No. 12-515

In the Supreme Court of the United States

MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN,
Plaintiff,

v

1:10-cv-1273
Paul L. Maloney,
Chief Judge
United States District Court

THE BAY MILLS INDIAN COMMUNITY,
Defendant.

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_____/

COMPLAINT

Plaintiff State of Michigan brings the following Complaint for declaratory and injunctive relief:

JURISDICTION

1. The Court has federal subject matter jurisdiction of this action pursuant to:

a) 28 U.S.C. § 1331, as this Complaint alleges violations of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.*;

b) 25 U.S.C. § 2710(d)(7)(A)(ii), as Plaintiff is a State which seeks to enjoin gaming activity conducted in violation of a tribal-state compact; and

c) 28 U.S.C. § 2201, as this Complaint also seeks a declaratory judgment.

PARTIES

2. Plaintiff is the State of Michigan (State).

3. Defendant Bay Mills Indian Community (Bay Mills) is a federally recognized Indian tribe.

VENUE

4. Defendant Bay Mills has its Tribal offices and reservation in Chippewa County, in the Upper Peninsula of Michigan. Venue is therefore appropriate in this Court pursuant to 28 U.S.C. § 1391(b)(1).

GENERAL ALLEGATIONS

5. On or about August 20, 1993, John Engler, the Governor of the State of Michigan at that time, entered into a tribal-state gaming compact (the "Bay Mills compact") with Bay Mills. A true and correct copy of this compact is attached as Exhibit A.

6. The Bay Mills compact permits Bay Mills to operate casino games, also known as "Class III gaming" (which is defined in IGRA, 25 U.S.C. § 2703(8)), on "Indian lands" as defined in Section 2(B) of the compact.

7. Since the Bay Mills compact was signed, Bay Mills has conducted Class III gaming in one or more casinos it operates on Indian lands in Chippewa County in the Upper Peninsula.

8. On or about November 3, 2010, Bay Mills began operating a casino in a renovated building located in or near the village of Vanderbilt (the "Vanderbilt casino") in Otsego County in the Lower Peninsula of Michigan.

9. The land on which the Vanderbilt casino is being operated is not part of the Bay Mills reservation.

10. The land on which the Vanderbilt casino is being operated was acquired by Bay Mills after October 17, 1988.

11. The land on which the Vanderbilt casino is being operated was not contiguous to the boundaries of the Bay Mills reservation on October 17, 1988.

12. The Vanderbilt casino is approximately 100 miles by road from the Bay Mills reservation.

13. The title to the land on which the Vanderbilt casino is being operated has not been taken into trust by the United States for the benefit of Bay Mills.

14. The land on which the Vanderbilt casino is being operated is not subject to restriction by the United States against alienation.

15. Bay Mills does not exercise governmental power over the land on which the Vanderbilt casino is being operated.

16. After consultations between Bay Mills and the State of Michigan failed to resolve this dispute, the State sent a letter on December 16, 2010 to Bay Mills demanding that Bay Mills immediately cease the operation of all Class III gaming at the Vanderbilt casino. A true and correct copy of this letter is attached as Exhibit B.

17. Despite this demand, Bay Mills has refused to cease Class III gaming at the Vanderbilt casino.

18. By entering into the Tribal-State compact, Bay Mills waived its sovereign immunity for purposes of this legal action which seeks injunctive and declaratory relief to remedy violations of the Bay Mills compact and federal law.

COUNT I—VIOLATION OF COMPACT SECTION 4(H)

19. Plaintiff incorporates paragraphs 1-18 above as if fully stated in Count I.

20. Section 4(H) of the Bay Mills compact states: "The Tribe shall not conduct any Class III gaming outside of Indian lands."

21. Section 2(B) of the Bay Mills compact defines "Indian lands" to mean: "(1) all lands currently within the limits of the Tribe's Reservation; (2) any lands contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; and (3) any lands title to which is either held in trust by the United States for the benefit of the Tribe or individual or held by the Tribe or individual subject to restriction by the United States against alienation and over which the Tribe exercises governmental power."

22. For the reasons stated in paragraphs 9-15 above, the land on which the Vanderbilt casino is situated is not "Indian lands" as defined in the Bay Mills compact.

23. The operation of Class III gaming at the Vanderbilt casino therefore violates and is a breach of the Bay Mills compact.

24. As the Class III gaming conducted at the Vanderbilt casino in violation of the Bay Mills compact violates the laws of the State of Michigan, including but not limited to M.C.L. 750.301 *et seq.* (see Count II below), and federal anti-gambling

statutes (18 U.S.C. § 1955), it harms the public interest and the balance of harm caused by this Class III gaming weighs heavily in favor of the State.

25. There is no adequate remedy at law for this violation by Bay Mills of its compact which causes the State irreparable injury.

26. IGRA vests jurisdiction with this Court to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C.§ 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay Mills compact, (2) permanently enjoining Bay Mills from conducting Class III gaming at the Vanderbilt casino and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT II—VIOLATION OF COMPACT SECTION 4(C)

27. Plaintiff incorporates paragraphs 1-26 above as if fully stated in Count II.

28. Section 4(C) of the Bay Mills compact states:

> The Tribe shall license, operate, and regulate all Class III gaming activities pursuant to this Compact, tribal law, *IGRA, and all other applicable federal law.* This shall include but not be limited to the licensing of the consultants (except legal counsel with a contract approved under 25 U.S.C. §§ 81

> and/or 476), primary management officials, and key officials of each Class III gaming activity or operation. Any violation of this Compact, tribal law, *IGRA, or other applicable federal law* shall be corrected immediately by the Tribe. (Emphasis added.)

29. The violation of IGRA, 25 U.S.C. § 2710(d)(1), set forth in Count III below, also violates Section 4(C) of the Bay Mills compact.

30. 18 U.S.C. § 1955 makes it illegal for any person to conduct, finance, manage, supervise or own all or part of an illegal gambling business.

31. An illegal gambling business is defined in 18 U.S.C § 1955 as a gambling business which is a violation of state law in which it is conducted, involves five or more persons and remains in business for more than 30 days, and grosses more than $2,000 in any single day.

32. Operation of the Vanderbilt casino violates Michigan's anti-gambling statute, MCL 750.301 *et seq.*

33. On information and belief, the Vanderbilt casino involves more than five people and grosses more than $2,000 in a single day.

34. Representatives of Bay Mills have stated that the Tribe intends to keep operating the Vanderbilt casino indefinitely.

35. Operation of the Vanderbilt casino therefore violates applicable federal anti-gambling

laws, including 18 U.S.C. § 1955, and therefore violates Section 4(C) of the Bay Mills compact.

36. As the Class III gaming conducted at the Vanderbilt casino in violation of the Bay Mills compact violates the laws of the State of Michigan and federal anti-gambling statutes, it harms the public interest and the balance of harm caused by this Class III gaming weighs heavily in favor of the State.

37. There is no adequate remedy at law for this violation by Bay Mills of its compact which causes the State irreparable injury.

38. IGRA vests jurisdiction with this Court to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C.§ 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay Mills compact; (2) permanently enjoining Bay Mills from conducting Class III gaming at the Vanderbilt casino; and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT III—VIOLATION OF IGRA

39. Plaintiff incorporates paragraphs 1-38 above as if fully stated in Count III.

40. Section 2710(d)(1) of IGRA permits Class III gaming only on "Indian lands" as that term is defined in IGRA, and only if conducted "in conformance with a Tribal-State compact entered

into by the Indian tribe and the State under paragraph (3) [25 U.S.C. §2710(d)(3)] that is in effect."

41. IGRA defines "Indian lands" to mean: "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."

42. Based on the facts alleged in paragraphs 9-15 above, the Class III gaming conducted by Bay Mills at the Vanderbilt casino is not being conducted on Indian lands and therefore violates IGRA.

43. The Class III gaming conducted by Bay Mills at the Vanderbilt casino also violates IGRA because, for the reasons stated in Counts I and II of this Complaint, this gaming is not being conducted "in conformance with" the Bay Mills compact.

44. Finally, Class III gaming is prohibited pursuant to 25 U.S.C. § 2719 on the land on which the Vanderbilt casino is located, even if it is Indian lands, because it was acquired by Bay Mills after October 17, 1988 and does not qualify for any of the exceptions described in 25 U.S.C. § 2719(b).

45. There is no adequate remedy at law for this violation by Bay Mills of IGRA which causes the State irreparable harm; since the operation of the Vanderbilt casino violates IGRA it cannot be in the

public interest and the balance of harm of its continued operation weighs heavily in favor of the State.

46. IGRA vests jurisdiction with this Court to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C.§ 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay Mills compact; (2) declaring that the gaming at the Vanderbilt casino violates IGRA; (3) permanently enjoining Bay Mills from conducting Class III gaming at the Vanderbilt casino; and (4) granting Plaintiff such other relief as the Court deems appropriate.

Plaintiff further requests that it be awarded its costs and attorney fees incurred in bringing this action.

Respectfully submitted,

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Dated: *12/21/2010*

THE BAY MILLS INDIAN COMMUNITY

MEMORANDUM AND MATERIALS IN SUPPORT OF RESOLUTION NO. 10-5-20 AMENDMENT TO GAMING ORDINANCE

SUBMITTED TO

THE NATIONAL INDIAN GAMING COMMISSION

Presented to
The Hon. George T. Skibine
The Hon. Penny J. Coleman

May 26, 2010

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INTRODUCTION

Land acquired by the Bay Mills Indian Community (Tribe) under the authority of 107(a) of the Michigan Indian Land Claims Settlement Act (MILCSA), using Land Trust funds set aside pursuant to that same section, attains restricted fee status by operation of law as soon as the Tribe acquires unencumbered fee title to the land. This analysis of section 107(a) of MILCSA is consistent with the relevant standards set forth in analogous situations by the National Indian Gaming Commission (NIGC), the Department of the Interior (Department), and the federal courts. *See* Part I below. Further, after attaining restricted fee status, such land will meet the Indian Gaming Regulatory Act's (IGRA's) definition of "Indian lands," will not be subject to IGRA's Section 20 after-acquired lands prohibition, and therefore will be eligible to be used for gaming-related economic development. *See* Part II below.

PART I
THE MICHIGAN INDIAN LAND CLAIMS SETTLEMENT ACT: TRANSFER OF TITLE TO RESTRICTED STATUS BY OPERATION OF LAW

A. Brief Overview of the Michigan Indian Land Claims Settlement Act

1. The Bay Mills Indian Community's Claim Against the United States

The Bay Mills Indian Community is comprised of the "six [Ojibwe] bands residing at and near Sault Ste. Marie," as described in Article 1, First [Paragraph] of the Treaty of July 31, 1855, 11 Stat 621. The Bay Mills bands engaged in numerous treaties with the United States, several of which resulted in legal claims against the federal government which were adjudicated by the Indian Claims Commission.

In 1820 the Bay Mills bands ceded to the United States an area along the St. Mary's River rapids near present-day Sault Ste. Marie, Michigan for construction of a fort. Reserved from the cession was "a perpetual right of fishing at the falls of St. Mary's, and also a place of encampment upon the tract hereby ceded, convenient to the fishing ground." Art. 3, Treaty of June 16, 1820, 7 Stat. 206. In early 1855, the U.S. Army burned to the ground all Indian structures on the encampment and drove out the Ojibwe occupants so that the Corps of Engineers could build a lock. The encampment ground was excavated and the rapids were brought under control by the lock. On August 2, 1855, the Bay Mills Bands

signed another cession treaty relinquishing the encampment grounds and the right of fishing at the falls *(see* 11 Stat. 631). A United States commissioner unilaterally set the value of the Bay Mills bands' 1855 cession, indicated that it would be paid "as annuities are paid." Art. 2, Treaty of August 2, 1855. The amount in fact paid to the Bay Mills bands was ludicrously small, and it formed the basis of the complaint filed by the Tribe before the Indian Claims Commission (ICC) in *Bay Mills Indian Community, et al. v. United States,* Docket No. 18-R. In 1975, the ICC found the amount paid to the Tribe for this cession to be unconscionably low, and accordingly Congress appropriated the settlement funds for the Tribe in that same year. MILCSA provides for the distribution of the judgment for all of these claims.

The major land cession involving the six Bay Mills bands occurred in the Treaty of March 28, 1836 (7 Stat. 491), covering lands identified in Royce Area 205. Approximately 14 million acres, encompassing the east half of Michigan's Upper Peninsula and almost the entire western half of Michigan's Lower Peninsula, were ceded to the United States by the Ojibwe and Ottawa bands living there, including the six Bay Mills bands. The United States compensated the bands for the cession with annuities for 20 years, trade goods, access to technical assistance from mechanics and farmers, etc. The total amount paid to the ceding bands was so far below its actual value that the Bay Mills Indian Community filed suit against the United States before the Indian Claims Commission in Docket 18-E. Another Bay Mills claim, arising under the cession of the St. Martins Islands in the Treaty of July 6, 1820, 7 Stat. 207, was

consolidated for adjudication as Docket 364. Ruling in 1971, the Commission found that the United States obtained $12,142,225 in value from the property, but had paid less than one tenth that amount to the bands. The Commissioner declared this amount unconscionable, and the final judgment of the Commission was reported to Congress as $10,300,250. Although Congress appropriated the judgment funds the following year, since there was no distribution plan, the funds were not distributed. Unfortunately, it would take another 25 years for the Congress to enact a distribution plan by which the Tribe finally would receive compensation for its losses. That distribution plan, enacted on December 15, 1997, was the Michigan Indian Land Claims Settlement Act, Pub. L. 105-143, which finally completed the Bay Mills Indian Community's 50-year effort to obtain compensation and settle its treaty cession-related claims against the United States.

2. Structure of the Michigan Indian Land Claims Settlement

When the claims of the Bay Mills Indian Community were filed with the Indian Claims Commission in Dockets 18-E, 18-R and 364, the Bay Mills Indian Community was the only federally recognized tribe that was a signatory to the Treaty of July 6, 1820 (7 Stat. 207), Treaty of March 28, 1836 (7 Stat. 491), the Treaty of July 31, 1855 (11 Stat. 621), and the Treaty of August 2, 1855 (11 Stat. 631).

When judgment of the Indian Claims Commission in Dockets 18-E and 364 was entered in 1971, the Bay Mills Indian Community was still the only signatory tribe that was federally recognized.

But by 1975 when judgment was entered in Docket 18-R, the Sault Ste. Marie Tribe of Chippewa Indians had been administratively recognized and now participated along with the Bay Mills Indian Community in hearings conducted that year by the Bureau of Indian Affairs on developing a plan for distribution of the funds (as was required by the Indian Tribal judgment Funds Act, 25 U.S.C. § 1401, *et seq.*).

By the time the Bureau of Indian Affairs conducted a second round of distribution plan hearings in 1984, the Grand Traverse Band of Ottawa and Chippewa Indians too had been administratively recognized. Again, no plan for fund distribution was finalized, so then-Congressman Bob Davis introduced legislation in 1987 to effect distribution. Another consultation hearing was conducted by the Bureau in 1988, but no plan was finalized and submitted to Congress as a result.

The Bay Mills Indian Community finally sought judicial enforcement of the provisions of the Indian Tribal Judgment Funds Act by filing suit in 1996 against the Secretary of Interior, the Assistant Secretary for Indian Affairs, the Bureau of Indian Affairs and the Department in the United States District Court for the District of Columbia. The Tribe and the federal defendants agreed to resolve the litigation through the submission of proposed legislation by the Department of Interior to the Office of Management and Budget on or before December 15, 1996, after consultation with Bay Mills, other affected Tribes and any descendency groups. An order implementing the stipulation was

entered by Judge Stanley Sporkin on September 16, 1996.

The Department transmitted a draft bill to the House and Senate by letter dated March 14, 1997. Section 4 provided that each Tribe submit a plan for its respective share. When legislation was introduced as H.R. 1604, the Bay Mills Indian Community, the Sault Ste. Marie Tribe of Chippewa Indians, and the Grand Traverse Band of Ottawa and Chippewa Indians participated with Congress in developing their respective tribal plans for inclusion in the legislation. The result is sections 107 (Bay Mills), 108 (Sault Ste. Marie) and 109 (Grand Traverse) of the Michigan Indian Land Claims Settlement Act. *See* Attachment A.

B. MILCSA Land Acquisition Authority

Section 107(a) of MILCSA established a trust fund -- the "Land Trust" — which was created from a portion of the funds received by the Tribe in settlement of the Tribe's Indian Claims Commission cases (*see* discussion in subpart A above). Section 107(a)(3) requires that the Tribe use the proceeds of the Land Trust (*i.e.*, interest generated by the Land Trust) to improve existing tribal land holdings and to acquire new tribal land holdings. Further, it dictates that any new land holdings be held as "Indian lands":

> (3) The earnings generated by the Land Trust *shall be used exclusively* for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange.

> *Any land acquired with funds from the Land Trust shall be held as Indian lands are held.*

MILCSA § 107(a)(3), Pub.L. 105-143, 11 Stat. 2661 (Dec. 15, 1997) (emphasis added). Congress has dictated that the Tribe *must* use these particular settlement funds to improve existing, or obtain new, tribal lands (the funds *"shall be used exclusively"*). Congress also has dictated that land obtained with these particular settlement funds will *not* be land held in fee simple, but rather will be land upon which Congress has bestowed the special legal status of "Indian lands" ("Any land acquired with funds from the Land Trust *shall be held as Indian lands are held*"). More specifically, for the reasons discussed at length below, it is clear that the special legal status conferred on land acquired under MILCSA § 107(a)(3) is that of restricted fee title.

