No. 13-1438

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Defendant-Appellant.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Robert J. Jonker

BRIEF FOR PLAINTIFF-APPELLEE STATE OF MICHIGAN

Bill Schuette
Attorney General

John J. Bursch
Solicitor General
Co-Counsel of Record

Louis B. Reinwasser (P37757)
Kelly M. Drake (P59071)
Assistant Attorney General
Co-Counsel of Record
Attorneys for Plaintiff-Appellee
Environment, Natural Resources
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540

Dated: June 17, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Some of the issues raised in this appeal involve complex Indian law issues, including tribal sovereign immunity under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA). Oral argument will ensure that the Court is able to raise questions and fully explore the arguments presented by the parties.

JURISDICTIONAL STATEMENT

The district court had federal subject matter jurisdiction of this action pursuant to:

- 28 U.S.C. § 1331, as this action asserts violations of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, *et seq*., and federal common law;
- 25 U.S.C. § 2710(d)(7)(A)(ii), as Appellee State of Michigan seeks to enjoin gaming activity conducted in violation of a Tribal-State compact;
- 28 U.S.C. § 1367, as this action asserts violations of state common law; and
- 28 U.S.C. § 2201, as this action seeks a declaratory judgment.

Appellant, Sault Ste. Marie Tribe of Chippewa Indians (Sault Tribe or Tribe) does not seem to dispute these jurisdictional grounds, asserting only that "the Tribe disputes jurisdiction on grounds of sovereign immunity and ripeness." (Brief for Appellant, Doc. 006111693101, Page ID #12.) As explained below, the State contends that tribal sovereign immunity must be asserted as an affirmative

defense, can be waived, and its assertion does not create a subject-matter jurisdiction issue.

The State agrees with the Tribe that the Court of Appeals has jurisdiction of this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1), and that the appeal was timely filed.

STATEMENT OF ISSUES PRESENTED

This Court has ruled that IGRA abrogates a tribe's immunity where: (1) the plaintiff is a State or an Indian tribe; (2) the cause of action seeks to enjoin a class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect. *Michigan v. Bay Mills Indian Community*, 695 F.3d 406, 415 (6th Cir. 2012). The district court agreed that the State's claim met all of these requirements. The Tribe argues that elements 2 and 3 were not met.

The Tribe and the State are parties to an IGRA-authorized gaming compact. Section 9 of that compact provides:

> An application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application . . . .

The Tribe has acknowledged that in 2012, using funds it says it received as a result of the Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143, 111 Stat. 2652 (1997) (Settlement Act), the

Tribe bought land located in the City of Lansing over 200 miles from its reservation (Lansing Property). The Tribe further acknowledges that it intends forthwith to apply to the U.S. Department of Interior (Interior) to have the Lansing Property taken into trust so it can open one or more casinos on it. But despite the prior agreement requirement of § 9, the Tribe also told the district court that it does not intend to enter into a revenue-sharing agreement with the other state tribes, asserting it is not required because § 9 of the compact does not apply where, according to the Tribe, Interior must take land into trust without exercising its discretion because Settlement Act funds were used to buy the land to be taken into trust. With this background, the case raises the following issues:

1. Does the abrogation of tribal immunity in IGRA not arise until gaming actually occurs on Indian lands and therefore preclude any pre-gaming injunction action, or can a state or tribe seek such an action where gaming activities on Indian lands are credibly threatened by a tribe?

2. Is this action seeking to enjoin the Tribe from applying to have land taken into trust for gaming purposes an action to enjoin class III gaming activities?

3. Did the trial court abuse its discretion when it balanced the injunction factors in favor of entering the injunction that would preserve the State's ability to have its rights determined by the court?

a. **Likelihood of success:** Did the district court correctly determine that the Tribe's plan to apply to take land in trust for gaming purposes without obtaining a revenue-sharing agreement with the other state tribes would likely violate the compact?

b. **Irreparable harm:** Where IGRA does not permit the State to obtain money damages for a breach of the compact, did the district court correctly determine that the State had established irreparable harm if the preliminary injunction did not enter?

c. **Balance of harms:** Where the Tribe's agreement with the City of Lansing expressly anticipated the State's legal challenge, allowing the Tribe at least until January 1, 2017, to establish its right to open a casino on the Lansing Property, and where the Tribe has not even attempted to obtain a revenue-sharing agreement with the other state tribes, did the district court abuse its discretion when it determined that the balance of harm favored the State?

d. **Harm to public:** Is it in the public's interest, including the public interest of members of the Tribe, to require the development and operation of a casino in Lansing before permitting a court to enjoin it based on a compact violation? Where IGRA establishes gaming compacts as the primary means for regulating tribal casinos, is it in the public's interest to allow a tribe to ignore, without penalty, its compact promises?

INTRODUCTION

After enjoying the benefit of its gaming compact with the State for nearly 20 years – enabling the Sault Tribe to operate five casinos on its reservation and trust lands in Michigan's Upper Peninsula – the Tribe seeks to open a casino in Lansing, Michigan, more than 200 miles from its reservation, in direct violation of its promise in that compact not to do so. At least two other tribes with reservations much closer to Lansing have objected to the Sault Tribe's plans, filing amicus briefs below in support of the State's case and confirming that the Sault Tribe has no historical connection to the Lansing area.

More troubling, if the Sault Tribe is not held accountable for this breach of its compact, and if it can convince the Secretary of the Interior to take the Lansing parcel at issue into trust, under the Tribe's legal theory it will be free to buy property *anywhere* in Michigan and open a casino on it. While the State believes the Tribe's theory ultimately will fail, there is no reason to ever reach that issue when the parties' compact clearly anticipated efforts such as this to move gambling off-reservation, and strictly limited such activities.

The Tribe asserts now that it will be harmed if the injunction requiring it to comply with the compact is not vacated, because it has signed an agreement with the City of Lansing to open a casino downtown, an opportunity it claims it will lose if the legal challenges to its plans are not resolved before January 1, 2017. Even if true (the agreement the Tribe signed allows it to seek an extension from the City, something the Tribe apparently has not requested), there is no reason that this recent agreement should be allowed to trump the gaming compact the Tribe signed with the State in 1993. In that compact the Tribe promised not to even *apply* to have off-reservation land taken into trust for gaming unless it first obtained a revenue-sharing agreement with other Michigan tribes, which the Sault Tribe told the district court it will not do. Letting the Tribe flout this promise without penalty (the State cannot claim damages under IGRA, so an injunction is the only remedy) merely because the Tribe may have a favorable business opportunity, effectively renders the compacting process meaningless and will have far reaching consequences for tribal gaming in Michigan.

The district court did not abuse its discretion when it balanced the injunction factors and determined that the Tribe should be prohibited

from filing to have the Lansing Property taken into trust, thereby maintaining the status quo. This appeal should be dismissed.

STATEMENT OF THE CASE

I. Nature of the case.

The State seeks to hold the Tribe to its promise in its 1993 gaming compact not to apply to have land taken into trust for off-reservation gaming unless it first enters into a revenue-sharing agreement with other Michigan tribes. The Tribe told the district court that it did not intend to obtain such a revenue-sharing agreement and that it intended to apply to have the Lansing Property taken into trust as soon as it could.

The Tribe asserts two primary reasons why it should be allowed to proceed with its plans. It first asserts that this action is barred by the Tribe's sovereign immunity. Second, the Tribe argues that even if its immunity has been abrogated, its promise not to apply to have off-reservation lands taken into trust for gaming does not govern here because § 9 does not apply to its application to have the Lansing Property taken into trust.

As to the sovereign-immunity claim, basically the Tribe asserts that even if its plans violate the compact, the State cannot sue to enforce it because the abrogation of the Tribe's sovereign immunity

found in IGRA applies only where the action seeks to enjoin gaming activity on Indian lands. But here, the State *is* seeking to enjoin a gaming activity (the Tribe's application to have land taken into trust *for gaming purpose,* as well as the actual gaming the Tribe plans in the future) that *will* be on Indian lands if the Tribe's plans come to fruition. As held by the district court, there is no requirement in the IGRA abrogation provision that the gaming be *presently* occurring on Indian lands as asserted by the Tribe, as long as the action seeks to enjoin gaming activity on Indian lands which is credibly *threatened* to occur.

The Tribe's interpretation of § 9 as being limited to only certain types of off-reservation trust acquisitions involves a tortured reading of the plain language, which the district court properly rejected. Based on its finding that the Tribe's sovereign immunity was abrogated, and that the equities favored prohibiting the Tribe from breaching its compact, the district court granted the State's request for a preliminary injunction. This appeal is from that order.

II. Proceedings and disposition below.

The State filed a motion for a preliminary injunction along with its complaint. Instead of answering the complaint, the Tribe filed a

motion to dismiss. Two other Michigan tribes, the Saginaw Chippewa Indian Tribe of Michigan and the Nottawaseppi Huron Band of Potawatomi Indians, filed amicus briefs in support of the preliminary injunction and opposing the Sault Tribe's motion to dismiss.

After oral argument, the district court granted the State's motion for a preliminary injunction that prohibited the Sault Tribe from filing an application to take the Lansing Property into trust for gaming purposes unless the Tribe first obtained a revenue-sharing agreement with the other tribes. The district court denied the motion to dismiss, except that it granted, without prejudice, the motion to dismiss tribal officials who were named in their official capacity, as the court determined that the Tribe itself could be sued. It also granted the motion to dismiss, without prejudice, as to Counts V and VI of the complaint, finding they were not ripe for adjudication. The Tribe then filed an answer to the complaint and this appeal from the order granting the preliminary injunction.

STATEMENT OF FACTS

In 1993, the State and Tribe entered into a tribal-state gaming compact. (Compact, RE 1-1, Page ID # 19.) The Compact generally establishes the rights and responsibilities of the parties concerning the operation of class III gaming[1] by the Tribe in the State of Michigan. Pursuant to the Compact, the Tribe has conducted class III gaming in five casinos it operates on Indian lands in the Upper Peninsula of Michigan, where the Tribe's headquarters and reservation are located. (Opinion, RE 37, Page ID # 843-844.)

Section 9 of the Compact states:

> Off-Reservation Gaming.
>
> An application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application. (Compact, RE 1-1, Page ID # 30).

In January of 2012, the Sault Tribe Board of Directors approved Resolution 2012-11, which stated that the Tribe intended to open a casino in the City of Lansing (City) on land that is not part of the

[1] Class III gaming is essentially casino-style gambling. See 25 U.S.C. § 2703 (8).

Tribe's reservation. (Resolution, RE 1-3, Page ID # 84-86.) To that end, the Tribe and the City executed a Comprehensive Development Agreement. The Agreement provided that the City and/or the Lansing Economic Development Corporation would sell, and the Tribe would buy, certain parcels of property in the City on which the Tribe would build and operate two casinos, citing the Tribe's alleged authority to do so under federal law. (Development Agreement, RE 1-4, Page ID # 89.)

Representatives of the State first learned of the proposed Lansing casino through media reports. After gathering as much information as it could, the State sent a letter on February 7, 2012, warning the Tribe that the operation of class III gaming at a casino in Lansing would be unlawful and that if it proceeded with its plans, the Tribe would do so at its own risk. (Letter, RE 1-5, Page ID #149.) When it appeared from the Tribe's public statements and actions that it was ignoring this warning, the State filed the instant lawsuit and a motion for preliminary injunction to enjoin the Tribe from violating § 9 of the gaming compact by applying to take land into trust where it has not obtained a revenue-sharing agreement with the other Michigan tribes.

Nevertheless, on November 1, 2012, the Tribe purchased a parcel of real property in Lansing (Lansing property) pursuant to the Development Agreement. (Opinion, RE 37, Page ID # 845.) The Tribe's counsel indicated on the record below that the Tribe in fact plans to apply to Interior to have this land taken into trust as soon as possible (Transcript Dec. 5, 2012, RE 33, Page ID # 770, 774), and that the Tribe does not intend to obtain a § 9 revenue-sharing agreement with the other Michigan tribes. (Transcript Dec. 5, 2012, RE 33, Page ID #778.) The Development Agreement allows the Tribe five years after it begins "the application process" to have the land taken into trust. (Development Agreement, RE 1-4, Page ID # 109-110, §4.8(b)(i) and (iii).)[2] It also requires the Tribe to close on the purchase of the second parcel by January 1, 2017. (Development Agreement, RE 1-4, Page ID # 111, §5.1.1.) The district court found that it is undisputed that the Lansing property is "off-reservation" land. (Opinion, RE 37, Page ID # 845.)

[2] This five-year period has not commenced as the Tribe had not filed its application to take land into trust when the Complaint and motion for preliminary injunction were filed, and is now prohibited from doing so by the preliminary injunction.

SUMMARY OF ARGUMENT

The State's argument is straightforward: the Tribe promised in § 9 of its compact not to apply to have land taken into trust for gaming purposes unless it first obtained a revenue-sharing agreement with the other tribes. Because IGRA allows a state to obtain an injunction of gaming activity that occurs on Indian lands but in violation of a compact, the State brought such an IGRA action here seeking an injunction, but not damages.

The Tribe counters initially that the State is not likely to succeed on its claims because they are barred by the Tribe's sovereign immunity. The district court disagreed and held that immunity has been abrogated by IGRA, specifically 25 U.S.C. § 2710(d)(7)(A)(ii), consistent with this Court's *Bay Mills* ruling that IGRA abrogates a tribe's immunity where: (1) the plaintiff is a State or an Indian tribe; (2) the cause of action seeks to enjoin a class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect.

This Court has also ruled that sovereign immunity is an affirmative defense and that the burden of proving it is on the party asserting it. The Tribe must show that one or more of the five abrogation elements are missing. The Tribe has asserted that elements 2 and 3 are missing here.

The State contends that the Tribe has failed to meet its burden. But element 2 is satisfied because the State seeks to enjoin the Tribe from applying to have land taken into trust for gaming purposes, with the ultimate purpose of the lawsuit being to prevent illegal class III gaming. Having land taken into trust for gaming purposes is fairly considered a "gaming activity," as the only reason the Tribe seeks trust status for the Lansing Property is so it can build a casino on it.

The Tribe also argues that element 3 is missing because the Lansing Property is not yet Indian lands as defined in IGRA, even though it will become Indian lands if the Tribe is successful. However, as the district court held, there is no temporal element in 25 U.S.C. § 2710(d)(7)(A)(ii); IGRA abrogates immunity when the action seeks to enjoin gaming activity on Indian lands, which this action does. The State does not have to wait for operation of the casino to file its action

as long as there is a credible threat of gaming activity on Indian lands. That is clearly the case here based on the Tribe's Development Agreement with the City, which obligates the Tribe to seek trust status for and open a casino on the Lansing Property.

Alternatively, the State asked the district court to enjoin gaming that is occurring *now* on the Tribe's Indian lands in the Upper Peninsula, which will also violate the compact once the Tribe violates § 9 by applying to have the Lansing Property taken into trust.

The Tribe's second major argument in opposition to the preliminary injunction is that its plans do not violate § 9 and therefore the State cannot show a likelihood of success on the merits. The Tribe makes two arguments in this regard. Neither have merit.

First, the Tribe asserts that § 9 applies only where Interior must consider the purpose for the trust application. The district court rejected this argument because this is not what § 9 says. This section applies only where the application for trust is in fact for gaming purposes, but it nowhere says or even suggests that it governs a trust application *only* when this purpose is considered by Interior when it makes its trust decision.

Second, the Tribe argues that § 9 applies only when the tribe will rely on 25 U.S.C. § 2719(b)(1)(A) for an exception to the IGRA prohibition on gaming on land taken into trust after October 17, 1988. But § 9 does not say that either. It says it governs *whenever* a tribe applies to have off-reservation land taken into trust for gaming purposes pursuant to § 20 of IGRA, which is 25 U.S.C. § 2719 (Addendum 2a). There are at least three *other* exceptions expressly listed in § 20, and § 9 of the compact does not limit its application to only one of them, as argued by the Tribe.

Nor does such a limitation make sense as the intention of § 9 was to put a brake on the expansion of off-reservation gaming, and limiting § 9 to one of the IGRA exceptions directly conflicts with that intention. Given the fact that the Governor does not really need § 9 to regulate the number of gaming requests granted pursuant to 25 U.S.C. § 2719(b)(1)(A) (the Secretary's determination to allow gaming is only effective "if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination . . ."), it is more critical to furthering the intent to limit off-reservation gaming that § 9 apply to the *other exceptions* in § 20.

Thus, the State is likely to succeed on the merits of its claim.

The other three injunction factors also favor the State. As found by the district court, the State will incur irreparable harm if the preliminary injunction is vacated and the Tribe is allowed to apply to have the Lansing Property taken into trust since IGRA denies the State a damages remedy, even if it prevails on the merits of its case. Also, the harm is unique and intangible. For example, if the Tribe is allowed to apply to Interior for trust status, the State cannot formally participate in the decision. At best it can file an administrative appeal if Interior decides to take the land into trust, and in that case the State must sue the federal government and be subject to the standard of review applicable to administrative appeals. This is likely the reason the parties to the compact agreed that a tribe would not even be allowed to apply to have land taken into trust until § 9's requirements were met. This is a specific remedy, which provides a unique benefit to the State.

Nor is the Tribe seriously harmed. It is worth noting that if the Tribe complied with § 9 by obtaining a revenue-sharing agreement, no injunction would enter. Also, it is clear from the Development

Agreement that the parties anticipated protracted litigation and gave themselves long windows for satisfying contractual contingencies.

Finally, the public has a definite interest in the enforceability of tribal-state gaming compacts. These are the primary mechanism for regulating tribal gaming, and if a tribe's promises not to open casinos off its reservation need not be honored by a tribe, then the entire compacting process is in danger of being rendered meaningless.

For these reasons, the district court properly entered the preliminary injunction. At a minimum, it did not abuse its discretion when enjoining the Tribe.

ARGUMENT

I. The Tribe has not met its burden of establishing its affirmative defense that this action is barred by sovereign immunity.

A. This Court reviews decisions denying a sovereign-immunity defense under a de novo standard.

This Court reviews decisions denying sovereign immunity de novo. *Barton v. Summers*, 293 F.3d 944, 948 (6th Cir. 2002). But the Court should "accept any pertinent factual findings by the district court unless they are clearly erroneous." *S.J. v. Hamilton County, Ohio*, 374 F.3d 416, 418 (6th Cir. 2004).

