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

AMICUS CURIAE BRIEF OF THE NOTTAWASSEPI HURON BAND OF THE POTAWATOMI ON BEHALF OF THE STATE OF MICHIGAN

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I. INTRODUCTION

A. Identity of Amicus Curiae and Interest in the Case

Amicus curiae Nottawaseppi Huron Band of the Potawatomi ("NHBP") is a federally-recognized Indian tribe located in Calhoun County, and a signatory to a tribal-state gaming compact with the State of Michigan (the "State"). The State has twelve (12) tribal-state gaming compacts with Michigan Indian tribes (including NHBP and Defendant Sault Ste. Marie Tribe of Chippewa Indians (the "Sault Tribe")) containing nearly identical language addressing off-reservation gaming in Section 9 of each gaming compact.[1] Section 9 of the Sault Tribe's

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[1] Section 9 of the Compact Between the Sault Ste. Marie Tribe of Chippewa Indians and the State of Michigan 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.

R. 1, Ex. A, p. 15 (Compl.). Similarly, Section 9 of the Compact between the NHBP and the State of Michigan provides:

> An application to take land in trust for gaming purposes outside of eligible Indian lands, as defined in Section 2(B) of this Compact, 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 any gaming facility that is the subject of the application to take lands in trust for gaming purposes outside of eligible Indian lands.

Gaming Compact is at the heart of the present dispute. R. 37, p. 3 (Op. and Order).[2]

Section 9 of the NHBP Gaming Compact is nearly identical to the Sault Tribe Gaming Compact, both requiring a prior written agreement among the other federally-recognized Indian tribes in Michigan for revenue sharing prior to an application to take land into trust for gaming purposes being submitted. Thus, NHBP has an interest in the enforcement of Section 9 of the Sault Tribe's Gaming Compact and NHBP's parallel Section 9 agreement. Further, NHBP's own gaming compact includes a provision in Section 17 that provides for an exclusive benefit to engage in gaming in Calhoun County and surrounding market area, based, in part on Section 9, and implemented by Section 2(B). *See* Ex. 1 (NHBP Gaming Compact).

NHBP currently operates a single casino located in Calhoun County. Section 17 of NHBP's compact provides that, in exchange for this exclusive economic benefit, NHBP voluntarily provides revenue sharing with the State from the proceeds of the NHBP casino operation, and the State in turn provides NHBP with exclusive gaming opportunities in its market area. *Id.* Therefore, a casino in

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NHBP Gaming Compact, p. 13 (attached hereto as "Exhibit 1").

[2] "R." refers to the record entry number in the district court docket. Page citations refer to the "Page ID #" shown on the pages of the record entry being referenced. *See* 6th Cir. R. 28(a)(1).

the City of Lansing would potentially violate NHBP's exclusive gaming agreement with the State, thereby creating a cause of action for breach of contract between NHBP and the State of Michigan. R. 1, p. 2 (Compl.).

NHBP thus writes in support of the State's position that any fee-to-trust application is subject to Section 9 of the Sault Tribe's Gaming Compact (regardless whether the fee-to-trust application is eligible for an exception under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.*), specifically Section 2719 (b)(1)(B)(iii)). NHBP also writes in support of the argument that an application to take land into trust by the Sault Tribe, regardless of whether it is deemed mandatory or discretionary, is still subject to a Section 9 revenue sharing agreement prior to the submission of a fee-to-trust application. If the Sault Tribe is correct that the Michigan Indian Land Claims Settlement Act ("MILCSA"), Pub. L. No. 105-143, 111 Stat. 2652 (1997), meets the conditions for gaming under IGRA (specifically 25 U.S.C. § 2717(b)(1)(B)(iii)), then NHBP is profoundly impacted by breach of its contract/compact under Section 17 of its own tribal-state gaming compact regarding its exclusive gaming area in the State of Michigan. Thus, NHBP supports the holding and reasoning of the District Court opinion finding:

> An entirely reasonable construction of Section 9 of the Compact — in fact, the most plausible construction offered by either party so far — is that the Sault Tribe must secure the required revenue sharing agreement before submitting an application for a trust acquisition that

> has the stated purpose and inevitable effect of triggering an IGRA exception to the general prohibition on gaming that otherwise applies.

