the treaty fishing rights only of the Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians; no Ottawa groups were party to the case. It is clear from the decision, however, that if there were any present-day political successors in interest to the Ottawa bands that signed the Treaty of 1836, such tribal groups would possess the same fishing rights as Bay Mills and the Sault Tribe. The Ottawa bands within the ceded area were clearly party to the treaty. 471 F.Supp. at 225-231. They occupied much of the ceded area with the Chippewa

and participated in the Great Lakes fishery. Id., at 255-257. Under the decision there is no geographical limit on the exercise of the treaty right within the ceded area. Id., at 259. The Court also found that the present parties to the litigation adequately represented the interests of the Ottawas in Phase 1. Id., at 217.

The problem with fishing rights for Ottawas is that there is no federally recognized Ottawa tribal entity. Without such an entity, the federal government must oppose the assertion of treaty fishing rights by individual Ottawas or unrecognized Ottawa groups. The remainder of this memorandum will address problems associated with this issue.

II. A treaty fishing right can only be exercised by a tribe.

This Court has ruled in United States v. Michigan, 471 F.Supp. at 271:

> The fishing right reserved by the Indians in 1836 and at issue in this case is the communal property of the tribes which signed the treaty and their modern political successors; it does not belong to individual tribal members.

Accord, United States v. Washington, 520 F.2d 676 (C.A. 9, 1975); Settler v. Lameer, 507 F.2d 231 (C.A. 9, 1974); United States v. Three Winchester 30-30's, 504 F.2d 1288 (C.A. 7, 1974); Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961); Montana Power Co. v. Rochester, 127 F.2d 189 (C. A. 9, 1942). See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., _____ U.S. _____ (1979) Slip Opinion p.19).

Because the fishing rights are tribal property, an individual or a group does not make a sufficient showing of entitlement to the exercise of the right merely by a showing that the individual or group members descend from the tribes

and bands signatory to the treaty securing the fishing right. It must, in addition, be shown that the individuals involved are members of a tribe which is a successor in interest to the tribes and bands who secured the treaty right. As Judge Boldt recently ruled in United States v. Washington:

> The fishing rights secured by the treaties . . . are communal rights which belong to the Indians with whom the treaties were made in their collective sovereign capacity. Being communal in nature these rights are not inheritable or assignable by the individual member to any person, party or other entity whatsoever. They are held for the use and benefit of the persons who continue to maintain a tribal structure exercising governmental or political powers.

United States v. Washington, W. D. Washington, Civil No. 9213. Findings of Fact, Conclusions of Law and Decree Re Treaty Status of Intervenor Duwamish, Samish, Snohomish, Snoqualmie, and Steilacoom Tribes, 3/23/79. See United States v. Washington, 520 F.2d 676, 692 (C. A. 9, 1975).

This Court clearly incorporated this understanding of the tribe as a political entity recognized as such by the federal government into his decision. The Court put stress on the modern tribes as political successors in interest, and upon federal recognition of the tribes. 471 F.Supp. at 218, 249, 264, 272. Furthermore, the whole concept of preemption of state jurisdiction by tribal regulation is predicated on the view of tribes as political entities capable of the legislative, executive and judicial functions necessary to a regulatory system. Unless a group is a tribe in this political sense, it simply cannot be fit within the framework of the decision in United States v. Michigan.

In sum, if there is no Ottawa tribe in this political sense, there simply are no exercisable Ottawa fishing rights. Such rights cannot reside in individuals of Ottawa ancestry nor in Ottawa groups which are not tribes in the political

sense indicated. See Puget Sound Gillnetters Ass'n. v. U. S. District Court, 573 F.2d 1123, 1130 (C.A. 9, 1978).

III. The Department of the Interior has an administrative procedure for recognition of Indian groups as tribes, and one Ottawa group -- the Grand Traverse Band -- has availed itself of that process.

The Court has indicated, the touchstone for whether an Indian group is a tribe is whether the federal government recognizes the group as a tribe. "Courts will not disturb what Congress or the executive have done in terms of organizing or recognizing the political authority of Indian tribes." 471 F.Supp. at 264. See United States v. Sandoval, 231 U.S. 28 (1913); United States v. Holliday, 70 U.S. (3 Wall.) 407 (1867); United States v. Washington, supra. The Department of the Interior is the executive agency which deals with the recognition of tribes because of its responsibility for the supervision and management of Indian affairs. 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1457; Reorganization Plan No. 3 of 1950 (64 Stat. 1262).

In 1977, the Department of the Interior began the process of revamping the procedures by which it accorded federal recognition to Indian tribes. This effort resulted in the promulgation of 25 CFR, Part 54 - Procedures for Establishing that an American Indian Group Exists as an Indian Tribe. The regulations were published as a final rule on August 24, 1978 (43 F.R. 39361), effective October 2, 1978.