C. By Operation of Law, MILCSA Imposes a Restriction Against Alienation on Lands Acquired Pursuant to Section 107(a)(3)

Obviously, the phrase "as Indian lands are held" must have some meaning other than that the lands simply will be held in fee by the Tribe. Under well-established principles of statutory construction, statutory language is to be interpreted in such a way as to give it meaning -- Congress is presumed not to include meaningless verbiage in a statute. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." Sutherland Statutory Construction, § 46.6 at 230; *see also Duncan v. Walker,* 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.")

(internal quotations and citations omitted). Accordingly, we must assume that Congress would not have included this language in the statute unless Congress intended that the language would have real meaning.

If Congress had intended that the Tribe simply would hold land purchased with the Land Trust settlement funds in fee simple, there would have been no need to say anything at all about how the land would be held. Land purchased by a tribe outside specific congressional authorization or direction is held in fee simple anyway. *See* Office of the Solicitor, Opinion M-37023, Applicability of 25 U.S.C. § 2719 to Restricted Fee Lands, at 3, 6 (Jan. 18, 2009). (Federal restrictions against alienation do not automatically attach to off-reservation parcels acquired by a tribe in fee simple. Rather, a restriction on alienation attaches only by operation of treaty language or a tribe-specific statute [which is what MILCSA provides], or through some other type of federal involvement or "extenuating circumstances".) *See* Attachment B. *See also* December 19, 2008 Letter from Acting Deputy Assistant Secretary George Skibine to Lac Du Flambeau Band of Lake Superior Chippewa Indians President Edwards (land in Illinois purchased by Tribe in fee simple, without more, is not subject to the restriction against alienation of Indian lands embodied in the Indian Trade and Intercourse Act, 25 U.S.C. § 177).

Accepting the principle that "as Indian lands are held" cannot mean land held in fee simple and therefore must mean something else, we set out

below the applicable rules of statutory construction, the legislative history of MILCSA, and a comparison to other statutes, all of which confirm that lands validly acquired by the Tribe with funds from the Land Trust are held in restricted fee status by operation of law.

1. The Phrase "Indian Lands"

The phrase "Indian lands" has been used by Congress in a large number of statutes, and while the definitions vary depending on the context, in virtually every case the definition of "Indian lands" includes lands held in restricted fee status. *See* the following federal statutes, all of which expressly include restricted fee lands within the definition of "Indian lands": The Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470b(b)(4); the Federal Cave Resources Protection Act of 1988, 16 § 4302(3); the McKinney-Vento Homeless Assistance Act, 20 U.S.C. § 7713(7); the Indian Tribal Economic Development and Contract Encouragement Act of 2000, 25 U.S.C. § 81(a)(1); the Indian Health Amendments of 1992, 25 U.S.C. § 1680(n)(b); the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4); the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1702(3); the National Community Service Act of 1990, 42 U.S.C. § 12511(10); and the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2102(c).[1] Of particular importance for the Tribe's

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[1] In only three cases did Congress fail to expressly include restricted fee lands within the meaning of "Indian lands." In each of those statutes, restricted fee land would appear to be included by implication. The Public Land Corps Healthy Forests Restoration Act of 2005, 16 U.S.C. § 1722, defines

purposes of course is the "Indian lands" definition in IGRA, which also encompasses restricted fee lands. There, Indian lands are defined as including:

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

25 U.S.C. § 2703(4) (emphasis added).

From these definitions it is clear that the term "Indian lands" refers to a special status assigned to land held by Indian tribes which status includes trust land, reservation land, and land held in restricted fee status. It follows, then, that the phrase "held as Indian lands are held" has a particular meaning relating to that special status, whether it be trust, reservation or restricted fee — it is something

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Indians lands to include any Indian reservation, public domain allotments, former reservations in Oklahoma, ANCSA lands, and lead held by dependent Indian communities (the definition here is broad enough to encompass restricted fee lands); the Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. 4302(4), which uses the "Indian Country" definition of 18 U.S.C. 1151 (and therefore encompasses restricted fee land); and the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291, which defines Indian lands to include lands within Indian reservations, and all lands "held in trust for or *supervised by an Indian tribe.*"

other than the holding of land in fee simple status. For the reasons discussed below, in the case of section 107(a)(3) of MILCSA, that phrase must mean held in restricted status.

2. In MILCSA § 107(a)(3) "As Indian Lands Are Held" Means Restricted Fee

a. "As Indian Lands are Held" in Section 107(a)(3) *Does Not* Mean Held in Trust

What is obvious about the language of section 107(a)(3) is that it does not use any of the phraseology normally associated with the acceptance of trust title. It does not direct or otherwise authorize the Secretary to accept trust title, nor does it indicate that the United States will acquire trust title by operation of law — indeed it does not use the word "trust" in any fashion whatsoever. In obvious contrast are other provisions in MILCSA pertaining to other tribes where trust language specifically is used. *See* MILCSA § 108(f) (providing that lands acquired using amounts from interest or other income from the Sault St. Marie Self-Sufficiency Fund "shall be held in trust by the Secretary for the benefit of the tribe").[2] In light of the fact that other parts of the statute specifically provide that lands acquired with settlement funds shall be held in trust, Congress' decision not to use the same trust language for the Bay Mills Indian Community's land acquisition must be understood as intentional and meaningful, and the term "held as Indian lands are

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[2] *Cf.* MILCSA § 108(b)(4) (lands purchased with Self-Sufficiency Fund monies to be held as Indian lands are held).

held" means something other than lands held in trust.[3] "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another[.]" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) *(quoting Chicago v. Environmental Defense Fund,* 511 U.S. 328, 338 (1994)). In other words, the plain language of MILCSA makes a clear distinction as to how lands acquired for different tribes under the Act are to be treated differently. Congress' direction that some lands shall be "held in trust" and that other lands shall be "held as Indian lands are held" signals a clear difference in how the land shall be held, and establishes that lands acquired by Bay Mills are not held as trust lands.

The Department of the Interior has indicated its agreement that lands acquired pursuant to MILCSA Section 107(a)(3) are not to be held in trust. In a letter dated September 10, 2002, the Midwest Regional Director wrote to the Tribe that "[b]ecause Congress used both the phrase 'as Indian lands are

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[3] In a discussion of tribal property interests, Cohen points out that a number of treaties avoided the problem of defining the nature of Indian land interests by "providing that specified lands should be held 'as Indian lands are held," and that this kind of phrasing should be read to mean that the United States will hold title in trust for the tribe. Felix S. Cohen, Handbook of Federal Indian Law, Ch. 9, § A.1.a (1982 ed.). While this construction may apply generally to the executive's establishment of reservations by treaty, in the case of a statute enacted by Congress where certain sections specifically designate that land shall be held in trust, and other sections use the phrase "held as Indian lands are held", this general rule of construction for treaty provisions would not apply.

held' and the phrase 'in trust for the benefit of the tribe,' it is reasonable to assume that Congress intended different meanings for the two different phrases in the same statute." *See* Letter from The Hon. Larry Morrin, BIA Midwest Regional Director, to L. John Lufkins, President of the Bay Mills Indian Community (September 10, 2002) ("Morrin Letter") at 3, provided at Attachment C.

b. "As Indian Lands are Held" in Section 107(a)(3) *Does* Mean Held Subject to Restrictions Against Alienation

If the phrase "held as Indian lands are held" does not mean held in fee simple, and does not mean held in trust, the only other thing it can mean is that the land is held as a reservation, or that it is land held subject to restriction against alienation. While MILCSA includes no specific language stating that the land shall be part of the Tribe's reservation, lands validly set aside for tribal use or occupancy, even without specific use of the words "reserved" or "reservation", may be considered reservations. *See* Felix S. Cohen, Handbook of Federal Indian Law, ch. 15 § 6 at 296-297 (1942 ed.). But absent any of the specific language typically used in statutory reservations, *see id.* (describing typical statutory reservations language such as "reserved for the sole use and occupancy"), the better reading of the MILCSA phrase "held as Indian lands are held" is that lands acquired pursuant to Section 107(a)(3) are to be held subject to restriction against alienation. Both the courts and the Department have found that a restriction on alienation attaches to land held in fee by a tribe where there is federal involvement

with the acquisition or supervision over the land. *See generally* Cohen, § 15.06[4], citing *Alonzo v. United States,* 249 F.2d 189, 196 (10th Cir. 1957) (tribal land purchase in fee is subject to restriction on alienation where there is sufficient "federal involvement" to establish the restriction, in *Alonzo*, that federal involvement took the form of certain Congressional enactments ... relating to the Tribe's purchase of the land). *See also* Office of the Solicitor, Opinion M-37023, Applicability of 25 U.S.C. § 2719 to Restricted Fee Lands (Jan. 18, 2009) (restrictions against alienation attach to certain Indian fee lands by operation of law, including "tribe-specific statutes"). Cohen reaches the same conclusion, stating that the phrase "held as Indian lands are held" vests recognized and enforceable property rights in the Tribe. Cohen, Handbook of Federal Indian Law, Ch. 9, § A.1.a (1982 ed.). In this case, Congress clearly has enacted a "tribe-specific statute" that not only provides for the acquisition of the property but in fact actually requires the Tribe to use its Land Trust settlement for tribal land-related purposes.

Indeed the Department of the Interior's own fee-to-trust regulations define restricted fee lands in order to set them apart from the Department's administrative fee-to-trust process, and it is clear from that definition that land acquired under MILCSA more properly fits within that definition. *See* 25 C.F.R. § 151.2(e) (defining "restricted land" or "land in restricted status" as "land the title to which is held by ... a tribe and which can only be alienated or encumbered by the owner with the approval of the secretary because of limitations contained in the conveyance instrument pursuant to Federal law or

because of a Federal law directly imposing such limitations.") (emphasis added); *see also* 25 C.F.R.§ 151.1 ("[A]cquisition of land . . . by Tribes in fee simple status is not covered by these [fee-to-trust] regulations even though such land may, by operation of law, be held in restricted status following acquisition.").

For all of the forgoing reasons, it is clear that land acquired by the Bay Mills Indian Community pursuant to section 107(a)(3) of MILCSA will be restricted fee lands.

3. The Transfer of Title to Restricted Fee Status Occurs By Operation of Law

Congress provided no role at all for the Secretary in the acquisition of title to land purchased with Land Trust funds. This Congressionally-mandated lack of administrative involvement in the Tribe's acquisition of the land leads to the conclusion that MILCSA's directive that "[a]*ny land acquired with funds from the Land Trust shall be held as Indian lands are held*" effects a legislative transfer of title (once the land is purchased by the Tribe) into restricted fee status by operation of law without need for any administrative action.

A comparison between MILCSA and the Seneca Nation Land Claims Settlement Act, 25 U.S.C. § 1774, *et seq.*(Seneca Settlement Act) illustrates this point. Like MILCSA, the Seneca Settlement Act authorizes the Seneca Nation to acquire lands with funds appropriated by the statute, and it provides for the transfer into restricted fee of such lands by operation of law:

> Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of ... (25 U.S.C. 177), such lands shall be subject to the provisions of that Act, and shall be held in restricted fee status by the Seneca Nation.

25 U.S.C. § 1774f(c). While the Seneca Settlement Act includes an administrative step (the Secretary must receive and consider comments) not required by MILCSA, the mechanism by which title is transferred to restricted fee status is in principle the same: once the Tribe meets the requirements of the statute the restriction automatically attaches to the Tribe's fee title. *See NIGC Approval of Seneca Nation of Indians' Class III Gaming Ordinance, January* 20, 2009 NIGC letter to Seneca President Barry E. Snyder at 7 (Attachment M) ("Here, DOI certified that according to the provisions of the SNSA, the Buffalo Parcel *became restricted fee land by operation of law* on December 2, 2005.") (emphasis added).

The very same principles are illustrated by other act of Congress which effected a legislative transfer of trust title. In the Valles Caldera Preservation Act, Pub. L. 106-248, 114 Stat. 598 (2000), Congress authorized the federal acquisition of the Baca Ranch in New Mexico for preservation purposes, and provided the Santa Clara Pueblo the right to acquire certain portions of the Baca Ranch for fair market value. With respect to lands acquired by the Pueblo under that authority, Congress provided:

> As of the date of acquisition, the fee title lands, and any mineral estate underlying

> such lands, acquired under this subsection by the Pueblo of Santa Clara are deemed transferred into trust in the name of the United States for the benefit of the Pueblo of Santa Clara and such lands and mineral estates are declared to be part of the existing Santa Clara Indian Reservation.

§ 104(g)(2), Pub.L. 106-248, 114 Stat. 598. Although the Valles Caldera legislation requires that the Secretary and the Pueblo first agree on which lands the Tribe will be assigned the right to acquire, once the lands are identified, as in MILCSA, the Secretary has no involvement in the actual purchase of the lands by the title, and once purchased, the lands by operation of law are held in a specified status on behalf of the tribe (in the Pueblo's case, in trust status). There is no further action required by the Secretary once the Pueblo acquires title to the property — the terms of the statute dictate how the lands will be held and effectively transfer the land's title into that status.

In a similar statute, Congress transferred land held by the United States for the Flandreau, South Dakota Boarding School into trust for the Flandreau Santee Sioux Tribe:

> That all of the right, title, and interest of the United States in 80 acres of land ... acquired by the United States for the Flandreau Boarding School at Flandreau, South Dakota, and no longer used for such purposes; together with improvements thereon, are hereby declared to be held by the United States in trust for the Flandreau Santee

> Sioux Tribe, subject to all valid existing rights-of-way.

Pub.L. 88-483, 78 Stat 595 (1964). Again, like MILCSA and the Valles Caldera legislation, no further Departmental action is required; the lands are transferred into trust on behalf of the Tribe by operation of law. Also similar to MILCSA, this legislative transfer was made in connection with claims made by the Santee Sioux under the Indian Claims Commission Act, and Congress directed that the Indian Claims Commission (ICC) should consider whether the value of the title conveyed by the statute should be set off against any claim against the United States determined by the ICC. *Id* Other legislative transfer statutes use similar language that transfers land into trust by operation of law. *See,* e.g., Pub.L. 106-228, 114 Stat. 462 (2000) (certain land held in fee by Mississippi Choctaw "is declared to be held by the United States in trust for the benefit of the Mississippi Band of Choctaw Indians"); Utah Schools and Exchange Act, Pub.L. 105-335 (1998) (automatically transfers state-owned lands into trust for the tribes). As with these other statutes, land acquired pursuant to MILCSA section 107(a)(3) is by operation of law transferred into an inalienable status (in MILCA's case into restricted fee rather than trust) without the need for any administrative action to give effect to the restriction.

Finally, the conclusion that land acquired pursuant to section 107(a)(3) attains restricted status by operation of law (and accordingly requires no administrative action) is further supported by the fact that the Department of the Interior has no role

in the expenditure of funds from the Land Trust to purchase lands pursuant to section 107(a)(3). Section 107(a)(6) provides:

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

The plain language of section 107(a)(3) and section 107(a)(6) makes clear that the Secretary has no role in the acquisition of land pursuant to MILCSA.

For all these reasons, by operation of law MILCSA automatically imposes a restriction on alienation on land validly acquired by the Tribe pursuant to section 107(3)(a) without further administrative action.

4. MILCSA's Legislative History Supports The Restricted Fee and Legislative Transfer Analyses

MILCSA's legislative history underscores the analyses provided above that the land is to be held in restricted fee and that it acquires that status by operation of law rather than by administrative action.

Congress initially intended that lands acquired by Bay Mills would be held in trust, but the House Committee purposely changed that approach before enacting the bill into law. NIGC cannot ignore

Congress' deliberate action. "While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose." Sutherland Statutory Construction, § 46.6 at 247-48. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza Fonseca,* 480 U.S. 421, 442-43 (1987); *see also Chickasaw Nation v. United States,* 434 U.S. 84, 93 (2001). As shown below, Congress clearly discarded language providing that lands acquired by Bay Mills would be held in trust, and instead replaced that language with a phrase that allows the land rather to be held in restricted fee.