R.37, p. 15 (Op. & Order). In further support of this proposition, the District Court also found held that:

> [I]n the Sault Tribe's view, the trust acquisition will inevitably trigger an IGRA Section 20 exception that permits gaming that would otherwise be prohibited. Therefore, the State's claim that the Sault Tribe would inevitably violate Section 9 of the Compact by submitting its trust application has substantial merit."

R. 37, pp. 15-16 (Op. & Order).

B. Source of Authority to File this Amicus Brief

By separate motion, NHBP sought leave to file an *amicus curiae* brief under the Federal Rules of Appellate Procedure ("FRAP") FED. R. APP. PROC. 29, providing in relevant part:

> (a) … Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing. (b) Motion for Leave to File. The motion must be accompanied by the proposed brief and state: (1) the movant's interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

II. ARGUMENT

A. Section 9 of the Compact Represents the Balance of Interests Among the Tribes and State Governing the Scope of Indian Gaming in Michigan

IGRA "represents a balance struck by Congress among the interests of tribal governments, the states, and the federal government in gaming activities on Indian

lands." *Muhammad v. Comanche Nation Casino*, 742 F. Supp. 2d 1268, 1276 (W.D. Okla. 2010). It balances the rights and responsibilities of three separate sovereigns. *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003); *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007); *In re Indian Gaming Related Cases*, 331 F. 3d 1094 (9th Cir. 2003). Michigan Indian gaming compacts and Indian gaming only exist under the authority of IGRA. That federal statute creates a comprehensive federal statutory and regulatory scheme for the "operation and regulation of gaming by Indian tribes." *Seminole Tribe v. Fla.*, 517 U.S. 44, 48 (1996); *see also Keweenaw Bay Indian Community v. United States*, 136 F. 3d 469, 472-473 (6th Cir. 1998). Indian gaming is only lawful when "conducted in conformance with a Tribal State compact entered into by the Indian tribe and State...that is in effect." 25 U.S.C. § 2710(d)(1)(C). IGRA has a detailed scheme for compact negotiations, a detailed approval process, and detailed scheme on the permissible scope. 25 U.S.C. § 2710(d)(3)(A), (B), and (C). This detailed scheme is necessary as tribes and States are separate sovereigns, an important and central event to the success of the statute. *Seminole Tribe*, 517 U.S. at 58; *Arichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712,716 (9th Cir. 2003). Indeed, "[t]ribal-state compacts are at the core of the scheme of Congress developed to balance the interests of the federal government, the states and the tribes." *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir.

1996). Thus, it is this very centrality of the compact process that requires that compact provisions, such as Section 9, be enforced as an essential element of the regulatory scheme.

Here, the State requires the Sault Tribe to enter into revenue-sharing agreements as a way of contractually binding the Sault Tribe to balance its off-reservation gaming interests with those of the other Michigan tribes. "Tribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes." *Bay Mills Resort & Casino v. Gerbig*, 2008 WL 4606304, at *2 (Mich. Ct. App. Oct. 2, 2008) (quoting *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996)). Thus, the federal, state, and tribal parties here need to not only balance these interests with each other, but to balance the interests among the other Michigan tribes. As a result, many of the gaming compacts—including the Sault Tribe's and NHBP's—further limit gaming by requiring tribes that seek to establish off-reservation gaming on lands acquired after 1988 to seek the prior consent of the other Michigan tribes. As "IGRA only grants the states bargaining power, not regulatory power, over tribal gaming," the ability to enforce such compact provisions is the only way of giving teeth to the State in Indian gaming. *Taxpayers of Michigan Against Casinos v. State*, 471 Mich. 306, 323, 685 N.W.2d 221, 229 (2004). The

Sault Tribe's plan to open its Lansing Casino directly threatens this delicate balance and NHBP. As the District Court Opinion noted:

> . . . draining Section 9 of the Compact of any potential for independent enforcement would create perverse incentives: it would reward with increased leverage those Tribes willing to flout the Section 9 obligation and penalize those Tribes that choose to honor their Section 9 obligation.