B. The Tribe has the burden of proving that its sovereign immunity has not been abrogated.

This Court has also made it clear that a party that asserts sovereign immunity bears the burden of proving that defense. *Lowe v. Hamilton County Dep't of Job & Family Servs.*, 610 F.3d 321, 324 (6th Cir. 2010) ("'[T]he entity asserting Eleventh Amendment immunity has the burden to show that it is entitled to immunity, i.e., that it is an arm of the state.' *Gragg v. Kentucky Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002)."). While these cases deal with Eleventh Amendment immunity, this Court considers this to be "sovereign

immunity." *Lowe,* 610 F.3d at 324 ("The desire to protect the solvency and dignity of the states motivates the doctrine of Eleventh Amendment sovereign immunity."). So does the Supreme Court. *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 389 (1998) ("The Eleventh Amendment, however, does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so."). The need to protect the solvency and dignity of states is no less important than protecting the tribes' solvency and dignity. Thus, the burden of proving immunity here is on the Tribe.

Moreover, sovereign immunity, even for states, is a defense that must be asserted or it is waived, which means it is not truly jurisdictional. This was the conclusion reached by the Ninth Circuit in *ITSI TV Products v. Agricultural Associations*, 3 F.3d 1289, 1291-92 (9th Cir. 1993), which is the case this Court specifically relied on when it decided *Gragg*:

> The Supreme Court has held that "the Eleventh Amendment defense . . . partakes of the nature of a jurisdictional bar" insofar as it may be raised for the first time on appeal. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). The Court has emphasized, however, that it has "never held that [the defense] is jurisdictional in the sense that it must be raised

> and decided by [the court] on its own motion." . . . The Court has accordingly recognized that Eleventh Amendment immunity, unlike a true jurisdictional bar, may be expressly waived. . . and may even be forfeited by the State's failure to assert it. See *Blatchford v. Native Village of Noatak*, 115 L. Ed. 2d 686, 111 S. Ct. 2578, 2584 n.3 (1991) (noting that, in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), "since Montana had not objected in this Court on sovereign immunity grounds, its immunity had been waived and was not at issue").
>
> Eleventh Amendment immunity thus does not implicate a federal court's subject matter jurisdiction in any ordinary sense. It therefore cannot be said that the general principle that the plaintiff must establish the facts supporting "jurisdiction" means that ITSI should have been required to prove that Cal Expo and the DAAs were not entitled to such immunity. Rather, we believe that Eleventh Amendment immunity, whatever its jurisdictional attributes, should be treated as an affirmative defense.

(Emphasis added.) There is no question that a tribe's sovereign immunity can also be expressly waived, *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.,* 523 U.S. 751, 754 (1998), and therefore does not automatically destroy original jurisdiction, just as with Eleventh Amendment immunity. Tribes, like states, must therefore assert sovereign immunity as an affirmative defense.

While this Court did uphold the trial court's dismissal of an action on the basis of sovereign immunity under Fed. R. Civ. P. 12(b)(1) in *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d

917 (6th Cir. 2009), it did not expressly adopt the trial court's rationale, did not expressly say its ruling was based on Fed. R. Civ. P. 12(b)(1), and strongly suggested that while it viewed sovereign immunity as jurisdictional in some sense, it was not subject-matter jurisdiction. It noted, for example, that "[t]he Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power" and "if an entity enjoys tribal-sovereign immunity, federal jurisdiction is otherwise irrelevant and dismissal of the suit is proper." *Id.* at 920. This view of sovereign immunity is entirely consistent with this Court's and the Ninth Circuit's earlier statements quoted above that the party asserting sovereign immunity has the burden to prove it.

As will be shown, the Tribe has failed to meet its burden of proving that sovereign immunity bars this action.

C. IGRA abrogates the Tribe's immunity.

This Court has held that 25 U.S.C. § 2710(d)(7)(A)(ii) describes the elements that determine whether Congress has abrogated a tribe's sovereign immunity. See, *Michigan v. Bay Mills Indian Community*, 695 F.3d 406, 415 (6th Cir. 2012). The Court must consider whether: (1) the plaintiff is a State or an Indian tribe; (2) the cause of action

seeks to enjoin a class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect. *Id.* at 412. While the Tribe asserts that elements 2 and 3 are missing from the State's case, the Tribe has failed, however, to meet its burden of establishing that these factors are missing.

1. The Tribe has not met its burden of showing that the necessary abrogation elements are missing from the State's complaint.

a. The Complaint seeks to enjoin gaming activity on Indian lands (element 3).

Relying on the *Bay Mills* decision, the Tribe asserts that the State cannot satisfy element 3 of the IGRA abrogation test because the Lansing Property has not yet been taken into trust and thus is not yet Indian lands. This case, however, is distinguishable from *Bay Mills,* where this Court said there was abrogation because in that case, the State specifically alleged that the property in question was not and *never would be Indian lands* under IGRA. The Court said that this allegation conclusively proved that element 3 of the §2710(d)(7)(A)(ii) test could not be satisfied:

> The plaintiffs' own pleadings defeat their argument that the Regulatory Act supplies jurisdiction here. In their complaints, the plaintiffs expressly allege that the Vanderbilt casino is not located on Indian lands, which means the plaintiffs cannot meet the third condition (that the "gaming activity [is] located on Indian lands") recited above . . . The plaintiffs allege these things *because they are essential to the plaintiffs' claim* that gaming at the Vanderbilt casino violates Bay Mills' Tribal-State compact. But the allegations mean that, even at the pleading stage, the plaintiffs cannot show federal jurisdiction over their § 2710(d)(7)(A)(ii) claims.

Bay Mills, 695 F.3d at 412 (emphasis added).

There is no comparable allegation in the instant litigation. In *Bay Mills,* the tribe's entire argument that it could game on its after-acquired property in Vanderbilt hinged on the fact that the property had not and would not be taken into trust, otherwise, it would be subject to the prohibitions found in § 20 of IGRA. Thus, the State was alleging that the Vanderbilt casino would never be Indian lands because it would never be trust lands. Here, however, the Sault Tribe is taking *the exact opposite course* by committing in the Development Agreement to have the Lansing property taken into trust so it can become Indian lands. Thus, the gaming the State is trying to enjoin in Lansing would occur on Indian lands if the Tribe succeeds in its plans.

The Tribe here is trying to take the *Bay Mills* case into uncharted territory. In effect, the Tribe is arguing that for there to be an abrogation of its immunity under §2710(d)(7)(A)(ii), illegal gaming *must be presently occurring* on Indian lands. This issue was never reached in *Bay Mills*.

This precise argument, however, was rejected by the court in *Arizona v. Tohono O'odham Nation*, 2011 U.S. Dist. LEXIS 64041 (D. Ariz. June 15, 2011) (Tohono Opinion, RE 22-2, Page ID #501-510), a case expressly relied on by the district court (Opinion, RE 37, Page ID # 849-851). *Tohono* is remarkably similar to the case at hand.

In *Tohono*, the State of Arizona sought an injunction under § 2710(d)(7)(A)(ii) based on the defendant tribe's breach of a provision in its gaming compact that precluded the tribe from opening a gaming facility in the Phoenix area. The tribe had purchased property near Phoenix and announced its plans to open a casino on it. The land had not been taken into trust at the time of the lawsuit. In response to the complaint, the tribe asserted that the state's action was barred by the tribe's sovereign immunity because it did not satisfy the requirement in § 2710(d)(7)(A)(ii) that the lawsuit seek to enjoin gaming on Indian

lands. (Tohono Opinion, RE 22-2, Page ID # 503.) Just as the Sault Tribe does here, the Tohono tribe argued that since the land had not yet been taken into trust, there were no Indian lands subject to a § 2710(d)(7)(A)(ii) lawsuit. *Id.*

The *Tohono* court was not persuaded. The court noted that the lawsuit sought to enjoin gaming activity that the tribe said it would conduct at some point in the future. Applying the plain language of § 2710(d)(7)(A)(ii), the court observed that *there was no temporal requirement concerning the gaming to be enjoined*, and that there was no reason that a plaintiff had to wait for such gaming to be presently occurring before seeking relief under IGRA:

> Section 2710(d)(7)(A)(ii) grants district courts jurisdiction over "*any* cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . that is in effect." (Emphasis added.) Congress did include one temporal limitation on this abrogation of tribal sovereign immunity — it required that the suit concern a compact "that is in effect." But Congress did not include a similar temporal limitation on when the land at issue in the suit must become Indian lands. Instead, it focused on the nature of the claim: "to enjoin a class III gaming activity located on Indian lands." That is precisely what this lawsuit seeks to do. Congress extended the abrogation to "any" lawsuits "initiated" by a State or Indian tribe to enjoin gaming activity on Indian lands, but without specifying when the lawsuit must be "initiated." Plaintiffs have initiated this

> lawsuit to enjoin class III gaming on Indian lands owned by the Nation in the Phoenix metropolitan area — precisely the kind of lawsuit for which Congress abrogated sovereign immunity in § 2710(d)(7)(A)(ii).

(Tohono Opinion, RE 22-2, Page ID # 503.)

The district court here rejected the Sault Tribe's assertion that the State's complaint does not satisfy the § 2710(d)(7)(A)(ii) prerequisites for injunctive relief for the same reasons embraced by the *Tohono* court. As noted by the lower court here ". . . the statute includes no similar temporal requirement for any other element, requiring only that the ultimate purpose of the lawsuit be to enjoin Class III gaming activity on Indian lands in violation of a currently effective compact." (Opinion, RE 37, Page ID # 849.) While the Lansing Property is not yet in trust, just as in *Tohono*, the Tribe here has made clear its intentions to pursue trust status as soon as possible for the ultimate purpose of opening a casino. This is not a hypothetical threat. As noted by the district court, courts regularly allow enforcement of contract provisions before they are actually breached, such as in the case of non-competition agreements where the risk of a violation is imminent. *Basicomputer v. Scott,* 973 F.2d 507, 511-512 (6th Cir. 1992).

It does not make sense that Congress would have intended to abrogate a tribe's sovereign immunity in a case where a tribe has incurred the time and expense to have land taken into trust and to build a casino where it was conducting class III gaming in violation of its compact, but *not* intend an abrogation where the tribe has committed itself to a path that, barring failure of the tribe's plan, would result in the tribe conducting class III gaming in violation of its compact. If the Tribe's admitted purpose here is to try to open a casino that will be a violation of § 9, shouldn't the court have the power to stop that plan before everyone gets too far down the road?

It also makes little sense that whether or not the Tribe is protected by sovereign immunity hinges on *when* a complaint is filed. This Court's assessment of the legality of the Tribe's conduct will not change, all else being equal, based on the date the complaint is filed. If at some point in the future that conduct will be unlawful, and the Tribe's immunity abrogated, isn't it in the best interest even of the Tribe, or at least its members, to be told that now instead of later when the Tribe has built a useless casino and then gets sued?

Barring the State from court until the first wager is placed at a casino (because under the Tribe's theory, class III gaming on Indian lands *must be presently occurring* before its immunity is abrogated), also places an unfair burden on the State. Section 2710(d)(7)(A)(ii) only allows the State to obtain *an injunction* of the unlawful gaming activity, not damages. The district court ruled that the State must satisfy the traditional equitable injunction factors to obtain such an injunction, including balancing any harm to the plaintiff against the harm to the defendant. (Opinion, RE 37, Page ID # 855-856.) The State fully expects that if it must wait until the Tribe begins operating its casino before it can assert abrogation of its immunity under § 2710(d)(7)(A)(ii), the Tribe will claim then that the balance of harm swings decidedly in its favor, that a permanent injunction should not be entered because it will lose all the value of its casino development and will have to fire all

the employees it hired to run the gaming operation.[3] There will likely be other similar items listed in such a parade of horribles, intended to persuade the court that the Tribe's harm from a permanent injunction far outweighs that of others, including the State.

Seen in this light, it is hard to imagine that Congress truly intended in § 2710(d)(7)(A)(ii) to abrogate tribal immunity only after a tribe has actually initiated the unlawful gaming. Allowing a federal court to step in when it is clear that the tribe has set itself on a path dedicated to achieving class III gaming on Indian lands, particularly where, as here, the Tribe clearly has the resources to navigate that path, does not deprive the Tribe of any legitimate benefit. The Tribe's plan of action either violates § 9 or it does not, and there is no good reason to delay the day of reckoning, particularly where, as recognized by the district court below and in the *Tohono* opinion, a fair reading of

[3] Whether the State is seeking a preliminary or permanent injunction is irrelevant as the relative harms must be balanced by the court in either case. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) ("According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: . . . (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted . . . ").

§ 2710(d)(7)(A)(ii) fully supports the conclusion that immunity is abrogated when a complaint seeks to enjoin unlawful gaming activity, whether presently occurring or where it is credibly threatened.

b. The complaint seeks to enjoin class III gaming activity (element 2).

The Tribe asserts on appeal that its immunity is not abrogated for this action because, according to the Tribe, the action does not seek to enjoin class III gaming activity, but rather prays for an injunction prohibiting the Tribe from applying to have land taken into trust. The Tribe asserts that "as a matter of plain meaning, 'submission . . . of an application' to the Secretary of the Interior, seeking action pursuant to a federal statute (MILCSA)[4] having nothing to do with gaming, is not 'a class III gaming activity.'" (Brief for Appellant, Doc. 006111693101, Page ID # 36.)[5] The State's complaint has nothing to do with the Settlement Act, but rather seeks an injunction of the Tribe's threatened

[4] MILCSA is the acronym used by the Tribe for the Settlement Act.

[5] The Tribe's recurrent suggestion that it is somehow obligated by the Settlement Act to apply to have this land taken into trust is irrelevant. Section 9 prohibits such an application here regardless of what statute might authorize the trust taking. In any event, the Tribe did not *have* to buy the Lansing Property using Settlement Act funds. It apparently chose to do so and is now stuck with the consequences.

application to Interior to have land taken into trust in violation of § 9 which prohibits such an application if made "for gaming purposes." (Complaint, RE 1, Page ID # 1-15.) So the indirect suggestion by the Tribe that this application has "nothing to do with gaming" is difficult to credit. As the ultimate and sole purpose of this application to Interior is to enable the Tribe to operate a casino in Lansing, the application has *everything* to do with gaming.

Likewise, there is no dispute that the purpose of § 9 is to discourage tribes from operating off-reservation gaming facilities by prohibiting such facilities unless revenues are shared with other tribes. That intent is also directly related to gaming. It is likely that the parties agreed to barring an application to take land into trust for gaming purposes, instead of just prohibiting off-reservation gaming in the absence of a revenue-sharing agreement, because they knew, for the reasons discussed above, that the further down the path to gaming a tribe traveled, the more difficult it would be to stop it. The compacting parties knew that nipping an attempt at off-reservation gaming in the bud would be the most effective course to ensuring that a tribe would not operate an off-reservation casino. In any event, prohibiting the

Tribe from applying to have land taken into trust for gaming effectively enjoins gaming activity.

This same situation is evident from the facts in *Tohono*. While it is true that the relief requested in this case on its face is different from that in *Tohono,* this is not a material distinction. There, the compact provision that was violated prohibited the opening of a "new gaming facility" in the Phoenix area. (*Tohono* Complaint, RE 16-3, Page ID # 458, ¶¶ 6 and 7.) As the complaint there asserted, "By representing that the Compact would prevent additional gaming facilities from being opened in the Phoenix metropolitan area, the Nation was necessarily representing that it would not conduct gaming on any lands in the Phoenix metropolitan area it might have taken into trust under the Gila Bend Reservation Replacement Act . . . ." (*Tohono* Complaint, RE 16-3, Page ID # 458, ¶7.) Thus, the complaint draws the direct connection between *preventing* additional *gaming facilities* and *prohibiting gaming* in the Phoenix area.

Here, the compact violation is the application to have land taken into trust in the absence of a revenue-sharing agreement. In both *Tohono* and this case, however, the ultimate intention is to prohibit

"class III gaming activity" that will occur once the property is in trust and a casino is built. In *Tohono*, the mechanism for targeting class III gaming was a prohibition on opening "additional gaming facilities"; in the case at hand the mechanism is a prohibition on applying to have land taken into trust for gaming purposes. Enjoining the violations of these respective compacts had the ultimate effect and purpose of enjoining illegal class III gaming.

Furthermore, the Sault Tribe's application to have the Lansing Property taken into trust for gaming purposes is itself a "gaming activity" that can be enjoined pursuant to § 2710(d)(7)(A)(ii). "Class III gaming" is a defined term in IGRA. 25 U.S.C. § 2703(8). While § 2710(d)(7)(A)(ii) could have demanded that an action seek to enjoin "class III gaming," which would suggest that only the actual conduct of the games so defined could be enjoined, it does not. Instead, it says the injunction should enjoin "class III gaming *activity*," a broader category than just the gaming itself. Just as opening a gaming facility was an enjoinable class III gaming activity in the *Tohono* case, applying to take land in trust for gaming purposes would also be an enjoinable gaming activity.

Here, class III gaming and applying to have land taken into trust are inextricably linked. Applying to have land taken into trust for gaming purposes, as the Tribe proposes to do here, is a first and necessary step for the Tribe to conduct class III gaming. If the Tribe could not open a casino at the end of the process, it would never apply in the first place. The process of applying to have land taken into trust is undeniably an "activity," and since its sole purpose is to permit the Tribe to conduct class III gaming, and considering the relevant word choices in IGRA, it is completely rational and fair to believe that Congress would consider it a "class III gaming activity" that should be enjoined if it violates a tribe's compact promise.

Preventing the application to have land taken into trust *for gaming purposes* has the ultimate effect of preventing the Tribe from conducting class III gaming, which comports with the intention of § 9. Turning the State out of court for the reasons championed by the Tribe would truly exalt form over substance. There is no reason to believe that Congress intended in IGRA to allow a tribe to breach a promise not

to apply to have land taken into trust for gaming purposes without any consequence. It should not be allowed here.[6]

c. Alternatively, the Tribe should be enjoined from gaming at its existing casinos in violation of the Compact.

In the proceedings below, the State informed the court that to address the Tribe's arguments concerning the alleged failure to satisfy

---

[6] The Tribe's fallback position that it may in any event open a *class II* gaming facility without penalty is not compelling. Class II gaming is essentially bingo and very limited non-banking card games. 25 U.S.C. § 2703(7)(A). The district court apparently found it difficult to credit the suggestion that the Tribe and its outside investors would expend the resources committed in the Development Agreement to build a bingo parlor. This Court would normally defer to such a factual finding by a lower court of a party's intent, particularly in a preliminary injunction hearing.

Nor is there any practical way to modify the preliminary injunction to accommodate the remote possibility that the Tribe would only operate class II games on the Lansing Property. If the Tribe agrees to an injunction that prohibits it from ever operating class III games on the Lansing Property, the State would likely stipulate to that modification. However, to maintain the status quo in a manner that protects the court's ability to grant effective relief to the State, for the reasons discussed in this brief, the preliminary injunction must prohibit the Tribe from violating § 9. Anything else creates a situation where the Tribe breaches the compact with the hope that it will be in a better position to get its way when it asks for forgiveness later. Given the reality that the Tribe will choose class III gaming if at all possible, not class II, there is no reason to modify the preliminary injunction just because there might be a slight chance that the Tribe would open a bingo parlor instead of a casino. The district court did not abuse its discretion when it maintained the status quo.

the § 2710(d)(7)(A)(ii) elements, the State would request an injunction of the Tribe's class III gaming presently occurring at its existing casinos, which would be conducted in violation of its Compact if the Tribe violates § 9.[7] The district court agreed that the State would be entitled to request this relief as well in this § 2710(d)(7)(A)(ii) case. (Opinion, RE 37, Page ID # 852.)