As originally introduced by Congressman Kildee, H.R. 1604 mandated that lands acquired with earnings generated by the Land Trust *"shall be held in trust* by the United States for the Bay Mills Indian Community." *See* H.R. 1604 IH at § 7(a)(3) (emphasis added). *See* Attachment D. On June 24, 1997, the House Resources Committee held a hearing on the bill. H.R. Rep. No. 105-352, at 9 (Oct 28, 1997). *See* Attachment E. Shortly after that hearing, the Department of the Interior submitted proposed "technical amendments" to the Committee for its consideration. Among other things, the Department expressly requested that the Committee modify the sentence "Any lands so acquired shall be held in trust by the United States for the Bay Mills Indian Community" so as to make clear that the Secretary was not required to take such land into trust but

rather "that the Secretary retains discretion under existing regulations (25 C.F.R. Part 151) and that this section does not repeal the limitations in section 20 of the Indian Gaming Regulatory Act." July 15, 1997 Letter from Assistant Secretary Ada E. Deer to Chairman Don Young, Committee on Resources at 3. *See* Attachment F. After receiving the Department's proposed "technical amendments," the Committee met to consider the bill and adopted by voice vote an amendment in the nature of a substitute "to make certain technical corrections proposed by the Administration[.]" H.R. Rep. No. 105-352, at 9. *See* Attachment E. The substitute bill reported out of Committee did not change a single word of § 7(a)(3). *See* Attachment G. In other words, the House Resources Committee rejected the Department's request that language be adopted to make the Bay Mills acquisition a discretionary trust acquisition.[4]

Then, Congress went even further, and it stripped out the language that would have required Bay Mills land acquisitions to be held in trust. More specifically, as described in the relevant Committee Report, issues had arisen among the tribes regarding the legislation, and the House Resources Committee had worked with the tribes such that "[t]hese issues have been resolved *to the satisfaction of the Tribes* and descendancy groups involved and the Committee plans to address them with a floor amendment to H.R. 1604[.]" H.R. Rep. No. 105-352, at 9 (emphasis added). *See* Attachment E. On November 4,1997, the

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[4] "Committee Reports represent the most persuasive indicia of congressional intent in enacting a statute." Sutherland Statutory Construction, § 48.6, at 571-72.

full House considered the Committee's most recent version of H.R. 1604 that addressed tribal concerns. The only substantive amendments to section 7(a)(3) (what would become section 107(a)(3) in the final statute) were made in this version, which was passed by the House by voice vote. The amendments made were as follows:

> *The earnings generated by the Land Trust shall be used ~~annually and~~ exclusively for* ***improvements on tribal land or*** *the consolidation and enhancement of tribal landholdings through purchase or exchange. Any land so acquired with* ***funds from the Land Trust*** *shall be held as* ***Indian lands are held*** *~~in trust by the United States for the Bay Mills Indian Community~~.*

H.R. 1604 EH at § 7(a)(3). *See* Attachment H. Accordingly, not only did the House reject the Department's proposed amendments on this section to turn this language into discretionary trust acquisition language, Congress went even further by removing any need for administrative action whatsoever, and making the land subject to a restriction on alienation by operation of law once the land is acquired. Amendments made to other sections of the Act demonstrate that the House rejected Interior's comments on how lands would be held under the Act. Most notably, the House added section 8(f) to the Sault Ste. Marie Tribe plan which provides that "[a]ny lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe." Contrary to the Department's

request, Congress did not provide language in section 8(f) that would have allowed the Secretary to retain discretion under the Act as to whether to acquire lands, nor did it provide that this legislative mandate did not repeal the limitations in section 20 of IGRA.

The Senate Committee on Indian Affairs also held a hearing on H.R. 1604 — the day *before* the House vote on that legislation. *See* S. Hrg. 105-413.[5] *See* Attachment I. The Department's testimony explained that its comments were "directed *toward the most recent version* of H.R. 1604, *which is to be presented on the House Floor tomorrow*. . . [and that the Department] support[s] the enactment of H.R. 1604 with certain technical and clarifying amendments, which are truly in the nature of technical amendments, which will be provided both to the House and Senate staff for, hopefully, incorporation into the bill." *Id.* at 29 (emphasis added).

The legislative record is clear that both bodies of Congress rejected the Department's comments on the land acquisition provisions contained in the legislation as passed by the House. Regarding § 7(a)(3) [section 107(a)(3)], the Department appears to have requested that the sentence "[a]ny land acquired with funds from the Land Trust shall be

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[5] Senator Inouye noted the uniqueness of the situation, explaining that "[vie are considering a measure that has yet to be passed by the House of Representatives, but we consider that justice has been delayed too long, and therefore we intend to report this measure out as soon as you report yours, air." S. Hrg. 105-413 at 28.

held as Indian lands are held" be deleted "because it is unnecessary." *See* Draft Letter from Assistant Secretary-Indian Affairs to Senate Indian Affairs Committee Chairman Ben Nighthorse Campbell, at 2.[6] *See* Attachment J. Apparently, the Department believed that lands acquired pursuant to the Act either were automatically subject to restriction against alienation under the Indian Trade and Intercourse Act (25 U.S.C. § 177) and therefore such language was unnecessary, or that such lands would not be protected in any manner, and therefore such language was unnecessary.

Congress' decision to retain the phrase "shall be held as Indian lands are held" despite Interior's request, combined with the rule that every word in a statute must be given effect, compels the conclusion that such lands are restricted given that tribes do not need federal legislation to acquire fee and freely alienable land. *Cf.* Opinion of the Solicitor, No. M-37023 at 6 (Jan. 18, 2009) ("While the Department has not previously opined on this precise question, Federal restrictions under the Non-Intercourse Act do not automatically attach to off-reservation parcels acquired by a tribe in fee simple absolute."); December 19, 2008 Letter from Acting Deputy Assistant Secretary George Skibine to Lac Du Flambeau Band of Lake Superior Chippewa Indians President Edwards (land in Illinois purchased by

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[6] The Tribe's files contain only the "Draft" letter from the Assistant Secretary. We presume that the Department's final letter did not substantively differ from the Draft. In any event as discussed below, the Senate did not incorporate any of the Interior's comments on the land acquisition sections contained in MILCSA.

Tribe in fee simple, without more, is not subject to 25 U.S.C. § 177). Further, any argument that the phrase had no effect and the land is unrestricted and held in fee simple runs afoul of the overall history surrounding the legislation. After finally providing a modicum of justice to the tribes after extracting 12 million acres of their land for approximately 15 cents an acre, Congress surely did not maintain, over Interior's objection, the particular phrase authorizing the acquisition of land by Bay Mills and yet intend that those lands acquired pursuant to the Act would have no protection whatsoever.

The subsequent history of the legislation further confirms Congress' rejection of Interior's requests to amend the language governing the status of lands acquired pursuant to the Act. As discussed above, Interior's letter requested that the last sentence of § 7(a)(3) [section 107(a)(3)] be deleted.[7] Interior requested that the same sentence be deleted from section 8(b)(4) relating to acquisitions by the Sault Ste. Marie Tribe. Notably, Interior also requested that the Senate delete section 8(f) which provides that any lands acquired by Sault Ste. Marie with interest or other income from the designated fund "shall be held in trust by the Secretary for the benefit of the tribe." Interior's draft requested as follows:

> Section 8(f) should be deleted because it *is superfluous and conflicts with section 8(b)(4), if 8(b)(4) is not deleted.* If Section 8(f) is

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[7] That sentence provides: "Any land acquired with funds from the Land Trust shall be held as Indian lands are held."

> retained, we would like it clarified that the Secretary retains discretion under existing regulations (25 C.F.R. Part 151) and that this section does not repeal the limitations in section 20 of the Indian Gaining Regulatory Act.

Draft Letter from Assistant Secretary-Indian Affairs to Senate Indian Affairs Committee Chairman Ben Nighthorse Campbell, at 2 (emphasis added). *See* Attachment J. Interior's comment that the requirement in 8(f) placing the lands in trust was superfluous and conflicted with the requirement in 8(b)(4) to hold the lands "as Indian lands are held" demonstrates that Interior understood the phrase "as Indian lands are held" to constitute restricted lands. If Interior understood the phrase "as Indian lands are held" to mean simply alienable, fee simple land without any restrictions, a direction by Congress to hold the lands in trust would not be superfluous. However, Interior clearly understood that lands acquired by 8(b)(4) would be held in restricted fee by operation of law because placing the same land in trust would be *superfluous* (because they are already protected against alienation) and in *conflict* with 8(b)(4) because recognized Indian title is either restricted fee or trust land, but not both.

Finally, the legislative record shows that the Senate did not make any amendments to H.R. 1604 that were suggested by the Department. *See* 143 Cong. Rec. S12425-26 (Nov. 9, 1997) (amendments offered in Senate to H.R. 1604). *See* Attachment K. After passing the amendments offered by Senators Murkowski and Inouye, H.R. 1604 passed the Senate

by unanimous consent. On November 13, 1997, the House considered the amendments offered by the Senate and again did not incorporate any of Interior's proposed amendments to the sections relating to land acquisitions pursuant to the Act. The House ultimately accepted all of the Senate's amendments but one and sent the bill back to the Senate. *See* Attachment L. The Senate receded from the one amendment rejected by the House and the President signed the legislation into law on December 15, 1997. *See* Attachment L.

In sum, the extensive legislative history of MILCSA confirms that lands acquired pursuant to section 107(a)(3) are restricted fee lands by *operation of law* because Congress rejected Interior's request to modify the legislation to provide for discretionary trust acquisitions. *Further, such lands are restricted fee lands rather than trust lands or alienable, fee simple lands, because Congress purposefully discarded "held in trust," replaced that language with "held as Indian lands are held,"* and rejected the Department's request that the phrase be deleted.

5. 2002 BIA Memorandum Did Not Squarely Address The Legislative Transfer Question

In 2002, the BIA Midwest Regional Director issued a letter to the Bay Mills Indian Community's then-President regarding the land acquisition provisions contained in MILCSA as applicable to the Tribe. Letter from The Hon. Larry Morrin, BIA Midwest Regional Director, to L. John Lufkins, President of the Bay Mills Indian Community (September 10, 2002) ("Morrin Letter") *See* Attachment C. The Morrin Letter was issued in

response to the Tribe's request that the Secretary accept *trust title* to 235 acres of land purchased with money from the Tribe's Land Trust pursuant MILCSA. *Id. at* 1. The Tribe believes that this land already has attained restricted fee status.[8]

The Regional Director analyzed MILCSA's land acquisition section in responding to the Tribe's request. He framed the issue as follows: "[T]he real question is ... does the MILSCA (sic) provide mandatory acquisition authority for the Bay Mills Indian Community." *Id.* He concluded that, "land acquisition authority in MILCSA is not mandatory," and, "the Bureau should process trust applications ... as discretionary trust acquisitions." *Id. at* 7. In other words, the Morrin Letter addresses only the question whether MILCSA provides mandatory trust acquisition authority to the Secretary, and he finds that it does not. The Martin Letter does not address at all whether MILCSA effectuates a legislative transfer of title by operation of law as discussed in Part I.C.3 above.

While Regional Director Morrin rejected the idea that MILCSA vests the Secretary with mandatory trust acquisition authority on behalf of the Tribe, he also acknowledged the possibility that MILCSA could provide for lands acquired by the Tribe to be held in restricted fee, explaining:

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[8] The Tribe did request that the Department acquire trust title to 40 of those acres in trust for the use of its community college, and the Tribe believed that trust status was necessary to ensure that certain kinds of federal funding would be available to the community college.

> The use of the language, "Any land acquired with funds from the Land Trust shall be held as Indian lands are held" is not a clear statement that the acquired lands are to be held in trust, or more particularly that the acquisition authority is mandatory. *Indian lath may be held in a variety of ways, including in* trust by the United States, *subject to restrictions on alienation,* or owned in fee by the Indian Tribe. Certainly the language does not provide clear mandatory acquisition authority.

Id. at 2-3 (emphasis added).

At no time did the Midwest Regional Director squarely address whether Congress directed that lands purchased by the Tribe pursuant to section 107(a)(3) be held in restricted fee. Rather, the Regional Director's discussion focused on the Secretary's role in trust land acquisition, where he indicated that the intent of the Department's proposed changes to MILCSA was "to retain the Secretary's discretion to acquire land in trust, not to change how the land acquired with the funds from the Land Trust would be held." *Id.* at 3. As discussed further in Part I.C.4 above, the Regional Director's assertion[9] that MILCSA's legislative history

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[9] The Regional Director asserted that Congress changed the proposed language of MILCSA "to retain the Secretary's discretion to acquire the land in trust, not to change how the land acquired with the funds from the Land Trust would be held." Morin Letter at 3. He added, "the change in language, following a request from the Department to deify the statute to retain the Secretary's discretionary authority, is an indication that the authority was not meant to be mandatory." *Id.*

supported his conclusion was based upon a mistaken view of MILCSA's legislative history. Although the proposed changes may have reflected *Interior's* intent, Congress in fact rejected the Department's proposed amendments to the relevant sections of the MILCSA.

In sum, MILCSA was enacted to compensate the Tribe by distributing funds awarded to it by the Indian Claims Commission, and by allowing the Tribe to enhance its land base through purchase and exchange of new, restricted lands to replace the lands it lost. The Morrin Letter did not squarely address the Tribe's authority to acquire title to land with MILCSA funds; instead, it merely addressed whether MILCSA provided for a mandatory acquisition of trust title by the Secretary. By its terms, MILCSA allows the Tribe to use settlement funds to acquire title to new lands, and it provides that such lands, by operation of law, will be restricted from alienation upon acquisition by the Tribe.

PART II

IGRA ALLOWS LANDS ACQUIRED PURSUANT TO MILCSA § 107(a)(3) TO BE USED FOR GAMING

A. IGRA Allows Gaming on "Indian Lands"

The Indian Gaming Regulatory Act allows tribes to conduct gaming operations on "Indian lands." *See* 25 U.S.C. § 2710(6) and (d). IGRA defines the term:

> (4) The term "Indian lands" means —

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

25 U.S.C. § 2703(4) (emphasis added). For the reasons set forth below, lands validly acquired by the Tribe pursuant to Section 107(a)(3) of MILCSA fall within IGRA's definition of "Indian lands." Further, as also discussed below, because such lands will be held in restricted fee, they will not be subject to IGRA Section 20's prohibition on gaming on after-acquired lands. Finally, it also is clear that the Tribe will exercise governmental power over the land. Accordingly, lands validly acquired pursuant to section 107(a)(3) are eligible for gaming.

1. MILCSA Lands are "Subject to Restriction by the United States Against Alienation"

As discussed in detail in Part I above, once the Tribe validly acquires fee title to land using MILCSA Section 107(a) Land Trust funds, by operation of law the land will become restricted against alienation. Accordingly, the land will meet the requirement in 25 U.S.C. § 2703(4)(B) that off-reservation land must either be held in trust or be held "subject to restriction by the United States against alienation."

2. The Tribe will Exercise Jurisdiction Over those Lands

IGRA permits a tribe to conduct gaming on "Indian lands" over which the tribe, as a legal matter, possesses governmental jurisdiction. *See* 25 U.S.C. § 2710(b) and (d). Where Indian lands are located off-reservation, IGRA further requires that the tribe exercise "governmental power" over the Indian lands. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b). A tribe must have legal jurisdiction over the land before the tribe can, as a factual matter, exercise "governmental power" over the land. *See NIGC Approval of Seneca Nation of Indians' Class III Gaming Ordinance, January* 20, 2009 NIGC letter to Seneca President Barry E. Snyder at 8 (Attachment M); *Mechoopda Indian Tribe of the Chico Reservation,* NIGC Memorandum at 3 (2003) ("[t]ribal jurisdiction is a threshold requirement to the exercise of governmental power"); *Bear River Band of the Robnerville Rancheria,* NIGC Memorandum at 4 (2002).

a. The Bay Mills Indian Community Will Have Legal Jurisdiction

As a matter of law tribes are presumed to possess governmental jurisdiction within "Indian country." As recently articulated by NIGC,

> The presumption of jurisdiction exists for any federally recognized tribe acting within the limits of Indian country. This jurisdiction, an inherent sovereign power, can only be modified by a dear and explicit expression of Congress.

NIGC *Seneca* Letter at 8 (internal citations omitted); *see also* NIGC *Mechoopda* Opinion at 3; NIGC *Robnerville* Opinion at 5.

"Indian country" is defined in 18 U.S.C. § 1151 and applies both to criminal and civil jurisdiction. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207 n.5 (1987); NIGC *Seneca* Letter at 8-9. "Indian country" includes the following geographic areas:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. Thus, Congress's definition of "Indian country" includes reservations, dependent Indian communities and Indian allotments *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 527 (1998).

In *Venetie,* the Court considered whether land acquired pursuant to the Alaska Native Claims

Settlement Act (ANCSA) and held in fee simple by the Native Village of Venetie constituted "Indian country" and was therefore subject to tribal jurisdiction. The Court noted that because ANCSA "revoked the Venetie Reservation" and Indian allotments were not at issue, the question was whether the Tribe's land constituted a dependent Indian community. *Venetie,* 522 U.S. at 953. Based on earlier precedent which Congress essentially codified in section 1151, the Court held that "dependent Indian communities" under section 1151(6) are those lands that satisfy two criteria: (1) the land "must have been set aside by the Federal Government for the use of the Indians as Indian land;" and (2) the land "must be under federal superintendence" *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 527 (1998); NIGC *Seneca* Letter at 9.

In its approval of the Seneca Nation's gaming ordinance, NIGC explained that "[a]lthough for many the term 'Indian country' may be perceived as synonymous with the reservation system, this perception is erroneous because the term is not so limited. Reservation status is not necessary for a finding of Indian country. NIGC *Seneca* Letter at 9. Citing to numerous Supreme Court and Circuit decisions, NIGC appropriately concluded that restricted fee land that satisfies both criteria, regardless of whether it has been declared a reservation, constitutes "Indian country." NIGC *Seneca* Letter at 9; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 511 (1991); *United States v. Sandoval,* 231 U.S. 28 (1913) (restricted fee land constitutes Indian

country); *United States v. Roberts,* 185 F.3d 1125 (10th Cir. 1999).

Here, once the Bay Mills Indian Community purchases the title to land with earnings generated from the Land Trust, the land passes into restricted fee status by operation of law pursuant to MILCSA Section 107(a)(3) and constitutes a "dependent Indian community" under 18 U.S.C. § 1151. The MILCSA restricted fee land is "validly set apart for the use of the Indians *as Indian land*" by Congress. *Venetie,* 522 U.S. at 529 (*quoting United States v. McGowan,* 302 U.S. 535, 539 (1938)). Indeed, MILCSA closely tracks the Court's enunciation of the test in *Venetie* and *McGowan* by mandating that lands acquired pursuant to section 107 "shall be held *as Indian lands are held.*" Lands "held as Indian lands are held" constitutes recognized title that is subject to the Indian Trade and Intercourse Act, 25 U.S.C. § 177. *See* Treaty with the Menominee, Art. 2, 10 Stat. 1064 (1854);[10] *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 405 (1968);[11] *Cayuga*

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[10] "Article 2. In consideration of the foregoing cession the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country . . [legal description of reservation lands]."

