UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN,

Plaintiff,

v

THE BAY MILLS INDIAN COMMUNITY,

Defendant.

_____/

Consolidated Cases No. 1:10-cv-01273-PLM; 1:10-cv-1278

Hon. Paul L. Maloney

STATE OF MICHIGAN'S RESPONSE IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION IN CASE NO. 1:10-CV-1278

Introduction

Plaintiff State of Michigan (State) supports the request by Little Traverse Bay Bands of Odawa Indians (LTBB) in Case No. 1:10-cv-1278 for entry of a preliminary injunction closing the casino now being operated by Defendant Bay Mills Indian Community (BMIC) in Vanderbilt, Michigan (Vanderbilt casino). This is the same casino which the State has asked this Court to close in the Complaint filed by the State on December 21, 2010 (State's Complaint) in Case No. 1:10-cv-01273-PLM.

The Vanderbilt casino can be lawfully operated only if it complies with the requirements of the Indian Gaming Regulatory Act, 25 U.S.C. §2701 *et seq.* (IGRA), which expressly limits the operation of tribal casinos to those operating on "Indian lands" as defined in IGRA. LTBB has presented a convincing argument in its brief in support of its motion concerning the four preliminary injunction factors. In particular, the State concurs with the analysis in LTBB's brief that explains why the Vanderbilt casino is not operating on Indian lands and is therefore in

violation of IGRA and BMIC's gaming compact with the State. This analysis provides strong support for the likelihood of success injunction factor.

Confirmation of LTBB's arguments came by way of recent opinions issued by the National Indian Gaming Commission (NIGC) and the U.S. Department of Interior (Interior) which both concluded that the Vanderbilt casino was not operating on "Indian lands" as defined in IGRA, and therefore lost the protection of federal Indian law. This is significant to this case where both the State and LTBB are asserting that the Vanderbilt casino must be closed since it is not on Indian lands, because the NIGC is the federal agency charged by Congress with the administration and enforcement of IGRA's statutory provisions. See, i.e., 25 U.S.C. §§ 2705, 2706, 2710(b)(2), 2710(d)(1)(A)(iii), 2711, 2713(a)(1). NIGC reached its decision after a thorough consideration of the legal analysis provided it by BMIC (which will likely be the basis of BMIC's defense in this consolidated litigation), and after consulting with Interior – the federal agency generally charged with administering Indian matters – which reached the same conclusion. Given that this determination arrived at by the federal agencies charged with administering IGRA and other laws governing Indian tribes supports a finding by this Court that the Vanderbilt casino is unlawful because it is not on Indian lands, there is a high likelihood of success on the merits of these consolidated cases. When the Court balances the other preliminary injunction factors, including the public interest in not having an unlawful casino operating in the State of Michigan, it is clear that this preliminary injunction motion should be granted.

I. The Opinions From NIGC And Interior Should Be Given Substantial Deference By The Court

The decisions from NIGC (NIGC Decision) and Interior (Interior Opinion) are attached to the supplemental materials submitted by LTBB on January 4, 2010 (Docket #7). These

decisions were prompted when NIGC became aware that BMIC had opened the Vanderbilt casino. There was however, considerable history predating the actual opening. As discussed in the Interior Opinion (n.1), BMIC had on three separate occasions sought decisions from Interior and/or NIGC that could have authorized operation of this casino, twice in the context of NIGC approval of a gaming ordinance under its IGRA authority[1] that would have allowed gaming on this specific Vanderbilt site, and once in the context of an "Indian lands opinion" from Interior that might likewise have paved the way to gaming at Vanderbilt. As noted in the Interior Opinion, BMIC withdrew all three of these requests before a final decision was issued by the agencies, presumably because BMIC had reason to believe the decisions would not be favorable to its cause.

Thus, both Interior and NIGC have a thorough understanding of the facts and law concerning BMIC's theory behind its decision to open the Vanderbilt casino. And based on that understanding both agencies determined that IGRA did not authorize operation of the casino because it was not being conducted on Indian lands.

As explained in its 15 page, single-spaced analysis, the Interior Opinion relies on its interpretation and application of the Michigan Indian Land Claims Settlement Act of 1997, 105 Pub.L. 143; 111 Stat. 2652 (MILCSA) (copy attached as Exhibit A). This is because BMIC has asserted that the MILCSA entitles it to buy lands with funds appropriated by Congress as part of a land claim settlement, and that those lands become "Indian lands" for IGRA purposes by operation of law. This theory is discussed at length both in the Interior Opinion that disagrees with BMIC's analysis, and LTBB's brief which also thoroughly debunks this theory. The State agrees with these analyses and will not reiterate them here. However, it is critical to note that

[1] 25 U.S.C. § 2710(d)(1)(A)(iii).

Interior has a significant role in the interpretation and application of the MILCSA which lends considerable weight to its interpretation of that statute's provisions.

The MILCSA was adopted in 1997 after many years of effort seeking actual payment of funds that had earlier been awarded by the Indian Claims Commission to certain Michigan Tribes, including BMIC. These funds represented compensation for lands that had been ceded by the Tribes to the federal government, but for which the Tribes had not been adequately compensated. Interior was charged with, among other things, approving plans submitted by the Tribes for the use and distribution of the judgment funds and submitting a plan for use and distribution to Congress. MILCSA, § 105(b); 25 U.S.C § 1402 ("Within one year after appropriation . . . the Secretary of the Interior shall prepare and submit to Congress a plan for the use and distribution of the funds. Such plan shall include identification of the present-day beneficiaries, a formula for the division of the funds among two or more beneficiary entities if such is warranted, and a proposal for the use and distribution of the funds."). This is particularly significant here, because these plans ultimately became sections of the enacted statute. In the case of BMIC, the plan it proposed, and which Interior approved and formally submitted to Congress pursuant to 25 U.S.C. § 1402, became § 107 of the MILCSA (§ 107). Section 107 is the provision in the MILCSA on which BMIC has expressly relied for its claim that the Vanderbilt casino is on Indian lands.

Because of Interior's role in submitting the language that ultimately became § 107 of the MILCSA, as well as its overall responsibilities and authorities for administering federal law as it

applies to Indian tribes,[2] Interior's interpretation of the language in § 107 must be given considerable weight. NIGC recognized this in its decision, noting that the MILCSA is "the Department's [Interior's] to interpret." NIGC Decision, p.2. There is a strong argument that this interpretation is controlling here pursuant to the decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). While *Chevron* deference is generally found where the agency decision in question followed notice and public comment, the Supreme Court has not limited such deference only to these circumstances. For example, in *United States v. Mead Corp*., 533 U.S. 218 (2001) the Court recognized that *Chevron* deference can arise in other circumstances where it is warranted. *Mead* at 230-231 ("That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded, see, e.g., *NationsBank of N. C., N. A. v. Variable Annuity Life Ins. Co*., 513 U.S. 251, 256-257, 263 (1995)"). In *NationsBank* the Court deferred to an interpretation by the Comptroller of Currency which the Court referred to as the "expert administrator's statutory exposition," *id.* at 257, even though the interpretation had not arisen in the context of rule making or any other notice and comment setting. However, since the interpretation of the ambiguous language in the statute in question was "reasonable . . . in light of the legislature's revealed design" and the Comptroller was given broad authority under the legislation in question to regulate banking, the Comptroller's interpretation of that statute was given "controlling weight" by the Court. *Id.*

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[2] 25 U.S.C. §§ 2, 9; *Board of Comm'rs v. United States*, 139 F.2d 248, 251-252 (10th Cir. 1943) ("Historically, the Secretary of the Interior has been the delegated arm of the Federal government to act as the guardian of the Indian ward; to administer the affairs of its Indians, and to that end as been granted wide discretionary powers in the enforcement of the declared Congressional policy.")

Likewise in the case at hand, Interior not only has broad authority in the administration and regulation of Indian affairs, it had a specific role in submitting the language to Congress that became § 107 of the MILCSA. This certainly gives any interpretation of the language by Interior special – and arguably controlling – weight when it is in dispute. Interior's role in developing, approving and submitting the language of the statute is similar to its role in promulgating regulations that are submitted to Congress for review,[3] and that would unquestionably be entitled to *Chevron* type deference in a legal dispute. Furthermore, as discussed at length in Interior's Opinion, its conclusions are entirely consistent both with the design of the MILCSA and IGRA. There is no reason not to grant this interpretation of § 107 controlling weight.[4]

Even if Interior's interpretation is not as a matter of law binding on this Court, case law strongly suggests that this opinion must be given serious consideration. As recently noted by the U.S. Court of Appeals for the Sixth Circuit:

> We also review less formal agency authorities, lacking the "force of law" of notice and comment rule-making, which may be relevant. See *United States v. Mead Corp*., 533 U.S. 218, 226-27 (2001). Although *Chevron* deference does not apply to these "other" agency interpretations, they still enjoy "some deference whatever its form" due to the agency's institutional expertise and in the interests of judicial uniformity. *Id*. at 226-27, 234-35. The weight of deference accorded depends on the agency authority's inherent persuasiveness. See *id.* at 228.

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[3] 5 U.S.C. § 801. Even if there was no public notice and comment on § 107, the party directly affected by the statute, BMIC, was given significant input into the language that was ultimately adopted by Congress. See § 105(b) of the MILCSA. Thus the policy underlying *Chevron* deference that is served by notice and comment was satisfied in this instance.

[4] At least one other court has found that *Chevron* type deference to Interior's Indian lands determinations is appropriate. *United States v. Livingston*, 2010 U.S. Dist. LEXIS 97598, 38-39 (E.D. Cal. Sept. 1, 2010) (copy attached as Exhibit B) ("As set forth above, Congress allows the Department [of Interior] to handle Indian affairs. 25 U.S.C. §479a. But Congress delegated its authority to recognize Indian tribes federally to the executive branch long before 1994. In 1978, Congress passed 25 U.S.C. §§2, 9 to allow the Bureau of Indian Affairs to manage 'all Indian affairs and...all matters arising out of Indian relations.' Thus, the Department has the authority to make these interpretations, and this Court should accord 'considerable weight' to the 'executive department's construction of a statutory scheme it is entrusted to administer.' *Chevron, U.S.A., Inc. v. Nat. Resources Defense Council, Inc*., 467 U.S. 837, 844 (1984).")

> Specifically, we consider "the thoroughness evident in [the agency authority's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id*. (quoting *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944)); see also *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 643 (6th Cir. 2004) (observing that *Skidmore* and its progeny "permit[] an agency to earn the weight given to it by the courts, while *Chevron* gives reasonable agency interpretations controlling weight as a matter of right").

Thornton v. Graphic Communs. Conf. of the Int'l Bhd. of Teamsters Supplemental Ret. & Disability Fund, 566 F.3d 597, 615 (6th Cir. 2009). So even if Interior's interpretation of § 107 of the MILCSA isn't controlling as a matter of law, because of the "thoroughness evident" in Interior's consideration and the validity of its reasoning, it is certainly persuasive and should be given considerable weight by this Court. Based on Interior's conclusion that the Vanderbilt casino is not built on Indian lands, and NIGC's concurrence in that opinion, there is every likelihood that the Plaintiffs' in the consolidated cases will succeed on the merits of their cases and the Vanderbilt casino will be permanently closed by Order of this Court.