The regulations commanded that the Department promulgate and publish a list of Indian tribal entities that have a government-to-government relationship with the United States. This list was published in the Federal Register on February 6, 1979. 44 F.R. 7235. The list includes all federally recognized tribes; Indian groups not on the list must petition for acknowledgement of tribal

status under 25 CFR, Part 54. The Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians are on the list. No Ottawa group descended from the Ottawa signatory to the Treaty of 1836 is listed. There is no such Ottawa group which is recognized as a tribe, so at present there are no exercisable Ottawa fishing rights.

The members of this group trace their ancestry to Ottawa bands who were signatory to the Treaty of 1836, so if the Grand Traverse Band petition were granted, it would then be a tribe eligible to exercise the treaty fishing right. Because an administrative determination is pending on this matter, a word need be said in explanation of the administrative process involved.

Any Indian group believing that it should be recognized by the federal government as an Indian tribe is eligible to file a petition with the Secretary of the Interior. 25 CFR § 54.4. The form and content of the petition are specified in some detail. §54.7. Once filed, the petition is analyzed by the Assistant Secretary for Indian Affairs, who has created the Federal Acknowledgement Project in the Bureau of Indian Affairs for that purpose. The criteria to be applied in determining whether the petition should be granted are set forth in §54.7(a), which provides:

> [The group must show that] the petitioner has been identified from historical times until the present on a substantially continuous basis, as "American Indian" or "aboriginal". A petitioner shall not fail to satisfy any criteria herein merely because of fluctuations of tribal activity during various years. Evidence to be relied upon in determining the group's substantially continuous Indian identity shall include one or more of the following:
>
> (1) Repeated identification by Federal authorities;
>
> (2) Longstanding relationships with State governments based on identification of the group as Indian;
>
> (3) Repeated dealings with a county, parish, or other local government in a relationship based on the group's Indian identity;

(4) Identification as an Indian entity by records in courthouses, churches, or schools;

(5) Identification as an Indian entity by anthropologists, historians, or other scholars;

(6) Repeated identification as an Indian entity in newspapers and books;

(7) Repeated identification and dealings as an Indian entity with recognized Indian tribes or national Indian organizations.

See, e.g., Montoya v. United States, 180 U.S. 261 (1901); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (C.A. 1, 1979); United States v. Washington, supra.

Within a year after the petition is filed with the Department of Interior (unless extended for one additional 180-day petiod), the Assistant Secretary is to publish proposed findings on the petition. §54.9(f). After the proposed findings are published, there follows a 120-day public comment period, during which third parties can challenge the findings. §54.9(g). Within 60 days after the close of the comment period, the Assistant Secretary must make and publish his determination of the petitioner's status, which becomes effective 60 days after publication. §54.9(h). During the 60-day period following publication, the Secretary may request that the Assistant Secretary reconsider his decision §54.10.

The effect of granting an acknowledgement petition is set forth in §54.11(a), which states:

> Upon final determination that the petitioner is an Indian tribe, the tribe shall be eligible for services and benefits from the Federal Government available to other federally recognized tribes and entitled to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes with a government-to-government relationship to the United States as well as having the responsibilities and obligations of such tribes. Acknowledgement shall subject such Indian tribes to the same authority of Congress and the United States to which other federally acknowledged tribes are subject.

Because the acknowledgement procedure set forth in 25 CFR, Part 54, has been in place less than a year, no Indian

group's petition has yet been finally determined. The Grand Traverse Band petition, however, is at the very top of the process and will be acted on first of all of the dozens of pending petitions.

The Federal Acknowledgement Project is currently in the process of drafting the proposed findings. Expedited processing of the proposed findings through the bureaucratic process has been promised.

IV. The doctrine of primary jurisdiction precludes the Court from considering the tribal status of Ottawa groups until the administrative process is completed.

Because there is a comprehensive administrative procedure for the federal acknowledgement or recognition of Indian tribes under 25 CFR Part 54, the primary jurisdiction to determine the issue of whether an Indian group is a tribe rests with the Department of the Interior. The court must defer to the agency process before itself addressing the issue.

The doctrine of primary jurisdiction sets forth a principle of division of labor between the administrative agencies and the courts. The doctrine was perhaps best explained in United States v. Western Pacific R. Co., 352 U.S. 59, 63-4 (1956), where it was contrasted with the exhaustion of administrative remedies doctrine:

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction', on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Accord, Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973); United States v. Philadelphia National Bank, 374 U.S. 321 (1963); Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958). See Aircraft Diesel Equipment Corp. v. Hirsch, 331 U.S. 752 (1947); 3 Davis, Administrative Law Treatise, §19.01.

The doctrine of primary jurisdiction, then, determines whether the court or the agency makes the initial determination on an issue, and not who makes the final decision. The notion is that, initially, the agency with the expertise in an area, and one given charge of the area by Congress, should make the determination. Far East Conference v. United States, 342 U.S. 570 (1952). If an agency has primary jurisdiction over an issue, the court should either dismiss the case or stay proceedings pending administrative action. United States v. Michigan National Corp., 419 U.S. 1 (1974); 3 Davis, Administrative Law treatise, §19.07.