This alternative relief is consistent with the decision of the Seventh Circuit in *Wisconsin v. Ho-Chunk*, 512 F.3d 921 (7th Cir. 2008). In that case, the state sued claiming that the tribe had stopped making incentive payments and had refused to arbitrate the issue as required by the compact. Based on the tribe's refusal to arbitrate in violation of the compact, the state sought to enjoin class III gaming. The court said the § 2710(d)(7)(A)(ii) claim could proceed: "Therefore, the district court properly had jurisdiction, and Congress abrogated the Nation's sovereign immunity, with respect to the State's claim pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) to enjoin the Nation's class III gaming due to

[7] The State offered to amend its complaint, but notes that it does not believe such an amendment is necessary merely to seek an alternative remedy based on the facts alleged in the complaint, particularly where the complaint specifically requested "such other relief as the Court deems appropriate." (Complaint, RE 1, Page ID # 9.) The district court did not indicate that such an amendment would be necessary.

its alleged refusal to submit to binding arbitration." *Id.* at 935. Thus, the Seventh Circuit ruled that the tribe's *gaming activities* were being "conducted in violation"[8] of the compact because the tribe was *refusing to go to arbitration*, which was required by the compact.

Here, the Sault Tribe is threatening to violate its Compact by applying to have land taken into trust. There is no reason to distinguish this from the compact violation (the refusal to arbitrate) in *Ho-Chunk*. Since the court there allowed the state to pursue an injunction of class III gaming based on the refusal to arbitrate, the State here can seek an injunction of ongoing gaming if the Tribe violates § 9 by applying to have land taken into trust. This alternative request for relief satisfies the requirements for pleading an abrogation of the Tribe's sovereign immunity, specifically elements 2 and 3 of the § 2710(d)(7)(A)(ii) test.

The Sault Tribe contends in its appeal brief that the district court got this issue wrong, asserting that compact violations by a tribe at one gaming site should not be grounds to enjoin otherwise lawful gaming at a separate site. (Brief for Appellant, Doc. 006111693101, Page ID # 44.)

[8] § 2710(d)(7)(A)(ii).

The Tribe takes the district court to task for not citing to any prior case law to support the court's conclusion that the alternative relief would be appropriate. (*Id.)*

While it is true that the district court did not cite to a supporting decision,[9] its reasoning was consistent with the *Ho-Chunk* case, which the State discussed at length in its brief to the district court. (State Response to Motion to Dismiss, RE 22, Page ID # 486.) What is noteworthy here is the Tribe's failure to even attempt to distinguish *Ho-Chunk* when it was fully aware that the State had and would rely on it for the alternative relief argument.

d. The Indian canon of statutory construction does not apply to § 2710(d)(7)(A)(ii).

The Tribe asserts that ambiguities in federal laws implicating Indian rights must be resolved in the Indians' favor. (Brief for Appellant, Doc. 006111693101, Page ID # 36, 40.) This notion is sometimes referred to as the Indian canon of statutory construction. It does not apply here because, as noted by the *Tohono* court, the

[9] The Tribe is in no position to object on this basis; it cites to no authority in support of its position either.

provisions of § 2710(d)(7)(A)(ii) at issue are unambiguous. (Tohono Opinion, RE 22-2, Page ID # 503.)

It does not apply for a second reason. Section 2710(d)(7)(A)(ii) expressly allows both states ***and tribes*** to seek an injunction of unlawful gaming. The Indian canon of construction is just that – its purpose is no different than any other canon of statutory construction that seeks no more than to divine the intent of Congress. This was made clear by the Supreme Court in *Chickasaw Nation v. United States*, 534 U.S. 84, 93-94 (2001) (citations omitted):

> The Court has also said that "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." The Tribes point out that our interpretation is not to the Indians' benefit.
>
> Nonetheless, these canons do not determine how to read this statute. For one thing, canons are not mandatory rules. They are guides that "need not be conclusive." They are designed to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force. In this instance, to accept as conclusive the canons on which the Tribes rely would produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote.

Since § 2710(d)(7)(A)(ii) was intended sometimes to benefit tribes seeking an injunction, one could argue that the five elements, if

ambiguous in some way, should be construed to favor the plaintiff tribe. For example, if another tribe was seeking to enjoin a breach of a gaming compact, the plaintiff tribe would certainly claim that the Indian canon of construction requires the abrogation language of § 2710(d)(7)(A)(ii) to be interpreted *broadly* to allow the tribe access to federal court so it could obtain a remedy.

On the other hand, when a state is seeking an injunction against a tribe, as here, the tribe will certainly argue the exact opposite – that these *same elements* should be *narrowly* construed to favor the defendant tribe. The end result would be *two conflicting interpretations of the same statutory language*. Since any given words in a statute can have only one intended meaning, it is inappropriate to use the canon as a guide to interpreting § 2710(d)(7)(A)(ii) where Congress has made clear that it implicates tribes' rights – whether they are seeking an injunction or defending against one.

II. The district court did not abuse its discretion when it weighed the four preliminary injunction factors and determined that the Tribe should be enjoined from violating the Compact.

The purpose of entering a preliminary injunction is "to preserve the relative positions of the parties until a trial on the merits can be held," *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007), in other words to preserve the status quo. To that end, this Court has established four factors that must be balanced by a district court when considering a motion for a preliminary injunction. Those four factors are: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction. *Id.* at 542.

These four considerations are "factors to be balanced, not prerequisites that must be met." *Id.* at 540. The district court judge "is not required to make specific findings concerning each of the four factors used in determining a motion for preliminary injunction if fewer factors are dispositive of the issue." *Id.*

The status quo is currently maintained by the preliminary injunction as it precludes the Tribe from applying to have the Lansing Property taken into trust. But for that injunction, the Tribe has indicated it would apply to have the land taken into trust straightaway.

A. This Court applies the abuse-of-discretion standard of review when preliminary injunctions are appealed.

This Court generally reviews a district court's grant of a preliminary injunction for abuse of discretion. *Certified Restoration* at 540. Under this standard, the district court's legal conclusions are reviewed de novo and its factual findings for clear error. *Id.* at 541. The district court's determination of whether the movant is likely to succeed on the merits is a question of law and is accordingly reviewed de novo. *Id.* However, the district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief is reviewed for abuse of discretion. *Id.* This standard of review is "highly deferential" to the district court's decision, *id.*, and the district court's weighing and balancing of the equities is overruled only in the "rarest of cases." *U.S. v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004).

The Tribe has not even approached a showing that this is one of those "rarest of cases" that would warrant a finding that the trial court abused its discretion when weighing the preliminary injunction factors, and its appeal should therefore be denied.

B. The district court correctly ruled that the State would likely succeed on the merits of its case that alleges a breach of the compact and violations of IGRA.

1. The Tribe's plans to apply to have the Lansing Property taken into trust without first obtaining a revenue-sharing agreement with the other Michigan tribes would violate § 9.

The Tribe asserts that its plans to apply to have the Lansing Property taken into trust for gaming purposes do not violate the compact, and thus the State cannot show it is likely to succeed on the merits of its claim. For the reasons discussed below, this argument should be rejected.

a. Whether Interior's decision on the Tribe's trust application is mandatory or discretionary is irrelevant.

The Tribe argues that § 9 of the compact will not be breached because it does not even apply to this trust application, allegedly because it is a "mandatory" trust application under the Settlement Act

and not a "discretionary" trust application. However, even if it is true that the Secretary would have no discretion when considering such an application (the State disagrees that Interior has any mandatory obligation to take this property into trust), this distinction is irrelevant.

Section 9 is unambiguous: it says an application to take land into trust for gaming purposes pursuant to § 20 of IGRA "shall not be submitted" in the absence of a revenue-sharing agreement. There is no distinction between, or even mention of, mandatory and discretionary trust applications in § 9. It affects *all off-reservation* land taken into trust after 1988 for gaming purposes, as post-1988 trust applications are precisely what § 20 of IGRA governs.

The Tribe asserts that this is an incorrect reading of § 9. According to the Tribe, its imminent application to Interior is to take land into trust, but it is not necessary to Interior's decision process that it know the purpose for which the land will be used, because Interior will be *required* to take the land into trust regardless of the nature of that purpose. Thus, according to the Tribe, its application would not be for a decision from Interior approving a trust application "for gaming purposes" because they are not now seeking a decision from Interior

that hinges on whether the Tribe will game on the property. For this reason, the Tribe asserts, its application is not subject to the prohibition in § 9.

This is a stilted interpretation of the Compact that ignores the plain meaning of § 9. The obvious reason for including the phrase "for gaming purposes" was to ensure that *every* application to take land into trust by a tribe would not be subject to the requirements of § 9. For example, if a tribe wants to apply to Interior to have land taken into trust to build a daycare center, § 9 does not require the tribe to enter into a revenue-sharing agreement. While this may seem obvious, if the phrase "for gaming purposes" was not in § 9, by its express terms, it would apply to this *and every other* trust application filed by a tribe. Conjuring some other meaning for the phrase "for gaming purposes" that further limits the scope of § 9, particularly asserting an interpretation that requires the assessment of unmentioned concepts like mandatory versus discretionary trust applications, is implausible and is unnecessary when the plain language and purpose are unambiguous. This effort was properly rejected by the district court.

While the State agrees with the Tribe's assertion that § 20 of IGRA does not itself authorize trust applications, if the phrase "for gaming purposes" is read naturally as discussed in the immediately preceding paragraph (merely to reflect the actual intended use of the land), § 9 makes complete sense. There *is* such a thing as an application to take land into trust, and there are plenty of such applications that are subject to § 20, i.e., when the trust application is post-1988 and the Tribe intends to operate a casino on the trust land.

So a straightforward interpretation of § 9 dictates that it would apply where there is: 1) an application to take land into trust; 2) after 1988; and 3) the trust land will be used for gaming. There is no dispute that the facts of this case fall precisely within this interpretation and therefore trigger the § 9 requirements.

b. The application of § 9 does not depend on which § 20 exception may ultimately apply to a tribe's gaming on lands taken into trust after 1988.

The Tribe has developed a new argument for this appeal, apparently to take advantage of parol evidence in the form of testimony before Congress that was not presented for consideration by the court

below, but which is now attached to the Tribe's appeal brief. (Brief for Appellant, Doc. 006111693101, Page ID #95.) Basically, the Tribe argues as an alternative to its "mandatory-discretionary" formulation, that the parties to the 1993 compacts intended § 9 to apply only to trust applications where the tribe also applies to Interior for a determination that it can game on the property under the exception provided in 25 U.S.C. § 2719(b)(1)(A), also known as the two-part determination.[10] As the Tribe acknowledges, this determination is independent of the trust application itself (for example, tribes can apply for the § 2719(b)(1)(A) determination for land that had *previously* been taken into trust), and while it does probably involve the exercise of Interior's discretion, the ultimate decision is made by the Governor who has absolute veto power over whether a tribe can operate a casino under the § 2719(b)(1)(A) exception.

This appears to be a completely different argument than the mandatory-discretionary argument initially made by the Tribe. Under this claim, the sole criteria for determining whether § 9 requires a

[10] 25 U.S.C. § 2719 generally prohibits gaming on property taken into trust after the effective date of IGRA (October 17, 1988), unless the circumstances of the trust application fall within the exceptions listed in that section.

revenue-sharing agreement is whether the tribe seeking trust status will ultimately employ the § 2719(b)(1)(A) exception for gaming. If so, according to the Tribe, § 9 requires a revenue-sharing agreement. If not, then no such agreement is required.

The obvious problem with this interpretation is that, by its own terms, § 9 does not limit its reach to § 2719(b)(1)(A). In fact, it does not single out § 2719(b)(1)(A) at all. Rather, § 9 applies to *all* trust applications for gaming purposes that fall under any part of § 20 (§ 2719), not just § 2719(b)(1)(A). Limiting § 9 to just the § 2719(b)(1)(A) exception makes no sense as the intention of § 9 was to put a brake on the expansion of off-reservation gaming. Given this intention and the fact that the Governor does not really need § 9 to stop for gaming requests made pursuant to 25 U.S.C. § 2719(b)(1)(A), as he has an absolute veto over such requests, it is critical to furthering that intention that § 9 apply to the other exceptions in § 20 where the Governor's veto authority does not extend.

Nor does the fact that § 9 mentions "off-reservation" gaming applications support the Tribe's theory that § 9 only applies to gaming that meets the § 2719(b)(1)(A) exception. All the § 2719(b)(1) exceptions

can apply to *either* on or off-reservation gaming, with the exception of § 2719(b)(1)(B)(ii), which is limited to lands taken into trust as part of a tribe's *initial* reservation.[11] In fact, the Tribe's Lansing casino, which it claims falls within the settlement-of-a-land-claim exception, one of the three so-called "equal footing" exceptions in §2719(b)(1)(B), would itself be more than 200 miles "off" the Tribe's reservation. If anything, § 9's focus on off-reservation gaming reinforces the State's argument that its scope was not limited to just applications made under § 2719(b)(1)(A), but rather was intended to govern *all* off-reservation applications that fall within § 20's ambit.

[11] Even if it is true that § 2719(b)(1)(A) is sometimes referred to as the "off-reservation" exception, as shown in the two memoranda attached to the Tribe's appeal brief, this does not help interpret § 9. These memoranda were written in 2010 and 2011, yet § 9 was negotiated in 1993, not long after IGRA was adopted. Common parlance at Interior in 2010 is irrelevant to what the State and Tribes meant in 1993 when referring to off-reservation gaming in § 9. And if the parties intended such a specific limitation on § 9, they would not have selected such a vague reference; they would have cited to the specific exception. Instead, they clearly indicated their intent to subject all post-1988 off-reservation trust applications for gaming to the revenue sharing requirement. "Off-reservation" in § 9 is not a technical term of art. It simply and naturally refers to gaming that occurs *off-reservation*, not to one distinct exception out of several listed in § 2719 as the Tribe now claims.

To support its new theory, the Tribe refers to 2002 Congressional testimony from Lance Boldrey, former Michigan Governor John Engler's deputy legal counsel, who told the Senate that § 9 was "aimed squarely" at a different provision of § 20 than the settlement of a land claim exception. (Brief for Appellant, Doc. 006111693101, Page ID #53.) Mr. Boldrey said that his interpretation was "bolstered" by an interpretation of § 9 made in a 1995 Interior memorandum. (*Id.*) There are several problems with this argument.

First, as the Tribe, to its credit, points out in its corrected brief, its own Tribal Chairman testified at these same proceedings that gaming pursuant to the settlement-of-a-land-claim exception (§ 2719(b)(1)(B)(i)) is subject to § 9:

> Our first objection is that this bill appears to divest our tribe, and the five other tribes who signed gaming compacts simultaneously with us and Bay Mills, from rights secured by the compacts . . . Since the bill and the settlement agreement it ratifies are specifically based on a provision of 25 U.S.C. § 2719 that deals with *settlement of a land claim*, the *taking of the Port Huron lands into trust for gaming purposes appears to fall under Section 9 of the compact*.

Bay Mills Indian Community Land Claims Settlement Act: Hearing on S. 2986 Before the Senate Committee on Indian Affairs, 107th Congress, 109 (2002) (prepared statement of Bernard Bouschor, Chairman, Sault

Ste. Marie Tribe of Chippewa Indians) (Addendum 4a) (emphasis added). While the Tribe now tries to neutralize this admission by noting that shortly after Chairman Bouschor's Senate testimony, the Sault Tribe itself entered into a similar agreement settling land claims, citing to statements made in 2004 hearings before the House of Representatives, the Tribe fails to note that in the later hearings the Tribe's attorney did *not* say that § 9 would not apply to land taken into trust in settlement of a land claim as now implied by the Tribe. Rather, he confirmed that § 9 would apply where gaming occurred on newly acquired trust land, but did not in that case *only* because the Governor *had waived its application*:

> Section 9 of the compact required that gaming revenues from a casino on newly acquired land be shared among all of the Indian tribes of Michigan. . . . And in this case, Section 9 is not implicated, because the Governor chose to waive that requirement.

Legislative Hearing on H.R. 831, to Provide for and Approve the Settlement of Certain Land Claims of the Bay Mills Indian Community; and H.R. 2793, to Provide for and Approve the Settlement of Certain Land Claims of the Sault Ste. Marie Tribe of Chippewa Indians, Before the House Committee on Resources, 108th Congress, 60 (2004) (statement

of Paul Shagen, Esq., Senior Tribal Attorney, Sault Ste. Marie Tribe of Chippewa Indians) (Addendum 22a).

Second, while Bernard Bouschor was the Tribe's chairman in 1993 when the compacts were signed, Lance Boldrey did not work for Governor Engler at that time and did not play any role in the negotiation of the compacts. Rather, Michael Gadola was the Governor's deputy legal counsel at the time and the lead negotiator for Michigan during the compact negotiations. As his attached affidavit shows (Addendum 44a), he disagrees with Mr. Boldrey's interpretation of § 9, which Mr. Gadola says was intended to put a brake on the expansion of off-reservation gaming by requiring a revenue-sharing agreement for *all* off-reservation gaming on land taken into trust after October 17, 1988. Mr. Gadola specifically notes that *he* did negotiate the terms of § 9.

Third, at least two other tribes[12] are on record, through the filing of amicus briefs below (RE 26 and RE 32), as supporting an interpretation of § 9 that requires a revenue-sharing agreement

[12] Including the Saginaw Chippewa Indian Tribe, which is a party to a 1993 compact that is substantially the same as the Sault Tribe's compact and includes an identical § 9.

whenever a 1993 tribe applies to have off-reservation land taken into trust, no matter which § 20 exception the tribe may rely on for its gaming.

Fourth, the Interior memorandum that Mr. Boldrey relied on to interpret § 9 (Addendum 47a) does not support his claim that § 9 only applies when a tribe seeks the benefit of the § 2719(b)(1)(A) exception. In fact, the situation addressed in that memo involved a request by a 1993 tribe for a determination pursuant to § 2719(b)(1)(A) for a two-part determination so it could operate a casino on land taken into trust after 1988. The author of the memo determined that *§ 9 did not apply in that case* because the land was already in trust at the time the request for a two-part determination was made. The memo concludes: "It is our opinion that Section 9 of the compact is triggered by an application by a Michigan Tribe to have land taken into trust for gaming." (Addendum 47a). Whether or not this memorandum accurately analyzes § 9, it does not support the interpretation espoused by Mr. Boldrey, and in fact appears to contradict that interpretation when it concludes that § 9 did not apply where the tribe sought a § 2719(b)(1)(A) determination from Interior.