II. The Public Interest Factor Weighs Heavily In Favor Of Preliminary Injunctive Relief

In addition to the likelihood of success factor, the public interest factor must be given dispositive weight in this motion. As noted by LTBB, the State does have compacts with tribes other than BMIC that require that economic incentive payments be made to the State based on revenues generated by tribal casinos, including such an agreement with LTBB. BMIC, on the other hand, is under no obligation to make payments to the State from any revenues generated by its casinos. Thus, to the extent the Vanderbilt casino is drawing casino customers from these other tribal casinos, the State will lose money.

More important perhaps, the operators of a tribal casino that is not authorized by IGRA not only are violating IGRA, they are also violating State and federal anti-gambling laws. See State's Complaint (Docket #1), Counts I and II. These State laws also make it illegal for anyone

to frequent an unlawful casino as well. Michigan Compiled Laws 750.309. It is certainly not in the public interest to allow the continued operation of a casino that is essentially enticing the public to violate the law and is effectively creating a public nuisance. Injunctive relief is appropriate to remedy such a nuisance.

III. The Other Preliminary Injunction Factors

The State concurs in the analysis of LTBB as it pertains to the other preliminary injunction factors.

Conclusion

For the reasons set forth above and in the motion and brief submitted by LTBB, the State respectively asks that the motion for preliminary injunction be granted.

Respectfully submitted,

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LEXSEE 105 P.L. 143

UNITED STATES PUBLIC LAWS
105th Congress -- 1st Session

PUBLIC LAW 105-143 [H.R. 1604]
DECEMBER 15, 1997
MICHIGAN INDIAN LAND CLAIMS SETTLEMENT ACT

105 P.L. 143; 111 Stat. 2652; 1997 Enacted H.R. 1604; 105 Enacted H.R. 1604

BILL TRACKING REPORT: 105 Bill Tracking H.R. 1604
FULL TEXT VERSION(S) OF BILL: 105 H.R. 1604
CIS LEGIS. HISTORY DOCUMENT: 105 CIS Legis. Hist. P.L. 143

An Act

To provide for the division, use, and distribution of judgment funds of the Ottawa and Chippewa Indians of Michigan pursuant to dockets numbered 18-E, 58, 364, and 18-R before the Indian Claims Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

[*1] SECTION 1. SHORT TITLE.

This Act may be cited as the "Michigan Indian Land Claims Settlement Act'.

I TITLE I--DIVISION, USE, AND DISTRIBUTION OF JUDGMENT FUNDS OF THEOTTAWA AND CHIPPEWA INDIANS OF MICHIGAN

[*101] SEC. 101. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

[**2653] [*102] SEC. 102. FINDINGS; PURPOSE.

(a) FINDINGS- Congress finds the following:

((1) Judgments were rendered in the Indian Claims Commission in dockets numbered 18-E, 58, and 364 in favor of the Ottawa and Chippewa Indians of Michigan and in docket numbered 18-R in favor of the Sault Ste. Marie Band of Chippewa Indians.

(2) The funds Congress appropriated to pay these judgments have been held by the Department of the Interior for the beneficiaries pending a division of the funds among the beneficiaries in a manner acceptable to the tribes and descendency group and pending development of plans for the use and distribution of the respective tribes' share.

(3) The 1836 treaty negotiations show that the United States concluded negotiations with the Chippewa concerning the cession of the upper peninsula and with the Ottawa with respect to the lower peninsula.

(4) A number of sites in both areas were used by both the Ottawa and Chippewa Indians. The Ottawa and Chippewa Indians were intermarried and there were villages composed of members of both tribes.

(b) PURPOSE- It is the purpose of this title to provide for the fair and equitable division of the judgment funds among the beneficiaries and to provide the opportunity for the tribes to develop plans for the use or distribution of their share of the funds.

[*103] SEC. 103. DEFINITIONS.

For purposes of this title the following definitions apply:

(1) The term "judgment funds' means funds appropriated in full satisfaction of judgments made in the Indian Claims Commission--

(A) reduced by an amount for attorneys fees and litigation expenses; and

(B) increased by the amount of any interest accrued with respect to such funds.

(2) The term "dockets 18-E and 58 judgment funds' means judgment funds awarded in dockets numbered 18-E and 58 in favor of the Ottawa and Chippewa Indians of Michigan.

(3) The term "docket 364 judgment funds' means the judgment funds awarded in docket numbered 364 in favor of the Ottawa and Chippewa Indians of Michigan.

(4) The term "docket 18-R judgment funds' means the judgment funds awarded in docket numbered 18-R in favor

of the Sault Ste. Marie Band of Chippewa Indians.

(5) The term "judgment distribution roll of descendants' means the roll prepared pursuant to section 106.

(6) The term "Secretary' means the Secretary of the Interior.

[*104] SEC. 104. DIVISION OF FUNDS.

(a) DOCKET 18-E AND 58 JUDGMENT FUNDS- The Secretary shall divide the docket 18-E and 58 judgment funds as follows:

(1) The lesser of 13.5 percent and $ 9,253,104.47, and additional funds as described in this section, for newly recognized or reaffirmed tribes described in section 110 and eligible individuals on the judgment distribution roll of descendants.

[**2654] (2) 34.6 percent to the Sault Ste. Marie Tribe of Chippewa Indians of Michigan and the Bay Mills Indian Community, of which--

(A) the lesser of 35 percent of the principal and interest as of December 31, 1996, and $ 8,313,877 shall be for the Bay Mills Indian Community; and

(B) the remaining amount (less $ 161,723.89 which shall be added to the funds described in paragraph (1)) shall be for the Sault Ste. Marie Tribe of Chippewa Indians of Michigan.

(3) 17.3 percent (less $ 161,723.89 which shall be added to the funds described in paragraph (1)) to the Grand Traverse Band of Ottawa and Chippewa Indians of Michigan.

(4) 17.3 percent (less $ 161,723.89 which shall be added to the funds described in paragraph (1)) to the Little Traverse Bay Bands of Odawa Indians of Michigan.

(5) 17.3 percent (less $ 161,723.89 which shall be added to the funds described in paragraph (1)) to the Little River Band of Ottawa Indians of Michigan.

(6) Any funds remaining after distribution pursuant to paragraphs (1) through (5) shall be divided and distributed to each of the recognized tribes listed in this subsection in an amount which bears the same ratio to the amount so divided and distributed as the distribution of judgment funds pursuant to each of paragraphs (2) through (5) bears to the total distribution under all such paragraphs.

(b) DOCKET 364 JUDGMENT FUNDS- The Secretary shall divide the docket 364 judgment funds as follows:

(1) The lesser of 20 percent and $ 28,026.79 for newly recognized or reaffirmed tribes described in section 110 and eligible individuals on the judgment distribution roll of descendants.

(2) 32 percent to the Sault Ste. Marie Tribe of Chippewa Indians of Michigan and the Bay Mills Indian Community, of which--

(A) 35 percent shall be for the Bay Mills Indian Community; and

(B) the remaining amount shall be for the Sault Ste. Marie Tribe of Chippewa Indians of Michigan.

(3) 16 percent to the Grand Traverse Band of Ottawa and Chippewa Indians of Michigan.

(4) 16 percent to the Little Traverse Bay Bands of Odawa Indians of Michigan.

(5) 16 percent to the Little River Band of Ottawa Indians of Michigan.

(6) Any funds remaining after distribution pursuant to paragraphs (1) through (5) shall be divided and distributed to each of the recognized tribes listed in this subsection in an amount which bears the same ratio to the amount so divided and distributed as the distribution of judgment funds pursuant to each of paragraphs (2) through (5) bears to the total distribution under all such paragraphs.

(c) DOCKET 18-R JUDGMENT FUNDS- The Secretary shall divide the docket 18-R judgment funds as follows:

(1) 65 percent to the Sault Ste. Marie Tribe of Chippewa Indians of Michigan.

(2) 35 percent to the Bay Mills Indian Community.

[**2655] (d) AMOUNTS FOR NEWLY RECOGNIZED OR REAFFIRMED TRIBES OR INDIVIDUALS ON THE JUDGMENT DISTRIBUTION ROLL OF DESCENDANTS HELD IN TRUST- Pending distribution under this title to newly recognized or reaffirmed tribes described in section 110 or individuals on the judgment distribution roll of descendants, the Secretary shall hold amounts referred to in subsections (a)(1) and (b)(1) in trust.

[*105] SEC. 105. DEVELOPMENT OF TRIBAL PLANS FOR USE OR DISTRIBUTION OF FUNDS.

(a) DISBURSEMENT OF FUNDS- (1) Except as provided in paragraphs (2), (3), and (4), the Secretary shall disburse each tribe's respective share of the judgment funds described in subsections (a), (b), and (c) of section 104 not later than 30 days after a plan for use and distribution of such funds has been approved in accordance with this section. Disbursement of a tribe's share shall not be dependent upon approval of any other tribe's plan.

(2) Section 107 shall be the plan for use and distribution of the judgment funds described in subsections (a)(2)(A), (b)(2)(A), and (c)(2) of section 104. Such plan shall be approved upon the enactment of this Act and such funds shall be distributed by the Secretary to the Bay Mills Indian Community not later than 90 days after the date of the enactment of this Act to be used and distributed in accordance with section 107.

(3) Section 108 shall be the plan for use and distribution of the judgment funds described in subsections (a)(2)(B), (b)(2)(B), and (c)(1) of section 104. Such plan shall be approved upon the enactment of this Act and such funds shall be distributed by the Secretary to the Sault Ste. Marie Tribe of Chippewa Indians of Michigan not later than 90 days after the date of the enactment of this Act to be used and distributed in accordance with section 108.

(4) Section 109 shall be the plan for use and distribution of the judgment funds described in subsections (a)(3) and (b)(3) of section 104. Such plan shall be approved upon the enactment of this Act and such funds shall be distributed by the Secretary to the Grand Traverse Band of Ottawa and Chippewa Indians of Michigan, not later than 90 days after the date of the enactment of this Act to be used and distributed in accordance with section 109.

(b) APPROVAL OR COMMENT OF SECRETARY- (1) Except as otherwise provided in this title, each tribe shall develop a plan for the use and distribution of its respective share of the judgment funds. The tribe shall hold a hearing or general membership meeting on its proposed plan. The tribe shall submit to the Secretary its plan together with an accompanying resolution of its governing body accepting such plan, a transcript of its hearings or meetings in which the plan was discussed with its general membership, any documents circulated or made available to the membership on the proposed plan, and comments from its membership received on the proposed plan.

(2) Not later than 90 days after a tribe makes its submission under paragraph (1), the Secretary shall--

(A) if the plan complies with the provisions of section 3(b) of the Indian Tribal Judgment Funds Use or Distribution Act *(25 U.S.C. 1403*(b)), approve the plan; or

[**2656] (B) if the plan does not comply with the provisions of section 3(b) of the Indian Tribal Judgment

Funds Use or Distribution Act *(25 U.S.C. 1403*(b)), return the plan to the tribe with comments advising the tribe why the plan does not comply with such provisions.

(c) RESPONSE BY TRIBE- The tribe shall have 60 days after receipt of comments under subsection (b)(2), or other time as the tribe and the Secretary agree upon, in which to respond to such comments and make such response by submitting a revised plan to the Secretary.