In determining whether an agency has primary jurisdiction, the courts look in particular to two factors: whether consistency and uniformity of result are desirable and whether the agency has specialized expertise in a given area. Ricci v. Chicago Mercantile Exchange, supra; Far East Conference v. United States, supra; Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285 (1922); Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907); 5 Mezines, Stein & Gruff, Administrative Law, §47.01[1].

Given these considerations, it is obvious that the primary jurisdiction doctrine precludes the court from considering whether Ottawa groups are tribes until the groups have availed themselves of the acknowledgement process set forth in 25 CFR Part 54. Interior has long been the executive agency which has dealt with the tribes as political entities on behalf of the federal government under a Congressional delegation of that power. 25 U.S.C. §2, §9; 43 U.S.C. § 1457. Because tribes are still sovereign entities, and because the relationship between tribes and the federal government is a relationship between governments, the whole area is charged with delicate political overtones,

and courts should be especially reluctant to make these sorts of political decisions in the first instance. In this context, then, Interior is obviously possessed of great specialized expertise. This Court has recognized that fact by stressing federal recognition of the tribes in its decision and by stating:

> Courts will not disturb what Congress or the executive have done in terms of organizing or recognizing the political authority of Indian tribes. * * * As the agency charged with the administration of laws affecting Indians, actions and interpretations of the Department of the Interior are entitled to 'great weight'.

United States v. Michigan, supra at 264. See United States v. Jackson, 280 U.S. 183 (1930); United States v. Sandoval, supra; United States v. Holliday, supra; United States v. Washington, supra.

It is also obvious that the question of federal recognition of tribes, involving as it does an across-the-board acknowledgement of the existence of a government eligible for a number of federal programs, is one peculiarly calling for consistency and uniformity of result. This is especially appropriate where a political relationship is involved.

Interior is the agency charged with this responsibility, and it must be afforded the opportunity to develop a consistent, uniform approach to the delicate political question of recognition of Indian groups as tribes.

V. Conclusion

Because treaty fishing rights are tribal rights, and there currently are no federally recognized Ottawa tribal entities, there are no Ottawa fishing rights currently exercisable under the Treaty of 1836. The United States must oppose all attempts by individuals of Ottawa ancestry to establish such rights, since their rights depend upon membership in a tribe possessing the rights, and there is no such tribe of Ottawas. As to Ottawa groups claiming tribal status, we assert the doctrine of primary jurisdiction--this matter must initially be determined through the Interior administrative process set forth in 25 CFR Part 54, and not through the courts.

The Grand Traverse Band of Ottawas presents special considerations, since it is so far along in the acknowledgement process. We must stand on the primary jurisdiction doctrine as to this group until proposed findings are published. Once proposed findings have been published, however, we can support the fishing rights of this group on an interim basis, pending completion of the administrative process. The proposed findings constitute the agency's internal determination, subject to such changes as are appropriate in light of the external input during the public comment period. On this basis, we can recognize the Grand Traverse Band as a possessor of the treaty fishing right, recognizing that this is on an interim basis only pending final administrative action and that it entails no federal obligations to the band in other areas.

Respectfully submitted,

ELMER T. NITZSCHKE
Office of Field Solicitor
Department of Interior
686 Federal Building
Twin Cities, Minnesota

JAMES S. BRADY
United States Attorney

J. TERRANCE DILLON
Assistant United States Attorney
504 Federal Building
Grand Rapids, Michigan 49503

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7)(B) because this brief contains 13,940 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because this brief has been prepared with a proportionally spaced typeface using Microsoft Word 2002, font size 14 and Times New Roman type style.

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Riyaz A. Kanji
KANJI & KATZEN, PLLC
The First National Building
201 South Main Street
Suite 1000
Ann Arbor, Michigan 48104-2177
(734) 769-5400
Counsel for the Grand Traverse Band of Ottawa and Chippewa Indians

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GRAND TRAVERSE BAND OF OTTAWA
AND CHIPPEWA INDIANS

Plaintiff – Appellee

v.

OFFICE OF THE U.S. ATTORNEY FOR THE WESTERN DISTRICT OF MICHIGAN;

Case No. 02-1679

Defendant

STATE OF MICHIGAN

Intervenor – Appellant

_____/

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served the documents listed below by causing to have them sent by First Class Mail, postage prepaid, on June 10, 2003 to:

John Charamella
Native American Affairs Division
Office of the Attorney General
State of Michigan
120 North Washington
Lansing, MI 48909

The documents served are as follows:

1. Final Brief for Appellee Grand Traverse Band of Ottawa and Chippewa Indians;
2. This Certificate of Service.

Taryn M. Stejskal
Legal Assistant
KANJI & KATZEN, PLLC
201 South Main Street
Suite 1000
Ann Arbor, Michigan 48104-2177
(734) 769-5400