[11] "The Menominee Tribe of Indians was granted a reservation in Wisconsin by the Treaty of Wolf River in 1854. 10 Stat. 1064. By this treaty . . the United States confirmed to them the Wolf River Reservation 'for a home, *to be held as Indian lands are held*' . . . [T]he language 'to be held as Indian lands are held' includes the right to fish and to hunt.. . . The essence of the Treaty of Wolf River was that the Indians were authorized to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing." *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 405 (1968).

Indian Nation v. Cuomo, 758 F.Supp. 107, 110 (N.D.N.Y. 1991), *rev'd on other grounds, Cayuga Indian Nation v. Pataki,* 413 F.3d 266 (2d Cir. 2005).[12] Because land validly acquired pursuant to Section 107(a)(3) is subject to the restriction on alienation embodied in the Indian Trade and Intercourse Act, it also meets the government supervision requirement. As the Supreme Court acknowledged in *Venetie,* "federal restrictions on the lands' alienation" constitute an "'exercise of the government's guardianship over the tribes and their affairs.'" 522 U.S. at 528 *(quoting United States v. Sandoval,* 231 U.S. 28, 48 (1913). *See also* NIGC *Seneca* Letter at 9. Further, as restricted fee land the property will be regulated by a multitude of statutes, (including IGRA) passed by Congress that place such lands under federal superintendence. Thus, once validly purchased with Land Trust funds, land obtains restricted fee status and the Bay Mills Indian Community will, as a legal matter, possess jurisdiction over it.

b. The Bay Mills Indian Community Will Exercise Governmental Power

Having established jurisdiction over the Parcel, the Tribe will then be able to demonstrate that it will exercise present-day governmental power over the property as required by IGRA Section 4(4)(B), 25 U.S.C. § 2703(4)(B). NIGC recently explained that it "has not formulated a uniform definition of "exercise

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[12] [I]f an Indian tribe possesses recognized title in certain land, then Congress, and only Congress, may divest the tribe of its title to such land." *Cayuga Indian Nation v. Cuomo,* 758 F.Supp. at 110.

of governmental power" but rather decides that question in each case based upon all the circumstances." NIGC *Seneca Letter at* 10. Of course present-day governmental power over the land cannot be established before the land is acquired in restricted fee. NIGC *Mechoopda* Opinion at 5. However, in multiple analogous situations both NIGC and Interior have found that an applicant tribe will exercise governmental powers over lands once the lands are acquired in trust or restricted fee. *See* NIGC *Mechoopda* Opinion at 5;[13] Interior *Pomo of Upper Lake* Indian Lands Determination at 7.[14] In the case of the Bay Mills Indian Community, it is clear that the Tribe will exercise governmental authority over its MILCSA section 107(a)(3) land once it is acquired because the Tribe will build a gaming facility on the property and regulate its

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[13] The Tribe has submitted information indicating that, once the land is in trust, it will exercise governmental authority over the parcel through various environmental, zoning, trespass, law enforcement and other ordinances and programs. We can reasonably rely on the Tribe's representations and assume for the purpose of this opinion that the Tribe will exercise those authorities when the land is acquired in trust." NIGC *Mechoopda Opinion* at 5.

[14] "Governmental authority will be exercised once the fee-to-trust process is complete. The Tribe has entered into a Memorandum of Understanding (MOU) with the Lake County government addressing civil jurisdiction and development of the property.. . . Moreover, the prospective development of a gaming ordinance and the regulation of the proposed gaming operation are indicators of the exercise of governmental power. If the Secretary accepts the land into trust, it will qualify as Indian lands under IGRA." Interior *Porno of Upper Lake* Indian Lands Determination at 7.

operations pursuant to its federally approved tribal gaming ordinance.[15]

B. IGRA's Ban on Gaming on "After Acquired Lands" Does Not Apply to Restricted Fee Lands

Section 20 of IGRA provides that gaming "shall not be conducted on lands *acquired by the Secretary in trust* for the benefit of an Indian tribe after October 17, 1988" unless specific exceptions apply. 25 U.S.C, 2719(a) (emphasis added). As discussed in detail below, the Department of the Interior and NIGC have concluded that IGRA's prohibition against gaming on lands acquired after October 17, 1988 does not apply to restricted fee lands that constitute Indian country. The Department of the Interior articulated its conclusion through rulemaking that implements IGRA's Section 20 and in Solicitor M-Opinion M-037023, dated January 18, 2009. (M-Opinions are "binding on all Departmental offices . . . and may only be modified or overruled by the Solicitor, Under Secretary or Secretary." *See* M-Opinion M-37003, dated January 18, 2001 and attachments thereto.) NIGC concurred in the Department's analysis and conclusion that Section 20 does not apply to restricted fee lands when it approved the Seneca Nation of Indians' Class III Gaming Ordinance.

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[15] Once acquired in restricted fee status, several of the Tribe's laws will become applicable to the parcel, including the Tribe's NIGC-approved gaming ordinance and the Tribal Code (which includes provisions governing the Tribe's court and criminal justice systems).

Set forth below is a brief summary of the United States' articulation of this position in approvals involving the Seneca Nation; following that is by a summary of the Department's Section 20 (25 C.F.R. Part 292) regulations and M-Opinion finding that restricted lands are not subject to IGRA's Section 20 prohibition against gaming on after acquired lands. Based on analyses adopted by both the Department and NIGC, it is clear that lands acquired by the Bay Mills Indian Community pursuant to MILCSA will not be subject to the prohibition set forth in Section 20 of IGRA.

1. The United States' Position in the Seneca Litigation Supports this Analysis

The United States has relied on this same analysis in its ongoing defense of NIGC's approval of the Seneca Nation of Indians' (Seneca's) Gaming Ordinance. In 2002, NIGC approved a Seneca gaming ordinance that included a non-site specific general definition of tribal lands eligible for gaming that was consistent with IGRA's definition of "Indian lands." In 2005, Seneca purchased land in Buffalo, New York and, pursuant to the requirements of the Seneca Nation Settlement Act (25 U.S.C. § 1774 *et seq.*),[16] requested that the Department confirm the

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[16] The Chairman's analysis began with the Seneca Nation Settlement Act (SNSA), 25 U.S.C. § 1774. The SNSA settled disputes over leases between the Seneca Nation, the village of Salamanca, New York and the United States. In the settlement the Seneca Nation was awarded $60,000,000 for their claims against the government and also for agreeing to offer new leases in Salamanca. 25 U.S.C. § 1774(d). The Seneca Nation was authorized to use these funds. to acquire "land within the aboriginal area in New York or situated within or near

status of that land as being held in restricted fee. Once the Department completed the administrative work required by the Seneca Nation Settlement Act, title to the land transferred to restricted fee by operation of law (this occurred in December 2005).

In January 2006, opponents to Seneca's proposed Buffalo casino filed suit challenging, among other things, NIGC's 2002 approval of the Nation's gaming ordinance. The District Court found that NIGC's approval of the Nation's gaming ordinance was arbitrary and capricious because NIGC did not issue an Indian lands determination for the general locations set forth in the Nation's gaming compact with the State. The court vacated NIGC's approval of the ordinance and remanded the matter back to the agency to determine whether the Buffalo site constituted "Indian lands" under IGRA. *See Citizens Against Casino Gambling in Erie County v. Kempthorne,* 471 F.Supp.2d 295 (W.D.N.Y. 2007).

Shortly thereafter, Seneca submitted an amended gaming ordinance to NIGC for approval. The amended ordinance modified the definition of tribal lands to include the legal description of the Buffalo site. NIGC approved the amended ordinance on July 2, 2007 after finding that 1) the Buffalo site constituted Indian lands; 2) that "restricted lands" were subject to Section 20 of IGRA; and 3) that Seneca's restricted lands were acquired pursuant to a settlement of a land claim and therefore were

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proximity to former reservation lands." 25 U.S.C. § 1774f(c). Unless the Secretary objects within thirty days of the comment period the land becomes subject to the provisions of 25 U.S.C. § 177 (Non-Intercourse Act)[16] and is "held in restricted fee." Id.

excepted from IGRA Section 20's general prohibition on gaming on newly acquired lands.

Opponents to the Nation's Buffalo casino again filed litigation challenging NIGC's approval of Seneca's new gaming ordinance. The district court again set aside NIGC's approval of the amended 2007 ordinance as arbitrary and capricious, this time finding that the Seneca Nation Settlement Act did not settle a land claim and therefore that the lands acquired in Buffalo pursuant to the Act did not satisfy the requirements of IGRA Section 20's settlement of a land claim exception (25 U.S.C. § 2719(b)(1)(B)(i)). The court agreed with NIGC that IGRA Section 20's general prohibition on gaming on lands acquired after the enactment of IGRA applied to all lands, including restricted fee lands. *See Citizens Against Casino Gambling in Erie County v. Hogen,* No. 07-CV-0451S (W.D.N.Y. July 8, 2008).

A few months after the Department of the Interior's regulations governing section 20 of IGRA. (discussed in detail in Part (b) below) became effective, the Seneca Nation submitted an amended gaming ordinance to NIGC for approval. The amended ordinance again included a legal description of its Buffalo site in its definition of Nation lands. Based on its application of the Department's recently promulgated regulations, NIGC approved the Seneca Nation's ordinance.[17] Chairman Hagen explained that the Department's recent "change of course" in its regulations led NIGC

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[17] *NIGC Approval of Seneca Nation of Indians' Class III Gaming Ordinance,* January 20, 2009 NIGC letter to Seneca President Barry E. Snyder (Attachment M).

"to review this new ordinance and the agency's Indian lands analysis afresh." *Id. at* 2.

Turning to whether the Seneca Nation's *restricted fee lands in Buffalo were eligible for* gaming under IGRA, NIGC concurred in Interior's recently promulgated regulations which interpreted the restrictions contained in section 20(a) to apply only to lands acquired in *trust* after the effective date of IGRA. *Id.* at 7. NIGC stated that this conclusion "adheres to the explicit language of the statute" because section 20 "only references trust land acquired after October 17, 1988. It says nothing of land held by a tribe subject to restriction by the United States against alienation." *Id.* at 11. Pointing to the Department's differing definitions of trust and restricted land in 25 C.F.R. Part 151 and federal statutes distinguishing between trust and restricted lands, NIGC concluded that ("in trust' is a term of art that has a specific meaning with the realm of federal Indian law." *Id.* at 17. NIGC concluded that based on "Congress' history of enacting legislation pertaining to trust and restricted land, it is evident that Congress in this context understood that the two types of Indian lands are not the same and intended to use the term 'in trust' accordingly. . . . [Conversely the] use of the term *restricted* in some provisions of IGRA and not in [section 20] evinces Congressional intent to exclude it from the general prohibition." *Id.* at 17-18.

NIGC further explained that even if the statutory language of section 20 was ambiguous, the Department's and NIGC's interpretation of that ambiguous language is reasonable. NIGC explained

that the conclusion that Indian country restricted lands were not subject to IGRA's prohibitions "comports with the plain language of IGRA, resolves any ambiguity in favor the tribes, as required by the Indian canon of construction, and promotes IGRA's underlying policies and objectives [of encouraging tribal economic development, self sufficiency and strong tribal government]." *Id at* 20. Accordingly, based on this recent plain reading of IGRA, NIGC approved the Seneca Nation's gaming ordinance.

2. The Department's Part 292 Regulations Also Support This Analysis

In 2008 the Department of the Interior promulgated regulations implementing the exceptions to IGRA Section 20's general prohibition against gaming on after-acquired lands, published now at 25 C.F.R. Part 292, which make clear that Section 20 applies only to trust land, and not to restricted fee lands. In the preamble to the regulations, the Department explained that "[t]he omission of restricted fee from section 2719(a) is considered purposeful, because Congress referred to restricted fee lands elsewhere in IGRA, including section 2719(a)(2)(A)(ii) and 2703(4)(B)." 73 Fed. Reg. 29354, 29355 (May 20, 2008).

Following issuance of the regulations, on January 18, 2009, then-Solicitor David Bernhardt issued a memorandum opinion further explaining the Department's interpretation of Section 20 in the Part 292 regulations, and justifying the Department's departure from its pre-Part 292 position that Section 20 barred gaming on both after-acquired trust and restricted fee lands.

Memorandum Opinion M-37023 re: Applicability of 25 U.S.C. § 2719 to Restricted Fee Lands (Jan. 18, 2009). The Solicitor concluded that upon further investigation the Department "has since determined that the better view of the law is that when a tribe purchases new lands off-reservation and those lands are held by the tribe in fee, the land is not, without more, automatically subject to restrictions against alienation." *Id.* at 6.

In reaching this conclusion, the Solicitor first examined the basic attributes of trust land and restricted fee land, explaining that the Secretary of the Interior "lacks any general authority to place restrictions on lands tribes acquire in fee." *Id* at 3. The only authority that the Secretary has to acquire and place restrictions on lands for Indians is through Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465. But land acquired under the IRA is held by the United States in trust, it is not held by the tribe as restricted fee land. Restricted fee lands are created by operation of law, either pursuant to the terms of a specific treaty or statute (such as the Seneca Nation Settlement Act or MILCSA), or more generally the Non-Intercourse Act. Land purchased in fee by a tribe outside the reservation boundaries is not, however, without more *(e.g.,* a specific statute or treaty), subject to the Non-Intercourse Act and is not considered "Indian country". The Solicitor relied on the United States' position in *Cass County v. Leech Lake Band of Chippewa Indians,* 524 U.S. 103 (1998), to support his conclusion that "the Non-Intercourse Act's Federal protections against alienation do not extend to off-reservation lands owned by a tribe in fee unless some extenuating

circumstances exist." *Id. at 7.* The memorandum also relied on the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation of New* York, 544 U.S. 197 (2005), to support the Department's view that a tribe's purchase of land in fee outside of the reservation does not establish a tribe's sovereignty over that land because the IRA provides the "proper avenue for [a tribe] to reestablish sovereignty over territory." *Id* at 6.

Against this background, the Solicitor explained that the Department had concluded that the language in Section 20 was plain and that Congress clearly meant for the prohibition against gaming on after-acquired lands to apply only to trust land for three reasons. First, the terra "in trust" has "a common and generally well-accepted meaning in Indian law." Congress is familiar with this meaning and chose specifically to apply Section 20 to this form of land. Second, the statute expressly applies to "lands acquired in trust by the Secretary," and as previously discussed, the Secretary does not acquire restricted fee lands — they are acquired and owned by tribes. Third, lands held in trust by the Secretary may be different from restricted fee lands in certain respects, depending on the terms of the specific statutes and implementing regulations. *Id* at 5-6. For these reasons, and because the Department's prior interpretation was based on the "misapprehension of the law" that off-reservation lands purchased by tribes automatically would be subject to restrictions against alienation, the Solicitor concluded that the plain language in Section 20 could not be ignored, and was properly implemented in the new Part 292 regulations.

In sum, the Department's Part 292 regulations are based on the presumption that lands purchased by a tribe in fee that are located outside the boundaries of the reservation are not subject to the restrictions against alienation imposed by the Indian Trade and Intercourse Act unless Congress has dictated otherwise. Conversely, in cases where a specific statute creates the restrictions against alienation for land purchased by a tribe, or effects a legislative transfer of such lands in restricted fee status, such as in MILCSA, such lands would be eligible for gaming under IGRA and the Department's Part 292 regulations, because as the Part 292 regulations make clear, the prohibition against gaming on after-acquired lands in Section 20 does not apply to restricted fee lands. Accordingly, land acquired pursuant to MILCSA section 107(a)(3) is not subject to IGRA section 20's general ban on gaming on after-acquired off-reservation lands.

CONCLUSION

For all of the foregoing reasons, once the Tribe acquires fee title to lands purchased with the proceeds of the Land Trust, the Tribe's fee title will become restricted from alienation by operation of law pursuant to the Michigan Indian Land Claims Settlement Act Section 107(a)(3).[18] Further, once the

[18] In the unlikely event that NIGC, the Department of the Interior or a court were to subsequently determine that restricted fee lands are subject to IGRA's general prohibition against gaming on lands acquired after 1988, the Tribe maintains that lands acquired pursuant to section 207(a)(3) of the Michigan Indian Land Claims Settlement Act satisfy IGRA's "settlement of land claim exception," 25 U.S.C. 2719(b)(1)(B)(i), and respectfully requests the opportunity to

restriction on alienation attaches to the property, the property will become eligible for gaming because it is not subject to the restrictions set forth in Section 20 of IGRA on lands acquired in trust after October 17, 1988.

If you have any questions, please contact President Jeff Parker, tribal attorneys Ms. Kathryn Tierney and Mr. Chad DePetro (all of whom can be reached at (906) 248-3241) or Ms. Heather Sibbison at (202) 457-6148.

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provide additional information and analysis on this issue should NIGC, the Department or a court find that the prohibitions contained in section 20 apply to restricted fee lands.

United States Department of the Interior
OFFICE OF THE SOLICITOR
DEC 21 2010

Mr. Michael Gross
Associate General Counsel, General Law
National Indian Gaming Commission
1441 L Street, NW
Washington, DC 20005

Re: Bay Mills Indian Community Vanderbilt property, Indian lands opinion

Dear Mr. Gross:

This is in response to your letter dated November 9, 2010, in which you state that the Bay Mills Indian Community (the Tribe) recently opened an off-reservation gaming facility on a parcel that it purchased in Vanderbilt, Michigan (the Vanderbilt site). You asked for my opinion whether the Vanderbilt site is held in restricted fee under the Indian Gaming Regulatory Act (IGRA) by virtue of the fact that the Tribe purchased the land using money from its land trust under the Michigan Indian Land Claims Settlement Act of 1997 (the MILCSA). As I understand it, the NIGC is attempting to determine whether it has regulatory jurisdiction over the Tribe's Vanderbilt site. Such regulatory jurisdiction would exist only if the Vanderbilt site qualifies as *Indian lands* under IGRA.