(d) SUBMISSION TO CONGRESS- (1) The Secretary shall, within 45 days after receiving the governing body's comments under subsection (c), submit a plan to Congress in accordance with the provisions of section 3(b) of the Indian Tribal Judgment Funds Use or Distribution Act *(25 U.S.C. 1403*(b)). If the tribe does not submit a response pursuant to subsection (c), the Secretary shall, not later than 45 days after the end of the response time for such a response, submit a plan to Congress in accordance with the provisions of section 3(b) of the Indian Tribal Judgment Funds Use or Distribution Act *(25 U.S.C. 1403*(b)).

(2) If a tribe does not submit a plan to the Secretary within 8 years of the date of enactment of this Act, the Secretary shall approve a plan which complies with the provisions of section 3(b) of the Indian Tribal Judgment Funds Use or Distribution Act *(25 U.S.C. 1403*(b)).

(e) GOVERNING LAW AFTER APPROVAL BY SECRETARY- Once approved by the Secretary under this title, the effective date of the plan and other requisite action, if any, is determined by the provisions of section 5 of the Indian Tribal Judgment Funds Use or Distribution Act *(25 U.S.C. 1405).*

(f) HEARINGS NOT REQUIRED- Notwithstanding section 3 and section 4 of the Indian Tribal Judgment Funds Use or Distribution Act *(25 U.S.C. 1403* and *25 U.S.C. 1404),* the Secretary shall not be required to hold hearings or submit transcripts of any hearings held previously concerning the Indian judgments which are related to the judgment funds. The Secretary's submission of the plan pursuant to this title shall comply with section 4 of the Indian Tribal Judgment Funds Use or Distribution Act *(25 U.S.C. 1404).*

[*106] SEC. 106. PREPARATION OF JUDGMENT DISTRIBUTION ROLL OF DESCENDANTS.

(a) PREPARATION-

(1) IN GENERAL- The Secretary shall prepare, in accordance with parts 61 and 62 of title 25, Code of Federal Regulations, a judgment distribution roll of all citizens of the United States who--

(A) were born on or before the date of enactment of this Act;

(B) were living on the date of the enactment of this Act;

(C) are of at least one-quarter Michigan Ottawa or Chippewa Indian blood, or a combination thereof;

(D) are not members of the tribal organizations listed in section 104;

(E) are lineal descendants of the Michigan Ottawa or Chippewa bands or tribes that were parties to either [**2657] the 1820 treaty (7 Stat. 207), the 1836 treaty (7 Stat. 491), or the 1855 treaty (11 Stat. 621);

(F) are lineal descendants of at least one of the groups described in subsection (d); and

(G) are not described in subsection (e).

(2) TIME LIMITATIONS- The judgment distribution roll of descendants prepared pursuant to paragraph (1)--

(A) shall not be approved before 8 years after the date of the enactment of this Act or a final determination has

been made regarding each petition filed pursuant to section 110, whichever is earlier; and

(B) shall be approved not later than 9 years after the date of the enactment of this Act.

(b) APPLICATIONS- Applications for inclusion on the judgment distribution roll of descendants must be filed with the superintendent, Michigan agency, Bureau of Indian Affairs, Sault Ste. Marie, Michigan, not later than 1 year after the date of enactment of this Act.

(c) APPEALS- Appeals arising under this section shall be handled in accordance with parts 61 and 62 of title 25, Code of Federal Regulations.

(d) GROUPS- The groups referred to in subsection (a)(1)(F) are Chippewa or Ottawa tribe or bands of--

(1) Grand River, Traverse, Grand Traverse, Little Traverse, Maskigo, or L'Arbre Croche, Cheboigan, Sault Ste. Marie, Michilmackinac; and

(2) any subdivisions of any groups referred to in paragraph (1).

(e) INELIGIBLE INDIVIDUALS- An individual is not eligible under this section, if that individual--

(1) received benefits pursuant to the Secretarial Plan effective July 17, 1983, for the use and distribution of Potawatomi judgment funds;

(2) received benefits pursuant to the Secretarial Plan effective November 12, 1977, for the use and distribution of Saginaw Chippewa judgment funds;

(3) is a member of the Keweenaw Bay Chippewa Indian Community of Michigan on the date of the enactment of this Act;

(4) is a member of the Lac Vieux Desert Band of Lake Superior Chippewa Indians on the date of the enactment of this Act; or

(5) is a member of a tribe whose membership is predominantly Potawatomi.

(f) USE OF HORACE B. DURANT ROLL- In preparing the judgment distribution roll of descendants under this section, the Secretary shall refer to the Horace B. Durant Roll, approved February 18, 1910, of the Ottawa and Chippewa Tribe of Michigan, as qualified and corrected by other rolls and records acceptable to the Secretary, including the Durant Field Notes of 1908-1909 and the Annuity Payroll of the Ottawa and Chippewa Tribe of Michigan approved May 17, 1910. The Secretary may employ the services of the descendant group enrollment review committees.

(g) PAYMENT OF FUNDS- Subject to section 110, not later than 90 days after the approval by the Secretary of the judgment distribution roll of descendants prepared pursuant to this section, the Secretary shall distribute per capita the funds described in [**2658] subsections (a)(1) and (b)(1) of section 104 to the individuals listed on that judgment distribution roll of descendants. Payment under this section--

(1) to which a living, competent adult is entitled under this title shall be paid directly to that adult;

(2) to which a deceased individual is entitled under this title shall be paid to that individual's heirs and legatees upon determination of such heirs and legatees in accordance with regulations prescribed by the Secretary; and

(3) to which a legally incompetent individual or an individual under 18 years of age is entitled under this title shall be paid in accordance with such procedures (including the establishment of trusts) as the Secretary determines to be necessary to protect and preserve the interests of that individual.

[*107] SEC. 107. PLAN FOR USE AND DISTRIBUTION OF BAY MILLS INDIAN COMMUNITY FUNDS.

(a) TRIBAL LAND TRUST- (1) The Executive Council of the Bay Mills Indian Community shall establish a nonexpendable trust to be known as the "Land Trust'. Not later than 60 days after receipt of the funds distributed to the Bay Mills Indian Community pursuant to this title, the Executive Council of the Bay Mills Indian Community shall deposit 20 percent of the share of the Bay Mills Indian Community into the Land Trust.

(2) The Executive Council shall be the trustee of the Land Trust and shall administer the Land Trust in accordance with this section. The Executive Council may retain or hire a professional trust manager and may pay the prevailing market rate for such services. Such payment for services shall be made from the current income accounts of the trust and charged against earnings of the current fiscal year.

(3) The earnings generated by the Land Trust shall be used exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange. Any land acquired with funds from the Land Trust shall be held as Indian lands are held.

(4) The principal of the Land Trust shall not be expended for any purpose, including but not limited to, per capita payment to members of the Bay Mills Indian Community.

(5) The Land Trust shall be maintained as a separate account, which shall be audited at least once during each fiscal year by an independent certified public accountant who shall prepare a report on the results of such audit. Such report shall be a public document, and shall be available for inspection by any member of the Bay Mills Indian Community.

(6) Notwithstanding any other provision of law, the approval of the Secretary of any payment from the Land Trust shall not be required and the Secretary shall have no trust responsibility for the investment, supervision, administration, or expenditure of funds from the Land Trust.

(b) LAND CLAIMS DISTRIBUTION TRUST- (1) The Executive Council of the Bay Mills Indian Community shall establish a nonexpendable trust to be known as the "Land Claims Distribution Trust Fund'. Not later than 60 days after receipt of the funds distributed to the Bay Mills Indian Community pursuant to this title, the Executive Council of the Bay Mills Indian Community [**2659] shall deposit into the Land Claims Distribution Trust Fund the principal funds which shall consist of--

(A) amounts remaining of the funds distributed to the Bay Mills Indian Community after distribution pursuant to subsections (a) and (c);

(B) 10 percent of the annual earnings generated by the Land Claims Distribution Trust Fund; and

(C) such other funds which the Executive Council chooses to add to the Land Claims Distribution Trust Fund.

(2) The Executive Council shall be the trustee of the Land Claims Distribution Trust Fund and shall administer the Land Claims Distribution Trust Fund in accordance with this section. The Executive Council may retain or hire a professional trust manager and may pay for said services the prevailing market rate. Such payment for services shall be made from the current income accounts of the trust and charged against earnings of the current fiscal year.

(3) 90 percent of the annual earnings of the Land Claims Distribution Trust Fund shall be distributed on October 1 of each year after the creation of the trust fund to any person who--

(A) is enrolled as a member of the Bay Mills Indian Community;

(B) is at least 55 years of age as of the annual distribution date; and

(C)(i) has been enrolled as a member of the Bay Mills Indian Community for a minimum of 25 years as of the

annual distribution date, or

(ii) was adopted as a member of the Bay Mills Indian Community on or before June 30, 1996.

(4) In the event that a member of the Bay Mills Indian Community who is eligible for payment under subsection (b)(3), should die after preparation of the annual distribution roll and prior to the October 1 distribution, that individual's share for that year shall be provided to the member's heirs at law.

(5) In the event that a member of the Bay Mills Indian Community who is at least 55 years of age and who is eligible for payment under subsection (b)(3), shall have a guardian appointed for said individual, such payment shall be made to the guardian.

(6) Under no circumstances shall any part of the principal of the Land Claims Distribution Trust Fund be distributed as a per capita payment to members of the Bay Mills Indian Community, or used or expended for any other purpose by the Executive Council.

(7) The Land Claims Distribution Trust Fund shall be maintained as a separate account, which shall be audited at least once during each fiscal year by an independent certified public accountant who shall prepare a report on the results of such audit. Such report shall be a public document and shall be available for inspection by any member of the Bay Mills Indian Community.

(8) Notwithstanding any other provision of law, the approval of the Secretary of any payment from the Land Claims Distribution Trust Fund shall not be required and the Secretary shall have no trust responsibility for the investment, supervision, administration, or expenditure of the Fund.

(c) LAND CLAIMS INITIAL PAYMENT- As compensation to the members of the Bay Mills Indian Community for the delay in distribution of the judgment fund, payment shall be made by the [**2660] Executive Council within 30 days of receipt of the Bay Mills Indian Community's share of the judgment fund from the Secretary, as follows:

(1) The sum of $ 3,000 to each enrolled member of the Bay Mills Indian Community living on the date of enactment of this legislation, who has attained the age of 55 years, but is less than 62 years of age, if that individual was adopted into or a member of the Bay Mills Indian Community on or before June 30, 1996.

(2) The sum of $ 5,000 to each enrolled member of the Bay Mills Indian Community living on the date of enactment of this legislation, who is at least 62 years of age and less than and 70 years of age, if that individual was adopted into or a member of the Bay Mills Indian Community on or before June 30, 1996.

(3) The sum of $ 10,000 to each enrolled member of the Bay Mills Indian Community living on the date of enactment of this legislation, who is 70 years of age or older, if that individual was adopted into or a member of the Bay Mills Indian Community on or before June 30, 1996.