Fifth, the district court did not consider the statement of Mr. Boldrey when entering the injunction and its inclusion in the Tribe's brief is an improper attempt to expand the record on appeal. *Inland Bulk Transfer Co. v. Cummins Engine Co.,* 332 F.3d 1007, 1012 (6th Cir. 2003) (quoting *S & E Shipping Corp. v. Chesapeake & O. Ry. Co.,* 678 F.2d 636, 641 (6th Cir. 1982)); *Thompson v. Bell,* 363 F.3d 688, 690 (6th Cir. 2004).

And finally, § 9 is unambiguous and any parol evidence such as Mr. Boldrey's statements is inadmissible for the purpose of interpreting that compact provision. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler,* 146 F.3d 367, 373 (6th Cir. 1998).[13] Even if the Court considers this new evidence, it is quite clear that on balance, it supports the State's interpretation of § 9, and contradicts the Tribe's interpretation that § 9 only applies where a two-part determination is made by Interior.

* * *

[13] The State realizes that its response to Mr. Boldrey's testimony also primarily relies on parol evidence not considered by the court below. However, if this Court determines it can consider Mr. Boldrey's statements, then the other matters here introduced by the State should be considered as well.

Under the Tribe's theory that any lands bought with Settlement Act funds satisfy the settlement of a land claim exception in IGRA, the Tribe will be able to buy real property *anywhere* in the State and force Interior to take it into trust. Although the State does not believe federal law supports the Tribe's scheme, it is less of a concern because the State has the protections afforded by § 9.

However, if the State is denied enforcement of § 9, and the Tribe is right about its ability to game on any land bought with Settlement Act funds, the gaming landscape in Michigan will be turned on its head because there is no practical limit on the amount of land which the Tribe could purchase with Settlement Act funds. This means the Tribe can open as many casinos in Michigan as it desires. In fact, the primary motivation for the Tribe is to open casinos off its reservation because it has already saturated the on-reservation market (the Tribe has five casinos in the Upper Peninsula) and it is seeking new markets far from its other casinos which may be more lucrative.

The Tribe's interpretation of § 9 flies in the face of its intended purpose. Instead of asserting some level of control of the expansion of

off-reservation gaming on newly acquired trust lands,[14] the State gets no benefit from the Tribe's § 9 agreement not to apply to have land taken into trust without first signing a revenue-sharing agreement. This Court should reject an interpretation of § 9 that conflicts with its plain language and that would allow unlimited expansion of off-reservation gaming. The district court's determination that the State has shown a likelihood of success on the merits of its action should be affirmed.

C. The district court correctly found that the State would incur irreparable harm if the injunction was not entered.

Given the strictures of IGRA, there is no damages remedy available to the State if the Tribe is allowed to violate § 9 of the Compact by applying to Interior to have the Lansing Property taken into trust. IGRA only provides jurisdiction to federal courts to enter injunctive relief when a party to a gaming compact violates that compact. 25 U.S.C. § 2710(d)(7)(A)(ii).

[14] (Brief for Appellant, Doc. 006111693101, Page ID #53) (Boldrey quote); Gadola Affidavit (Addendum 44a).

Furthermore, as discussed above, if the Tribe is allowed to pursue its plans to open a casino on the Lansing Property before an injunction is entered, it will be that much harder for the State to prove that the balance of harms does not favor the Tribe, which will be steadily investing more and more of its resources as it gets further down the path of operating a casino in Lansing. There is no way that the State can be compensated for this increased burden, except by ultimately prevailing and obtaining a permanent injunction, but it is this very remedy that will be that much more difficult to get if the preliminary injunction entered by Judge Jonker is not affirmed by this Court. The State will, of course, argue on the merits that the Tribe is not entitled to proceed with the operation of a casino on the Lansing Property, and that the Tribe should not be able to offer the cost of its investments for weighing on the scales of equity, but the State cannot predict what the ultimate result will be. It *can* predict that it will be more difficult and more costly for the State to make its case on the merits if it has to rebut the Tribe's claims that it should be allowed to operate the casino because its closure will result in a loss of jobs and the value of the Tribe's investments.

The cases cited by the Tribe support the granting of this preliminary injunction. Even if it is true that a breach of contract does not "automatically" result in irreparable harm (Brief for Appellant, Doc. 006111693101, Page ID # 60), the facts here certainly fit within the parameters laid out in the Tribe's brief for finding irreparable injury when such a breach exists, i.e., difficulty in calculating damages, loss of a unique product, or the existence of intangible harms. (*Id.*).

Not only will there be "difficulty in calculating" the State's damages from allowing the Tribe to breach § 9, as discussed above, a damages remedy will be completely unavailable to the State. This was the primary ground that the district court relied on to find irreparable injury. (Opinion, RE 37, Page ID # 17 (citing *Performance Unlimited, Inc. v. Questar Publishers,* 52 F.3d 1373, 1382 (6th Cir. 1995).)

Likewise, the State will lose the "unique" benefit that the Tribe agreed to give it in the Compact when it promised not to even apply to have land taken into trust when it did not have a revenue-sharing agreement with the other tribes. The Tribe says it should just be allowed to apply and the State can argue to Interior that the application should not be granted (even though there is no formal mechanism for

the State to participate in the trust process). If the application is granted, then, according to the Tribe, the State can simply file an appeal of the administrative decision.

What is patently obvious is that giving the State other options to challenge the trust application is a distinctly less valuable, and possibly less effective, alternative to the action the State would have to take if the Tribe honored its promise in the compact, which would be *no action at all* because the Tribe would not be applying to Interior to have the Lansing Property taken into trust. And if the State is forced to file an appeal under the Administrative Procedures Act, it will have to sue the federal government and will have to contend with the standard of review of administrative decisions which can be a disadvantage compared to non-administrative federal court actions.

Finally, the State will suffer intangible harms if a tribe is allowed to enjoy the benefits of its gaming compact while ignoring its obligation to the State. As noted by the district court, tribal-state gaming compacts are the primary regulatory mechanism selected by Congress to manage Indian gaming under IGRA. (Opinion, RE 37, Page ID # 22.) Although the lower court correctly believed this established that

allowing a tribe to ignore § 9 would harm the public interest, it also makes a strong case that the State – and the whole of Indian gaming – will suffer an intangible loss. Telling tribes that their promises can be ignored with impunity will create uncertainties that will destabilize the entire compacting process. If states cannot rely on any given promise made by a tribe, they will be disinclined to even expend the energy to negotiate a gaming compact. The system established by Congress in IGRA will likely break, leaving courts to deal with the fall out. Given the high stakes involved for tribes, their members and the public at large, these intangible harms must be taken into consideration.

The primary purpose of entering a preliminary injunction is to maintain the status quo. Allowing the Tribe to proceed with its plans, including an application to Interior to have land taken into trust, will undeniably alter the status quo to the disadvantage of the State.

D. The district court correctly held that the balance of harm favored the State.

The Tribe's claims that it will be harmed by the injunction cannot be well taken. It will not lose the opportunity to buy the Lansing Property. The Tribe's agreement with the City of Lansing expressly

anticipated the State's legal challenge, allowing the Tribe until at least January 1, 2017, to close on the Lansing Property. While it is possible the City could refuse to sell the property to the Tribe if this dispute has not resolved by that time, the Development Agreement also expressly allows the City to give the Tribe an extension of time to complete the purchase. (Development Agreement, RE 1-4 Page ID # 111.) The Tribe has apparently not made such a request for an extension. Nor has the Tribe even attempted to obtain a revenue-sharing agreement with the other state tribes, which would alleviate its violation of § 9.

In any event, the Tribe should not expect that its agreement with the City should be given preference over its 20-year-old agreement with the State. Given the Tribe's refusal to share casino revenues with the other tribes, this "opportunity" to open a casino in Lansing is not legitimate and should not be protected at the expense of the State, the public, or the other tribes who have honored their obligations under the gaming compact.

The district court did not abuse its discretion when it determined that the balance of harm favored the State.

E. The district court correctly determined that the public interest was best protected by entering a preliminary injunction.

It is not in the public's interest, including the public interest of members of the Tribe, to allow the Tribe to pursue trust status for the Lansing Property in violation of § 9. If the State is ultimately successful on the merits of this case, the Tribe will have wasted its own resources (which of course belong to its members) and the resources of whatever agencies and courts become involved in the trust process, and any challenges to that process.

Furthermore, as noted by the district court, the public has a distinct interest in having public contracts like the gaming compact enforced as written, barring some showing that the provision at issue somehow is contrary to public policy, which is not the case here. Section 9 of the compact is entirely consistent with the policy expressed in IGRA that limits gaming on land taken into trust after 1988. It is reasonable for the Court to assume that the contracting parties had good reasons for including this further limit on the expansion of gaming in the compact. The public's interest is protected by maintaining the status quo by prohibiting the Tribe from pursuing its off-reservation

gaming plans, particularly where it is likely that those plans will ultimately be determined to violate § 9.

CONCLUSION AND RELIEF REQUESTED

The district court correctly determined that the Tribe's sovereign immunity was abrogated by Congress, and it did not abuse its discretion when it concluded that the Tribe's imminent plans to apply to have the Lansing Property taken into trust would violate § 9 of the compact and irreparably harm the State.

The State respectfully asks that the preliminary injunction entered by the district court be affirmed.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Solicitor General
Co-Counsel of Record

/s/ Louis B. Reinwasser (P37757)
Kelly M. Drake (P59071)
Assistant Attorney General
Co-Counsel of Record
Attorneys for Plaintiff-Appellee
Environment, Natural Resources
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540

Dated: June 17, 2013

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more than 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 13,715 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Century Schoolbook.

/s/ Louis B. Reinwasser
Assistant Attorney General
Co-Counsel of Record
Attorneys for Plaintiff-Appellee
Environment, Natural Resources
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540

CERTIFICATE OF SERVICE

I certify that on June 17, 2013, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Louis B. Reinwasser
Assistant Attorney General
Co-Counsel of Record
Attorneys for Plaintiff-Appellee
Environment, Natural Resources
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540

ADDENDUM

ADDENDUM TABLE OF CONTENTS

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Plaintiff-Appellee, per Sixth Circuit Rule 28(c), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	**Date**	**Record Entry No.**	**Page ID Range**
Complaint	09/07/2012	R. 1	1-15
Compact	09/07/2012	R. 1-1	16-33
Resolution	09/07/2012	R. 1-3	84-86
Development Agreement	09/07/2012	R. 1-4	87-148
Letter	09/07/2012	R. 1-5	149
Tohono Complaint	12/04/2012	R. 16-3	455-458
State Response to Motion to Dismiss	12/14/2012	R. 22	468-498
Tohono Opinion	12/14/2012	R. 22-2	500-510
Amicus Curiae Brief	01/02/2013	R. 26	570-589
Amicus Curiae Brief	01/02/2013	R. 32	717-734
Transcript Dec. 5, 2012	01/08/2013	R. 33	747-793
Opinion	03/05/2013	R. 37	842-863
Notice of Appeal	04/03/2013	R. 39	888

(5) To the extent that revenue derived from fees imposed under the schedule established under paragraph (1) are not expended or committed at the close of any fiscal year, such surplus funds shall be credited to each gaming activity on a pro rata basis against such fees imposed for the succeeding year.

(6) For purposes of this section, gross revenues shall constitute the annual total amount of money wagered, less any amounts paid out as prizes or paid for prizes awarded and less allowance for amortization of capital expenditures for structures.

(b)(1) The Commission, in coordination with the Secretary and in conjunction with the fiscal year of the United States, shall adopt an annual budget for the expenses and operation of the Commission.

(2) The budget of the Commission may include a request for appropriations, as authorized by section 2718 of this title, in an amount equal the amount of funds derived from assessments authorized by subsection (a) of this section for the fiscal year preceding the fiscal year for which the appropriation request is made.

(3) The request for appropriations pursuant to paragraph (2) shall be subject to the approval of the Secretary and shall be included as a part of the budget request of the Department of the Interior.

(Pub. L. 100–497, § 18, Oct. 17, 1988, 102 Stat. 2484.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2706, 2710, 2717a, 2718 of this title.

§ 2717a. Availability of class II gaming activity fees to carry out duties of Commission

In fiscal year 1990 and thereafter, fees collected pursuant to and as limited by section 2717 of this title shall be available to carry out the duties of the Commission, to remain available until expended.

(Pub. L. 101–121, title I, Oct. 23, 1989, 103 Stat. 718.)

CODIFICATION

Section was enacted as part of the Department of the Interior and Related Agencies Appropriations Act, 1990, and not as part of the Indian Gaming Regulatory Act which comprises this chapter.

§ 2718. Authorization of appropriations

(a) Subject to the provisions of section 2717 of this title, there are hereby authorized to be appropriated such sums as may be necessary for the operation of the Commission.

(b) Notwithstanding the provisions of section 2717 of this title, there are hereby authorized to be appropriated not to exceed $2,000,000 to fund the operation of the Commission for each of the fiscal years beginning October 1, 1988, and October 1, 1989. Notwithstanding the provisions of section 2717 of this title, there are authorized to be appropriated such sums as may be necessary to fund the operation of the Commission for each of the fiscal years beginning October 1, 1991, and October 1, 1992.

(Pub. L. 100–497, § 19, Oct. 17, 1988, 102 Stat. 2485; Pub. L. 102–238, § 2(b), Dec. 17, 1991, 105 Stat. 1908.)

AMENDMENTS

1991—Subsec. (b). Pub. L. 102–238 inserted at end ''Notwithstanding the provisions of section 2717 of this title, there are authorized to be appropriated such sums as may be necessary to fund the operation of the Commission for each of the fiscal years beginning October 1, 1991, and October 1, 1992.''

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2706, 2717 of this title.

§ 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) of this section shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86–2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 465 and 467 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected

Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of title 26

(1) The provisions of title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

(Pub. L. 100–497, § 20, Oct. 17, 1988, 102 Stat. 2485.)

§ 2720. Dissemination of information

Consistent with the requirements of this chapter, sections 1301, 1302, 1303 and 1304 of title 18 shall not apply to any gaming conducted by an Indian tribe pursuant to this chapter.

(Pub. L. 100–497, § 21, Oct. 17, 1988, 102 Stat. 2486.)

§ 2721. Severability

In the event that any section or provision of this chapter, or amendment made by this chapter, is held invalid, it is the intent of Congress that the remaining sections or provisions of this chapter, and amendments made by this chapter, shall continue in full force and effect.

(Pub. L. 100–497, § 22, Oct. 17, 1988, 102 Stat. 2486.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified generally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

CHAPTER 30—INDIAN LAW ENFORCEMENT REFORM

§ 2801. Definitions

For purposes of this chapter—

(1) The term ''Bureau'' means the Bureau of Indian Affairs of the Department of the Interior.

(2) The term ''employee of the Bureau'' includes an officer of the Bureau.

(3) The term ''enforcement of a law'' includes the prevention, detection, and investigation of an offense and the detention or confinement of an offender.

(4) The term ''Indian country'' has the meaning given that term in section 1151 of title 18.

S. HRG. 107–925

BAY MILLS INDIAN COMMUNITY LAND CLAIMS SETTLEMENT ACT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

S. 2986

TO PROVIDE FOR AND APPROVE THE SETTLEMENT OF CERTAIN LAND CLAIMS OF THE BAY MILLS INDIAN COMMUNITY, MICHIGAN

OCTOBER 10, 2002
WASHINGTON, DC

U.S. GOVERNMENT PRINTING OFFICE

84–595 PDF WASHINGTON : 2003

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON INDIAN AFFAIRS

DANIEL K. INOUYE, Hawaii, *Chairman*
BEN NIGHTHORSE CAMPBELL, Colorado, *Vice Chairman*

KENT CONRAD, North Dakota
HARRY REID, Nevada
DANIEL K. AKAKA, Hawaii
PAUL WELLSTONE, Minnesota
BYRON L. DORGAN, North Dakota
TIM JOHNSON, South Dakota
MARIA CANTWELL, Washington

FRANK MURKOWSKI, Alaska
JOHN McCAIN, Arizona,
PETE V. DOMENICI, New Mexico
CRAIG THOMAS, Wyoming
ORRIN G. HATCH, Utah
JAMES M. INHOFE, Oklahoma

PATRICIA M. ZELL, *Majority Staff Director/Chief Counsel*
PAUL MOOREHEAD, *Minority Staff Director/Chief Counsel*

CONTENTS

BAY MILLS INDIAN COMMUNITY LAND CLAIM SETTLEMENT ACT

THURSDAY, OCTOBER 10, 2002

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 11:27 a.m. in room 485, Senate Russell Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senator Inouye.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. The Committee on Indian Affairs meets this morning to receive testimony on S. 2986, a bill to provide for and approve the settlement of certain claims to lands in the State of Michigan of the Bay Mills Indian Community.

[Text of S. 2986 follows:]

October 10, 2002

SENATE COMMITTEE ON INDIAN AFFAIRS

PREPARED STATEMENT OF

BERNARD BOUSCHOR, CHAIRMAN

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

For the Hearing on

S. 2986

Bay Mills Indian Community Land Claim Settlement Act

My name is Bernard Bouschor, and I am the Chairman of the Sault Ste. Marie Tribe of Chippewa Indians (the "Sault Tribe"), a position that I have held for 17 years. The Sault Tribe opposes S. 2986. This bill purports to settle a land claim, but in reality it would enlist Congress in opening the Indian Gaming Regulatory Act to another casino scam. The Sault Tribe has a stronger claim to the land in question than Bay Mills, but we are not included in the bill. Bay Mills has already lost its claim in court and has no viable claim to settle. The bill will not clear anyone's title, as the alleged beneficiaries of the bill, the Charlotte Beach landowners, have concluded in a statement from their attorney included in the attached exhibits. The bill may well interfere with other Michigan tribes' rights under our tribal-state gaming compacts negotiated and approved

under IGRA. Finally, it is another step in the hijacking of federal Indian policy by non-Indian gaming interests, and would further distort the federal-tribal relationship in a way that tarnishes tribes to their future detriment. I would like to amplify on each of these points.

I. The Sault Tribe Has a Claim to the Charlotte Beach Lands.

The Sault Tribe has a direct and vital interest in this bill. We share the claim. We are a much larger tribe than Bay Mills. With almost 30,000 members, we are one of the largest Indian tribes in the country and by far the largest in Michigan. In fact, we have more members than all of the other eleven tribes in Michigan combined. Our territory is the eastern Upper Peninsula of Michigan, and our government is headquartered in Sault Ste. Marie, about 20 miles east of the Bay Mills Reservation.