According to the warranty deed for the Vanderbilt site, the Tribe purchased the property in August 2010 from Treetops Acquisition Company,

LLC, a Michigan Limited Liability Company. The legal land description on the warranty deed follows:

> Lands in the Township of Corwith, County of Otsego, Michigan described as:
>
> A parcel of land on part of the Northwest 1/4 of Section 22, Township 32 North Range 3 West, according to the Certificate of Survey recorded in Liber 515, pages 93 and 94, Otsego County Records, described as: Beginning at the Northwest corner of said Section 22; thence South 88°15'18" East, 1321.66 feet along the North line of said Section 22; thence 1099.04 feet along a curve to the left, said curve having a radius of 5844.58 feet and a long chord of 1097.42 feet bearing South 21°33'41" West and being along the Westerly Right-of-Way line of Limited Access 1-75; thence continuing South 22°56'39" West, 440.43 feet along said Right-of-Way line; thence continuing South 45°47'56" West, 460.00 feet along said Right-of-Way line; thence continuing South 56°47'56" West, 112.50 feet along said Right-of-Way line; thence North 89°30'40" West, 209.68 feet; thence 537.75 feet along curve to the right, said curve having a radius of 1432.69 feet and a long chord of 534.60 feet bearing North 14°48'58" West, being along the centerline of Highway Old 27; thence North 00°05'27" West, 1611.53 feet along the West line of said Section 22 to the Point of Beginning.

Warranty Deed between Treetops Acquisition Company, LLC and the Bay Mills Indian Community, Otsego County Mich. Liber 1237 at 261 (Aug. 27, 2010).

This deed describes a parcel of land containing about 47 acres in Otsego County, in the northern part of Michigan's Lower Peninsula. It is located about 87 miles away from the Tribe's headquarters and reservation in Chippewa County, in the northern part of Michigan's Upper Peninsula-over 100 miles away by road.

As explained below, it is my opinion that the Vanderbilt site was not acquired in conformance with the MILSCA and it is not a restricted fee site.

Indian Gaming Regulatory Act

In IGRA, the term *Indian lands* is defined to mean:

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

25 U.S.C. § 2703(4).

The NIGC's regulations clarify the definition of *Indian lands* for purposes of IGRA. Those regulations provide:

> Indian lands means:
>
> (a) Land within the limits of an Indian reservation; or
>
> (b) Land over which an Indian tribe exercises governmental power and that is either-
>
> > (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
> >
> > (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12.

The question presented now is whether the Tribe's fee land purchase in Vanderbilt was transformed, by operation of law, into any of the three categories of *Indian lands* under IGRA-reservation, trust, or restricted fee. As I understand it, your inquiry focused on the restricted fee category because the Tribe previously submitted legal memoranda to the NIGC and the Department arguing that position.[1] In developing my opinion, I

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[1] The Bay Mills Indian Community, Memorandum and Materials in Support of Resolution No. 10-5-20 Amendment to Gaming Ordinance, Submitted to the National Indian Gaming Commission (May 26, 2010); The Bay Mills Indian Community, Memorandum and Materials in Support of Resolution No. 10-2-9 Amendment to Gaming Ordinance, Submitted to the National

have carefully considered the Tribe's legal memoranda. I have also considered a legal analysis submitted by four other tribes in Michigan that argues against the Bay Mills position,[2] as well as correspondence issued by the Michigan Attorney General's Office and other relevant materials.

Importantly, we are not presented here with a fee land purchase by a tribe using general tribal funds. Rather, the Tribe has submitted evidence showing that the land was purchased with earnings from a special fund created by a tribal-specific statute. Therefore, this analysis is focused on, and limited to, an interpretation of the MILCSA.[3]

Indian Gaming Commission (Feb. 25, 2010); The Bay Mills Indian Community, Request for an Indian Lands Opinion, Submitted to the Department of the Interior (July 7, 2009). The Tribe withdrew each of these requests before receiving responses from the NIGC or the Department.

[2] Letter from Little Traverse Bay Bands of Odawa Indians, Nottawaseppi Huron Bank of Potawatomi Indians, Match-e-Be-Nash-She-Wish Band of Pottawatomi Indians, and Saginaw Chippewa Indian Tribe of Michigan to Attorney General Eric Holder, U.S. Dept. of Justice, Secretary Kenneth Salazar, U.S. Dept. of the Interior, Chairwoman Tracie Stevens, National Indian Gaming Commission (Dec. 14, 2010).

[3] The Department has previously articulated its position that unless a tribal-specific statute expressly dictates otherwise, off-reservation lands purchased by a tribe in fee simple do not automatically become restricted fee sites by operation of the Trade and Intercourse Act, otherwise known as the Non-Intercourse Act, codified as amended at 25 U.S.C. § 177. M-Opinion 37023 at 6 (Jan. 18, 2009); *see also* Letter from George T. Skibine, Acting Deputy Assistant Secretary - Policy and Economic Development, to Carl Edwards, President of the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin (Dec. 19, 2008) (the Trade and Intercourse Act's

Michigan Indian Land Claims Settlement Act

In 1997, Congress enacted the MILCSA, 105 Pub. L. 143, 111 Stat. 2652. The purpose of the statute was to provide plans to distribute certain Indian Claims Commission judgment funds that the Department had been holding in trust. Among other things, the MILCSA established a non-expendable land trust for the Tribe.

Congress provided that the principal of the Tribe's land trust was not to be expended for any purpose, but that:

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

MILCSA § 107(a)(3).

The Tribe submits, and for present purposes I will assume, that it purchased the Vanderbilt site with earnings from its MILCSA Land Trust. The United States does not hold the deed to the Vanderbilt site in trust, and the Tribe has no current application to place the land into trust. Nor does the Vanderbilt site fall within an existing Indian reservation. Therefore, the issue is whether the language of MILCSA Section 107(a)(3) operated as a

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restrictions on alienation do not apply to off-reservation lands purchased by a tribe in fee simple).

matter of law to create a reservation, trust site, or restricted fee site under IGRA when the Tribe purchased the Vanderbilt site in fee simple.

For two reasons, each sufficient by itself, I conclude that the Tribe's purchase of the Vanderbilt site did not transform it into *Indian lands* under IGRA.

I. Consolidation and Enhancement of Tribal Landholdings

First, under the statute's plain language, MILCSA Section 107(a)(3) does not apply to the Tribe's purchase of the Vanderbilt site. The statute mandates that "earnings generated by the Land Trust shall be used *exclusively* for improvements on tribal land or *the consolidation and enhancement of tribal landholdings* through purchase or exchange." MILCSA § 107(a)(3) (emphasis added). The expenditure in this case was not for an improvement on tribal land, as it was for the purchase of new land rather than for an improvement on existing land. So the only issue is whether the new land purchase in Vanderbilt was made for the "consolidation and enhancement of tribal landholdings ...."

In interpreting a statute, one must always start with the language of the statute itself. *Duncan* v. *Walker,* 533 U.S. 167, 172 (2001). If Congress has provided unambiguous direction within the language of the statute, agencies and courts are obligated to follow it. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984). The MILCSA does not define the terms *consolidation* and *enhancement,* nor does the statute set forth a

tribal land consolidation area within which Land Trust purchases may be made.[4] Because Congress did not provide a special definition of those terms, it is proper in this instance to rely on their ordinary meanings.

Webster's New Twentieth Century Unabridged Dictionary defines the word *consolidate* as meaning "to unite (various units) into one mass or body." Webster's primary definition of the word *enhance* is "to make greater, as in cost, value, attractiveness, etc.; heighten; intensify; augment." Another definition of *enhance* is "to rise; to increase." But that alternative definition is noted as being archaic.

The Tribe's trust landholdings are all located in Chippewa County, on Michigan's Upper Peninsula. The Vanderbilt site is in Otsego County, on Michigan's Lower Peninsula, over 85 miles away from the Tribe's existing trust landholdings. Furthermore, the Tribe has confirmed with my office that it does not own any other fee lands in Vanderbilt. Given that the Vanderbilt land purchase was over 85 miles away from any other tribal trust lands and not near any other tribal fee lands, it cannot have been acquired for the purpose of consolidating-or uniting-other tribal landholdings. In fact, it could be argued that the acquisition actually results in a further fragmentation of the Tribe's landholdings.

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[4] In addition, I note that the Bay Mills Indian Community does not have a land consolidation plan or tribal consolidation area approved by the Bureau of Indian Affairs. Nor has the Tribe submitted a proposal for any such consolidation plan or consolidation area.

Moreover, the Tribe's submissions do not demonstrate a fulfillment of this requirement. The submissions merely state that the MILCSA's land acquisition authority is "to improve existing tribal land holdings and to acquire new tribal land holdings." Tribe's May 2010 Memorandum at 3; Tribe's Feb. 2010 Memorandum at 3; Tribe's July 2009 Memorandum at 3. The Tribe gives no explanation of its interpretation that MILCSA allows for unlimited acquisitions of "new tribal land holdings." The Tribe's submissions also do not show that the Tribe's purchase in any way consolidated tribal landholdings. My office sought additional information from the Tribe on this point, but as of the date of this letter, no additional information had been provided by the Tribe.

The analysis could end there, because Congress' use of the conjunctive *and* within the phrase *consolidation and enhancement* strongly implies that any Land Trust purchase has to both consolidate and enhance tribal landholdings. *OfficeMax, Inc.* v. *United States,* 428 F.3d 583, 588-90 (6th Cir. 2005) (determining through comprehensive analysis that "dictionary definitions, legal usage guides and case law compel us to start from the premise that 'and' usually does not mean 'or.'").[5]

The presumption that *and* is conjunctive may be rebutted only where the context in which the term is

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[5] *See* Letter from Larry Morrin, BIA Regional Director, to Mr. L. John Lufkins, President of the Bay Mills Indian Community (Sept. 10, 2002) at 2, 4 (stating that the "earnings may also be used to consolidate *and* enhance tribal land holdings through either purchase or exchange." (emphasis in original)).

used or other provisions of the statute dictate a contrary interpretation. *OfficeMax,* 428 F.3d at 589 (citing *Crooks* v. *Harrelson,* 282 U.S. 55, 58 (1930)). In examining the context and other provisions of the MILCSA, I find nothing that warrants such a conclusion. To the contrary, the context and other provisions of the MILCSA demonstrate that Congress knew how to use the word *or* when it intended to provide a choice between alternatives. First, Congress twice used the disjunctive *or* within the very same sentence at issue here when it meant to provide a choice-"improvements on tribal land *or* the consolidation" and "purchase *or* exchange." Moreover, Congress specifically used the disjunctive *or* in a separate but similar section of the MILCSA setting forth the distribution plan for the Sault Ste. Marie Tribe:

> The principal of the Self-Sufficiency Fund shall be used exclusively for investments or expenditures which the board of directors determines-
>
> * * *
>
> (C) will consolidate *or* enhance tribal landholdings.

MILCSA § 108(b)(1) (emphasis added). The same phrase is used in the language relating to the Sault Ste. Marie Tribe's expenditure of Self-Sufficiency Fund income:

> The interest and other investment income of the Self-Sufficiency Fund shall be distributed-

* * *

(5) for consolidation *or* enhancement of tribal lands.

MILCSA § 108(c) (emphasis added).

Because Congress chose to use the word *or* in an otherwise similar section of the statute for the Sault Ste. Marie Tribe, but used the word *and* with regard to the Bay Mills Indian Community, I must assume that the distinction was intentional and that it makes a difference. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another ...."); *Leisnoi, Inc. v. Stratman,* 154 F.3d 1062, 1067 (9th Cir. 1998) ("Congress's use of two distinct phrases leads us to conclude that two different meanings were intended."); 2A Sutherland, Statutory Construction § 4606 (5th ed. 1992 & Supp. 1997) ("When the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."). Because Congress made a choice to create different distribution plans for each of the MILCSA tribes, agencies and the courts are obligated to respect those differences. Therefore, under the Bay Mills distribution plan, the Tribe may use Land Trust earnings to purchase new lands only where such purchases both consolidate and enhance tribal landholdings.

Furthermore, even if Congress had meant to authorize the Tribe to make Land Trust purchases

that either consolidate or enhance tribal landholdings, I do not believe that the Vanderbilt purchase can be said to enhance tribal landholdings. I believe that the term *enhancement* of tribal landholdings means that any Land Trust purchase must somehow enhance *(i.e.,* make greater the value or attractiveness) some other tribal landholding already in existence. Because the Vanderbilt site is very far from all other tribal landholdings, it cannot be said to enhance any of them. Therefore, even under an interpretation where *enhancement* includes the addition of new land, there must be some connection to benefiting existing tribal landholdings. Such a showing has not been made here.[6]

The statute simply cannot be read to authorize the Tribe to purchase additional landholdings in any geographic location with no connection to the intended purposes of the MILCSA, which was the consolidation and enhancement of tribal landholdings. First, such an interpretation would rely on a strained definition of *enhancement.* And second, it would be very unusual. Especially after IGRA became law in 1988, Congress has typically included some geographic guidance when it authorizes a tribe to obtain new lands that will fall

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[6] This discussion highlights the practical necessity and benefit of the Department's position that the MILCSA provides discretionary trust acquisition authority. *See* Section II, *infra;* Letter from Larry Morrin, BIA Regional Director, to Mr. L. John Lufkins, President of the Bay Mills Indian Community at 4-5 (Sept. 10, 2002). Under that interpretation, the Tribe would have to demonstrate to the Secretary that its Land Trust acquisitions conform to the limitations in the MILCSA before the Secretary would accept them into trust.

under its legal jurisdiction. *See, e.g.,* Auburn Indian Restoration Act, 103 Pub. L. 434 § 204 (1994) (codified at 25 U.S.C. § 13001-2); Aroostook Band of Micmacs Settlement Act, 102 Pub. L. 171 § 5(a) (1991) (codified at 25 U.S.C. 1721); Seneca Nation Settlement Act, 101 Pub. L. 503 § 8(c) (1990) (codified at 25 U.S.C. § 1774f(c)); Ponca Restoration Act, 101 Pub. L. 484 § 10(c)(1) (1990) (codified at 25 U.S.C. § 983h(c)(1)).

Moreover, if tribal land purchases made in conformity with Section 107 of the MILCSA become restricted fee *Indian lands* under IGRA, as the Tribe has argued, then interpreting the statute as containing no geographic limitations would produce a result inconsistent with the legislative purpose of IGRA. The legislative purpose of IGRA Section 20, codified at 25 U.S.C. § 2719, was to freeze every tribe's gaming eligible Indian lands as they existed on IGRA's enactment date, subject to several delineated exceptions. Consistent with IGRA's plain language, the Department has interpreted IGRA Section 20's general prohibition against gaming on newly acquired lands to apply only to "lands acquired by the Secretary in trust for the benefit of an Indian tribe." *See* M-37023 (Jan. 18, 2009). Therefore, if the Tribe's land purchases under the MILCSA became restricted fee by operation of law, then the general prohibition against gaming on newly acquired lands would not apply. That alone does not lead to an absurd result, as Congress certainly has created specific gaming opportunities for tribes that faced specific circumstances. But if the MILCSA were to be interpreted as containing no geographic limitations on where the Tribe may purchase lands under

Section 107(a)(3), and considering that the purchasing power of the Tribe's Land Trust earnings may continue indefinitely, then the Tribe potentially could open any number of gaming facilities anywhere in the nation from now through the indefinite future. Given the legislative purpose of IGRA Section 20, along with the nearly complete lack of discussion regarding gaming within the MILCSA's legislative history (see Section II below), it is hard to believe that Congress intended such a result.

It follows that the MILCSA does not transform the Vanderbilt site into *Indian lands* by operation of law. I acknowledge that the second sentence of Section 107(a)(3) does say literally that "[a]ny land acquired with funds from the Land Trust shall be held as Indian lands are held." But the words *any lands acquired* should not be interpreted to include lands that were acquired contrary to the parameters of the statute. The second sentence must be read along with the preceding sentence, which includes the limitations just discussed and the mandate that Land Trust earnings shall be used exclusively for those purposes. In order to give meaning to the first sentence, the second sentence must be interpreted to include those limitations as well and therefore affect only those lands that are acquired in conformance with the statute. Because the Vanderbilt site did not consolidate and enhance tribal landholdings, the last sentence of Section 107(a)(3) does not apply and it cannot - under any interpretation - create Indian lands eligible for gaming under IGRA.

II. Held as Indian Lands are Held

Even if the Tribe had used its Land Trust earnings to purchase land in an area that could be said to consolidate and enhance tribal landholdings, I do not believe that the MILCSA would operate as a matter of law to transform that land purchase into *Indian lands* under IGRA. This part of the analysis requires an interpretation of what Congress meant by: "Any land acquired with funds from the Land Trust shall be held as Indian lands are held."