(d) ANNUAL PAYMENTS FROM LAND CLAIMS DISTRIBUTION TRUST FUND- The Executive Council shall prepare the annual distribution roll and ensure its accuracy prior to August 30 of each year prior to distribution. The distribution roll shall identify each member of the Bay Mills Indian Community who, on the date of distribution, will have attained the minimum age and membership duration required for distribution eligibility, as specified in subsection (b)(3). The number of eligible persons in each age category defined in this subsection, multiplied by the number of shares for which the age category is entitled, added together for the 3 categories, shall constitute the total number of shares to be distributed each year. On each October 1, the shares shall be distributed as follows:

(1) Each member who is at least 55 years of age and less than 62 years of age shall receive 1 share.

(2) Each member who is between the ages of 62 and 69 years shall receive 2 shares.

(3) Each member who is 70 years of age or older shall receive 3 shares.

[*108] SEC. 108. PLAN FOR USE OF SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS OF MICHIGAN FUNDS.

(a) SELF-SUFFICIENCY FUND-

(1) The Sault Ste. Marie Tribe of Chippewa Indians of Michigan (referred to in this section as the "Sault Ste. Marie Tribe'), through its board of directors, shall establish a trust fund for the benefit of the Sault Ste. Marie Tribe which shall be known as the "Self-Sufficiency Fund'. The principal of the Self-Sufficiency Fund shall consist of--

(A) the Sault Ste. Marie Tribe's share of the judgment funds transferred by the Secretary to the board of directors pursuant to subsection (e);

(B) such amounts of the interest and other income of the Self-Sufficiency Fund as the board of directors may choose to add to the principal; and

(C) any other funds that the board of directors of the Sault Ste. Marie Tribe chooses to add to the principal.

[**2661] (2) The board of directors shall be the trustee of the Self-Sufficiency Fund and shall administer the Fund in accordance with the provisions of this section.

(b) USE OF PRINCIPAL-

(1) The principal of the Self-Sufficiency Fund shall be used exclusively for investments or expenditures which the board of directors determines--

(A) are reasonably related to--

(i) economic development beneficial to the tribe; or

(ii) development of tribal resources;

(B) are otherwise financially beneficial to the tribe and its members; or

(C) will consolidate or enhance tribal landholdings.

(2) At least one-half of the principal of the Self-Sufficiency Fund at any given time shall be invested in investment instruments or funds calculated to produce a reasonable rate of return without undue speculation or risk.

(3) No portion of the principal of the Self-Sufficiency Fund shall be distributed in the form of per capita payments.

(4) Any lands acquired using amounts from the Self-Sufficiency Fund shall be held as Indian lands are held.

(c) USE OF SELF-SUFFICIENCY FUND INCOME- The interest and other investment income of the Self-Sufficiency Fund shall be distributed--

(1) as an addition to the principal of the Fund;

(2) as a dividend to tribal members;

(3) as a per capita payment to some group or category of tribal members designated by the board of directors;

(4) for educational, social welfare, health, cultural, or charitable purposes which benefit the members of the Sault Ste. Marie Tribe; or

(5) for consolidation or enhancement of tribal lands.

(d) GENERAL RULES AND PROCEDURES-

(1) The Self-Sufficiency Fund shall be maintained as a separate account.

(2) The books and records of the Self-Sufficiency Fund shall be audited at least once during each fiscal year by an independent certified public accountant who shall prepare a report on the results of such audit. Such report shall be treated as a public document of the Sault Ste. Marie Tribe and a copy of the report shall be available for inspection by any enrolled member of the Sault Ste. Marie Tribe.

(e) TRANSFER OF JUDGMENT FUNDS TO SELF-SUFFICIENCY FUND-

(1) The Secretary shall transfer to the Self-Sufficiency Fund the share of the funds which have been allocated to the Sault Ste. Marie Tribe pursuant to section 104.

(2) Notwithstanding any other provision of law, after the transfer required by paragraph (1) the approval of the Secretary for any payment or distribution from the principal or income of the Self-Sufficiency Fund shall not be required and the Secretary shall have no trust responsibility for the investment, administration, or expenditure of the principal or income of the Self-Sufficiency Fund.

(f) LANDS ACQUIRED USING INTEREST OR OTHER INCOME OF THE SELF-SUFFICIENCY FUND- Any lands acquired using amounts [**2662] from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe.

[*109] SEC. 109. PLAN FOR USE OF GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS OF MICHIGAN FUNDS.

(a) LAND CLAIMS DISTRIBUTION TRUST FUND- (1) The share of the Grand Traverse Band of Ottawa and Chippewa Indians of Michigan (hereafter in this section referred to as the "Band'), as determined pursuant to subsections (a)(3) and (b)(3) of section 104, shall be deposited by the Secretary in a nonexpendable trust fund to be established by the Tribal Council of the Band to be known as the "Land Claims Distribution Trust Fund' (hereafter in this section referred to as the "Trust Fund').

(2) The principal of the Trust Fund shall consist of--

(A) the funds deposited into the Trust Fund by the Secretary pursuant to this subsection;

(B) annual earnings of the Trust Fund which shall be retained, and added to the principal; and

(C) such other funds as may be added to the Trust Fund by action of the Tribal Council of the Band.

(b) MANAGEMENT OF THE TRUST FUND- The Tribal Council of the Band shall be the trustee of the Trust Fund and shall administer the Fund in accordance with this section. In carrying out this responsibility, the Tribal Council may retain or hire a professional trust manager and may pay the prevailing market rate for such services. Such payment for services shall be made from the current income accounts of the Trust Fund and charged against the earnings of the fiscal year in which the payment becomes due.

(c) TRUST FUND AS LOAN COLLATERAL- (1) The Trust Fund shall be used by the Band as collateral to secure a bank loan equal to 80 percent of the principal of the Trust Fund at the lowest interest rate then available. Such

loan shall be used by the Band to make a one-time per capita payment to all eligible members.

(2) The loan secured pursuant to this subsection shall be amortized by the earnings of the Trust Fund. The Tribal Council of the Band shall have the authority to invest the principal of the Trust Fund on market risk principles that will ensure adequate payments of the debt obligation while at the same time protecting the principal.

(d) ELDERS' LAND CLAIM DISTRIBUTION TRUST FUND- (1) Upon the retirement of the loan obtained pursuant to subsection (c), the Tribal Council shall establish the Grand Traverse Band Elders' Land Claims Distribution Trust Fund (hereafter in this section referred to as the "Elders' Trust Fund'). There shall be deposited into the Elders' Trust Fund the principal and all accrued earnings that are in the Land Claims Distribution Trust Fund on the date of retirement of such loan.

(2) Upon establishment of the Elders' Trust Fund, the Tribal Council of the Band shall make a one-time payment to any person who is living on the date of the establishment of the Elders' Trust Fund, and who was an enrolled member of the Band for at least 2 years prior to the date of the enactment of this Act as follows:

(A) $ 500 for each member who has attained the age of 55 years, but is less than 62 years of age.

[**2663] (B) $ 1,000 for each member who has attained the age of 62 years, but is less than 70 years of age.

(C) $ 2,500 for each member who is 70 years of age or older.

(3) After distribution pursuant to paragraph (2), the net annual earnings of the Elders' Trust Fund shall be distributed as follows:

(A) 90 percent shall be distributed on October 1 of each year after the creation of the Elder's Trust Fund to all living enrolled members of the Band who have attained the age of 55 years upon such date, and who shall have been an enrolled member of the Band for not less than 2 years upon such date.

(B) 10 percent shall be added to the principal of the Elders' Trust Fund.

(4) Distribution pursuant to paragraph (3)(A) shall be as follows:

(A) One share for each person on the current annual Elders' roll who has attained the age of 55 years, but is less than 62 years of age.

(B) Two shares for each person who has attained the age of 62 years, but is less than 70 years of age.

(C) Three shares for each person who is 70 years of age or older.

(5) None of the funds in the Elders' Trust Fund shall be distributed or expended for any purpose other than as provided in this subsection.

(6) The Elders' Trust Fund shall be maintained as a separate account, which shall be audited at least once during each fiscal year by an independent certified public accountant who shall prepare a report on the results of such audit. Such report shall be reasonably available for inspection by the members of the Band.

(7) The Tribal Council of the Band shall prepare an annual Elders' distribution roll and ensure its accuracy prior to August 30 of each year. The roll shall identify each member of the Band who has attained the minimum age and membership duration required for distribution eligibility pursuant to paragraph (3)(A).

(e) GENERAL PROVISIONS- (1) In the event that a tribal member eligible for a payment under this section shall die after preparation of the annual distribution roll, but prior to the distribution date, such payment shall be paid to the

estate of such member.

(2) In any case where a legal guardian has been appointed for a person eligible for a payment under this section, payment of that person's share shall be made to such guardian.

(f) NO SECRETARIAL RESPONSIBILITIES FOR TRUST FUND- The Secretary shall have no trust responsibility for the investment, supervision, administration, or expenditure of the Land Claims Distribution Trust Fund or the Elders' Trust Fund.

[*110] SEC. 110. PAYMENT TO NEWLY RECOGNIZED OR REAFFIRMED TRIBES.

(a) ELIGIBILITY- In order to be eligible for tribal funds under this Act, a tribe that is not federally recognized or reaffirmed on the date of the enactment of this Act--

(1) must be a signatory to either the 1836 treaty (7 Stat. 491) or the 1855 treaty (11 Stat. 621);

(2) must have a membership that is predominantly Chippewa and Ottawa;

(3) shall not later than 6 months after the date of the enactment of this Act, submit to the Bureau of Indian Affairs [**2664] a letter of intent for Federal recognition if such a letter is not on file with the Bureau of Indian Affairs; and

(4) shall not later than 3 years after the date of the enactment of this Act, submit to the Bureau of Indian Affairs a documented petition for Federal recognition if such a petition is not on file with the Bureau of Indian Affairs.

(b) DISTRIBUTION OF FUNDS ALLOTTED FOR NEWLY RECOGNIZED OR REAFFIRMED TRIBES- Not later than 90 days after a tribe that has submitted a timely petition pursuant to subsection (a) is federally recognized or reaffirmed, the Secretary shall segregate and hold in trust for such tribe, its respective share of the funds described in sections 104(a)(1) and (b)(1), $ 3,000,000 plus 30 percent of any income earned on the funds described in section 104(a)(1) and (b)(1) up to the date of such distribution.

(c) DISTRIBUTION OF FUNDS ALLOTTED FOR CERTAIN INDIVIDUALS- If, after the date of the enactment of this Act and before approval by the Secretary of the judgment distribution roll of descendants, Congress or the Secretary recognizes a tribe which has as a member an individual that is listed on the judgment distribution roll of descendants as approved pursuant to section 106, the Secretary shall, not later than 90 days after the approval of such judgment distribution roll of descendants, remove that individual's name from the descendants roll and reallocate the funds allotted for that individual to the fund established for such newly recognized or reaffirmed tribe.

(d) FUNDS SUBJECT TO PLAN- Funds held in trust for a newly recognized or reaffirmed tribe shall be subject to plans that are approved in accordance with this title.