R. 37, p. 18 (Op. & Order)..

B. Section 9 Requires a Revenue Sharing Agreement for Off-Reservation Gaming Applications Filed Under the Authority of MILCSA

The Sault Tribe argues a two-step proposition to avoid Section 9 of its Gaming Compact. First, arguing that the MILCSA requires that land acquired with the MILCSA funds must be held in trust. Second, arguing that such lands, once held in trust, are then eligible for gaming under the "settlement of a land claim" provision of 25 U.S.C. § 2719. Based on this two-step application, the Sault Tribe maintains that a MILCSA trust acquisition is eligible for gaming under the exceptions to the general prohibition and *not* subject to Section 9 of the Gaming Compact. However, nowhere does the Sault Tribe establish that either MILCSA or the IGRA provides for an exemption from the application of Section 9 of the Gaming Compact.

Rather, Section 9 requires a revenue sharing agreement for *all* applications to take land into trust regardless of whether the application is done under the

general authority of 25 U.S.C. § 465 (which provides the Secretary authority to accept land into trust) or under some other federal statute, such as, MILCSA, which allegedly mandates that the land be taken into trust. Even though a MILCSA application for trust is not submitted under the authority of IGRA, Section 2719 still applies as the *intent* of such an application under MILCSA is to engage in gaming. This dovetails into the same intent covered by Section 9 of the Gaming Compact. Section 2719 is not authority to take land into trust; its impact, if any, is post-trust. *Cf. Keweenaw Bay Indian Cmty v. United States*, 136 F.3d 469 (6th Cir. 1998) (the procedures in Section 2719 apply to all gaming on after-acquired property even though the Tribe argued that gaming was authorized by the compact where the land went into trust after October 17, 1988 but prior to the effective date of the compact). In the same manner, the gateway procedures established in the Gaming Compact, in conjunction with the procedures established in the IGRA, should apply. Section 9 is a gateway procedure to gaming.

Here, the first step to apply is Section 9 of the compact; second is the application for trust land under MILCSA; and the third step is determining whether the land is eligible for gaming. Section 9 of the Gaming Compact is simply the first step in the IGRA process of determining whether trust land under MILCSA is eligible for gaming. Discretionary or mandatory fee-to-trust applications, which are not identified in the Gaming Compact, are both applications under Section 9.

The purpose of an alleged mandatory trust application must be consistent with the purpose of the authorizing Act, not the purpose of Section 2719. The Secretary of the Interior will look to MILCSA to determine whether the trust acquisition is mandatory or discretionary.[3] The Secretary may also determine whether the funds used to acquire the land are from the same funds originally established in 1997 at the inception of MILCSA. *Cf. Wyandotte Nation v. Salazar*, No. 11-2656-JAR-DJW, 2013 WL 1497821, at *9 (D. Kan. April 10, 2013) (finding that delayed on tribal trust application justified where the Secretary has "active and ongoing" investigation on whether designated statutory funds were used to acquire the real property).