The term *Indian lands* appears in numerous statutes with different definitions. Therefore, although the term appears in both IGRA and the MILCSA, one cannot assume that Congress intended the term *Indian lands* in the MILCSA to mean *Indian lands* as defined under IGRA. There no indication in the MILCSA or its legislative history that Congress intended to adopt the IGRA definition of *Indian lands*. Moreover, doing so would not have provided any guidance on how lands purchased under MILCSA Section 107 are to be held, because IGRA defines *Indian lands* to include reservation lands, trust lands held by tribes or individuals, as well as lands held by tribes or individuals in restricted fee. Furthermore, to conclude that the definition of *Indian lands* in a broadly applied statute such as IGRA is synonymous with similar wording in a tribe specific statute is unpersuasive. MILCSA addresses specific land claims of particular tribe and provides that any lands acquired per its terms will be treated like other Indian lands but it does not dictate any special land status, whereas IGRA is a broad statutory delegation of authority by

Congress to the executive branch that applies to all tribes where the definition of *Indian lands* is used to ascertain the eligibility of tribes to have certain provisions of IGRA apply to them. The former statutory language is for the purpose of stating that lands acquired thereunder will be one of those kinds of Indian lands and the latter statute is to show what kind of land status is necessary to qualify for certain statutory provisions. Given these distinctions, a more in-depth analysis is required.

In its prior submissions to the Department and the NIGC, the Tribe argued that the phrase *held as Indian lands are held* in the MILCSA means that lands purchased by the Tribe with earnings from its Land Trust become automatically subject to a restriction by the United States against alienation (a so-called restricted fee site), therefore qualifying as *Indian lands* under IGRA.

There is no plain meaning of the phrase *held as Indian lands are held.* Neither the full phrase nor the term *Indian lands* are defined in the MILCSA. Nor does the phrase have a precise meaning within the body of Federal Indian law. In practice, Indian lands can be held in a variety of ways-*e.g.*, in fee simple, in restricted fee, in trust for the benefit of a tribe or tribes, in trust for the benefit of individual Indians, and as reservations. Furthermore, these forms of Indian land ownership are not exhaustive and they are not all mutually exclusive. Therefore, the phrase *held as Indian lands are held* does not identify a particular land tenure.

The phrase has appeared in at least two other statutes, but in the other statutes it has been used

only in conjunction with a more specific land holding directive, such as: "the land transferred shall be taken in the name of the United States in trust for the tribe or bands to be held as Indian lands are held, and shall be part of their reservation." 25 U.S.C. § 766 (a); *see also* 25 U.S.C. § 1300f(c) ("The Secretary of the Interior is directed ... to accept on behalf of the United States and in trust for the Pascua Yaqui Tribe, the title to the real property ... and such lands shall be held as Indian lands are held ...."). Those statutes do not help to discern the meaning of the phrase when it appears by itself. In fact, these statutes suggest that use of the phrase *held as Indian lands are held* in isolation does not vest the land with a particular status, and rather, the use of that phrase is merely to reflect Congress' intent that the land should be treated like other Indian lands are treated once some action is taken to establish its status.

The phrase *held as Indian lands are held,* or similarly *held as other Indian lands are held,* appeared in a number of 19th century Indian treaties.[7] The phrase does not have a special meaning relating to the Bay Mills Indian Community, because the Tribe has not provided, and our own research has not uncovered, any treaty

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[7] Treaty Made at Chicago with the United Nation of Chippewa, Ottowa and Potawatamie Indians, 7 Stat. 431 (1833); Treaty with the Winnebagoes, 7 Stat. 370 (1832); Treaty with the Oneida Indians Residing at Green Bay, 7 Stat. 566 (1838); Treaty with the Sioux, 10 Stat. 954 (1851); Treaty with the Menomonee Indians, 10 Stat. 1064 (1854); Treaty with the Mendawakanton and Wahpakoota Bands of Dakota or Sioux Tribe of Indians, 12 Stat. 1031 (1858).

signed by a political predecessor of the Bay Mills Indian Community that used such language.

In each of the treaties where the phrase was used, it was in the context of creating what today we would call a reservation for the subject tribes. The phrase was used in place of a more definitive directive regarding the nature of the underlying land ownership. But this created a legal uncertainty, because the title derived by an Indian tribe on its reservation depends entirely upon the terms of the treaty. Some treaties called for the United States to grant ownership of the reservation lands to the subject tribes in fee simple. Other treaties granted fee ownership to the tribes, but subject to a restriction against alienation. Many other treaties have language that has been interpreted to mean that the United States retained fee title to the lands, with a right of use and occupancy or beneficial interest held by the tribe.[8] Given such a varied background, it was undoubtedly difficult for 19th century treaty drafters to describe a definitive tribal estate. By using the circular phrase *held as Indian lands are held,* the drafters tried to avoid the problem. In his Handbook of Federal Indian Law, Felix Cohen explained:

> [A] number of treaties dodge the problem of defining the Indian estate by providing that specified lands shall be held "as Indian lands are held," or as an Indian reservation, thus

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[8] Such was the case with the Menominee Reservation created by the 1854 treaty cited above, which used the phrase *held as Indian lands are held. See Menominee Tribe of Indians v. United States,* 391 U.S. 404 (1968).

> ignoring the fact that considerable differences may exist with respect to the tenures by which various tribes hold their land.

Felix S. Cohen, Handbook of Federal Indian Law, U.S. Dept. of the Interior, Office of the Solicitor at 296 (U.S. Govt. Printing Office 1942) (internal footnotes omitted).

So by its very nature and history, this phrase is ambiguous. Therefore, the Indian canon of construction applies and the statute should be construed liberally in favor of the Tribe. *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985). The question is whether the MILCSA can be liberally construed as a mechanism that automatically transforms unrestricted fee lands purchased by the Tribe into *Indian lands* under IGRA.

In interpreting an ambiguous statutory provision, it is proper to consult legislative history to discern congressional intent. In this case, the MILCSA includes rather extensive legislative history. Interestingly, this history is almost entirely devoid of any discussion of gaming, but for two comments made by the Department of the Interior. In the first version of the bill, the language that would become Section 107(a)(3) was different. It read:

> The earnings generated by the Land Trust shall be used annually and exclusively for the consolidation and enhancement of tribal landholdings through purchase or exchange. Any land so acquired shall be held in trust by

> the United States for the Bay Mills Indian Community.

HR 1604 § 7(a)(3). After testifying during a hearing before the House Committee on Resources, the Department's Assistant Secretary -- Indian Affairs wrote a letter to the Committee with several proposed technical amendments to this bill. As to the provision at issue here, the letter stated:

> Section 7 is the use and distribution plan for the Bay Mills Indian Community. Section 7(a)(3) provides that earnings generated by its land trust shall be used annually and exclusively for consolidation and "enhancement" of tribal landholdings. It should be clarified whether enhancement includes improvements upon land, or only the acquisition of additional land. This section does not permit the Community to consolidate earnings from the fund for two or more years in order to acquire choicer or more valuable property, or from returning money to the principal of the Land Trust - two options which may give the Community desired flexibility depending on economic conditions.
>
> Section 7(a)(3) provides that "Any land so acquired shall be held in trust by the United States for the Bay Mills Indian Community." It should be clarified that the Secretary retains discretion under existing regulations (25 C.F.R. Part 151) and that this section does not repeal the limitations in section 20 of the Indian Gaming Regulatory Act.

Letter from Ada E. Deer, Assistant Secretary - Indian Affairs, to the Honorable Don Young, Chairman of the Committee on Resources, U.S. House of Representatives (July 15, 1997).

As you know, Section 20 of the Indian Gaming Regulatory Act prohibits gaming on lands acquired by the Secretary in trust for a tribe after October 17, 1988, the date of IGRA's enactment, subject to several potential exceptions. This, plus a nearly identical comment made in a subsequent Department letter discussed below, is the sole reference to gaming within the legislative history of the MILCSA. The intent of the Department's comment was to clarify that if lands were taken into trust for the Tribe under this statute, then those newly acquired lands would be subject to IGRA's general prohibition against gaming, unless eligible for one of the statutory exceptions.

The Tribe has argued that Congress rejected the Department's proposed changes to Section 7(a)(3), which would become Section 107(a)(3). In so arguing, the Tribe correctly points out that after receiving the Department's letter, the House Resources Committee reported a bill to the full House that did not change a single word of Section 7(a)(3). *See* HR 1604 RH (Oct. 28, 1997). But the bill as introduced on the House floor seven days later contained several changes to Section 7(a)(3). *See* Congressional Record - House H9931, H9933 (Nov. 4, 1997); HR 1604 EH (undated). Specifically, Congress added the Department's suggestion that Land Trust funds should be authorized for use on improvements to existing tribal lands; Congress deleted the word

"annually" and thus accepted the Department's suggestion that the Tribe should be allowed to save its yearly earnings for the purchase of more valuable land; and Congress replaced its original mandatory trust language with the language that became law-that "[a]ny land acquired with funds from the Land Trust shall be held as Indian lands are held." Therefore, I do not interpret the Committee's reported bill as a signal that the Committee rejected the Department's recommendations. Rather, it seems more likely that the bill was reported out of committee while changes to the land acquisition sections were still being negotiated. The bill as introduced on the House floor reflected Congress' intent to remove the mandatory trust nature of the acquisition and to default to standard rules applicable to such land acquisitions. The Tribe argues that by removing the mandatory trust acquisition language, Congress intended to remove any need for administrative action and made the land subject to restraint against alienation by operation of law. If that were Congress' intent, I believe Congress would have expressly designated such lands as restricted fee, as it had done so before. *See* discussion of the Seneca Nation Settlement Act of 1990, *infra*.

As further support for this explanation of events, I note that the Sault Ste. Marie Tribe was addressing its land acquisition goals within the bill at the same time. After the Committee reported its bill, but before the bill was introduced on the House floor, the Sault Ste. Marie Tribe was able to have significant changes made to its distribution plan for land acquisition purposes. In the reported bill, the

Sault Ste. Marie Tribe's distribution plan contained no explicit language relating to land acquisition. *See* HR 1604 RH § 8 (Oct. 28, 1997). But by the time the bill was introduced onto the House floor, it contained the following new language relating to land acquisition:

> (b) Use of Principal.-
>
> > (1) The principal of the Self-Sufficiency Fund shall be used exclusively for investments or expenditures which the board of directors determines-
>
> ***
>
> > (C) will consolidate or enhance tribal landholdings.
>
> ***
>
> > (4) Any lands acquired using amounts from the Self-Sufficiency Fund shall be held as Indian lands are held.
>
> (c) Use of Self-Sufficiency Fund Income.- The interest and other investment income of the Self-Sufficiency Fund shall be distributed-
>
> ***
>
> > (5) for consolidation or enhancement of tribal lands.
>
> ***

> (f) Lands Acquired Using Interest or Other Income of the Self-Sufficiency Fund.-Any lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe.

HR 1604 EH § 8 (undated).[9] Thus, Congress' amendments here show a similar intention to treat acquired lands as *Indian lands* and that the designation of that land status would come later under default land acquisition rules, with the exception of paragraph (f) which called for a mandatory land acquisition but perhaps was a mistake by Congress. If Congress had meant restricted fee status, then it could have indicated as much but declined to do so.

On November 3, 1997, the Senate Committee on Indian Affairs held a hearing on the bill. Michael Anderson, Deputy Assistant Secretary for Indian Affairs. testified in support of HR 1604, noting specifically that his testimony was directed toward the most recent version of H.R. 1604, which was to be presented on the House floor the next day. *See* Judgment Funds of the Ottawa and Chippewa Indians of Michigan. Hearing before the Committee on Indian Affairs of the United States Senate, S. Hrg. 105-413 at 29 (Nov. 3. 1997). In other words, Mr. Anderson's testimony was directed toward the bill that used the language "held as Indian lands are held" in the land acquisition sections for the Bay

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[9] The final version of the MILCSA includes this language. 105 Pub. L. 143 § 108 (1997).

Mills and Sault Ste. Marie Tribes. Mr. Anderson stated:

> The Department submitted two draft bills in March to Congress, and also has submitted comments on H.R. 1604, as introduced, to Chairman Don Young last summer, on July 15, 1997. We are pleased to note that while most of the suggestions were incorporated within the latest version, that these basically were agreed to, and we now have basic agreement other than a couple of technical amendments.

Id. at 30.

The technical amendments to which Mr. Anderson referred were subsequently delivered to the Senate Committee on Indian Affairs. *See* Letter from Michael Anderson. Acting Assistant Secretary - Indian Affairs, to Ben Nighthorse Campbell, Chairman, Committee on Indian Affairs (Nov. 12, 1997). But that letter did not reach the Senate before its primary vote on HR 1604, which took place on November 9, 1997, and may not have even reached the Senate before its final action on the bill on November 13, 1997, which was to recede from an amendment not passed by the House. This fact is reflected in a letter written by Solicitor John Leshy to the White House's Office of Management and Budget recommending that the President sign the bill:

> The Department submitted a letter setting forth certain technical and clarifying amendments to the bill which did not reach

> the Senate prior to the vote which took place in that chamber on November 10 [sic], 1997. However, we are considering various administrative and legislative options to address the issues detailed in that letter. Nevertheless, the Department of the Interior supports this legislation as an effective and equitable means of distributing the judgment funds to the affected tribes and lineal descendants.

Letter from John Leshy, Solicitor, to Franklin D. Raines, Director, Office of Management and Budget (Nov. 19, 1997). The President then signed the bill into law on December 15, 1997.

The technical amendments proposed in the Michael Anderson letter included a suggestion regarding Section 7(a)(3). The letter states: "Section 7(a)(3): Delete the last sentence because it is unnecessary." The last sentence to which the letter refers is the sentence at issue here: "Any land acquired with funds from the Land Trust shall be held as Indian lands are held." Similarly, the Michael Anderson letter made the following comment about Section 8(b)(4), the nearly identical counterpart for the Sault Ste. Marie Tribe: "Section 8(b)(4) should be deleted because it is unnecessary and adds nothing to existing law." In addition, the Michael Anderson letter states:

> Section 8(f) should be deleted because it is superfluous and conflicts with Section

> 8(b)(4), if 8(b)(4) is not deleted.[10] If Section 8(f) is retained, we would like it clarified that the Secretary retains discretion under existing regulations (25 C.F.R.
>
> Part 151) and that this section does not repeal the limitations in section 20 of the Indian Gaming Regulatory Act.

Letter from Michael Anderson, Acting Assistant Secretary - Indian Affairs, to Ben Nighthorse Campbell, Chairman, Committee on Indian Affairs at 2 (Nov. 12, 1997) (footnote added).

An important conclusion may be drawn from these portions of the Michael Anderson letter, as compared to the previous Ada Deer letter. Under the revised language in the bill, the Department was no longer concerned that the land acquisition provisions for Bay Mills could be interpreted to provide for mandatory trust acquisition or implicitly repeal any limitations in IGRA. That is evident by the fact that the Michael Anderson letter did not carry the

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[10] It is perhaps not readily apparent how a statutory provision can be both superfluous and conflicting. But I believe that the *superfluous* comment was in reference to the fact that by its plain language, Section 8(b)(4) could be interpreted to apply to any lands acquired using any amounts from the Self-Sufficiency Fund, including both principal and interest income. Under that interpretation, it would not be necessary to have a second section at 8(f) to cover lands acquired using interest from the Self-Sufficiency Fund. This view is also consistent with the Department's characterization of 8(f) as conflicting with 8(b)(4). If 8(b)(4) covered all Self-Sufficiency Fund land acquisitions and was not a mandatory trust directive, then 8(f) would be in conflict if it were interpreted to provide for mandatory trust acquisition of lands acquired using interest income.

concern forward as it related to Bay Mills. At the same time, the Michael Anderson letter did raise the concern as it now related to Sault Ste. Marie, where Congress added the trust acquisition language that had previously applied to Bay Mills. As to the new Bay Mills language, the Department seemed basically satisfied. The suggestion that the *Indian lands* sentence should be deleted as unnecessary is evidence that the Department interpreted it to have no true legal effect. The language was unnecessary because there is no need for federal legislation to acquire fee land and then request that the land be placed into trust under the Secretary's discretionary authority, consistent with the Department's statements in the legislative history. My interpretation is consistent with that position. I believe that the term *held as Indian lands are held* served simply as a congressional affirmation that the statute was not changing any of the standard Indian land acquisition rules.

Had Congress retained its original language, the Tribe would have had a strong argument that any lands purchased with Land Trust earnings would have been subject to mandatory trust acquisition.[11] When the Department raised this concern, Congress responded by amending the bill. By changing the

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[11] The Tribe previously asserted that the final language adopted in Section 107(a)(3) created mandatory trust acquisition authority. In a 2002 letter to the Tribe, the Department expressed its interpretation that the language of Section 107(a)(3) creates discretionary trust acquisition authority. Letter from Larry Morrin, BIA Regional Director, to Mr. L. John Lutkins, President of the Bay Mills Indian Community (Sept. 10, 2002).

language "shall be held in trust" to "shall be held as Indian lands are held," Congress borrowed a phrase and a strategy from the 19th century treaties, which basically was to decline to set forth any specific directive. Instead of defining with particularity how the tribal estate would be owned pursuant to MILCSA Land Trust purchases, Congress borrowed the phrase *held as Indian lands are held* as a way of declining to change the standard rules. It follows that the standard Indian land rules apply. The Tribe may use Land Trust earnings to purchase land in fee simple; the Tribe may then request the Secretary to take such lands into trust for the benefit of the Tribe; the Secretary retains discretion under 25 C.F.R. part 151 to take such lands into trust; and with any such trust acquisition for gaming purposes, the Tribe is subject to the standard analysis for newly acquired trust lands under IGRA Section 20. Unless and until the Secretary acts to accept those lands into trust, any off-reservation lands acquired by the Tribe with Land Trust earnings are held by the Tribe in unrestricted fee.