(e) DETERMINATION OF MEMBERSHIP IN NEWLY RECOGNIZED OR REAFFIRMED TRIBE-

(1) SUBMISSION OF MEMBERSHIP ROLL- For purposes of this section--

(A) if the tribe is acknowledged by the Secretary under part 83 of title 25, Code of Federal Regulations, the Secretary shall use the tribe's most recent membership list provided under such part;

(B) unless otherwise provided by the statutes which recognizes the tribe, if Congress recognizes a tribe, the Secretary shall use the most recent membership list provided to Congress. If no membership list is provided to Congress, the Secretary shall use the most recent membership list provided with the tribe's petition for acknowledgment under part 83 of title 25, Code of Federal Regulations. If no such list was provided to Congress or under such part, the newly recognized tribe shall submit a membership list to the Secretary before the judgment distribution roll of descendants is approved or the judgment funds shall be distributed per capita pursuant to section 106;

(C) a tribe that has submitted a membership roll pursuant to this section may update its membership rolls not later than 180 days before distribution pursuant to section 106.

(2) FAILURE TO SUBMIT UPDATED MEMBERSHIP ROLL- If a membership list was not provided--

(A) to the Secretary, the Secretary will use the tribe's most recent membership list provided to the Bureau of Indian Affairs in their petition for Federal acknowledgment [**2665] filed under part 83 of title 25, Code of Federal Regulations, unless otherwise provided in the statute which recognized the tribe;

(B) to the Bureau of Indian Affairs, the newly recognized or reaffirmed tribe shall submit a membership list before the judgment distribution roll of descendants is approved by the Secretary, unless otherwise provided in the statute which recognized the tribe; and

(C) before the judgment distribution roll of descendants is approved, the judgment funds shall be distributed per capita pursuant to section 106.

[*111] SEC. 111. TREATMENT OF FUNDS IN RELATION TO OTHER LAWS.

The eligibility for or receipt of distributions under this Act by a tribe or individual shall not be considered as income, resources, or otherwise when determining the eligibility for or computation of any payment or other benefit to such tribe, individual, or household under--

(1) any financial aid program of the United States, including grants and contracts subject to the Indian Self-Determination Act; or

(2) any other benefit to which such tribe, household, or individual would otherwise be entitled under any Federal or federally assisted program.

[*112] SEC. 112. TREATIES NOT AFFECTED.

No provision of this Act shall be construed to constitute an amendment, modification, or interpretation of any treaty to which a tribe mentioned in this Act is a party nor to any right secured to such a tribe or to any other tribe by any treaty.

II TITLE II--LIMITATION ON HEALTH CARE CONTRACTS AND COMPACTS FOR THEKETCHIKAN GATEWAY BOROUGH

[*201] SEC. 201. FINDINGS.

Congress finds that--

(1) the execution of more than 1 contract or compact between an Alaska Native village or regional or village corporation in the Ketchikan Gateway Borough and the Secretary to provide for health care services in an area with a small population leads to duplicative and wasteful administrative costs; and

(2) incurring the wasteful costs referred to in paragraph (1) leads to decrease in the quality of health care that is provided to Alaska Natives in an affected area.

[*202] SEC. 202. DEFINITIONS.

In this title:

(1) ALASKA NATIVE- The term "Alaska Native' has the meaning given the term "Native' in section 3(b) of the

Alaska Native Claims Settlement Act *(43 U.S.C. 1602*(b)).

(2) ALASKA NATIVE VILLAGE OR REGIONAL OR VILLAGE CORPORATION- The term "Alaska Native village or regional [**2666] or village corporation' means an Alaska Native village or regional or village corporation defined in, or established pursuant to the Alaska Native Claims Settlement Act *(43 U.S.C. 1601* et seq.).

(3) CONTRACT; COMPACT- The terms "contract' and "compact' mean a self-determination contract and a self-governance compact as these terms are defined in the Indian Self-Determination and Education Assistance Act *(25 U.S.C. 450* et seq.).

(4) SECRETARY- The term "Secretary' means the Secretary of Health and Human Services.

[*203] SEC. 203. LIMITATION.

(a) IN GENERAL- The Secretary shall take such action as may be necessary to ensure that, in considering a renewal of a contract or compact, or signing of a new contract or compact for the provision of health care services in the Ketchikan Gateway Borough, there will be only one contract or compact in effect.

(b) CONSIDERATION- In any case in which the Secretary, acting through the Director of the Indian Health Service, is required to select from more than 1 application for a contract or compact described in subsection (a), in awarding the contract or compact, the Secretary shall take into consideration--

(1) the ability and experience of the applicant;

(2) the potential for the applicant to acquire and develop the necessary ability; and

(3) the potential for growth in the health care needs of the covered borough.

DESCRIPTORS: DEPARTMENT OF INTERIOR; INDIAN CLAIMS COMMISSION; MICHIGAN; INDIAN CLAIMS; JUDGMENTS, CIVIL PROCEDURE; INDIAN HEALTH SERVICE; ALASKAN NATIVES; HEALTH FACILITIES AND SERVICES; GOVERNMENT CONTRACTS AND PROCUREMENT

LEXSEE 2010 U.S. DIST LEXIS 97598

UNITED STATES OF AMERICA, Plaintiff, vs. JEFF LIVINGSTON, Defendant.

CASE NO. CR-F-09-273 LJO

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 97598

September 1, 2010, Decided
September 1, 2010, Filed

COUNSEL: [*1] For Jeff Livingston, Defendant (1): Marc Days, LEAD ATTORNEY, Federal Defender (FRS), Fresno, CA; Peggy Sasso, LEAD ATTORNEY, Office of the Federal Defender, Fresno, CA.

For USA, Plaintiff: Ian Garriques, LEAD ATTORNEY, U.S. Attorney's Office, Fresno, CA; Kirk Edward Sherriff, LEAD ATTORNEY, United States Attorney, Fresno, CA; Mark Eugene Cullers, LEAD ATTORNEY, U.S. Department of Justice, Fresno, CA.

JUDGES: Lawrence J. O'Neill, UNITED STATES DISTRICT JUDGE.

OPINION BY: Lawrence J. O'Neill

OPINION

ORDER ON DEFENDANTS' MOTION TO DISMISS (Doc. 56)

INTRODUCTION

Defendant Jeff Livingston ("Mr. Livingston") moves to dismiss the indictment against him on the grounds that, as a matter of law, the government cannot establish an essential element of the offense; to wit, that the gaming establishment, the Chuckchansi Gold Resort and Casino ("Casino"), was operated pursuant to an ordinance approved by the National Indian Gaming Commission ("NIGC"). Mr. Livingston argues the California Rancheria Act terminated the status of the land in 1958, and was never restored to "Indian land" status during the relevant time period. The government contends that stipulated judgments and the agency opinion letters establish that the Casino [*2] operated on "Indian land" during the relevant time period. Having considered the parties' arguments, exhibits, and the applicable case law, this Court finds that Mr. Livingston fails to meet his burden to prove that the government cannot, as a matter of law, establish an essential element of the crime. Accordingly, this Court DENIES the motion to dismiss.

BACKGROUND

Charges and Ordinance

Mr. Livingston is charged with two counts of violating *18 U.S.C. §1168(b)*, entitled "theft by an officer or employee of a gaming establishment on Indian lands." *18 U.S.C. §1168(b)* reads:

> Whoever, being an officer, employee, or individual licensee of a gaming establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission, embezzles, abstracts, purloins, willfully

> misapplies, or takes and carries away with intent to steal, any moneys, funds, assets, or other property of such establishment of a value in excess of $ 1,000 shall be fined not more than $ 1,000,000 or imprisoned for not more than twenty years, or both.

Each count alleges that Mr. Livingston was an employee of a gaming establishment, Casino, operated by an [*3] Indian tribe, the Picayune Rancheria of the Chukchansi Indians ("Tribe"), pursuant to an ordinance approved by the NIGC, and that Mr. Livingston stole from the Casino. The indictment charges Mr. Livingston with theft on or about May 2007 and July 2007.

The question presented in this motion is whether the Casino was operated by the Tribe "pursuant to an ordinance or resolution approved by the National Indian Gaming Commission" as required by the statute. It is undisputed that Tribe passed a gaming ordinance, Resolution No. 1996-08, on June 24, 1996, and that the NIGC approved the Tribe's gaming ordinance on June 27, 1996. The NIGC's June 27, 1996 ordinance approval letter explains that "scope of the [NIGC] Chairman's review and approval is limited to the requirements of the IGRA and the NICG regulations." The letter cautions the Tribe: "It is important to note that the gaming ordinance is approved for gaming only on Indian lands as defined in the IGRA."

Mr. Livingston argues that the NIGC approval is limited, and applies only to the extent that the Casino was on "Indian land" during the relevant times of the indictment. Mr. Livingston contends that the Casino was not on Indian land during [*4] the relevant time period, because the Indian land status was terminated and not restored until it was placed back into trust on July 31, 2007. Mr. Livingston submits that because the land on which the Casino sits was not Indian land during the relevant time period, it was not a gaming establishment operating pursuant to the NIGC's approval, which approved "gaming only on Indian lands." Mr. Livingston concludes that because the Casino was not operated pursuant to an ordinance approved by the NIGC, the government cannot state an essential element of the crime.

The government maintains that the Casino was operated by the Tribe pursuant to NIGC's approval of the Tribe's gaming ordinance. The government argues that the June 27, 1996 letter was not conditional, and approved the gaming at the Casino. The government further argues that the Casino land qualified as "Indian land" based on the restoration of its rancheria status by *Tille Hardwick et al. v. United States*, No. C-79-1710 SW (N.D. Cal. 1979) ("*Hardwick*") litigation. The government also relies on government opinion letters that conclude that the Casino was on Indian land during the relevant period of time.

To resolve the issue presented, [*5] this Court considers the history of the Casino land in question, the *Hardwick* litigation, the NIGC approval and federal opinion letters, and the *post-Hardwick* decisions.

Creation and Termination of Trust

The Picayune Rancheria was first established by Executive Order of April 24, 1912, issued by President William H. Taft. The Executive Order, *inter alia*, designated 80 acres of land in Madera County to be held in trust by the United States for "Indian use." The land was occupied by one family, who did not form a tribal government or seek recognition as a tribal entity.

In 1958, Congress passed the California Rancheria Act, Public Law 85-671, 72 Stat. 619, to terminate the trust relationship between the United States and numerous Indian parcels in California, including the Picayune Rancheria. Under the California Rancheria Act, Congress terminated the alienation restrictions and distributed in fee simple title to the land that comprised the rancheria. The federal trust relationship with the land was officially terminated in 1966. The land was distributed and the parcels were eventually sold to non-Indians.

***Hardwick*Litigation and Tribal Organization**

In 1979, a class action lawsuit was filed [*6] in the Northern District of California to challenge the termination of the trust relationship under the California Rancheria Act. *Tille Hardwick et al. v. United States*, No. C-79-1710 SW (N.D. Cal. 1979) ("*Hardwick*"). *Hardwick* purportedly was filed on behalf of individual members of rancherias, and 34 terminated rancherias, including the Picayune Rancheria. The rancherias sought, among other things, to "unterminate" each of the subject rancherias and to hold the same in trust for the benefit of the Indians of the original Rancheria; and for the subject rancherias to be treated as Indian reservations in all respects.