The mandatory trust statute scope, and including whether it *is* mandatory, is a flexible determination made on a case-by-case basis depending on the statutory language that authorizes the Secretary to take land into trust. *See* DOI Fee to Trust Handbook. Under this view, 25 U.S.C. § 2719's effect, if any, is not determined until the land is in trust. *Cf. Keweenaw Bay Indian Cmty v. United States*, 136 F.3d 469 (6th Cir. 1998). However, the impact of Section 9 of the Tribal-State Gaming Compact is determined prior to the Secretary's determination on whether the fee land is eligible for trust status. Section 9 is a pre-trust application requirement;

[3] Here, the alleged authorizing Act, MILCSA, requires that the land subject to the application for trust must "consolidate or enhance" the investments of the Tribe as determined by the Sault Tribe. The Sault Tribe has clearly determined that the "enhancement" for the acquisition is for gaming purposes.

MILCSA is a pre-trust determination whether the trust is mandatory or discretionary; Section 2719 is a post-trust determination by the Secretary of the Interior or the National Indian Gaming Commission, or a judicial determination that the land is gaming eligible. All three steps must be taken to comply with the gaming compact and the IGRA. As relevant here, after the land is in trust, the Secretary of Interior determines the Section 2719 post-trust effect on whether the land is eligible for gaming. The Secretary has in addition implemented specific regulations governing the scope of Section 2719 and its exceptions to the general prohibition of gaming after October 17, 1988 (the effective dated of the IGRA). *See* Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354 (May 20, 2008), implementing 25 CFR § 292 — Gaming on Lands Acquired After October 17, 1988.

The issue of whether MILCSA is a settlement of a land claim is an independent issue that has not yet been determined, nor litigated, briefed or argued to any degree at all. On the merits, however, NHBP would argue that it is highly doubtful that MILCSA based trust acquisition qualifies as a land claim settlement under the Secretary's definition of a "land claims" for purpose of acquire gaming.

C. Section 9 of the Tribal State Gaming Compact Applies to Both Mandatory and Discretionary Fee-To-Trust Applications

The Sault Tribe alleges that the Department of Interior has a mandatory obligation to take the land into trust under the MILCSA, and therefore Section 9 of

the Gaming Compact does not apply to the mandatory trust application (Appellant's Br. 38-46). As the District Court noted, "nothing in the language of Section 9 of the Compact draws any explicit distinction between so-called discretionary applications and so-called mandatory applications." R. 37, p. 16 (Op. & Order).

The Sault Tribe makes a text-based argument that the Section 9 title of "Off-Reservation Gaming" can only mean the two part determination under 25 U.S.C. § 2719(b)(1)(A). This reading is allegedly supported by Section 2(C) which contains the language "any lands which the Tribe proposes to be taken into trust by the United States for purposes of locating a gaming establishment thereon shall be subject to the Governor's concurrence power pursuant to 25 U.S.C. § 2719." The Sault Tribe maintains that the plain term "any lands" language of 2(C) is limited to the two part determination of § 2719(b)(1)(A) based on the "equal footing doctrine" and a previous construction of 2(C). *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Att'y for W.D. of Mich.*, 198 F. Supp. 2d 920, 937-940 (W.D. Mich. 2002). The short answer is that assuming the "equal footing doctrine" is the basis for the exceptions in 25 U.S.C. § 2719, then surely the Sault Tribe (which has five casinos and has been federally recognized since 1972) was under "federal jurisdiction"[4] for generations is not eligible for the benefits of the

[4] *See Carcieri v. Salazar*, 555 U.S. 379 (2009).

"equal footing" doctrine. Further, *Grand Traverse* is easily distinguished on the facts since the trust land in that case was already in trust prior to the implementation of Section 9. During the compact negotiations in the late 80's and early 90s, the fee-to-trust regulations utilized by the parties were those published in 1980.[5] These regulations do not mention "mandatory" or "discretionary" dichotomy urged by the Sault Tribe. Whatever utility the discretionary and mandatory dichotomy may have for the Secretary in the DOI Fee-to-Trust Handbook, it is not controlling law for the gaming compact contract between the parties. Section 9 created a contractual obligation between the Sault Tribe and the State that has nothing to do with whether the trust application is denominated as discretionary or mandatory. *See id.,* at 923 (summarizing Michigan law on contract intention of the parties in compact interpretations). Without citations to authority, Appellants argue that MILCSA is a mandatory trust acquisition statute, without geographic limit, for taking land into trust for any purpose, including gaming, and that the Sault Tribe is not bound by the terms of Section 9. The text of Section 9 is surprisingly clear in its contractual intent of the parties and does not