We share a common, overlapping ancestry with Bay Mills. Because of this common ancestry, we have just as strong a claim to the Charlotte Beach lands as does Bay Mills. This is no idle assertion. That very issue was adjudicated in federal court and affirmed by the Sixth Circuit, which stated: [1]

> We are satisfied that the evidence establishes the existence of two separate tribes, both of which trace their ancestry to the two Chippewa bands headed by O-Shaw-Wan-O and Shaw-wan and both of which therefore have a potential interest in the Charlotte Beach property.

[1] Bay Mills Indian Community v. Western United Life Assurance Co., 2000 WL 282455 (6th Cir., March 28, 2000). A copy of the decision is attached as Exhibit A.

Since we share the claim with Bay Mills but did not join in their lawsuit, the federal court dismissed their case, finding that the Sault Tribe was an "indispensable party." Bay Mills could not pursue the claim to the land without us.

II. The Bill Will Not Help the Landowners.

The bill purports to incorporate a settlement agreement between the State of Michigan and Bay Mills. The agreement recites that the Governor "desires to settle the land claim for the benefit of … the affected Charlotte Beach landowners," and goes on to state that the parties believe that the settlement will "lead to a clearing of title of the Charlotte Beach lands."[2] These statements are a sham. The bill does nothing for the landowners, and both the State and Bay Mills know it.

You don't have to take the Sault Tribe's word for it. The landowners themselves have reached that conclusion. They have prepared a statement for the Committee through their attorney, which we have attached.[3] That statement captures something of what the landowners have already been through, and just how enactment of the bill will make their situation worse.

Why would the landowners oppose the bill? Because it leaves them worse off than without its passage. They know the Sault Tribe has a claim to their land, and the bill does not address that claim. Since the courts have ruled that we have whatever claim

[2] *Settlement of Land Claim*, attached as Exhibit B. Attached as Exhibit C.

[3] Prepared Statement of Leeanne Barnes Deuman, attached as Exhibit C.

Bay Mills has, and since we haven't settled that claim and have been excluded from this bill, the landowners know that their title will not be cleared. In fact, it will be even more clouded, since Congressional ratification of the claim will only strengthen our own claim. The landowners cannot get relief and clear title unless and until the Sault Tribe is included in the bill.

III. Bay Mills Has Already Lost its Claim in Court.

The Sault Tribe claim is in fact a more serious threat to the landowners than is the Bay Mills claim. Bay Mills has already lost on the merits of its claim, in a case that went all the way to the Supreme Court. This is another part of the scam: having lost its claim in court, Bay Mills seeks to enlist Congress in transmuting a lost claim into casino gold.

Bay Mills and the State have been arguing that the claim was dismissed on procedural grounds and so retains vitality. This attempts to confuse and hide the true result of the litigation. The story is somewhat complicated, since it involves two lawsuits, but the result of these cases is clearly the foreclosure of all of the Bay Mills claims.

The claim to Charlotte Beach lands stems from an 1857 deed from a non-Indian couple, Boziel Paul and his wife, to the Governor of Michigan. The deed purported to convey the land to the Governor in trust for the benefit of the two Chippewa bands mentioned in the passage quoted in the 6th Circuit opinion quoted in Section I, above. The Pauls had obtained the land by federal land patent in 1855. The Governor neither

acknowledged nor acted on the deed, and about 30 years later the Charlotte Beach lands were sold for back taxes. The Charlotte Beach claim, then, focuses on actions taken (or not taken) by the governor and the State.[4]

Bay Mills filed two lawsuits asserting a claim to the Charlotte Beach land: a federal action against the Charlotte Beach landowners and their title companies,[5] and a claim against the State filed in the Michigan Court of Claims.[6] The cases did not differ materially on the legal theories or claims presented. In fact, the federal case is replete with claims against the State even though the state was not a party. The difference was in the relief sought: primarily return of the land in the federal suit, damages in the state suit. Two suits were needed because the State could not be sued for damages in federal court, and not because of any difference in the suits based on the facts, applicable law, or legal claims.

The federal action was dismissed on procedural grounds – the absence of the Sault Tribe from the case. That decision does not constitute an adjudication of the claims on the merits and does not by itself preclude litigation of the claims by Bay Mills. However, the same claims were involved in the state case, and in *that* case *all* of the Bay Mills claims were disposed of on the merits or on procedural grounds (primarily statute of limitations) that bar litigation in any court.

---

[4] These facts are briefly stated in the 6th Circuit opinion, Exhibit C.
[5] *Bay Mills Indian Community v. Western United Life Assurance Co., et al.*, W.D. Mich. No. 2:96-CV-275. The complaint filed in the case is attached as Exhibit D.
[6] *Bay Mills Indian Community v. State of Michigan, et al.*, Mich. Ct. App. Docket No. 218580. The opinion of the appellate court is attached as Exhibit E.

Since Bay Mills lost on its claims in state court, it cannot relitigate them in federal court or any other forum under well established principles of collateral estoppel. Put simply, Bay Mills had its day in court, and does not get another one. The federal claims (primarily, that the land was not subject to taxation, and that its alienation violated the Indian Nonintercourse Act) were all lost on the merits in state court. Bay Mills had raised a number of state law claims in the federal action, but these are all what is called "pendent" claims, over which the federal court has no independent jurisdiction. They can only be litigated in federal court as ancillary to and arising out of the same circumstances as the federal claims.

These pendent state claims cannot be brought in federal court at this point, because the state courts have already decided them and there are no surviving federal causes of action to which they may be appended. The statute of limitations bars the claims in federal court because the issue was a matter of state law applied to state claims by a state court.

A federal action on the Bay Mills claims is thus no longer viable. It would be futile because collateral estoppel bars relitigation of the claims based in federal law, and the state court has already disposed of the state law claims in a way that precludes their being raised again. Bay Mills simply has no claim left. Whether lost on the merits or forever time-barred, the claims are gone.

The claim to the Charlotte Beach lands is still viable -- but only because the Sault Tribe could litigate them. Bay Mills has no claim, but we do. We were not party to

either of the Bay Mills cases and so are not bound by the results. If there is reason to settle the claim with any tribe, it is with the Sault Tribe, not Bay Mills. Through the pretense of a viable claim, Bay Mills seeks a windfall for its loss. If this bill passes, it would invite tribes who have lost claims in court, perhaps on statute of limitations grounds, to seek "settlement" of those claims in order to obtain a casino. There must be hundreds of such situations just waiting to be resurrected.

IV. The Bay Mills Case Was a Scam from the Start.

It is clear that Bay Mills filed its claim in order to obtain a casino by exploiting a loophole in the Indian Gaming Regulatory Act that allows tribes to conduct gaming on lands taken in trust after the passage of IGRA if the land is obtained in settlement of a land claim.[7] Congress would be torturing the meaning of this provision of IGRA if it allowed Bay Mills to parlay its situation into a casino on land 300 miles from its reservation to which it has no historic connection. Many of the reasons why this is so are presented in the statement of George Bennett from the Grand Traverse Band and will not be repeated by me. However, we want the Committee to know that the Bay Mills claim was clearly filed *because of* the IGRA loophole.

The Charlotte Beach claim did not originate with Bay Mills. It was the product of a Detroit area attorney who developed it specifically as a vehicle to obtain an IGRA casino. This attorney approached the Sault Tribe first with the claim, but we turned him

[7] 25 U.S.C. §2719(b)(1)(B)(i.).

down. He then took the claim to Bay Mills, who joined him up on his scheme. This attorney, Robert Golden, then represented Bay Mills in both court cases. The goal never was to recover the Charlotte Beach lands.

From its inception, the federal case had the air of a collusive suit. The federal complaint was filed on October 18, 1996. On October 10, 1996 – barely a week before suit was filed – one James F. Hadley purchased land within the Charlotte Beach claim area.[8] A few months later, on March 19, 1997, Hadley, representing himself, entered into a settlement agreement with Bay Mills.[9] Mr. Hadley just happened to own some land in Auburn Hills, a Detroit suburb, that he was willing to give Bay Mills in return for clearing his title to the Charlotte Beach lands, and he was also willing to sell Bay Mills land adjacent to that Auburn Hills parcel. The settlement was conditioned upon the Secretary of the Interior taking the Auburn Hills land into trust. The district court entered a consent judgement incorporating the settlement terms on March 28, 1997.

The goal was, of course, a suburban Detroit casino. Bay Mills soon filed an application to have the Auburn Hills land taken into trust for gaming purposes.[10] The application languished in the Interior Department, which later decided that the IGRA loophole for a land claim settlement required ratification of the settlement by Congress. When it became apparent that the trust approval was not forthcoming, Bay Mills moved

[8] The deed conveying this land is attached as Exhibit G.
[9] The Settlement Agreement is attached as Exhibit H.
[10] The first page of the trust application is attached as Exhibit I.

on to pursue a different casino site, and the consent judgment with Hadley was set aside on August 16, 1999.

Despite mounting opposition to the lawsuit by the Charlotte Beach landowners, Bay Mills tried to obtain other settlement agreements that would result in a casino. They focused on land in the small community of Vanderbilt, Michigan and developed several settlement proposals ofr obtaining the land. These proposals generally provided for the creation of a settlement fund with which the tribe would purchase a casino site. The final such proposal was circulated at the end of 1998.

Most landowners firmly opposed settlement, and they moved to dismiss the federal case because the Sault Tribe was not a party. In order to defend against this motion, Bay Mills attempted to show that the Sault Tribe was not properly recognized as a tribe and so had no rights in the property.[11] Thus Bay Mills tried to prove that we were not a tribe in order to pursue its casino.

The district court dismissed the federal case on December 11, 1998. As we showed earlier, the 6th Circuit affirmed this decision. Bay Mills later lost the state case in the Michigan Court of Claims, lost on appeal in the Michigan Court of Appeals on April 23, 2001, and was denied review by the Supreme Court on March 18, 2002.[12]

Long before the Supreme Court delivered the final blow, Bay Mills had switched from the courts to Congress in search of its casino. The site has changed – first Auburn

[11] See 6th Circuit opinion, Exhibit A, attached. The validity of Sault Tribe organization under federal law was upheld in City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157 (D. D.C. 1980).
[12] Bay Mills Indian Community v. Michigan, 122 S.Ct. 1303 (2002) (mem.)

Hills, then Vanderbilt, now Port Huron – but the goal has always been the same. Bay Mills ginned up a claim, entered into a suspicious settlement with a person who bought into the claim as a defendant eight days before suit was filed, attacked our tribe's very existence, and now seeks to put one over on Congress, all in pursuit of its goal. This is hardly a track record that Congress should reward.

V. Bay Mills is Apparently Fronting for Non-Indian Interests.

At this point, one could well be wondering why this bill is before Congress, given the points we have raised. Why is the state willing to settle the claim it had won? Why have the landowners been excluded from the process? How is it that two tribes share the claim, but that only one tribe -- and the losing tribe, at that – is included in the bill? The answer is simple: Bay Mills is apparently fronting for a group of non-Indian movers and shakers who have carried Bay Mills along on their casino quest.

The Sault Tribe, on the other hand, is fronting for no one. We have five tribally owned and operated casinos on our Indian land in the eastern Upper Peninsula, and we have never had outside management involved in them in any way. We also own and operate one of the three state-licensed casinos in Detroit, and are proud of the fact that we are the first and so far only tribe to hold a state license for a metropolitan casino, completely unrelated to our tribal status or IGRA. We manage that casino without outside management as well.

It is the shame of current federal Indian policymaking that powerful non-Indian gaming interests, or those who want to become involved in gaming, have latched on to tribes who have proven all too willing to lend themselves out to such interests. Bay Mills is just one of many examples around the country. Non-Indian money and influence has led to a steady expansion of IGRA casinos and an explosion of IGRA loopholes through which those of wealth and power pass, Indian tribes in tow.

We've watched the trend in outside management grow in Michigan. Michigan has five tribes that have obtained federal recognition since IGRA was passed, and all five have outside management. Of the seven tribes in Michigan prior to IGRA's passage, not one has outside management – Bay Mills will become the first if this bill passes. There is a surge of groups seeking federal recognition as tribes in Michigan, and all have deals with outside interests. In fact, it seems that they are seeking federal recognition at the instigation of those outside interests.

Federal Indian policy has been hijacked by these interests, who are increasingly to be found behind every tribal recognition effort, every "settlement" of a land claim, every "restoration" of tribal lands. This distorts Indian policy in favor of these interests and weakens the voice of those tribes who have not been enlisted to front for such interests. The non-Indian gamers trod a familiar path in Indian affairs. Before them others used Indian tribes for their own purposes: there were the coal, oil, and gas interests; before that, land speculators; before that, the fur traders.

IGRA increasingly stands less and less for tribal opportunity and more and more for opportunism. It should be our goal to stem this tide, not assist it in rising.

VI. The Settlement Agreement May be Legally Flawed.

In addition to all of the problems set forth above, there are a number of legal problems with the bill. The bill will likely be the subject of a legal challenge if passed, by us and by others as well. Some of these problems are highlighted in the statement of George Bennett on behalf of the Grand Traverse Band. I want to address only two of our legal objections here.

Our first objection is that this bill appears to divest our tribe, and the five other tribes who signed gaming compacts simultaneously with us and Bay Mills, from rights secured by the compacts.[13] Section 9 of the compact of each of the tribes provides:

> An application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application.

Since the bill and the settlement agreement it ratifies are specifically based on a provision of 25 U.S.C. §2719 that deals with settlement of a land claim, the taking of the Port Huron lands into trust for gaming purposes appears to fall under Section 9 of the compact. Yet the Governor and Bay Mills have "agreed" that Section 9 does not apply to

[13] Besides Sault Tribe and Bay Mills, these tribes are the Hannahville Indian Community, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Keweenaw Bay Indian Community, and Saginaw Chippewa Tribe of Michigan.

the Port Huron lands.[14] This is a blatant attempt to deprive the Sault Tribe and the other compacting tribes of their right to share in the casino revenues under Section 9. The provision is in each of the compacts, and each tribe appears to be a third party beneficiary of the provision in every other tribe's compact. Bay Mills and the Governor cannot wish or waive this contract right away.

It happens that the seven tribes have actually entered into an agreement on revenue sharing that implements Section 9. That Inter-Tribal Agreement, signed by all tribes on May 25, 1994, is attached as Exhibit I. Under the agreement, the Sault Tribe would be entitled to 21% of the net gaming revenues from a Bay Mills casino in Port Huron if that casino falls within Section 9.

This is the only revenue sharing agreement among the tribes. If it does not apply to Port Huron, then it may be that the land cannot be taken into trust for gaming purposes because that action would violate the compact, and hence IGRA. If Congress purports to extinguish rights that are secured by Section 9, that would be an illegal taking or an impairment of our contract rights.

The settlement agreement also purports to make a number of changes that implicate the tribal-state compact. Its provisions effectively double the length of the compact term and change the financial obligations of Bay Mills, all without any legislative approval. The compacts were originally approved by the Michigan

[14] See Ex. ___, ¶ 5, p. 4.

Legislature, as required by Section 11(B) of the compacts. The agreement appears to circumvent the legislature in amending the compact.

Conclusion

S.B. 2986 is a very bad idea. It accomplishes nothing that it purports to do and much that should not be done. The bill does not clear anyone's title. It does not include the Sault Tribe and has no effect on our claim. It revives a claim Bay Mills has lost, rewarding shady dealings in the process. Indian policy should suffer no further distortion in favor of non-Indian interests lurking behind tribes like Bay Mills. If Congress sanctions this sham, the lines will grow long of those who will surely follow.

H.R. 831, TO PROVIDE FOR AND APPROVE THE SETTLEMENT OF CERTAIN LAND CLAIMS OF THE BAY MILLS INDIAN COMMUNITY; AND H.R. 2793, TO PROVIDE FOR AND APPROVE THE SETTLEMENT OF CERTAIN LAND CLAIMS OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS.

LEGISLATIVE HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

Thursday, June 24, 2004

Serial No. 108-100

Printed for the use of the Committee on Resources

Available via the World Wide Web: http://www.access.gpo.gov/congress/house
or
Committee address: http://resourcescommittee.house.gov

U.S. GOVERNMENT PRINTING OFFICE

94-455 PS WASHINGTON : 2003

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON RESOURCES

RICHARD W. POMBO, California, *Chairman*
NICK J. RAHALL II, West Virginia, *Ranking Democrat Member*

Don Young, Alaska
W.J. "Billy" Tauzin, Louisiana
Jim Saxton, New Jersey
Elton Gallegly, California
John J. Duncan, Jr., Tennessee
Wayne T. Gilchrest, Maryland
Ken Calvert, California
Scott McInnis, Colorado
Barbara Cubin, Wyoming
George Radanovich, California
Walter B. Jones, Jr., North Carolina
Chris Cannon, Utah
John E. Peterson, Pennsylvania
Jim Gibbons, Nevada,
Vice Chairman
Mark E. Souder, Indiana
Greg Walden, Oregon
Thomas G. Tancredo, Colorado
J.D. Hayworth, Arizona
Tom Osborne, Nebraska
Jeff Flake, Arizona
Dennis R. Rehberg, Montana
Rick Renzi, Arizona
Tom Cole, Oklahoma
Stevan Pearce, New Mexico
Rob Bishop, Utah
Devin Nunes, California
Randy Neugebauer, Texas

Dale E. Kildee, Michigan
Eni F.H. Faleomavaega, American Samoa
Neil Abercrombie, Hawaii
Solomon P. Ortiz, Texas
Frank Pallone, Jr., New Jersey
Calvin M. Dooley, California
Donna M. Christensen, Virgin Islands
Ron Kind, Wisconsin
Jay Inslee, Washington
Grace F. Napolitano, California
Tom Udall, New Mexico
Mark Udall, Colorado
Aníbal Acevedo-Vilá, Puerto Rico
Brad Carson, Oklahoma
Raúl M. Grijalva, Arizona
Dennis A. Cardoza, California
Madeleine Z. Bordallo, Guam
George Miller, California
Edward J. Markey, Massachusetts
Rubén Hinojosa, Texas
Ciro D. Rodriguez, Texas
Joe Baca, California
Betty McCollum, Minnesota

Steven J. Ding, *Chief of Staff*
Lisa Pittman, *Chief Counsel*
James H. Zoia, *Democrat Staff Director*
Jeffrey P. Petrich, *Democrat Chief Counsel*

C O N T E N T S

LEGISLATIVE HEARING ON H.R. 831, TO PROVIDE FOR AND APPROVE THE SETTLEMENT OF CERTAIN LAND CLAIMS OF THE BAY MILLS INDIAN COMMUNITY; AND H.R. 2793, TO PROVIDE FOR AND APPROVE THE SETTLEMENT OF CERTAIN LAND CLAIMS OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS.

Thursday, June 24, 2004
U.S. House of Representatives
Committee on Resources
Washington, DC

The Committee met, pursuant to notice, at 2:21 p.m., in Room 1324, Longworth House Office Building, Hon. Richard W. Pombo [Chairman of the Committee] presiding.