On December 27, 1983, the court entered judgment be entered in favor of some of the *Hardwick* plaintiffs according to the terms of a stipulation for entry of judgment filed by the parties on August 2, 1983 ("1983 Stipulation"). The 1983 Stipulation identifies the Picayune Rancheria as one of the 17 rancherias subject to its provisions. The 1983 Stipulation restored the Indian status of the named plaintiffs and other class members of the 17 rancherias. The 1983 Stipulation provided a mechanism for owners of fee land to re-submit previous lands to the United States to hold [*7] in trust for the benefit of the Tribes. The 1983 Stipulation provided, however, that the Court:

> shall not include in any judgment entered pursuant to this stipulation any determination of whether or to what extent the boundaries of the rancherias listed and described in paragraph 1 shall be restored and shall retain jurisdiction to resolve this issue in further proceedings herein.

1983 Stipulation, para. 5. The 1983 Stipulation was signed by the United States federal defendants and the class action plaintiffs' attorney.

The Tribe did not take immediate action to organize its government after entry of the 1983 Stipulation and judgment. The Tribe held its first formal meeting to organize its tribal government in August 1986. Internal disputes over Tribal control erupted, factions emerged, and subsequent dueling applications for approval were denied.

While the Tribe was organizing its government, questions arose as to the boundaries of the rancheria, and as to the tax consequences flowing from the termination and later restoration of the Tribe. In 1987, the Picayune Rancheria and the County of Madera entered into a stipulation for entry of judgment ("1987 Stipulation"). Pursuant to the 1987 [*8] Stipulation, the Picayune Rancheria was "never" and is "not now lawfully terminated under the California Rancheria Act" because "the requirements of section 3 of the [California Rancheria] Act were not fulfilled prior to the conveyance of the deeds to the Rancheria Parcels." Pursuant to the 1987 Stipulation, the "original boundaries" of the rancheria was "restored, and all land within these restored boundaries...[was] declared to be 'Indian Country.'" [1] The parties agreed further that Picayune Rancheria "shall be treated by the County of Madera and the United States of America, [sic] as any other federally recognized Indian Reservation." The 1987 Stipulation was signed by an attorney for the plaintiffs, and an attorney for the County of Madera. The court entered judgment pursuant to the parties' stipulated terms.

> 1 Indian County, as defined by *18 U.S.C. §1151*, includes:
>
> > (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original [*9] or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

At the time of the 1987 Stipulation, there were seven parcels of land within the boundaries of the rancheria. One was held by an Indian, the other six parcels were held by non-Indians. The Tribe as a whole adopted a Tribal Constitution on November 7, 1988. Seeking to re-establish its reservation lands, began purchasing the six parcels. The Tribe re-acquired the last of the parcels in 2002.

Approval of Picayune Gaming Compact

In addition to the 1996 NIGC approval letter, the Tribe entered into a gaming agreement with the State of California that was approved by the NIGC in 2000. On September 10, 1999, the Tribe entered into a Tribal-State Compact with the State of California related to gaming ("Compact"). The Tribe submitted that Compact to the NIGC for review. On May 5, 2000, the United States Department of Interior issued a letter opinion that the Compact "does not violate the Indian Gaming Regulatory

Act." The May 5, 2000 letter approved the Compact. Noting [*10] that the Compact provides that gaming shall take place on "reservation" land located within Madera County, the letter makes clear, however, that "the terms of this Compact are approved only to the extent that they authorize gaming on 'Indian lands' as defined in IGRA, now or hereafter acquired by the Tribe."

Federal Opinions Letters Regarding Casino Indian Lands Status

After the Tribe approved its gaming ordinance, the status of its land as "Indian land" was called into question. A series of opinion letters between 1999-2001 demonstrate that the federal government believed the land to be "Indian lands" as defined by the IGRA. In forming these opinions, the government opinion letters relied on the 1983 and 1987 Stipulations.

A July 2, 1999 letter from the Bureau of Indian Affairs to the Office of the Solicitor responds to a request to submit "data pertaining to the Picayune Rancheria that may assist [the Office] in making a determination as to whether or not the lands currently being utilized for gaming purposes meet the definition of 'Indian lands' as set forth in" in the IGRA. The July 2, 1999 letter provides the following information:

> [A]s early as 1993, the Picayune Rancheriahas discussed [*11] its intent to establish a gaming facility. In 1996, the Picayune Rancheria advised of its plans to establish a casino on nontrust lands located within the exterior boundaries of the Picayune Rancheria as reinstated pursuant to the 1987 Stipulation entered by Madera Count in [Hardwick].
>
> In the said 1987 Stipulation, Madera County stipulated to the creation of "Indian Country" for all lands within the restored Rancheria boundaries. We have no record that the U.S. stipulated to the restoration of Picayune's boundaries or the creation of Indian Country in Hardwick as was accomplished for other rancherias located in Humbolt, Mendocino, Lake, Plumas, and Tuolumne Counties.

A March 2, 2000 letter written by the Department of Interior, Division of Indian Affairs ("Department") responded to an NIGC request for "a legal opinion regarding whether fee land in California purchased by the Picayune Tribe in 1996, which is within the boundaries of the Picayune Rancheria, falls within the definition of 'Indian lands'" under the IGRA. The March 2, 2000 letter "conclude[d] that the lands are 'Indian lands' and therefore maybe used for Indian gaming operations on the property." In arriving at this conclusion, [*12] the Department relied on the 1983 and 1987 Stipulations. The letter explained that in the 1983 Stipulation, the government "agreed that the individual members of the Rancherias would be restored to their status as Indians and the U.S. would recognize the Indian Tribes...of the seventeen rancherias as Indian entities with the same status as they possessed prior to distribution of these Rancherias." The letter recognizes that the United States did not sign the 1987 Stipulation, but takes the position that in signing the underlying 1983 Stipulation, the government anticipated "further proceedings" to determine the boundaries of the Picayune Rancheria. In the March 2, 2000 letter, the government states that "the United States considers itself bound by both stipulations." The March 2, 2000 letter affirms that the land qualifies as "Indian lands" as a reservation.

After the approval of the Compact by the NIGC, the State of California questioned "whether the casino will be operating on a reservation." In a December 3, 2001 letter to the State of California, the NIGC "adopted the Department of Interior's views," "concurr[ed] with the Department" and "likewise conclude[d] that the proposed gaming [*13] operation is located on lands considered "Indian lands" pursuant to" the IGCA. The December 3, 2001 letter noted the Department's conclusion "was based largely" on the *Hardwick* litigation and stipulations. The NIGC also concludes that the Picayune land proposed for gaming "should be treated as a reservation," and qualifies as Indian lands pursuant to *25 U.S.C. §2703(4)(A)*. In addition, because the land qualifies as reservation, the NIGC concluded that the land need not be taken into trust to qualify as "Indian lands" under the IGRA. The NIGC's December 3, 2001 opinion letter also relies on the Hardwick litigation and stipulations as well as a subsequent case interpreting the litigation, *Government Council of Pinoleville Indian Community v. Mendocino County, 684 F. Supp. 1042 (N.D. Cal. 1988)*.

***Post-Hardwick*Litigation**

In 2003, the Tribe completed construction of the Casino. The County of Madera re-assessed the value of the property's ad valorem property tax liability and attempted to assesses the taxes against the Tribe. The Tribe disputed tax liability.

In 2004, the County of Madera moved to enforce the judgment of the 1987 Stipulation in Northern District of California, relying on a [*14] provision of the 1987 Stipulation related to the assessment of ad valorem taxes. The motion was denied in a May 19, 2004 order. The court concluded that because the Tribe had not yet been organized at the time of the 1987 Stipulation, the Tribe could not have been a party to either the *Hardwick* litigation or to the 1987 Stipulation. The court recognized that the Tribe was a federally recognized Tribe in 1983, based on the 1983 Stipulation, but that because the Tribe had not waived its sovereign immunity expressly, the Tribe could not be bound by the 1987 Stipulation and judgment. The court denied the motion on the alternative grounds that the 1987 Stipulation would not provide the relief sought by the County of Madera. The court denied a subsequent motion for reconsideration on October 13, 2004.

Rather than appeal the Northern District's decision, the County of Madera filed an in rem action in Madera County Superior Court on October 25, 2004. The action sought declaratory relief as to the taxability of the land owned in fee by the Tribe. The Tribe moved to quash or dismiss the in rem complaint.

In 2006, the Tribe decided to expand the Casino to include additional hotel rooms, a weight [*15] room and spa facility, additional parking facilities, improved waste water treatment plant, warehouse storage facility and a children's area. On September 1, 2006, the County of Madera sent the Tribe a letter asserting for the first time that the California Environmental Quality Act ("CEQA") government the Casino's expansion and indicated that the Tribe must not proceed with the expansion without acquiring the necessary permits. The Tribe brought a motion in the Northern District to enforce the 1987 Stipulation. Because the court had determined that the Tribe was a non-party in 2004, the Tribe argued that it could enforce the 1987 Stipulation as an intended third party beneficiary of the 1987 Stipulation.

After the Tribe filed the 2006 motion to enforce judgment, but before the motion was heard, County of Madera filed a second state court action in Madera County Superior Court seeking to restrain the Tribe from proceeding with the expansion of the Casino. The Tribe removed that action to the Eastern District of California.

In its December 6, 2006 opinion, the Northern District reiterated its prior conclusion that the Tribe is not a party to the 1987 Stipulated Judgment. In its order, [*16] the court noted that the Tribe's arguments are based not only on the 1987 Stipulation, but are also grounded in federal law, the Compact, the Memorandum of Understanding between the Tribe and County of Madera, and the County's alleged waiver of jurisdiction over the Casino. The court concluded that "these matters go far beyond the scope of the 1987 Stipulated Judgment, and thus more properly addressed in a new action for declaratory relief. Accordingly, the Court will deny the Tribe's motion for enforcement of judgment without prejudice to the Tribe's filing of a declaratory relief action."

Less than a week later, the Madera County Superior Court issued its decision on the pending motion to quash or dismiss the in rem complaint. In a December 12, 2006 opinion, the court found that it had in rem jurisdiction over the Casino land, because the property was held in fee simple as opposed to being held in trust, and the property was physically located within a local government entity of the State. The court further found that it *Hardwick* litigation did not divest the court of in rem jurisdiction, in part, because the Northern District found in its 2004 and 2006 orders that it lacked personal [*17] jurisdiction over the Tribe.

In a December 18, 2006 decision, the Eastern District of California issued an order on the motions for remand, transfer, and for a temporary restraining order that were pending the case the Tribe removed to that court. *County of Madera v. Picayune Rancheria of Chukchansi Indians, 467 F. Supp. 2d. 993 (E.D. Cal. 2006)*. The court granted the County's motion to remand and denied as moot the motion to transfer venue to the Northern District, and the motion for a temporary restraining order. The court found that it lacked jurisdiction over the action because both parties agreed that the court lacked jurisdiction (although for different reasons), and the complaint does not allege a federal claim on its face. Accordingly, the court remanded the action back to the Madera County Superior Court for further proceedings.