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[5] Land Acquisitions, 45 Fed. Reg. 62,034 (September 18, 1980), provided in relevant part at section 120A .110: "Factors to be considered in evaluating requests to [fee-to-trust applications] in evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors: (a) The existence of statutory authority for the acquisition and any limitations contained in such authority."

"dovetail" with only the Secretary's authority for "discretionary applications" under Section 2719.

Even in those cases where a tribe had a historical nexus to the area (and the Sault Tribe has no historical nexus to the Lansing area), the settlement of a land claim standard has been severely restricted. *See Wyandotte Nation v. Salazar*, 825 F.Supp.2d 261 (D.D.C. 2011); *Confederated Salish v. U.S. ex rel. Norton,* 343 F.3d 1193 (9th Cir. 2003) ("mandatory trust language" was interpreted by the BIA to be discretionary under 25 CFR § 150.10). Here, the mandatory trust language alleged to exist in the MILCSA is in fact a discretionary standard on behalf of DOI. *See* R. 24, Ex. 1 (Morrin Letter) (where the Regional Director in conjunction with the Solicitor analyzed in detail MILCSA, principally in reference to another tribe but noting the provisions relevant to the Sault Tribe, and concluded it was not a mandatory statute).[6] Since the Morrin Letter established a discretionary standard for fee-to-trust applications under MILCSA, the Sault Tribe application under MILCSA is arguably subject to the same discretionary standard for an application under the authority of 25 U.S.C. § 465 with its parallel post-trust effect of 25 U.S.C. § 2719 on whether the trust land is eligible for an exception for gaming on Indian lands after October 17, 1988. Whether the MILCSA application is

[6] Admittedly, the Morrin Letter is not subject to final agency action nor does it have the force of law. *See United States v. Stevenson*, 676 F.3d 557 (6th Cir. 2012).

mandatory or discretionary, the application is still subject to the gateway provision of Section 9.

In any event, the pre-trust fee-to-trust application requires a revenue sharing agreement to comply with Section 9 of the Tribal-State Compact that is in effect. An Indian Lands Opinion under 25 CFR § 293(b) is not required as a condition precedent to a discretionary trust application or an alleged mandatory trust application. IGRA does not contain statutory mandates for an Indian Lands Opinion that gaming is authorized on the proposed fee-to-trust application. *Cf. N. County Cmty. Alliance, Inc. v. Salazar,* 573 F.3d 738, 747 (9th Cir. 2009). However, the absence of a requirement for an Indian Lands Opinion under the IGRA, does not relieve the Sault Tribe of its contractual obligation to comply with Section 9 of the Tribal-State Gaming Compact. This contractual obligation has been statutorily recognized under 25 U.S.C. § 2710(d)(1)(C), for gaming that is "conducted in conformance with a Tribal-State Compact entered into by the Indian Tribe and the State under paragraph (3) that is in effect." Section 9 is a gateway contractual obligation under the Sault Tribe Gaming Compact that is in effect, and therefore, a revenue sharing agreement is required for any trust application submitted for purposes of gaming. This revenue sharing agreement of Section 9 goes to the heart of balancing the competing interests of not only the State of

Michigan and the Sault Tribe, but also balancing the competing interests of all Michigan Indian Tribes.

III. CONCLUSION

The Nottawaseppi Huron Band of the Potawatomi respectfully requests that the preliminary injunction be affirmed to protect the interest of not only NHBP, but of all tribes in Michigan.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,613 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement 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 2007 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June 2013, a copy of the foregoing was served via the Court's Electronic Case Filing System to:

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