Present: Representatives Pombo, Young, Duncan, Jones, Gibbons, Hayworth, Flake, Rehberg, Cole, Pearce, Rahall, Kildee, Faleomavaega, Pallone, Christensen, Inslee, and Bordallo.

Also Present on Dais: Representative Stupak.

STATEMENT OF HON. RICHARD POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

The CHAIRMAN. The Committee on Resources will come to order.

The Committee is meeting today to hear testimony on H.R. 831 and H.R. 2793. They are intended to settle land claims asserted by the Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians. The bills are sponsored by Michigan Representatives Candice Miller and John Dingell.

The CHAIRMAN. Bay Mills and Sault Ste. Marie have reservations on the Upper Peninsula of Michigan, and the land claims pertain to an area called Charlotte Beach, which is also on the U.P. The premise of these bills is to extinguish the land claims in exchange for placing lands in trust for the purpose of gaming several hundred miles away from the tribes' existing reservation. Casinos would be constructed on the trust lands pursuant to the Indian Gaming Regulatory Act or as specified in the terms of the bills and the Tribal-State settlement agreements the bills ratify.

A few months ago, our distinguished former Chairman of this Committee, Mr. Young of Alaska, added similar legislation on

Port Huron is a city with a population of 32,000 people. We are the county seat for St. Clair County, which has a population of 175,000. We sit on the US/Canadian Border just across the St. Clair River from Sarnia, Ontario. We currently have an unemployment rate approaching 20 percent. In addition, we have many citizens that are below the poverty level. We are very much a blue collar community.

Our community has been devastated by the loss of employment opportunities; we had two industries that provided 7,500 jobs. One company had 5,000 employees and another had 2,500 employees. The one with 5,000 employees has reduced their workforce to 500 employees and the company with 2,500 employees closed their doors. We have an active Economic Development Alliance that helps promote our industrial park. Many of the tenants in our industrial park are suppliers for the auto industry. Unfortunately, when the Big Three (Ford, GM, and Chrysler) say they need to cut their costs, they turn to their suppliers, which means we are the first to suffer from any downturn and the last to recover. Whenever we get a new tenant in our park, another one closes its doors.

Our community is in desperate need of employment opportunities. That's why we asked the Bay Mills Tribe to consider resolving their land claim by accepting land in Port Huron for their economic development. With the proposed casino and their anticipation of employing 3,000 to 3,500 people at an above average wage, the economic benefit to our community would be tremendous. Those wages would be turned over many times in our community. You will probably hear from people who object to gaming and casinos. We have heard from those people as well. However, our community had an advisory vote in 2001 and the proposed casino won approval with over 54% of the vote. The main reason that the vote passed is because our area is already exposed to casino gaming. The Canadian government operates a casino just across the Blue Water Bridge (literally 500 yards from our site) in Port Huron. It takes less than ten minutes to get to the Canadian casino. 75-80 percent of their customers come from the States. So to hear people say they don't want another casino in Michigan, our people are already gambling and they are doing it in Canada. Unfortunately, our community doesn't receive any benefit. No jobs, no money for our local government, no money for schools and no money for our social services.

There are numerous entities that would benefit from a casino if it were located in Port Huron. I have included letters of support from my city council, the Economic Development Alliance of St. Clair County, the Superintendent of the Intermediate School District of St. Clair County, the United Way of St. Clair County as well as letters from local labor unions that support the casino. It is also important to note that Port Huron is the only border city in the northern tier that doesn't have a casino.

If the proposed Bay Mills Indian Community land claim settlement is given Congressional approval, the 3,000 plus jobs that would be created would make the casino the largest employer not only in Port Huron but in St. Clair County as well. The City of Port Huron needs these jobs. The region needs these jobs. I am here to speak on behalf of my community to request your support for immediate passage of H.R. 831, the Bay Mills Indian Community Land Claim Settlement Act. We cannot afford to wait any longer for this legislation to be enacted as it will result in a massive boost to our economy that will strengthen the Port Huron community and the lives of our citizens. I also wish to express my deepest gratitude to our Congresswoman, Candice Miller, for championing H.R. 831 and fighting so hard to do her part to turn the economy around for her constituents. I urge the chairman and the members of this committee to help her do right by our community.

The CHAIRMAN. Thank you.

Mr. Shagen?

STATEMENT OF PAUL W. SHAGEN, ESQ., SENIOR TRIBAL ATTORNEY, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS OF MICHIGAN, SAULT STE. MARIE, MICHIGAN

Mr. SHAGEN. Mr. Chairman and members of the Committee, thank you for the opportunity to testify today on behalf of the Sault Ste. Marie Tribe of Chippewa Indians and our chairman, Bernard Bouschor. As some of you may be aware, Chairman Bouschor looked forward to appearing before this Committee on this important piece of legislation, but was unable to attend because we are

in the process of concluding a tribal election today, so he is back in Sault Ste. Marie.

I am a Member of the Sault Tribe's Board of Directors. For a Sault Tribe, that is the Tribal Council. I was first elected in 1998. I am also a senior tribal attorney for Sault Tribe.

With nearly 30,000 members, we are one of the largest Indian tribes in the country and by far the largest in Michigan. The Sault Tribe and the Bay Mills Indian Community both hold claims to land in Charlotte Beach, Michigan, that was deeded in trust to the Governor in 1857 for the use and benefit of the tribes. The Charlotte Beach lands were later sold without the knowledge of either tribe. As a result, the tribes were denied their rights to their land and the current homeowners faced clouded title and greatly diminished property values.

In 2002, Michigan Governor John Engler reached separate land claims settlements with the Sault Tribe and Bay Mills. Under the settlements, the tribes agreed to relinquish all claims to the Charlotte Beach lands, and in return Governor Engler concurs in the provision of the alternative lands for the tribes. The settlements are the basis of the bipartisan legislation before the Committee today.

The Romulus site is of interest to the Sault Tribe in large part because the Detroit Metropolitan Wayne County Airport is located there. Many don't realize that Detroit Airport is one of the 10 busiest in the United States. We believe that a nearby casino would attract travelers and customers that are not now visiting downtown Detroit. The Romulus casino will also provide revenue for State and local Governments. We estimate that it would likely produce an additional $11 million a year in revenue to local Governments. In addition, we have agreed to pay an additional percentage of net gaming revenue from both the new casino and our casinos in the Upper Peninsula for a total of $32 million in revenue annually to the State. These additional fees are not currently paid by most competing tribes in Michigan.

We do not see a new casino in Romulus as a threat to Detroit. In fact, while we consider the possibility of a Romulus casino, we are planning to break ground on a permanent Greektown casino at a total cost of $450 million. A 2003 report by two Hillsdale College economists concluded that the addition of a Romulus casino would not saturate the Detroit market.

Nonetheless, we understand why our competitors in Detroit may raise concerns about a Romulus casino. We would, however, specifically ask Detroiters to understand the legal and historical circumstances that led to our settlement. We are committed to Detroit, and have indicated our willingness, as the Honorable John Dingell indicated, to work with the city and to ensure that Detroit's finances are not adversely affected by a Romulus casino.

Deputy Assistant Secretary Martin has raised a series of concerns both in her testimony today and in her letter that she submitted about this legislation. The Sault Tribe appreciates her comments and looks forward to working with Interior on addressing these issues, which we believe can be overcome. I would like to quickly address a couple of her concerns.

She argues that the gaming-related provisions of the agreements should be evaluated through compact amendments submitted to Interior. Unfortunately, compact amendments cannot resolve the Charlotte Beach land claims. Only Congress has the authority to extinguish tribal title to land.

Second, she suggested the revenue-sharing provisions of the agreements could violate IGRA. In response, I would note that Interior has approved compacts for every tribe in Michigan which include the exact same revenue-sharing provisions.

Third, she expresses concern about the impact of the settlements on Section 9 of the Michigan compacts. Section 9 was included in the compacts for the benefit of the Governor, and in this case, Governor has chosen to waive Section 9.

And also, just to talk briefly to the policy consideration that was raised by Secretary Martin, in 1994, the Department of Interior made a favorable finding which would have allowed tribal gaming by the Sault Tribe on after-acquired property in downtown Detroit. The reason that didn't occur was because the Governor of Michigan did not concur with that determination. It wasn't because of any objections from the Department of Interior.

We have also heard some concerns about the possible precedent of opening the casino on land at a distance from our reservation. And we don't view this as being an issue. Interior has reported that there are at least four tribes that have already done so, and one of these is in Michigan in the Upper Peninsula, Keweenaw Bay Indian Community. Another is in Wisconsin, where a tribe has a casino in Milwaukee, more than 200 miles from the tribe's reservation. Moreover, this is consistent with IGRA in that the settlement of a land claim exemption covers this exact situation before you today. Opponents may wish to graft a distance limit on the law, but it simply is not there.

In conclusion, we believe that H.R. 2793 and H.R. 831 deserve the support of the members of the Resources Committee. The bills will do several things. First, they will clear title and restore property values for the Charlotte Beach homeowners. Second, they will provide the tribes a fair compensation for the land to which they were entitled. And third, it will bring jobs and economic development to the communities that have voted to welcome tribal casinos.

Mr. Chairman, we look forward to working with you and the members of the Committees on this important piece of legislation and we thank you for the opportunity to testify today.

[The prepared statement of Mr. Shagen follows:]

Statement of Paul W. Shagen, Esq., Member, Board of Directors and Senior Tribal Attorney, Sault Ste. Marie Tribe of Chippewa Indians, Sault Ste. Marie, Michigan

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on behalf of the Sault Ste. Marie Tribe of Chippewa Indians and our Chairman, Bernard Bouschor. As you know, Chairman Bouschor looked forward to appearing before the Committee on this important legislation but is unable to attend because our tribe is concluding our election today. In his absence, I am pleased to be here to represent the Tribe.

I am a Member of the Sault Tribe's Board of Directors, which is our tribal council, and also a senior tribal attorney for the Sault. I was first elected to the Board in 1998. With nearly 30,000 members, we are one of the largest Indian tribes in the country and by far the largest in Michigan. Our territory is the eastern Upper Peninsula of Michigan, and our government is headquartered in the city of Sault Ste.

Marie. Although most of our members are in the Upper Peninsula, the next highest concentration of members are in Wayne County, in suburban Detroit.

We trace our roots to the Original Bands of the Sault Ste. Marie Chippewa Indians, which were organized tribes long before contact with white explorers in the 1600s. The Tribe's modern government began to take shape in the 1940s, when a group of Sugar Island residents began meeting to review their common history and develop a case for recognition. After more than 20 years of work, the Sault Tribe was recognized by the Secretary of the Interior in 1972. Land was taken into trust in 1974, and our Constitution was adopted in 1975.

Since the 1970s, the Sault Tribe has created a successful, business-based economy to provide programs, services, and jobs for tribal members. The Tribe controls five Kewadin casinos in Northern Michigan and 15 non-gaming businesses. We employ approximately 2,500 people and are northern Michigan's largest employer. We also own a majority interest in the Greektown Casino in Detroit, which is not an Indian casino.

The Charlotte Beach Lands and the Settlement with State of Michigan

The Sault Ste. Marie Tribe of Chippewa Indians and the Bay Mills Indian Community both hold claims to land in Charlotte Beach, Michigan that was deeded in trust to the Governor of the State of Michigan in 1857 for the use and benefit of the Tribes and their predecessors.

The Charlotte Beach lands, approximately 125 acres total, were later sold without the knowledge or agreement of the Sault Tribe or Bay Mills. As a result, the Tribes were denied the rights to their land, and the current homeowners face clouded title, uncertain property rights, and greatly diminished property values. Litigation to resolve title was unsuccessful because the Sault Tribe, which was not a party to the central case, was found to be an "indispensable party." The Sixth Circuit court noted: "We are satisfied that the evidence establishes the existence of two separate tribes...both of which...have a potential interest in the Charlotte Beach property." Companion litigation in state court also failed to remove the cloud of title to the Charlotte beach parcels.

In 2002, Michigan Governor John Engler reached separate land claim settlements with the Sault Tribe and with Bay Mills. In short, under the settlements, the Tribes agree to relinquish any and all legal and equitable claims to the Charlotte Beach lands, and in return, the Governor concurs in the provision of alternative lands in Michigan for the Tribes. The settlements are the basis of the bipartisan legislation before the Committee today, and enactment of H.R. 2793 and H.R. 831 will ratify and implement the terms of the two settlements.

The agreements were the product of lengthy negotiations, during which Governor Engler embraced two priorities: 1) that any casino subsequently built on the alternative lands have no real impact on other tribes; and 2) that any new casino have prior local support. To accomplish the first goal, the Sault Tribe settlement limited the alternative lands to parcels in specific communities. To accomplish the second, our settlement explicitly requires the approval of local communities.

Alternative Lands

Our settlement provides for not more than two parcels of alternative lands, one of which could be in Otsego County, and the second of which could be in one of the following three locations: Monroe County; the City of Romulus; or the City of Flint. In each case, the settlement requires that the location be approved by the county or city, and in the case of Otsego County, it requires also the approval of the Little Traverse Bay Bands of Odawa Indians.

Notwithstanding the various options included in our settlement with the State—and the possibility of securing alternative lands in two locations—we have voluntarily elected to pursue only the possibility of alternative land in Romulus. We are excited at the prospect of bringing jobs and economic development to Romulus, and we have worked closely with Mayor Lambert to develop a plan that meets the needs of the City and its residents. We are also pleased that the voters of the city have already shown their support, approving a referendum last year to allow the casino gaming contemplated by our settlement agreement with the state to be conducted within the corporate limits of Romulus.

Opportunity for Romulus and Its Residents

A Sault Tribe casino in Romulus, if approved, would have an enormous positive impact on the community. It would result in scores of construction jobs while the casino is being built and add 3,500 permanent new positions at the casino once it is open. Other than supervisory personnel, the jobs will be high-paying, union jobs. We have already received more than 500 job applications from Romulus residents eager to work at the casino.

We expect that a casino in Romulus would be a magnet for other development in the city, including hotels, restaurants, and recreational facilities like a world-class golf course—all of which would bring jobs, taxes, and greater spending in the community.

The Romulus site is of interest to us in large part because the Detroit Metropolitan Wayne County Airport is located there. Many do not realize that the Detroit airport is one of the ten busiest in the United States, with more traffic than at JFK in New York or the airports in Newark, San Francisco, Seattle, or Miami. As Northwest Airline's primary international hub, millions of passengers travel through the Detroit airport on their way to or from international and domestic destinations. We believe a nearby casino, with shuttle service from the terminals, would attract travelers with short layovers—travelers not now visiting downtown Detroit or its casinos 20 miles away.

The Romulus casino will also provide revenue for the State and for local governments. We estimate that it would likely produce approximately $6 million in slot revenue to local governments and $5 million in property taxes for related development on land adjacent to the casino. In addition, the casino will generate about $24 million per year in revenues to the State, plus additional state revenues of about $8 million a year from our casinos in the Upper Peninsula under provisions of the agreement. The total increase in revenue to the State of Michigan will be approximately $32 million per year, not including additional revenue from the Bay Mills casinos.

Moreover, the revenue from the Romulus Casino will enable the Sault Tribe itself to provide needed services for our own people in our community, including health care, housing, law enforcement, education, and other social services.

Impact on Detroit and Detroit Casinos

Our friends from Detroit may express the concern that a casino in Romulus will have a negative impact on the non-Indian casinos that operate there. Obviously, as the majority owners of one of those casinos, Greektown, this is a subject to which we have devoted considerable attention.

The Sault Tribe joined with city leaders and developers in Detroit in the 1980s—before any other casino company took Detroit seriously—in an effort to bring gaming jobs, revenues, and tourists to the city. We took a risk in Detroit because we knew gaming there could benefit both the city and our Tribe. In the years since we opened Greektown, our vision has been proven correct. The Greektown Casino employs 2,300 people and pays them $100 million annually. We target a significant percentage of our $171 million spending on Detroit-based businesses, including small businesses and those owned by minorities. Greektown has paid more than $160 million in gaming taxes to the city and state.

We do not see a new casino in Romulus as a threat to Greektown. In fact, while we consider the possibility of a Romulus casino, we are also planning to break ground on a permanent Greektown Casino at a total project cost of about $450 million. The new casino-resort will have 3,300 employees and include a 400-room hotel, 100,000 square feet of gaming space, a spa, a 1,500-seat theater, and a 4,000-space attached garage.

The Sault Tribe has also commissioned studies to analyze the impact of a Romulus casino on the casinos in Detroit. A 2003 report concluded that the addition of a casino in Romulus would not saturate the Detroit market. The study, by two Hillsdale College economists, suggested that the potential size of the Detroit/Windsor market could approach that of the Chicago market. Even if a new casino in Romulus generated $325 million in revenue, the Detroit/Windsor market would remain nearly $500 million smaller than Chicago.

Nonetheless, we can understand why Detroit's leaders would raise concerns about a tribal casino about 20 miles from the downtown casinos. As in any metropolitan area, there is natural competition between businesses in the suburbs and the city. We would, however, respectfully ask Detroiters to understand the legal and historical circumstances that led to our settlement with Governor Engler. And we have indicated our willingness to work with the city to ensure that Detroit's finances are not adversely affected by the opening of a casino in Romulus.

Need for Congressional Action

The agreements will take effect when Congress approves the bipartisan legislation to ratify the settlements, extinguish the Tribes' land claims, and authorize the Secretary of the Interior to take the alternative lands into trust. Together, H.R. 2793 and H.R. 831 would accomplish these objectives. Only passage of both bills will clear title to the Charlotte Beach lands.

Recognizing this, the Sault Tribe is working closely with Bay Mills in support of the two bills. Last year, our Board of Directors passed a resolution in support of the Bay Mills legislation. The Bay Mills Executive Council considered and approved a similar measure with respect to our legislation. In a memorandum of understanding between the two tribes earlier this year, we reiterated our joint support for the enactment of the two bills that would resolve the Charlotte Beach issue.

In conclusion, we believe H.R. 2793 and H.R. 831 deserve the support of the Members of the Resources Committee. The bills will:

- Clear title and restore property values for the Charlotte Beach homeowners;
- Provide the Tribes with fair compensation for the land to which they were entitled; and
- Bring jobs and economic development to communities that have voted to welcome tribal casinos.

Mr. Chairman, we look forward to working with you and Members of the Committee on this important matter, and we thank you for the opportunity to testify today.

The CHAIRMAN. Thank you.

Mr. Lambert?

STATEMENT OF HON. ALAN R. LAMBERT, MAYOR, CITY OF ROMULUS, MICHIGAN

Mr. LAMBERT. Thank you, Mr. Chairman, Committee members and distinguished guests. My name is Alan Lambert and I am the Mayor of the city of Romulus. Romulus is best known for being the home to Detroit Metropolitan Airport. If you have ever flown by commercial airline into Detroit, you have landed in our city. It is a pleasure to be here this afternoon to discuss a very important piece of bipartisan legislation introduced by Republican Congresswoman Candice Miller and Democratic Congressman John Dingell. In this election year, we are glad members of both parties agree that our city and the city of Port Huron should be able to vastly expand our economies by developing casinos that will add 3,500 new jobs to my city and thousands more to Port Huron.