The Tribe has argued that Congress rejected the Michael Anderson letter's proposed changes to Section 7(a)(3). But in making that argument, the Tribe was not aware that the Michael Anderson letter failed to reach the Senate in time for consideration. Considering that timing, the only thing that can be gleaned from the Michael Anderson letter is the Department's own position with regard to the language at issue.

As to the Department's comments in the earlier Ada Deer letter, the Tribe argued that Congress

actually went the other direction-that Congress replaced the trust language from the bill with the language that such lands "shall be held as Indian lands are held" not only to reject the Department's comment that the Secretary should retain discretion in the matter, but to remove any need for the Secretary to take any action whatsoever by making tribal land purchases restricted fee by operation of law. There is nothing in the legislative history to support the Tribe's view. Nothing in the record suggests that the Tribe requested Congress to make its MILCSA lands automatically held in restricted fee status. And had Congress decided on its own initiative to depart so drastically from the Department's suggestion, one would expect to see some discussion of that fact in the legislative history.

Furthermore, I note that seven years before Congress enacted the MILCSA, it demonstrated that it knew how to specify with particularity that a tribe's land purchases should be held in restricted fee. In the Seneca Nation Settlement Act of 1990, Congress provided:

> LAND ACQUISITION. -- Land within its aboriginal area in the State or situated within or near proximity to former reservation land may be acquired by the Seneca Nation with funds appropriated pursuant to this Act. State and local governments shall have a period of 30 days after notification by the Secretary or the Seneca Nation of acquisition of, or intent to acquire such lands to comment on the impact of the removal of such lands from real

> property tax rolls of State political subdivisions. Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of section 2116 of the Revised Statutes [25 U.S.C. § 177], such lands shall be subject to the provisions of that Act and *shall be held in restricted fee status* by the Seneca Nation. Based on the proximity of the land acquired to the Seneca Nation's reservations, land acquired may become a part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Springs Reservation in accordance with the procedures established by the Secretary for this purpose.

Seneca Nation Settlement Act of 1990, 101 Pub. L. 503 § 8(c)(codified at 25 U.S.C. § 1774f) (emphasis added).

This provision demonstrates that Congress knows how to express its unambiguous intent to place restraints against alienation on acquired land. In the Seneca Nation Settlement Act, Congress not only expressly stated that the land will be held in restricted fee, but it also provided a process for the Secretary of the Interior to determine whether the land should be given special status. This level of detail is in great contrast to the language in the MILCSA. Moreover, the Tribe's submission does not explain why Congress would use the more general phrase in the MILSCA if it had intended to automatically vest lands acquired under that Act with restricted fee status. Indeed, the Department's

regulations define "restricted land" or "land in restricted status" as "land the title to which is held by ... a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of *limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations.*" 25 C.F.R. § 151.2(e) (emphasis added). Here, the MILCSA does not reflect a direct imposition of such limitations. It is presumed that Congress knows of its former legislation and passes new laws in view of the provisions of the legislation already enacted. *Navajo Nation v. Dept. of Health & Human Serv.*, 325 F.3d 1133, 1139 n.8 (9th Cir 2003). Therefore, had Congress intended to create restricted fee lands in the MILCSA, it could have followed its precedent in the Seneca Nation Settlement Act and made that intention clear.[12]

Finally, I have considered and rejected an alternative interpretation that the phrase *held as Indian lands are held* in the MILCSA might operate to automatically create the same land tenure as created by the 19th century treaties using the same phrase. In each of those treaties, the United States defined a particular tract of land that was meant to serve as a tribal homeland or reservation. It has since generally been held that unless such treaties

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[12] Even if the MILCSA did transform the Vanderbilt site into restricted fee, the Tribe would still have to demonstrate that it has legal jurisdiction to exercise governmental power over the site in order for the property to be eligible for gaming under IGRA. *See* 25 U.S.C. § 2703(4)(8); 25 C.F.R. § 502.12(b). But because the MILCSA did not transform the Vanderbilt site into restricted fee, I do not have to reach that question.

stated otherwise, the United States retained the fee title to such lands and the tribes were granted a right of occupancy, with attendant hunting/fishing rights, often characterized as a beneficial or trust interest.[13] But Congress specifically amended the MILCSA bill to remove what could otherwise have been characterized as mandatory trust acquisition language, so it was obviously not its intent to create automatic trust lands. Nor can I interpret the MILCSA to create automatic reservations for the Tribe wherever and whenever the Tribe uses Land Trust earnings to purchase real estate. In this modern era of federal Indian law, Congress knows quite clearly how to create or expand Indian reservations, and it did not do so here.

For these reasons, I do not believe that even a liberal construction of the MILCSA can support the Tribe's position that its Land Trust purchases in fee simple automatically become restricted fee lands under the definition of *Indian lands* set forth in IGRA. Thank you for requesting my opinion on this matter. If you have any questions, please do not hesitate to contact me or Senior Attorney Jeffrey Nelson.

Sincerely,
Hilary C. Tompkins
Solicitor

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[13] *See Menominee Tribe of Indians v. United States,* 391 U.S. 404, 406-408 (1968).

MEMORANDUM FOR THE CHAIRWOMAN

December 21, 2010

From: Michael Gross, Associate General Counsel, General Law

cc: Paxton Myers, Chief of Staff
Dawn Houle, Deputy Chief of Staff
Lael Echo-Hawk, Counselor to the Chairwoman
Jo-Ann Shyloski, Associate General Counsel, Litigation and Enforcement

Re: Bay Mills Indian Community Vanderbilt Casino, NIGC Jurisdiction

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INTRODUCTION

On Wednesday, November 3, the Bay Mills Indian Community opened an off-reservation gaming facility in Vanderbilt, Michigan. The considered opinion of the Department of the Interior Solicitor is that the land is not within a reservation, not held in trust, and not held in restricted fee. Accordingly, the Community's new casino is not on Indian lands within the meaning of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701- 2721, and the National Indian Gaming Commission lacks jurisdiction over it. We are obligated, therefore, to refer the matter to the appropriate law enforcement agencies.

BACKGROUND

The Vanderbilt casino sits upon land described as:

> A parcel of land lying on part of the Northwest ¼ of Section 22, Township 32 North Range 3 West, according to the Certificate of Survey recorded in Liber 515, pages 93 and 94, Otsego County Records, Corwith Township, Otsego County, Michigan, described as: Beginning at the Northwest corner of said Section 22; thence South 88°15'18" East, 1321.66 feet along the North line of said Section 22; thence 1099.04 feet along a curve to the left, said curve having a radius of 5844.58 feet and a long chord of 1097.42 feet bearing South 21°33'41" West and being along the Westerly right-of-way line of Limited Access 1-75; thence continuing South 22°56'39" West 440.43 feet along said right-of-way line; thence continuing South 45°47'56" West, 460.00 feet along said right-of-way line; thence North 89°30'40" West 209.68 feet; thence 537.75 feet long curve to the right, said curve having a radius of 1432.69 feet and a long chord of 534.60 feet bearing North 14°48'58" West, being along the center-line of Highway Old 27; thence North 00°05'27" West, 1611.53 feet along the West line of said Section 22 to the point of beginning, containing 47.55 acres more or less.

The Community purchased the land using money from the land trust established by the Michigan

Indian Land Claims Settlement Act of 1997 (MILCSA), P.L. 105-143, 111 Stat. 2652 (Dec. 15, 1997). MILCSA states that "any land acquired with funds from the Land Trust shall be held as Indian lands are held." *Id.* at § 107(a)(3).

DISCUSSION

IGRA defines *Indian lands* as:

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

25 U.S.C. § 2703(4). NIGC's implementing regulations clarify:

> *Indian lands* means:
>
> (a) Land within the limits of an Indian reservation; or
>
> (b) Land over which an Indian tribe exercises governmental power and that is either-
>
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or

> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12. As the Vanderbilt land is neither reservation land nor trust land, it could only be Indian lands under IGRA if it were held in restricted fee. We have enquired of the Solicitor's Office whether the language in MILCSA that this land is to be "held as Indian lands are held" has the effect of making the land Indian land within the meaning of IGRA, and the answer we have received is "no." See letter from Hilary Tompkins, Solicitor, Department of the Interior to Michael Gross, Associate General Counsel, NIGC (December 21, 2010). As the Department of the Interior exercises broad authority over Indian affairs, 25 U.S.C. §§ 2, 9, and has various obligations to the tribes under MILCSA, *see e.g.* §§ 104-106, the statute is the Department's to interpret, and I defer to the Solicitor's opinion. The land is not Indian land within the meaning of IGRA, and as a consequence, NIGC lacks jurisdiction over the Vanderbilt casino.

IGRA, by its terms, applies only to gaming on Indian lands. *See,* e.g., 25 U.S.C. § 2710(a)(2) ("any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter"); 25 U.S.C. § 2710(b)(l) (requiring approved tribal gaming ordinance for the conduct of Class II gaming on Indian lands); *id.* (requiring tribal licensure of each gaming facility on Indian lands); 25 U.S.C. § 2710(b)(4)(A) (permitting licensure of individually owned gaming on Indian lands); 25 U.S.C. §

2710(d)(1) (requiring approved tribal gaming ordinance for the conduct of Class III gaming on Indian lands); 25 U.S.C. § 2710(d)(3)(A) (requiring a tribal-state compact for Class III gaming on Indian lands); Sen. Rep. 100-446 at p. A-I. (IGRA "is the outgrowth of several years of discussions and negotiations between gaming tribes, States, the gaming industry, the administration, and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands").

Likewise, the powers IGRA grants the Commission and the Chairwoman extend only as far as Indian lands extend. *See, e.g.,* 25 U.S.C. § 2705(a)(3) (power to approve tribal gaming ordinances for gaming on Indian land); 25 U.S.C. § 2705(a)(4) (power to approve management contracts for gaming on Indian lands); 25 U.S.C. § 2713 (enforcement power for violations of IGRA, NIGC regulations, or tribal gaming ordinances); 25 U.S.C. § 2706(b)(l), (2), (4) (powers to monitor gaming, inspect premises, and demand access to records for Class II gaming on Indian lands); 25 U.S.C. § 2702(3)("The purpose of this Act is ... to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming... ").

In short, in the absence of Indian lands, IGRA grants neither the Commission nor the Chairwoman any jurisdiction to exercise regulatory authority over the Vanderbilt casino. Further, when the

Commission obtains information that may indicate a violation of federal, state, or tribal statutes, it is obligated to turn that information over to the appropriate law enforcement officials. 25 U.S.C. § 2716(b).

If you have any further questions, please do not hesitate to ask.

LAW ENFORCEMENT AGREEMENT
Between
BAY MILLS INDIAN COMMUNITY
and
OTSEGO COUNTY SHERIFF'S OFFICE

THIS AGREEMENT, made by and between Otsego County Sheriff's Office (hereinafter termed SHERIFF), and the Bay Mills Indian Community (hereinafter termed the TRIBE).

Recitals.

The TRIBE is a federally recognized Indian Tribe with a Constitution adopted pursuant to the provisions of the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.*, with authority to enter into this Agreement under Articles II and VI, Section (1)(f).

The SHERIFF is authorized to enter into this Agreement pursuant to the provisions of the Urban Cooperation Act, MCL § 124.501, *et seq.*

The TRIBE wishes to deputize certified police officers of the SHERIFF as Tribal officers to act on the Indian lands of the TRIBE within Otsego County, and the SHERIFF desires to have said officers deputized by the TRIBE.

The TRIBE wishes to establish a cooperative relationship with the SHERIFF by which Tribal officers may be deputized as Deputy Otsego County Sheriffs in the future.

The TRIBE and the SHERIFF wish to establish a comprehensive agreement regarding the scope of each party's law enforcement authority on Indian lands of the TRIBE within Otsego County.

Accordingly, the TRIBE and SHERIFF agree as follows:

1. **Purpose**. The purpose of this Agreement is to maintain and promote the health, safety and welfare of all persons engaged in activities on Indian lands of the TRIBE located in Otsego County through the establishment of mutually agreed upon terms and conditions for the provision of effective law enforcement thereon.

2. **Definitions**.

a. "BIA" means the Bureau of Indian Affairs, U.S. Department of the Interior.

b. "Indian" means any person who is a member of a federally recognized Indian Tribe or who is an Alaskan Native and a member of a Regional Corporation *as* defined in the Alaska Native Claims Settlement Act, 43 U.S.C. § 1606.

c. "Indian country" shall have the meaning established in 18 U.S.C. § 1151, as it may from time to time be amended.

d. "Indian lands" means lands of the TRIBE obtained with funds from the Land Trust under § 107(a) of the Michigan Indian Land Claims Settlement Act, P.L. 105-143,

111 Stat. 2652, 2658, and held in restricted fee title by operation of said law and thereby constituting "Indian country".

e. "MCOLES" stands for the Michigan Commission on Law Enforcement Standards.

f. "Special Law Enforcement Commission" or "SLEC" means authorization issued by the Secretary of the Interior to enforce federal laws in Indian country, pursuant to the provisions of the Indian Law Enforcement Reform Act, 25 U.S.C. § 2801, *et seq.*

g. "Tribal officer" means a law enforcement officer employed by the TRIBE.

3. **Term of Agreement.** The initial term of this Agreement shall be for two (2) years, which shall commence on the date it is executed by both parties. Upon the expiration of the initial term, this Agreement shall automatically renew for a term of four (4) years, and there shall continue to be subsequent additional terms unless either party shall give written notice of its desire to terminate the Agreement not less than 30 days prior to the expiration of any term.

4. **Scope of Deputization.** TRIBE hereby deputizes, in accordance with applicable Tribal law, the Sheriff and his deputies, all of whom shall be certified pursuant to MCOLES, as Tribal officers, and who are listed in the attached appendix. An officer so deputized shall have the police powers conferred upon Tribal officers by the laws of the TRIBE and federal law when on duty and located on

the Indian lands of the TRIBE in Otsego County. The SHERIFF shall ensure that the appendix is kept current, by notifying the TRIBE of any changes in personnel in his Department, including MCOLES certification, as soon as practicable,

This deputization expressly includes authorization by the TRIBE to enter onto its Indian lands at any time in order to carry out law enforcement activities_

The TRIBE shall have the authority not to deputize an officer if good cause not to do so is found to exist. The deputy status of an officer may also be suspended for good cause, upon providing notice to the SHERIFF of such action. The parties agree that deputy status is a privilege and that determination of whether good cause exists to refuse to deputize an officer, or to suspend deputy status of a deputized officer, shall be at the sole discretion of the TRIBE; provided that the TRIBE shall undertake good faith discussions with the SHERIFF prior to exercising its discretion.

5. **Territorial Limitation.** The territorial limits of the powers conferred upon the law enforcement officers deputized under this Agreement shall be coextensive with the territorial limits of the TRIBE's Indian lands in Otsego County, without limitation to the powers conferred upon law enforcement personnel engaged in "fresh pursuit" or "hot pursuit" of an offender as defined under applicable Michigan law; provided that such pursuit shall be undertaken in accordance with the Otsego County Sheriffs written policies regarding such matters.

6. **Enforcement of Federal Laws Applicable in Indian Country.** It is understood and agreed that the execution of this Agreement does not authorize the SHERIFF to enforce federal criminal laws on the TRIBE's Indian lands. The TRIBE agrees to utilize its best efforts to facilitate the issuance of a Deputation Agreement with the BIA which includes SHERIFF' s officers, including the provision of 3-day training course regarding the standards of the U.S. Department of the Interior on federal criminal law and procedures. In the event that the training course is scheduled, attorneys from the Otsego County Prosecuting Attorney's Office will be invited to attend.

7. **Effect on State Jurisdiction.** It is further understood and agreed that this Agreement does not, nor is it intended by the parties hereto to affect, the jurisdiction of SHERIFF to enforce the criminal laws of the State of Michigan against non-Indians who commit a crime against a non-Indian or who engage in conduct constituting a victimless crime, as such term is defined under the laws of the State.

8. **Supervision.** While acting under this Agreement, deputies of SHERIFF shall remain employees of the County, reporting to and supervised by the SHERIFF. It is understood and agreed that the TRIBE's prosecutor shall receive all reports from deputized law enforcement officers concerning matters subject to the TRIBE's criminal jurisdiction.

9. **Tribal Law Enforcement Training.** It shall be the responsibility of the TRIBE to provide to SHERIFF training in Tribal law, Tribal law enforcement procedures and issues concerning

federal Indian law and jurisdiction. Such training shall be provided within 45 days of execution of this Agreement and at least annually thereafter for any officer of SHERIFF who has not completed this training in the previous 12 months. In the event that an officer should decline to participate in such training, the declination shall constitute good cause for the TRIBE to suspend the officer's deputization.

10. **Compensation and Costs.** Each party is responsible for all salaries, benefits and other employment expenses related to employment of their respective enforcement personnel; provided, that in the event that an officer deputized by the TRIBE is required to appear in a Tribal Court proceeding at a location outside Otsego County, his or her travel expenses shall be reimbursed by the TRIBE .

11. **Civil Immunity; Insurance.** All privileges and immunities provided by federal, State and Tribal laws, as well as County ordinances, shall apply to all law enforcement personnel while acting in the course and within the scope of his or her employment or service. Each party shall be responsible for the negligent acts or omissions of its law enforcement personnel. Under no circumstances shall either the TRIBE or SHERIFF be held liable for the acts or omissions of employees of the other party, to the extent that such acts or omissions fall within the scope of this Agreement. Such acts or omissions expressly include claims of false arrest, abuse of authority, false imprisonment and claims arising from alleged deficiencies in training and/or supervision.