Based on the Northern District's December 9, 2010

dismissal without prejudice, the Tribe filed a declaratory relief action against Madera County in the Northern District on December 12, 2006, and moved to relate that action to the *Hardwick* litigation. That case eventually settled in March 2007. Before it settled, however, the court issued a February [*18] 1, 2007 order. In the order, the court recognized that it had ruled previously that the Tribe was not a party to, and was not bound by, the 1987 Stipulated Judgment. Interestingly, the court concluded in its February 1, 2007 order that the Tribe had stated a basis for federal jurisdiction, because the Tribe was seeking a declaration of its rights to occupy and control its tribal lands. Specifically, the court noted that the Tribe was seeking a declaration that it has rights to occupy and control lands that constitute "Indian country." The basis of the Tribe's position was the 1987 Stipulation.

Current Status

On July 31, 2007, all of the land comprising the original Picayune rancheria was placed back into trust, held by the United States. The parties do not dispute that at this time, the land now qualifies as "Indian land" pursuant to *25 U.S.C. §2703(4)(B)*. On February 2, 2009, the Tribe submitted an amended request for approval of its gaming ordinance to the NIGC. The NIGC approved the Tribe's amended ordinance on March 27, 2009. Accordingly, there is no issue as to the current status of the Casino as Indian land.

STANDARD OF REVIEW

Mr. Livingston moves to dismiss the indictment pursuant [*19] to *Fed. R. Crim. P. 12(b)(2)*. Mr. Livingston may bring a motion that the indictment fails to state an offense at any time during the pendency of the proceedings. *Fed. R. Crim. P. 12(b)* permits Mr. Livingston to raise any defense "that the court can determine without a trial of the general issue." *Id.; United States v. Shortt Accountancy Corp., 785 F.2d 1448, 1452 (9th Cir.), cert. denied, 478 U.S. 1007, 106 S. Ct. 3301, 92 L. Ed. 2d 715 (1986)*. "A pretrial motion is 'capable of determination' before trial if it involves questions of law rather than fact." *Id.* "Whether an information is sufficient to charge a defendant is a particular situation is a question of law." *United States v. Linares, 921 F.2d 841, 843 (9th Cir. 1990)*. Accordingly, this Court may decide whether the indictment fails as a matter of law.

"A district court may make preliminary findings of fact necessary to decide the questions of law presented by pre-trial motions so long as the court's findings to not invade the province of the ultimate finder of fact." *United States v. Jones, 542 F.2d, 661, 664 (9th Cir. 1976)*. "As the ultimate finder of fact is concerned with the general issue of guilt, a motion requiring factual determinations may be decided before [*20] trial if 'trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense.'" *Shortt, 785 F.2d at 1452* (quoting *United States v. Covington, 395 U.S. 57, 60, 89 S. Ct. 1559, 23 L. Ed. 2d 94 (1969)*). A "motion to dismiss the indictment cannot be used as a device for a summary trial of the evidence." *United States v. Boren, 278 F.3d 911, 914 (9th Cir. 2002)*; *see also United States v. Sampson, 371 U.S. 75, 78-79, 83 S. Ct. 173, 9 L. Ed. 2d 136 (1962)* ("Of course, none of these charges have been established by evidence, but at this stage of the proceedings the indictment must be tested by its sufficiency to charge an offense."). The "unavailability of *Rule 12* in determination of general issues of guilt or innocence ... helps ensure that the respective provinces of the judge and jury are respected...." *United States v. Nukida, 8 F.3d 665, 670 (9th Cir. 1993)*. Accordingly, if this Court finds that there factual issues going to the guilt of the defendant, this Court must defer those issues to the ultimate fact-finder. *United States v. Nukida, 8 F.3d 665, 669 (9th Cir. 1993)* (a *Rule 12(b)* motion to dismiss is not the proper way to raise a factual defense).

DISCUSSION

The Court must resolve [*21] whether the Casino was operating pursuant to an ordinance approved by the NIGC pursuant to the IGRA to satisfy the element of *18 U.S.C. § 1168(b)*. The parties do not dispute that the California Rancheria Act terminated the rancheria, and that during the relevant time period, the land was not held in trust. Thus, the parties dispute whether the land on which the Casino operated qualified as a "reservation," pursuant to *25 U.S.C. §2703(4)(A)*.

Mr. Livingston argues that the Casino was not on "Indian land" during the relevant time period, because Congress had not repealed the California Rancheria Act. Mr. Livingston maintains that Congress has exclusive power to regulate and dispose of land belonging to the United States pursuant to the *Property Clause of the Constitution, U.S. Const. Art. IV, §3, cl. 2*, and that the 1983 and 1987 Stipulations could not undo the act of Congress. Mr. Livingston contends that the "touchstone"

to determine whether the Rancheria Act diminished the reservation boundaries is Congress' intent at the time the statute was enacted, and that Congress unequivocally intended to terminate the federal trust relationship with the land with the Rancheria Act. Mr. Livingston [*22] argues that at no time subsequent to the 1958 California Rancheria Act has Congress repealed the termination of the Picayune Rancheria. Mr. Livingston concludes that the government lacked authority to restore terminated rancherias, the stipulations could not restore the reservation status to the Picayune Rancheria, and because the Tribe failed to place the land back into trust, the land does not qualify as "Indian lands" within the meaning of the IGRA during the relevant time period.

The government argues that the 1983 and 1987 Stipulations restored the Tribe and its land as a reservation, qualifying the land as "Indian land" within the meaning of IGRA. In addition, the government argues that the June 27, 2006 approval letter was unlimited and not site specific. The government contends that the ordinance was a general approval for gaming on Indian lands that was in effect during the relevant time period. The government concludes that the element of the crime is established.

In reply, Mr. Livingston counters that the *Hardwick* stipulations, to which neither the United States nor the Tribe was a party, did not restore the land to rancheria status. Mr. Livingston suggests that "every court [*23] to consider the 1987 Stipulation has rejected the government's position" and that the government's argument that the 1987 Stipulation restored the status of the Picayune land is inconsistent with the *post-Hardwick* cases in the Northern and Eastern Districts and Madera County.

The Court considers the parties' arguments in turn.

1. Whether the June 26, 1996 Approval Letter Limited Approval to Indian Lands

The Court first considers whether the June 27, 1996 ordinance approval letter satisfies the element of the crime.

In 1988, Congress passed the IGRA, 100 P.L. 497; 102 Stat. 2467, to regulate gaming on Indian lands. Among other things, the IGRA created the crime of "theft by officers or employees of gaming establishments on Indian lands." This crime is codified at *18 U.S.C. §1168(b)*, which provides:

> Whoever, being an officer, employee, or individual licensee of a gaming establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission, embezzles, abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any moneys, funds, assets, or other property of such establishment of [*24] a value in excess of $ 1,000 shall be fined not more than $ 1,000,000 or imprisoned for not more than twenty years, or both.

Mr. Livingston is charged with two counts of "theft by officers or employees of gaming establishments on Indian lands." *18 U.S.C. §1168(b)*.

No published opinions analyze the elements of this crime. In addition, the Ninth Circuit Manual of Model Criminal Jury Instructions has no model jury instruction related to this statute. The parties previously stipulated to the following jury instruction, setting forth the elements of this crime:

> Defendant Livingston is charged in Counts One and Two of the Indictment with Theft by an Officer or Employee of a Gaming Establishment on Indian Land, in violation of *section 1168(b) of Title 18 of the United States Code*. For defendant Livingston to be found guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, defendant Livingston was an officer or employee of an Indian gaming establishment;
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> Second, the Indian gaming establishment was operated by or for, or licensed by, an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission;
>
> Third, [*25] on or about the dates

> alleged in the Indictment, defendant Livingston willfully embezzled or misapplied, or took with the intent to steal, moneys, funds, assets or other property of the Indian gaming establishment; and
>
> Fourth, that the value of such moneys, funds, assets or other property was in excess of $1,000.

The stipulated jury instruction properly and accurately sets forth the elements of the crime.

To establish a violation of *18 U.S.C. § 1168(b)*, the government bears the burden to prove beyond a reasonable doubt, *inter alia*, that the Casino "was operated by or for, or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission." In this motion, defendants bear the burden to establish that the government cannot establish this element.

As set forth above, the parties do not dispute that the Tribe passed an ordinance in 1996 that was approved by the NIGC. Defendants argue that the approval was limited to gaming on Indian lands, and because the Casino was not located on Indian lands, the Casino was not operated pursuant to the approval. The government argues that since the ordinance is not site specific, the language is "simply [*26] a reminder that the Tribe can only game on 'Indian lands.'" For the following reasons, this Court finds the government's argument unpersuasive.

First, the NIGC's June 27, 1996 ordinance approval letter makes clear that the NIGC approves gaming only on Indian lands. The letter explains that "scope of the [NIGC] Chairman's review and approval is limited to the requirements of the IGRA and the NICG regulations." The letter cautions the Tribe: "It is important to note that the gaming ordinance is approved for gaming only on Indian lands as defined in the IGRA." The plain language of the approval letter makes clear that the approval is limited in scope, and that only gaming on Indian lands is approved by NIGC.

Second, the IGRA restricts approval of gaming on Indian lands. The Chairman of the NIGC "shall" approve an ordinance onl if it meets the requirements of the IGRA. *25 U.S.C. §2710(e)*. One of the requirements of NIGC approval of a gaming ordinance is that the gaming establishment must be located on "Indian lands." "IGRA limits gaming to locations on Indian lands' as defined in *25 U.S.C. §2703(4)*." *N. County Comty. Alliance, Inc. v. Salazar, 573 F.3d 738, 741 (9th Cir. 2009)* ("*North County*"). [*27] *See also*, COHEN'S HANDBOOK ON FEDERAL INDIAN LAW §12.02 (2009) ("Gaming is permitted only on *Indian lands.*") (emphasis in original). As the *North County* court explained:.

> IGRA provides that Congress finds that "Federal law does not provide clear standards or regulations for the conduct of gaming on *Indian lands.*" *25 U.S.C. § 2701(3)* (emphasis added). IGRA establishes "independent Federal regulatory authority" and "Federal standards" for gaming " on *Indian lands.*" *Id. § 2702(3)* (emphasis added). IGRA provides that an Indian tribe can engage in "class II gaming *on Indian lands* within such tribe's jurisdiction" if certain conditions are met. *Id. § 2710(b)(1)* (emphasis added). Indian tribes are required to issue separate licenses "for each place, facility, or location *on Indian lands* at which class II gaming is conducted." Id. (emphasis added). IGRA provides that class III gaming "shall be lawful *on Indian lands only*" if certain conditions are met. Id. *§ 2710(d)(1)* (emphasis added).

North County, 573 F.3d at 744. The IGRA defines "Indian land" as

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the [*28] benefits of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. §2703(4). NIGC regulations have further clarified the Indian lands definition, providing that:

"Indian land" means land "within the limits of an Indian reservation." *25 C.F.R. § 502.12(a)*. Thus, under the IGRA, the NIGC only has power to approve a gaming establish that operates on Indian land.

Third, the title of the crime and the information and indictment against Mr. Livingston make clear that the theft must take place on "Indian lands."

Based on the foregoing, this Court finds that the 1996 NIGC approval was subject to a limitation explicitly stated in the approval letter; namely, that the NIGC approved the Tribe's ordinance for gaming only on Indian land." Accordingly, to satisfy the element of this crime, the government must prove at trial beyond a reasonable doubt that Casino was on Indian land at the time in question. To carry his burden on this pre-trial motion to dismiss, Mr. Livingston must prove that the land was not "Indian lands" as a matter of law.