In 2002, Michigan Governor John Engler took steps to settle a land dispute involving land in Charlotte Beach, Michigan to which the Sault Ste. Marie Tribe of Chippewa Indians and Bay Mills Indian Community have claims. To settle the claim, the Land Settlement Agreement signed by Governor Engler provided that the Bay Mills Tribe would be allowed to develop a casino in Port Huron and Sault Ste. Marie would be allowed to develop a casino in Vanderbilt in northern Michigan as well as one in Romulus, Flint, and Monroe.

The Sault Tribe has decided not to seek a casino in Vanderbilt and has chosen Romulus, my city, to be the location of the casino. Under Governor Engler's Land Settlement Agreements, the casino cannot be developed without the approval of the host cities and without the approval of Congress. Our City Council first provided host community approval through a resolution passed by a 5-2 vote. However, we felt this was too important to move forward without a voice of the people. Therefore, a referendum election was held on December 3, 2003, resulting in approval of the casino project in the city of Romulus.

As Mayor, I was a strong supporter of this referendum, for reasons that I will share with you. My reasons for support were simple. The casino will bring 3,500 new, high-paying, permanent jobs to our city of 23,000 people. A casino can be a beautiful

destination-style development that will include a hotel, convention center, and other amenities. It will also draw additional commercial development, such as retail stores, movie theaters, and offices, which our city needs very badly. The referendum also had the support of various local organizations, including unions, the Romulus Police Officers Association, Police Officers Association of Michigan, and the Southern Wayne County Regional Chamber of Commerce.

This casino is a real opportunity for our city and, actually, for all of southeast Michigan. Romulus Casino will provide revenue for the State and for local Governments, including approximately $6 million in slot revenue to the local Governments and $5 million in property taxes for development near the casino. The casino is a tremendous opportunity for the people of our city and for the region.

Because of the proximity to the airport, we have a responsibility to generate a positive economic climate for hotels and airline companies located within our city limits. Our airport is among the largest in the United States and the city of Romulus has the third-highest number of hotel rooms in the State of Michigan. Since 9/11, these businesses have suffered great losses. The casino will open up new opportunities that we could have never dreamed of and generate new businesses for them.

The average household income in Romulus is about $31,000 per year. These casino jobs will average about $40,000 per year, including benefits. We have had interest not only from residents, from our city, but also from people throughout southeast Michigan. At a job fair held last year for 2 days—these are some the applications I would like to show you—we had well over 500 people in the 2 days interested in jobs.

There have been some questions asked about what the impact of a Romulus casino would be on the existing Detroit casinos. A study was commissioned to examine the impact of the proposed casino on our community, including the economic impact of Romulus Casino on Detroit. Professor Gary Wolfram of Hillsdale College conducted the study. He is a noted economist and has real-life experience well beyond the classroom. He has served as deputy director of the Michigan Department of Treasury, appointed by Governor Engler, and also served on the Hill as chief of staff to Congressman Nick Smith.

The study, which I include as an attachment to my written testimony, concluded that a casino in Romulus would not have negative impact on the Detroit casinos. The analysis suggested that the Detroit casino market still has substantial room for growth. The study also concluded that if additional casinos can make Detroit a destination location to out-of-state travelers, the entire Michigan economy may substantially benefit.

In conclusion, a casino in Romulus would be a huge economic generator for our city and all of southeast Michigan, provide 3,500 permanent high-paying jobs, and would generate other types of commercial development that we need, such as offices, retail, and other forms of entertainment. Tax revenue to Romulus, southeast Michigan, and the State of Michigan will be significant. Finally, it would not be a detriment to the city of Detroit.

I urge you to support this very important bipartisan legislation introduced by Congresswoman Candice Miller and Congressman

John Dingell. Our residents supported it via referendum, our elected officials supported it through a host community resolution, and Governor John Engler supported it in the terms of Land Settlement Agreements. Now it needs your support as well. This is very important bipartisan legislation to our city, county, and State.

We thank you very much for your consideration.

[The prepared statement of Mr. Lambert follows:]

Statement of The Honorable Alan R. Lambert, Mayor, City of Romulus, Michigan

Mr. Chairman, Committee Members, Distinguished Guests:

I am Alan Lambert, Mayor of Romulus, Michigan.

Romulus is now best known for being the home to Detroit Metropolitan Airport. If you've ever flown by commercial airline into Detroit, you have landed in our city.

It is a pleasure to be here this afternoon to discuss a very important piece of bipartisan legislation introduced by Republican Congresswoman Candice Miller and Democratic Congressman John Dingell. In this election year, we're glad that members of both parties agree that our city and the City of Port Huron should be able to vastly expand our economies by developing casinos that will add 3,500 new jobs to our city and another 3,000 jobs to Port Huron.

In 2002, Michigan Governor John Engler took steps to settle a land dispute involving land in Charlotte Beach, Michigan to which the Sault Ste. Marie Tribe of Chippewa Indians and the Bay Mills Indian Community have claims. To settle the claim, the Land Settlement Agreements signed by Governor Engler provide that the Bay Mills Tribe would be allowed to develop a casino in Port Huron and the Sault Tribe would be allowed to develop a casino in Vanderbilt, in Northern Michigan, as well as one in either Romulus, Flint or Monroe.

The Sault Tribe has decided not to seek a casino in Vanderbilt and has chosen Romulus, my city, to be the location of its casino.

Under Governor Engler's Land Settlement Agreements, the casinos cannot be developed without the approval of the host cities and without the approval of Congress.

Our City Council first provided host community approval through a resolution passed by a 5-2 vote. However, we felt this was too important to move forward without a vote of the people. Therefore, a referendum election was held on December 3, 2003 resulting in approval of a casino project in the City of Romulus.

As Mayor, I was a strong supporter of the referendum—for reasons I will share with you today.

My reasons for support were simple. A casino will bring 3,500 new, high paying permanent jobs to our city of 23,000. A casino can be a beautiful destination style development that will include a hotel, convention center and other amenities. It will also draw additional commercial development such as retail stores, movie theaters, and offices.

The referendum also had the support of various local organizations, including unions, the Romulus Police Officers' Association, the Police Officers' Association of Michigan, and the Southern Wayne County Regional Chamber of Commerce.

This casino is a real opportunity for our city and all of Southeast Michigan.

The Romulus casino will provide revenue for the State and for local governments, including approximately $6 million in slot revenue to local governments and $5 million in property taxes for development near the new casino.

A casino is a tremendous opportunity for the people of our city and the region.

Because of proximity to the airport, we have a responsibility to generate a positive economic climate for our hotels and airline companies located within our own city limits. Our airport is among the largest in the United States, and the City of Romulus has the third highest number of hotel rooms in the State of Michigan. Since 9/11 these businesses have suffered great losses. A casino will open up new opportunities that we could have never dreamed of, and generate new business for them.

The average household income in Romulus is $31,000 per year. The casino jobs will average $40,000 per year, including benefits. We have had interest, not only from residents from our city, but also from people throughout Southeast Michigan. At a job fair held last year, more than 500 Romulus residents submitted applications for jobs at the casino.

There have been some questions asked about what the impact of a Romulus casino would be on the existing Detroit casinos. A study was commissioned to exam-

ine the impact of the proposed casino on our community, including the economic impact of a Romulus casino on Detroit.

Professor Gary Wolfram of Hillsdale College conducted the study. He is a noted economist who has real-life experience well beyond the classroom. He has served as Deputy Director of the Michigan Department of Treasury, appointed by Governor Engler, and also served here on the Hill as Chief of Staff to Congressman Nick Smith (R-MI).

The study, which I include as an attachment to my written testimony, concluded that a casino in Romulus would NOT have a negative impact on the Detroit casinos. The analysis suggested that the Detroit casino market still has substantial room for growth. The study also concluded that if additional casinos can make Detroit a destination location for out-of-state travelers, the entire Michigan economy may substantially benefit.

In conclusion, a casino in Romulus will be a huge economic generator for our city and all of Southeast Michigan. It will provide 3,500 permanent high paying jobs, and it would generate other types of commercial development that we need, such as offices, retail stores, and other forms of entertainment.

The tax revenue to Romulus, Southeast Michigan, and the State of Michigan will be significant, and finally it would not be detrimental to the City of Detroit.

I urge you to support this very important bi-partisan legislation introduced by Congresswoman Candice Miller and Congressman John Dingell. Our residents supported it via referendum. Our elected officials supported it through a host community resolution. And Governor John Engler supported it in the terms of the Land Settlement Agreements Now, it needs your support as well. This is very important bi-partisan legislation to our city, county, and state.

Thank you very much.

NOTE: The Wolfram study attached to Mr. Lambert's statement has been retained in the Committee's official files.

The CHAIRMAN. Thank you. I thank the entire panel for your testimony.

Any of you can answer this. How close together in terms of miles are these two sites?

Mr. NEAL. I think, Mr. Chairman, I would estimate we are probably about 75 miles from each other.

The CHAIRMAN. That is pretty close.

In trying to settle this, why were these two sites chosen?

Mr. PARKER. I can answer that to some extent. This is what the Governor of the State of Michigan wanted at the time of negotiations. And as I stated earlier, he really wanted something in Port Huron to compete with what was happening across the border and to try to stem the flow of cash going from Michigan into Ontario, Canada.

The CHAIRMAN. And the other site, was there a specific reason why that was chosen?

Mr. LAMBERT. If I could, Mr. Chairman. I note that he had given a choice of the three locations, Romulus, Monroe, and Flint, and I believe the Sault picked our location because of the airport and thought it could be a new way to get people to fly in.

Mr. SHAGEN. And obviously another component of that is that these are two communities that have consented to this and that want this and are excited about this opportunity. So that is another reason for this.

The CHAIRMAN. Was there a reason why both of these were not put in the same city?

Mr. PARKER. I would imagine that Governor Engler may be a person who could answer that question. We were negotiating with the State of Michigan to settle the Bay Mills claim to lands that were taken from us. So our settlement was specific to us.

The CHAIRMAN. And were all the negotiations separate?

Mr. PARKER. Yes.

The CHAIRMAN. And obviously, this is something that has been going on for a number of years in trying to come up with a settlement. And we have had testimony in the other body that was not the agreement that there is today on supporting both bills. And there are some concerns amongst members of the Committee as to why the opinion has changed over the last couple of years in terms of support of the different land claims. I think we need to explore that a little bit in terms of why opinions have changed in the last couple of years with it.

Mr. SHAGEN. Is that question directed at myself?

The CHAIRMAN. Predominantly, yes.

Mr. SHAGEN. OK, thank you. In the past I know that Chairman Bouschor testified before the Senate Committee on Indian Affairs. And, you know, at that point in time, we hadn't entered into a settlement agreement with Governor Engler yet. And we understood, and so did the landowners, that this would not clear their title, that, as the Sixth Circuit has ruled, we are an indispensable party, we have a claim. And, you know, we could not support the legislation at that point in time because, quite frankly, it didn't include us and it wasn't going to resolve the issue, from our perspective. So now that we have worked, the two tribes have cooperated since then and we now have a settlement agreement similar to what Bay Mills has, and we feel now that these two bills together, jointly, will resolve this land claim issue. So that is the reason why Sault Tribe is now supporting this measure, because we are included in it when we should have been included initially.

The CHAIRMAN. All right. Thank you.

Mr. Kildee?

Mr. KILDEE. Thank you, Mr. Chairman.

Mr. Shagen, do you have a petition before the Department of Interior now on this land settlement and taking the land into trust?

Mr. SHAGEN. I don't believe that we do at this point. I understand that Bay Mills has submitted their settlement agreement to the Department of Interior. That is not something that we have done. That is something that we are amenable to and that we can go forward with and work with Interior to resolve some of these issues. We don't object to that. But we haven't done that up to this point.

Mr. KILDEE. And I would suggest that it would probably be a prudent thing to do, to have at least two venues there to pursue your petition. And that is the more appropriate venue, particularly for this type of petition. You mentioned four, and there may very well be four. I can only find three where the land not contiguous to the reservation was taken into trust for the purpose of gaming. That is one in Wisconsin, one in Washington, and of course the Keweenaw Bay in Michigan. But whether it be three or four, all of those, those three or four, were all done through the administrative process. None were done through the Congressional process. So I think it would be just a prudent thing to do the same as Bay Mills has done, is to use both avenues or venues for that purpose.

Mr. SHAGEN. I believe the fourth was the Seneca Nation of New York on a location in Niagara Falls.

Mr. KILDEE. I wasn't aware of that one. I was aware of the there. The Mayor of Romulus—

Mr. LAMBERT. Yes, sir.

Mr. KILDEE. I fly into your city every week. I do know that Romulus has gone through similar things to Flint, Michigan, right, it has had its great days and not so great days and some changes in automotive industry and manufacturing in general.

Mr. LAMBERT. Yes, sir.

Mr. KILDEE. You are convinced, I am sure, then, that Romulus could compete in that market? You really will have, if you are successful in getting a casino getting a casino there, you will have four casinos in Wayne County, right—the three in Detroit and the one in Romulus?

Mr. LAMBERT. That is correct, sir.

Mr. KILDEE. How many miles away from Detroit is Romulus, roughly?

Mr. LAMBERT. Approximately 25.

Mr. KILDEE. Twenty-five miles?

Mr. LAMBERT. Yes.

Mr. KILDEE. And you think you could compete with the other three in Wayne County?

Mr. LAMBERT. Yes, we do.

Mr. KILDEE. Can you tell us why you think, what factors have gone into that?

Mr. LAMBERT. I think what is going to be a major key is having new business, actually people flying into the airport. This is going to be a resort-style with a convention center. We believe we are going to be able to have a lot of fly in traffic that doesn't come to Detroit right now. In fact, we believe when they do fly in, they will visit the Romulus site and also go to Detroit and visit the sites there.

Mr. KILDEE. So you think the three in Detroit—one of which is not trust territory; the Sault Ste. Marie is primarily owned by the tribe but it is not trust territory—if they and the other two, MGM and the other one, would be able to succeed also along with yours?

Mr. LAMBERT. We believe that to be correct, sir.

Mr. KILDEE. And there are market studies on that?

Mr. LAMBERT. That is right, there are.

Mr. KILDEE. All right. Well, I helped write IGRA and I tried to fair in IGRA. This is a difficult time for me, because I have friends all over. Jeff, you and I have been friends for a long time, and I hope that will persist before, during, and after this discussion here. But several things that I pushed in IGRA which I think have been helpful to the Native Americans, one was the Land Claims Settlement Exemption. We pushed that in there because we foresaw that things like this could happen where there were claims. And I am very aware, Chairman Taylor, of your claim at Charlotte Beach there. And we put that in, and I think we probably assumed, however, that that would be done more through, as the other four had been done, through the administrative process rather than a Congressional process. But I did help put that in because I could see situations that both Sault Ste. Marie and Bay Mills have.

Another thing I pushed to put in the bill at that time, because I was on the Committee then, on IGRA, was the fact that if States

are not bargaining in good faith, then the Secretary of Interior could intervene and bargain for that. And Bruce Babbitt came close to promulgating the rules on doing just that. So we tried to be fair to everyone, tried to be fair to the Indian tribes. And after the Cabazon decision, I am proud of the fact that I helped write IGRA, and I want IGRA to work. And I would prefer, certainly, however, obviously with my position being what it is today, that you use the administrative process rather than the Congressional process because I am just a little fearful of the precedent that we may create here by other people coming to Congress asking to bypass that administrative process.

But otherwise, Mr. Chairman, I have no questions. I think all the witnesses have testified very well.

The CHAIRMAN. Thank you.

Mr. Gibbons?

Mr. GIBBONS. [Presiding.] Thank you, Mr. Kildee. And since it is my turn to ask a question, I think I will take advantage of this opportunity.

I would like to ask Mr. Shagen, since he is the resident expert on IGRA—

Mr. SHAGEN. Oh, I don't—let's not get carried away here.

Mr. GIBBONS. Well, we are going to assume that because you are the senior attorney for the tribe.

One of the core requirements of IGRA, in order to establish a casino on non-ancestral land, is to get the consultation and approval of the other nearby tribes. Is that correct?

Mr. SHAGEN. I don't believe that to be the case.

Mr. GIBBONS. It is not?

Mr. SHAGEN. Yes.

Mr. GIBBONS. Then I have been misled into my understanding of what IGRA requires as well. So you are telling this Committee that it is not a requirement? Is that correct?

Mr. SHAGEN. It is not under—I have been advised it is not under IGRA, but it is under the Indian Reorganization Act, the land to trust requirements. So there is nothing in IGRA as far as requiring—

Mr. GIBBONS. All right, that is—you are right. You are right. I take back my statement about that. But you have identified the issue that if it is going to be taken into trust by the Government for a casino, it requires consultation and approval of the neighboring tribes, does it not?

Mr. SHAGEN. It does, for the land to trust. And that was one of the primary concerns of Governor Engler in adopting the settlement agreement, that it, one, there is the local approval from the local community; two, that it not adversely impact another tribe. In the case of the Vanderbilt site, we had a consent requirement, if we had gone forward with that, that we got the consent of the Little Traverse Bay Bands of Odawa Indians. However, we have foregone that.

Mr. GIBBONS. So there are some tribes that are here in the audience today, I am sure you are aware, who are not in support of this idea.

Mr. SHAGEN. Yes.

Mr. GIBBONS. What efforts have you taken on behalf of this tribe to see that the essential component that we are talking about here has been met with to assure fairness to those other tribes?

Mr. SHAGEN. Well, what I have been told is that it is actually—the requirement is consultation with the other tribes for the land to trust, not necessarily—

Mr. GIBBONS. Is it consultation with the BIA, or actually agreement with the other tribes as well?

Mr. SHAGEN. It is consultation—not agreement. Consultation with the other tribes is the requirement. And as far as the other tribes, what attempt we have taken, it is no secret that we are business competitors. You know, the Saginaw Chippewa Tribe is located north of Detroit and I am sure that they will be here today testifying in opposition to that. And, you know, a casino in Port Huron may impact them in some way. But we are business competitors and, you know, that is the reality of the situation.

Mr. GIBBONS. So you don't feel at all averse to the idea that you could install or put this casino in place without the consent or approval or acceptance of your project by those neighboring tribes?

Mr. SHAGEN. I mean, I think in the best-case scenario it would be nice to always be able to—

Mr. GIBBONS. Well, that is in the best-case scenario. This is what you are doing today—

Mr. SHAGEN. Exactly.

Mr. GIBBONS. Let me ask the Mayor of Romulus, Mr. Lambert. Sir, welcome before the Committee.

Mr. LAMBERT. Thank you.

Mr. GIBBONS. I know that Mr. Kildee talked about the three other casinos in Detroit. This would be a fourth. Those other three casinos pay a nine-something, 9.9 percent tax on the gaming revenues to those communities.

Mr. LAMBERT. Right.

Mr. GIBBONS. What steps are being taken should that revenue drop off dramatically by those communities and those Government agencies for that share of revenue that you are going to take from there?

Mr. LAMBERT. Actually, I think I should refer back to Mr. Shagen, because the Sault had said that they were going to work with Detroit on lost revenue. Actually, the city of Romulus would have nothing to do with it. Detroit maybe would get 9 percent of whatever percent they get, we would get 2 percent, out of the compact. So that money would be for the city of Romulus. The Sault had mentioned they would work with Detroit on any kind of revenue loss.

Mr. GIBBONS. All right.

Mr. LAMBERT. Are in negotiations with them at this point, I believe.

Mr. GIBBONS. And if we do this, would you have a problem with us granting a trust status for a casino development right next-door to your property?

Mr. SHAGEN. I guess that is something that I am not prepared to answer at this point.

Mr. GIBBONS. Well, what would you—just throw it up as a ballpark kind of concept idea. If we got one on either side of you, right

next-door, would you—it certainly would be OK with Romulus, because they are going to get the revenue from it. But would you be OK with it?

Mr. SHAGEN. We probably would be in the same situation as some of the other tribes in trying to protect our market.

Mr. GIBBONS. That is all I wanted to know.

Mr. Kildee, do you have any further questions?

Mr. KILDEE. Yes, thank you, Mr. Chairman. I appreciate that.

Mr. Parker, if I may ask you, if we would pass this law as written now, we would in effect put the compact terms into law. How, then, would you be able to modify or renegotiate that compact if it is part of Federal law?

Mr. PARKER. That is an interesting question simply because we are not asking you to modify or approve our existing compacts. Our existing compacts have already been approved. They were approved in 1993. They were published in the Federal Register. And they allow us to game on the site we have now and also on the site in Port Huron. What we are asking now for Congress to do is to relinquish our claim to the Charlotte Beach area by Congressionally approving the settlement agreement we have with the Governor of the State of Michigan—a totally separate document from the compact.

Mr. KILDEE. I am wondering if, dealing with your attorneys—and Mr. Shagen, yourself, you are an attorney—if it might be better, if this bill is to move forward, to take the language put in the compact into a Federal law out, because it seems to me that in the future you would have a difficult time changing that compact without changing Federal law.

Mr. PARKER. But the compact is not being modified or addressed in any way through this legislation.

Mr. KILDEE. No, but if you wanted to modify it in the future—

Mr. PARKER. There are provisions in the compact to do this. Because the compact itself is not a part of the pertinent law, nor is it as an attachment modifying this. This is just simply a settlement agreement. We were told by Interior that in order for us to resolve our claim, we had to have an Act of Congress.

Mr. KILDEE. I would just advise you—and I am not an attorney, I am a Latin teacher—just to make sure that you haven't locked yourself in in the future, just to review that again.

Thank you, Mr. Chairman.

Mr. GIBBONS. Thank you very much, Mr. Kildee. And to each of our panel members, I want to thank you—Oh, excuse me. Mr. Cole has a question. I am sorry.

Mr. COLE. Thank you very much, Mr. Chairman. I will try and be brief because I know it is late.

I just wanted to make a point, actually. First of all, I wanted to thank you, gentlemen, for, frankly, the cooperative spirit. I am always impressed when I see—I live in a State that has a lot of disputes between the State, the localities, and the tribes. And to see them all come together around an agreement I think is always a very impressive achievement. There are very legitimate policy and process issues here, and I have not made up my mind about those, but I very much appreciate the manner in which you have tried to settle a problem and help a community and, frankly, take a tribe,

which I think is an asset to a community, and turn it into something that is good for all concerned.

Insofar as opposition to what you are trying to do is focused on legitimate concerns about process and are we setting precedents here that are bad, I think that is fair and we ought to look at that very carefully. On the other hand, if the opposition is simply economic—you know, we have it here, we don't want you to have it there, that cuts in—that is not legitimate. I mean, every tribe has a right to develop its assets, and to do so in a cooperative and conciliatory way with the other governmental entities with which you are dealing is really very impressive. And you are to be commended.

So I hope we will try and find ways to work with you to resolve the problems, as opposed to taking an approach—and I am sure we will try to work with you, but as opposed to letting, you know, competing economic interests drive this. It ought to really be about the process and what is right. And again, I would tell you there are a lot of communities in the country, and a lot of States, that could learn a lot from the process that you developed to get to this point. So thank you for your efforts in that regard.

Thank you, Mr. Chairman.

Mr. GIBBONS. Thank you very much, Mr. Cole.

Mr. Stupak?

Mr. STUPAK. Mr. Chairman, thank you.

Mr. Parker, when did the Bay Mills Community first seek assistance from the Department of Interior for help in pursuing its land claim here on Charlotte Beach? And has it been a long-time venture, or is it something that mostly has come up with the expansion of gaming opportunities?

Mr. PARKER. This goes back to 1925. We made reference to the Interior Department to assist us in getting the property back. Land claims—that was going through a while back, meaning Land Claims Commission was reviewing the stuff, we submitted it to them. They let it go, though, because it was with the State not the Federal Government, although in other instances where tribes had claims with the State, they were allowed to go forward. So this is something we have been working on for quite some time. And your predecessor Mr. Davis, Congressman Davis, was working on this also.

Mr. STUPAK. Was the Port Huron area ever part of your aboriginal land? And if so, was this land ever ceded under treaties with the United States?

Mr. PARKER. It is our belief from our research that, yes, it was. In 1807 there was a treaty that ceded that portion of the land to the Federal Government. And I briefly touched on this before. And when they talked about the larger Chippewa Tribe, what they were talking about was the Chippewa Nation that was located in the Michigan area. After that treaty and that negotiation, that is when they started breaking—the Federal Government started breaking a nation up into tribes and smaller bands to facilitate the cession treaties that were going forward. And as I had stated earlier, the post-secondary educational opportunities that Michigan tribal representatives enjoy are based on that treaty of 1807. And that is open to all tribal Indians in Michigan.

Mr. STUPAK. When you mention universities, are you saying that secondary education is for Chippewa Indians available through Michigan universities based upon the treaties?

Mr. PARKER. And it is Odawa— This was Indian population of Michigan. It is open to everybody.

Mr. STUPAK. And that admission is to all State universities, or certain ones?

Mr. PARKER. State universities and State community colleges.

Mr. STUPAK. Have members of your tribe been able to take advantage of that?

Mr. PARKER. I did.

Mr. STUPAK. You did?

Mr. PARKER. Mm-hm.

Mr. STUPAK. Anyone currently?

Mr. PARKER. Quite a few.

Mr. STUPAK. OK.

Mr. Shagen, there has been some discussion today about Section 9 of the Michigan compact with the Community. Could you explain to the Committee what Section 9 is and why it is or is not a problem? It seems to be perceived a problem, at least by BIA.

Mr. SHAGEN. Section 9 of the compact required that gaming revenues from a casino on newly acquired land be shared among all of the Indian tribes of Michigan. And it is my understanding that Section 9, and I believe that the Governor's counsel at the last hearing testified to this, that Section 9 was included in the Tribal-State Gaming Compact for the benefit of the Governor. And in this case, Section 9 is not implicated, because the Governor chose to waive that requirement.

Mr. STUPAK. Well, then, do the tribes then pay money to the State of Michigan? I am not talking about local communities, but to the State of Michigan for the benefit of the people of the State of Michigan?

Mr. SHAGEN. I am sorry, I didn't catch the first part of that.

Mr. STUPAK. Do the tribes pay part of their casino revenues to the State of Michigan for the benefit of the State of Michigan?— and not necessarily local communities that may be around the reservation.

Mr. SHAGEN. We don't currently, but under the provisions of the settlement agreement with the State, we would pay 8 percent to the State from Romulus and, in addition, we would once again start paying the 8 percent from our northern casino properties to the State.

Mr. STUPAK. So by doing this agreement, this land transfer—the title of your property is extinguished and in exchange you get these two parcels of property, and if you do put up casinos, then 8 percent not only of the revenues from, in your case, Romulus or Bay Mills/Port Huron, but also 8 percent from your northern casinos would then go to the State of Michigan?

Mr. SHAGEN. Exactly. And we estimate that—

Mr. STUPAK. Would any other tribes be required to do that 8 percent?

Mr. SHAGEN. No.

Mr. STUPAK. So if there is some perceived advantage, economic advantage to you, you would still pay 8 percent, which would be

a disincentive to go through with this agreement because not only would you do it for your new locations, but also your current location. Is that correct?

Mr. SHAGEN. Yes, we would pay 8 percent on all locations across the board.

Mr. STUPAK. There has been some discussion about Detroit, and I think you hit it a little bit, but if you would take an opportunity, I would like to give you an opportunity to express or indicate how would the Sault Tribe make Detroit whole, or how it may or may not change if this bill is enacted?

Mr. SHAGEN. Well, I wasn't involved in those discussions, necessarily, with the city, but it is my understanding that there is a proposal on arrangement, that is being worked on, whereby the Sault Tribe from the Romulus property would make up any economic loss to the city, assuming that that occurred. It is our opinion that that won't occur and that the Detroit market can sustain an additional casino very easily. But in the event that that happened, we are in the process right now of working with the city to try to resolve the issue.

Mr. STUPAK. You are somewhat familiar with the city of Detroit and your casino down there, Mr. Shagen. Is there any requirement of consultation or permission of other casino owners before your new casino in Greektown rolls out their new casino? Or do you have to get permission from them to do something? Do you have to get permission from them to put in a new type of gaming? Do you have to get permission from them to increase the odds or lessen the odds?

Mr. SHAGEN. Well, we have to work with the Michigan Gaming Control Board and their restrictions, but not the other casinos.

Mr. STUPAK. With that, Mr. Chairman, I yield back.

Mr. GIBBONS. Thank you very much. And with that, if there are no further questions, I would excuse our third panel with a vote of thanks for your testimony here today. We have appreciated it. It has been helpful to us. And we will excuse you and call up the fourth panel.

The fourth panel is the Honorable George Bennett, Tribal Councilor of the Grand Traverse Band of Ottawa and Chippewa Indians, Suttons Bay, Michigan; Tribal Chief Audrey Falcon, the Saginaw Chippewa Indian Tribe of Mount Pleasant, Michigan; Mr. Richard Cummings, President of Michigan Machinists Council, Port Huron, Michigan; and Mr. William Black, Legislative and Community Affairs Director, Michigan International Brotherhood of Teamsters, Detroit, Michigan.

Before you would be seated, if you would all rise and raise your right hand.

[Witnesses sworn.]

Mr. GIBBONS. Let the record reflect that each of the witnesses answered in the affirmative.

And to each of our witnesses, let me begin by welcoming you to the panel here today. As we have explained to each of the panels before you, and I am sure you heard, there is a series of little lights in front of you that try to move the process along by giving you sort of a stoplight effect. If it is green, you can go; if it is yellow, we ask you to sort of try to slow down and sum it up; and when it is

AFFIDAVIT OF MICHAEL GADOLA

STATE OF MICHIGAN)
)
COUNTY OF INGHAM)

Michael Gadola, being first duly sworn, states as follows:

1. I am currently Legal Counsel to Michigan Governor Rick Snyder. From 1991 to 1995 and from 1997 to 1999, I served as Deputy Legal Counsel to then Michigan Governor John Engler.
2. As part of my duties for Governor Engler, I acted as lead negotiator for the State during the negotiations with seven Michigan Indian Tribes that led to the signing of tribal-state gaming compacts pursuant to the Indian Gaming Regulatory Act (IGRA) in 1993. In my role as lead negotiator for the State, I was responsible for drafting various compact proposals and counter-proposals, many of which became part of the 1993 compacts.
3. The lead negotiator for the tribes was attorney Bruce Greene who I understood also frequently acted as counsel for the Sault Ste. Marie Tribe of Chippewa Indians.
4. Section 9 was included in the compacts at the request of the State. Its purpose was to act as a brake on the expansion of off-reservation gaming by the tribes by placing additional conditions on any one tribe's attempts to open a casino on land that was not part of its reservation, specifically, by including a requirement that before such a tribe could even apply to the Secretary of the Interior to have land taken into trust for gaming purposes, that tribe would have to have entered into an agreement with the other Michigan tribes providing for the sharing of revenues generated by the casino among all the tribes.
5. Section 9 was intended to benefit the State in this regard.

6. While it is true that Section 9 would apply to trust applications submitted by a tribe relying on IGRA's two-part determination provision, 25 U.S.C. § 2719(b)(1)(A), and that the parties at the time were particularly concerned that trust applications submitted under this IGRA section be subject to Section 9, there was never any intention that the requirements of Section 9 would be limited only to applications submitted in reliance on this IGRA section. The parties' overriding concern was that a tribe would not seek to have off-reservation land placed into trust, no matter what exception to IGRA's prohibition on gaming on land taken into trust after 1988 was relied on by the tribe, without first entering into a revenue sharing agreement with the other tribes.

7. I have reviewed the testimony given by Lance Boldrey to the Senate Committee on Indian Affairs, 107th Congress, concerning the Bay Mills Indian Community Land Claims Settlement Act in 2002. I respectfully disagree with Mr. Boldrey's testimony to the extent it suggests that Section 9 was only intended to govern trust applications that relied on the 25 U.S.C § 2719(b)(1)(A) exception. Section 9 was intended to apply to all off-reservation trust applications that fell within the ambit of 25 U.S.C. § 2719, i.e., all trust applications made after October 17, 1988, or more precisely, all such applications submitted after the effective date of the 1993 compacts.

8. Mr. Boldrey's testimony suggests he was relying on an interpretation of Section 9 presented in a memo from someone at the Department of Interior. I have not read that memo but I am sure that neither Mr. Boldrey, nor the author of that memo, ever consulted with me regarding the meaning of Section 9. As I negotiated its language and reached a final agreement with the tribes, I believe my interpretation should be given more weight than the interpretation described in Mr. Boldrey's testimony.

9. I also disagree that the application of Section 9 is somehow governed by whether a particular trust application requires the Secretary of the Interior to make a decision as to whether gaming should be allowed on the land in question. Even if no such decision is necessary, as long as the tribe is applying to have off-reservation land taken into trust for gaming purposes, Section 9 would apply.

10. If I or any of the tribes signatory to the 1993 Compacts had been asked in 1993 if Section 9 would require a revenue sharing agreement with the other tribes before a tribe with its reservation located in the Upper Peninsula could apply to have land taken into trust for gaming in Lansing, Michigan, no matter what statute authorized Interior to take the land into trust, I am confident all that were asked would have said "yes."

11. Unless otherwise indicated, the matters asserted in this affidavit are based on my own first-hand knowledge and if called upon to testify concerning these matters, I would so testify.

Michael Gadola

Subscribed and sworn to before me
this 14 day of June, 2013

Samantha Simons

Samantha Simons, Notary Public
Ingham, County, Michigan
My Commission Expires: 2/4/2019

United States Department of the Interior

OFFICE OF THE SOLICITOR

In reply, please address to:
Main Interior, Room 6456

Memorandum

To: George Skibine, Director, Indian Gaming Management Staff

From: Troy M. Woodward, Attorney, Division of Indian Affairs

Subject: Applicability of Section 9 of the Compact between the Keweenaw Bay Indian Community and the State of Michigan

Date: August 21, 1995

In your above-referenced request, you sought our review of whether section 9 of a compact between the State of Michigan and the Keweenaw Bay Indian Community (KBIC) governing Class III gaming applies to land that has already been taken into trust. You also sought our legal opinion as to whether an application for a Secretarial determination under Section 20 of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21 (1988) is an application to take land into trust. You requested that we determine what triggers Section 20 and what triggers Section 9 of the compact.

As you note in your request, the Keweenaw Bay Indian Community (KBIC) has submitted to your office an application to conduct gaming activities on lands which were placed into trust status after October 1988.

When an acquisition is for gaming purposes, and the land is non-contiguous, off-reservation fee land, the requirements of Section 20 of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719, must be satisfied.

Section 20 prohibits gaming on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless the lands satisfy one of several exceptions.[1] The Act

---

[1] Section 20 will not apply to lands if:
(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or
(2) the Indian tribe has no reservation on October 17, 1988, and--
(A) such lands are located in Oklahoma and--

additionally provides that the prohibition against off-reservation Indian gaming will not apply when:

> the Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination

See 25 U.S.C. § 2719(b)(1)(A). Thus, unless the Secretary has determined that a gaming establishment on the newly acquired lands is in the best interest of the Indian tribe and its members and not detrimental to the surrounding communities, gaming on any land acquired in trust after the October 17, 1988 is contrary to the Act. In addition to the above determination by the Secretary, the Governor of the State must concur before gaming may occur on the land.

It is our opinion that Section 20 goes not to the Secretary's ability to take land into trust for a Tribe; that determination is an entirely different inquiry pursuant to 25 C.F.R. Part 151. Section 20 goes to the available uses of land taken into trust after October 17, 1988. Thus, when the Keweenaw Bay Indian Community requested the Secretary to take the Marquette property into trust for housing and other purposes, the Secretary acted within his discretion and took title to the property in trust for the benefit of the Tribe pursuant to 25 C.F.R. Part 151. But, because the land was acquired in trust after the October 1988 deadline imposed by IGRA, the land cannot be used for gaming unless the Secretary makes his determination that gaming on the property is in the best interest of the Tribe and its members, not detrimental to the surrounding communities and the Governor of the State has concurred in the determination. Thus, in our opinion, any intention to conduct Gaming on trust lands acquired after October 17, 1988 triggers Section 20. An application for the Secretary to make a Section 20 determination is not an application to take land into trust.

The State of Michigan and KBIC have entered into a compact governing Class III gaming by the Tribe. Section 9 of the compact

---

> (i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or
> (ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or
> (B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

provides that:

> [a]n application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application.

See Compact between the Keweenaw Bay Indian Community and the State of Michigan. While this section of the compact slightly misconstrues the meaning of Section 20 of IGRA (Section 20 is not an application to take land into trust, but is a prerequisite to using trust land acquired after October 1988 for gaming), we are of the opinion that the KBIC need not comply with this requirement because their application before the Bureau of Indian Affairs is not to take land into trust, but is instead an application for the Secretary to make a determination that gaming on the trust land is in the best interest of the Tribe and its members and not detrimental to the surrounding community. Additionally, the date the Secretary accepted the land into trust precedes the effective date of the compact and there is no indication that Section 9 is intended to be retroactive. It is our opinion that Section 9 of the compact is triggered by an application by a Michigan Tribe to have land taken into trust for gaming.