2. Whether [*29] the *Hardwick* Court had the Authority to Restore the Terminated Tribe

Mr. Livingston contends that the clear intent of Congress in passing the California Rancheria Act was to terminate the land, and that an act of Congress repudiating the California Rancheria Act was required to restore the rancheria to "Indian land" status. Mr. Livingston asserts that Congress has the exclusive power under the *Property Clause* to regulate lands, and that the *Hardwick* Stipulations could not, as a matter of law, undo the California Rancheria Act. Mr. Livingston's argument places importance on Congressional policy at the time the California Rancheria Act was passed, and suggests that this Court ignore the intent of subsequent Congresses and their acts. In considering Mr. Livingston's arguments, this Court places the California Rancheria Act in the context of the Congressional termination policy, which was followed by a period of restoration and self-determination.

Termination became an official Indian policy when the House of Representatives passed a resolution on July 1, 1952, directing the Committee on Interior and Insular Affairs to conduct a full investigation into BIA activities and to formulate legislative [*30] proposals "designed to promote the earliest practicable termination of all federal supervision and control over Indians." H.R. Rep. No. 82-2503, 82d Cong., 2d Sess. (1952); 1-1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.06. On August 1, 1953, Congress adopted House Concurrent Resolution 108, declaring a policy of Congress "as rapidly as possible to make the Indians...subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens [and] to end their status as wards." The passage of House Concurrent Resolution 108 motivated Congressional action which led to the passage of multiple termination bills focused primarily on ending the trust relationship between the United States and Indian tribes, with the ultimate goal to subject Indians to state and federal laws on the same terms as other citizens. In 1954, Congress voted to terminate 70 tribes and bands. Subsequent Congresses terminated additional tribes throughout the country. Termination bills contained many common provisions, and provided for a time period for completion of the termination process, and to allow distribution of property. The California Rancheria Act was passed during [*31] this termination period. In all, approximately 110 tribes were terminated by Congress.

Congress began to rethink its termination policy shortly after the California Rancheria Act passed. A new era of Indian policy began to form that supported government-to-government relationships between the federal government and individual Indian tribes. The Executive Branch implemented a policy to end termination by 1960, and President Nixon urged Congress to adopt a resolution officially repudiating termination.

Congress passed several acts to mark the end of its termination policy. For example, Congress passed the Indian Civil Rights Act of 1968 which repealed an earlier provision of Public Law 280 that allowed states to assume jurisdiction over Indian country unilaterally. Significantly, Congress passed the Menominee Restoration Act in 1973 ("Restoration Act"), considered to be a symbolic reversal of termination policy. 1-1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.07. The Restoration Act reinstated all rights and privileges of the tribe or its members, and authorized the Secretary of the Interior to make grants and to contract with the tribe for the provision of federal services. In 1975, Congress [*32] passed a major act of self-governance policy--the Indian Self-Determination and Education Assistance Act. Thus, although Congress did not repudiate the California Rancheria Act specifically, it enacted legislation repugnant to its previous termination policy, and moved forward with restoring many Indian lands and Tribes across the country.

In 1994, Congress passed Public Law 103-454, 108 Stat. 4791, which includes the following Congressional findings:

> "(1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;
>
> "(2) ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;
>
> "(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court;
>
> "(4) a [*33] tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;
>
> "(5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;
>
> "(6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;
>
> "(7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and
>
> "(8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians.".

25 U.S.C. §479a, directives. According to this provision, and contrary to Mr. Livingston's arguments, Congress "expressly repudiated" the termination policy, and expressly allows a tribe to become federally-recognized [*34] after termination "by a decision of a United States Court."

In addition, the function of the judiciary is to interpret acts of Congress and the execution of those acts by the executive branch. In the *Hardwick* litigation, the plaintiffs challenged the California Rancheria Act and questioned whether the executive branch complied with that law before terminating the tribes and the trusts. In the 1983 Stipulation and final judgment, it was determined that the executive branch failed to comply with the law, making the termination of the rancherias ineffective. The *Hardwick* court had the authority as a co-equal branch of government to review the law and the Department's execution of it.

3. Whether the *Hardwick* Stipulations "Unterminated" the California Rancheria Act and "Restored" the Picayune land on which the Casino Operated to a Reservation

In the 1983 Stipulation, the Department admitted that the United States failed to comply with the Rancheria Act in terminating the Picayune Rancheria and distributing its assets. The Department agreed, among other things, to restore the federal recognition of Picayune Rancheria and its members, to accept in trust certain lands formerly belonging to the [*35] tribe, and to process applications for land into trust for other parcels of land. The Plaintiffs agreed, among other things, to release the Defendants and the rest of the federal government from liability arising out of the litigation, to discharge the Department of Health and Human Services from any claims arising after the implementation of the Rancheria Act and before the restoration of recognition, and to dismiss its claims with prejudice. Although the 1983 Stipulation did not set the boundaries for the Picayune tribal lands, the Court retained jurisdiction to resolve this issue "in further proceedings herein." The United States agreed to this provision, which ultimately became a final judgment of the court.

Pursuant to the 1987 Stipulation, the "original boundaries" of the rancheria was "restored, and all land within these restored boundaries...[was] declared to be 'Indian Country.'" The parties agreed further that Picayune Rancheria "shall be treated by the County of

Madera and the United States of America, [sic] as any other federally recognized Indian Reservation." According to Stipulation, then, the land in question was restored, declared to be "Indian Counties," and the Picayune [*36] Rancheria "shall be treated as a...Reservation." According to these provisions, the Casino, located within the original boundaries of the rancheria, restored, and declared to be treated as a reservation, qualified as "Indian land" pursuant to *25 U.S.C. §2703(4)(A)*.

Mr. Livingston argues that the parties could not stipulate to overturn an act of Congress. The 1987 Stipulation, however, is a stipulated judgment that was entered by the court. "The Stipulated Judgment in this case is not a settlement agreement but is a legally enforceable judgment subject to *Rule 60(b)*."*Wilton Miwok Rancheria v. Salazar, 2010 U.S. Dist. LEXIS 23317, 2010 WL 693420 (N.D. Cal. 2010)* (holding that the 1983 Stipulation is a legally enforceable judgment). *See also, e.g., Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992)* ("There is no suggestion in these cases that a consent decree is not subject to *Rule 60(b)*. A consent decree ... is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees."). Because Congress delegated its authority to allow courts to recognize federally Indian tribes that [*37] were terminated under its termination policies, as set forth above, the judgments of the *Hardwick* court may restore the Picayune Tribe and its lands, declare the lands to be "Indian country," and declare that the land shall be treated as a reservation.

Mr. Livingston further argues that the 1987 Stipulation cannot restore the Tribe, as a matter of law, because the United States was not a party to it. Although the United States did not sign the 1987 Stipulation, the United States has consistently considered itself bound by the terms of the 1987 Stipulation, including the restoration of the Tribe and its lands to the original boundaries. In 2000 and 2001, the Department and the NIGC both made findings that the land was "Indian land" based on their belief and agreement that the government is bound by the 1987 Stipulation. Since 1987, several challenges have arisen as to the status of the land. Despite these challenges, the government has never waivered from its position that it is bound by 1987 Stipulation. The government's failure to challenge the judgment strongly suggests the conclusion that it is bound to the terms of the agreement through legal acquiescence.

In addition, the agencies' [*38] findings that land constituted "Indian land" based on the 1987 Stipulation, among other things, is evidence that Casino was operating pursuant to an NIGC approval of a gaming ordinance, to satisfy the element of the crime. During the relevant time period, there was an NIGC approval of the Tribe's ordinance, a Department opinion letter that the land was Indian land, and an NIGC opinion that the land was Indian land. The government reiterated its position that it is bound by the 1987 Stipulation in a May 7, 2007 opinion letter.

The Department has authority from Congress to establish tribal status. Courts have consistently upheld this authority. *See, e.g., Miami Nation of Indiana, Inc. v. U.S. Dep't of Int., 255 F.3d 342, 346 (7th Cir. 2001)* ; *James v. United States Dep't of Health & Human Servs., 824 F.2d 1132, 1137, 263 U.S. App. D.C. 152 (D.C. Cir. 1987)*. As set forth above, Congress allows the Department to handle Indian affairs. *25 U.S.C. §479a*. But Congress delegated its authority to recognize Indian tribes federally to the executive branch long before 1994. In 1978, Congress passed *25 U.S.C. §§2, 9* to allow the Bureau of Indian Affairs to manage "all Indian affairs and...all matters arising out of Indian [*39] relations." Thus, the Department has the authority to make these interpretations, and this Court should accord "considerable weight" to the "executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, U.S.A., Inc. v. Nat. Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*.

Mr. Livingston asserts that every court that considered the 1987 Stipulation has rejected the government's position that it restored the land to a rancheria. This Court disagrees. The *post-Hardwick* opinions relate only to tax or *in rem* issues. None of the opinions addresses whether the land was "Indian land" during the relevant time. Although the Tribe attempted to get declaratory relief on the issue, the case settled and the land was taken into trust without a post-1987 opinion on the issue of Indian lands. Moreover, none of the opinions suggests that the 1983 and 1987 Stipulations did not restore the land. In fact, in the last opinion, the court found that the Tribe established federal subject matter jurisdiction on its declaratoryjudgment act claim, based

on the argument that the land constituted "Indian County" pursuant to the 1987 Stipulation. Moreover, the court [*40] did not vacate its judgments entered after the 1983 and 1987 Stipulations. As it stands, the 1983 and 1987 Stipulated Judgements are in effect and enforceable. Accordingly, the case law does not establish that the Casino was not operating on Indian land during the relevant period of time.

The Court further questions whether this particular forum and this particular motion are appropriate to question or interpret the *Hardwick* judgments or the agency opinions. The Court has doubts as to whether this Court has jurisdiction to interpret the 1987 Stipulation, as the Northern District of California retained exclusive jurisdiction over those matters in its 1983 Stipulated Judgment. In addition, a party may challenge the approval of the ordinance, the Department's legal opinion and determination, and NIGC's opinion either within the appropriate administrative procedure or through a separate action pursuant to the Administrative Procedures Act. *See, Hein v. Capitan Grande Band of Diegueno Mission Indians, 201 F.3d 1256, 1261 (9th Cir. 2000)*. This is an improper forum to attack the *Hardwick* Stipulations or the agencies' conclusions.

Congress has delegated and reaffirmed that courts and the executive [*41] branch have a role in determining federally recognized tribal status, *25 U.S.C. §§ 479a, 479a-1*, and to allow the executive and judicial branches to restore the rights of terminated tribes. The 1983 and 1987 Stipulated Judgments and the government's opinion letters raise an issue as to whether the land on which the Casino operated qualified as "Indian lands" pursuant to the IGRA during the relevant time period. Accordingly, this Court finds that Mr. Livingston fails to establish as a matter of law that the Casino did not operate pursuant to the NIGC's approval of a gaming ordinance which restricted gaming to take place on "Indian land" as defined by the IGRA.

CONCLUSION

For the foregoing reasons, this Court DENIES Mr. Livingston's motion to dismiss.

IT IS SO ORDERED.

Dated: September 1, 2010

/s/ Lawrence J. O'Neill

UNITED STATES DISTRICT JUDGE