The TRIBE agrees to maintain and to name the SHERIFF as an additional insured on an insurance policy in the amount of $5 million per incident insuring against claims for liability related to the TRIBE's law enforcement activities, including activities undertaken by the SHERIFF'S deputized officers. Such a policy shall be maintained during the term of this Agreement, and all costs of such coverage shall be borne by the TRIBE. Proof of such coverage shall be provided to the SHERIFF upon request.

12. **Representation.** SHERIFF's deputies shall not represent themselves as a Tribal officer while off-duty.

13. **Warrants.** Arrest and search warrants which are to be executed on the TRIBE's Indian lands shall be issued by the Bay Mills Indian Community Tribal Court. The provisions of Michigan Court Rule 2.615 [Enforcement of Tribal Court Judgments] shall apply to this Agreement.

14. **Modification.** This Agreement may only be modified in writing by mutual agreement of the parties hereto, and which is attached hereto. The parties hereby expressly authorize in advance a modification by which the duties and obligations of the SHERIFF as deputized by the TRIBE shall equally apply to the duties and obligations of the TRIBE's law enforcement officers upon deputization by the SHERIFF.

15. **Termination.** Either party, in its sole discretion and without cause, may terminate this

Agreement at any time upon issuance of 60 days' prior written notice to the other party.

BAY MILLS INDIAN COMMUNITY

By _____
Jeffrey D. Parker, President
Executive Council

Dated: _____

OTSEGO COUNTY SHERIFF

By _____
James D. McBride
Sheriff
Dated: _____

APPENDIX
to
LAW ENFORCEMENT AGREEMENT

Officers Deputized by the Bay Mills Indian Community
December 15, 2010

Undersheriff Matthew Nowicki
Sergeant Trevor Winkel
Deputy Amy Moon
Deputy Sarah Holzschu
Deputy Timothy Hogan
Deputy Justin Holzschu
Deputy Matthew Muladore
Deputy Cody Wheat
Deputy Marcia LaForest
Deputy John Dye

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STATE OF MICHIGAN,
Plaintiff,

v. No. 1:10-cv-1273
HONORABLE
PAUL L. MALONEY

BAY MILLS INDIAN COMMUNITY,
Defendant,
and

LITTLE TRAVERSE BAY BANDS OF
ODAWA INDIANS,
Plaintiff,
No. 1:10-cv-1278
HONORABLE
PAUL L. MALONEY
v.
BAY MILLS INDIAN COMMUNITY,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that the Bay Mills Indian Community hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Order granting plaintiff Little Traverse Bay Band [*sic*] of Odawa Indian's [*sic*] motion for preliminary injunction entered in this action on the 29th day of March, 2011.

/s/ Chad P. DePetro
Chad P. DePetro (P58482)
cdepetro@bmic.net
Kathryn L. Tierney (P24837)
candyt@bmic.net
12140 W. Lakeshore Drive
Brimley, MI 49715
(906) 248-3241
(906) 248-3283

cc: Opposing counsel Facsimile
Court of Appeals

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN,
Plaintiff,

Case No. 1:10-cv-01273-PLM
Case No. 1:10-cv-01278-PLM

v.

Honorable Chief Judge
Paul L. Maloney

AMENDED COMPLAINT

THE BAY MILLS INDIAN COMMUNITY, BAY MILLS INDIAN COMMUNITY TRIBAL GAMING COMMISSION, INDIVIDUAL UNKNOWN MEMBERS OF THE BAY MILLS INDIAN COMMUNITY TRIBAL GAMING COMMISSION in their official capacity, JEFFREY PARKER, CHAIRMAN in his official capacity, TERRY CARRICK, VICE CHAIRMAN, in his official capacity, RICHARD LEBLANC, SECRETARY in his official capacity, JOHN PAUL LUFKINS, TREASURER in his official capacity and BUCKO TEEPLE, COUNCIL PERSON in his official capacity.

Defendants.

AMENDED COMPLAINT

Plaintiff State of Michigan brings the following Amended Complaint for declaratory and injunctive relief, and for an accounting and forfeiture:

JURISDICTION

1. The Court has federal subject matter jurisdiction of this action pursuant to:

a) 28 U.S.C. § 1331, as this Complaint alleges violations of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.*, and federal common law;

b) 25 U.S.C. § 2710(d)(7)(A)(ii), as Plaintiff is a State which seeks to enjoin gaming activity conducted in violation of a tribal-state compact;

c) 28 U.S.C. § 1367 as this Complaint alleges violations of State anti-gambling and other laws; and

d) 28 U.S.C. § 2201, as this Complaint also seeks a declaratory judgment.

PARTIES

2. Plaintiff is the State of Michigan (State).

3. Defendant Bay Mills Indian Community (Bay Mills) is a federally recognized Indian tribe.

4. Defendant Bay Mills Indian Community Tribal Gaming Commission (Tribal Commission) is a governmental subdivision and arm of Bay Mills

created by Section 4 of the Bay Mills Gaming Ordinance (Gaming Ordinance) (excerpts from most recent version of amended Gaming Ordinance as approved by the National Indian Gaming Commission on September 15, 2010, attached as Exhibit C) to operate for the sole benefit and interest of Bay Mills.

5. Individual unknown Members of the Bay Mills Indian Community Tribal Gaming Commission are officials of Bay Mills appointed by the Bay Mills Executive Council pursuant to the Gaming Ordinance, § 4.11(A) (Tribal Officials). Plaintiff does not know the names of the individuals who have been on the Gaming Commission during times relevant to this action, but will substitute those names as they become known through discovery.

6. Jeffrey Parker is Chairman of the Executive Council for Bay Mills.

7. Terry Carrick is Vice-Chair of the Executive Council for Bay Mills.

8. Richard LeBlanc is Secretary of the Executive Council for Bay Mills.

9. John Paul Lufkins is Treasurer of the Executive Council for Bay Mills.

10. Bucko Teeple is a Council Person on the Executive Council for Bay Mills (Messrs. Parker, Carrick, LeBlanc, Lufkins and Teeple referred to collectively as "Council Members.")

VENUE

11. Defendant Bay Mills has its Tribal offices and reservation in Chippewa County, in the Upper Peninsula of Michigan. Venue is therefore appropriate in this Court pursuant to 28 U.S.C. § 1391(b)(1).

GENERAL ALLEGATIONS

12. On or about August 20, 1993, John Engler, the Governor of the State of Michigan at that time, entered into a tribal-state gaming compact (the "Bay Mills compact") with Bay Mills. A true and correct copy of this compact is attached as Exhibit A.

13. The Bay Mills compact permits Bay Mills to operate casino games, also known as "Class III gaming" (which is defined in IGRA, 25 U.S.C. § 2703(8)), only on "Indian lands" as defined in Section 2(B) of the compact. See Exhibit A.

14. The Gaming Ordinance permits Bay Mills to conduct Class III gaming only on "Indian lands" as defined in Section 2.30 of the Gaming Ordinance. See Exhibit C.

15. The Gaming Ordinance only permits the operation of casinos owned by Bay Mills. Exhibit C, § 5.3(C).

16. Bay Mills created the Tribal Commission when it adopted its Gaming Ordinance which authorizes the Tribal Commission to approve and regulate all casinos operated by Bay Mills.

17. The Tribal Commission has the authority to close Tribally owned casinos that violate federal and/or Tribal law.

18. Since the Bay Mills compact was signed, Bay Mills has conducted Class III gaming in one or more casinos it operates on Indian lands in Chippewa County in the Upper Peninsula.

19. On or about November 3, 2010, ostensibly with the approval of the Tribal Commission, Bay Mills began operating a casino in a renovated building located in or near the village of Vanderbilt (the "Vanderbilt casino") in Otsego County in the Lower Peninsula of Michigan.

20. The Bay Mills Executive Council is authorized to take certain actions on behalf of Bay Mills.

21. The Bay Mills Executive Council, through the Tribal Council Members, made the decision to open and operate the Vanderbilt Casino.

22. The land on which the Vanderbilt casino is being operated is not part of the Bay Mills reservation.

23. The land on which the Vanderbilt casino is being operated was acquired by Bay Mills after October 17, 1988.

24. The land on which the Vanderbilt casino is being operated was not contiguous to the boundaries of the Bay Mills reservation on October 17, 1988.

25. The Vanderbilt casino is approximately 100 miles by road from the Bay Mills reservation.

26. The title to the land on which the Vanderbilt casino is being operated has not been taken into trust by the United States for the benefit of Bay Mills.

27. The land on which the Vanderbilt casino is being operated is not subject to restriction by the United States against alienation.

28. Bay Mills does not exercise governmental power over the land on which the Vanderbilt casino is being operated.

29. After consultations between Bay Mills and the State of Michigan failed to resolve the dispute giving rise to this action, the State sent a letter on December 16, 2010 to Bay Mills demanding that Bay Mills immediately cease the operation of all Class III gaming at the Vanderbilt casino. A true and correct copy of this letter is attached as Exhibit B.

30. Despite this demand, Defendants have refused to cease Class III gaming at the Vanderbilt casino.

31. By entering into the Tribal-State compact, Bay Mills waived its sovereign immunity for purposes of this legal action which seeks injunctive and declaratory relief to remedy violations of the Bay Mills compact and federal law.

32. Bay Mills' sovereign immunity was abrogated by Congress for purposes of this legal action when Congress adopted IGRA.

33. Bay Mills waived any sovereign immunity of the Tribal Commission for actions not in respect of lands within the exterior boundaries of Bay Mills' Reservation when it adopted the Gaming Ordinance, including specifically §§ 4.7 and 4.18(Y).

34. The Tribal Commission and Bay Mills are alter egos, as evidenced in part by Bay Mills' absolute control over the Tribal Commission (see Gaming Ordinance generally); therefore this waiver also extends to Bay Mills.

COUNT I—VIOLATION OF COMPACT SECTION 4(H)

35. Plaintiff incorporates paragraphs 1-34 above as if fully stated in Count I.

36. Section 4(H) of the Bay Mills compact states: "The Tribe shall not conduct any Class III gaming outside of Indian lands."

37. Section 2(B) of the Bay Mills compact defines "Indian lands" to mean: "(1) all lands currently within the limits of the Tribe's Reservation; (2) any lands contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; and (3) any lands title to which is either held in trust by the United States for the benefit of the Tribe or individual or held by the Tribe or individual subject to restriction by the United

States against alienation and over which the Tribe exercises governmental power."

38. For the reasons stated in paragraphs 22-28 above, the land on which the Vanderbilt casino is situated is not "Indian lands" as defined in the Bay Mills compact.

39. The operation of Class III gaming at the Vanderbilt casino therefore violates and is a breach of the Bay Mills compact.

40. As the Class III gaming conducted at the Vanderbilt casino in violation of the Bay Mills compact violates Tribal laws (see Count II below), the laws of the State of Michigan, including but not limited to M.C.L. 750.301 *et seq.* (see Count II below), M.C.L. 432.201 *et seq.* (see Count V below) and federal anti-gambling statutes (18 U.S.C. § 1955), it harms the public interest and the balance of harm caused by this Class III gaming weighs heavily in favor of the State.

41. There is no adequate remedy at law for this violation by Defendants of the Bay Mills compact which causes the State irreparable injury.

42. IGRA vests this Court with jurisdiction to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C. § 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay Mills compact, (2) permanently enjoining Defendants

from permitting and conducting Class III gaming at the Vanderbilt casino and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT II—VIOLATION OF COMPACT SECTION 4(C)

43. Plaintiff incorporates paragraphs 1-42 above as if fully stated in Count II.

44. Section 4(C) of the Bay Mills compact states:

> The Tribe shall license, operate, and regulate all Class III gaming activities pursuant to this Compact, *tribal law, IGRA, and all other applicable federal law*. This shall include but not be limited to the licensing of the consultants (except legal counsel with a contract approved under 25 U.S.C. §§ 81 and/or 476), primary management officials, and key officials of each Class III gaming activity or operation. Any violation of this Compact, *tribal law, IGRA, or other applicable federal law* shall be corrected immediately by the Tribe. (Emphasis added.)

45. The violation of IGRA, 25 U.S.C. § 2710(d)(1), set forth in Count III below, therefore also violates Section 4(C) of the Bay Mills compact.

46. 18 U.S.C. § 1955 makes it illegal for any person to conduct, finance, manage, supervise or own all or part of an illegal gambling business.

47. An illegal gambling business is defined in 18 U.S.C § 1955 as a gambling business which is a

violation of state law in which it is conducted, involves five or more persons and remains in business for more than 30 days, and grosses more than $2,000 in any single day.

48. Operation of the Vanderbilt casino violates Michigan's anti-gambling statutes, including M.C.L. 750.301 *et seq.* and M.C.L. 432.201 *et seq.*

49. On information and belief, the Vanderbilt casino involves more than five people and grosses more than $2,000 in a single day.

50. Before it was closed by Order of this Court, the Vanderbilt casino was in business more than 30 days.

51. Operation of the Vanderbilt casino therefore violates applicable federal anti-gambling laws, including 18 U.S.C. § 1955, and therefore violates Section 4(C) of the Bay Mills compact.

52. Section 5.5(A) of the Gaming Ordinance restricts operation of any Tribal casino to Indian lands which are defined in Section 2.30 of the Gaming Ordinance to mean: "(A) all lands within the limits of the Reservation of the Bay Mills Indian Community; and (B) all lands title to which is either held in trust by the United States for the benefit of the Bay Mills Indian Community or held by the Bay Mills Indian Community subject to restriction by [the] United States against alienation and over which the Tribe exercises governmental power."

53. Section 5.5(A) of the Gaming Ordinance also restricts operation of any Tribal casino to Indian

lands that comply with Section 20 of IGRA, 25 U.S.C. § 2719.

54. For the reasons stated in paragraphs 22-28 above, the land on which the Vanderbilt casino is situated is not "Indian lands" as defined in the Gaming Ordinance.

55. For the reasons set forth in paragraph 66 below, the Vanderbilt casino does not comply with the requirements of 25 U.S.C. § 2719.

56. The operation of Class III gaming at the Vanderbilt casino therefore violates the Gaming Ordinance which is Tribal law and therefore violates Section 4(C) of the Bay Mills compact.

57. As the Class III gaming conducted at the Vanderbilt casino in violation of the Bay Mills compact violates Tribal laws, the laws of the State of Michigan and federal anti-gambling statutes, it harms the public interest and the balance of harm caused by this Class III gaming weighs heavily in favor of the State.

58. There is no adequate remedy at law for this violation by Bay Mills of its compact which causes the State irreparable injury.

59. IGRA vests jurisdiction with this Court to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C. § 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the

gaming at the Vanderbilt casino violates the Bay Mills compact; (2) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino; and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT III—VIOLATION OF IGRA

60. Plaintiff incorporates paragraphs 1-59 above as if fully stated in Count III.

61. Section 2710(d)(1) of IGRA permits Class III gaming only on "Indian lands" as that term is defined in IGRA, and only if conducted "in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) [25 U.S.C. §2710(d)(3)] that is in effect" and only if authorized by a Tribal ordinance that meets the requirements of IGRA [25 U.S.C. § 2710(d)(1)(A)].

62. IGRA defines "Indian lands" to mean: "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."

63. Based on the facts alleged in paragraphs 22-28 above, the Class III gaming conducted by Bay Mills at the Vanderbilt casino is not being conducted on Indian lands and therefore violates IGRA.

64. The Class III gaming conducted by Defendants at the Vanderbilt casino also violates IGRA because, for the reasons stated in Counts I and II of this Complaint, this gaming is not being conducted "in conformance with" the Bay Mills compact.

65. The Class III gaming conducted by Defendants at the Vanderbilt casino also violates IGRA because, for the reasons stated in Count II of this Complaint, this gaming is not authorized by a duly enacted Tribal ordinance.

66. Finally, Class III gaming is prohibited pursuant to 25 U.S.C. § 2719 on the land on which the Vanderbilt casino is located, even if it is Indian lands, because it was acquired by Bay Mills after October 17, 1988 and does not qualify for any of the exceptions described in 25 U.S.C. § 2719(b).

67. There is no adequate remedy at law for this violation by Defendants of IGRA which causes the State irreparable harm; since the operation of the Vanderbilt casino violates IGRA it cannot be in the public interest and the balance of harm of its continued operation weighs heavily in favor of the State.

68. IGRA vests jurisdiction with this Court to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C. § 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay

Mills compact; (2) declaring that the gaming at the Vanderbilt casino violates IGRA; (3) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino; and (4) granting Plaintiff such other relief as the Court deems appropriate.

COUNT IV—VIOLATION OF FEDERAL COMMON LAW

69. Plaintiff incorporates paragraphs 1-68 above as if fully stated in Count IV.

70. As set forth above, because it is not on Indian lands, operation of the Vanderbilt casino violates State anti-gambling laws.

71. The Defendants did not have authority under federal law to approve and operate a casino that does not conform with the requirements of IGRA and that violates State anti-gambling laws.

72. When a Tribe and/or Tribal representatives permit and operate a casino which exceeds the scope of their authority, they violate federal common law governing Indian Tribes.

73. As the Class III gaming conducted at the Vanderbilt casino in violation of federal common law also violates Bay Mills compact (see Counts I and II above), Tribal law (see Count II), the laws of the State of Michigan, including but not limited to M.C.L. 750.301 *et seq.* (see Count II), M.C.L. 432.201 *et seq.* (see Count V below), and federal anti-gambling statutes (18 U.S.C. § 1955) (see Count II), it harms the public interest and the balance of harm

caused by this Class III gaming weighs heavily in favor of the State.

74. There is no adequate remedy at law for this violation by Defendants of federal common law which causes the State irreparable injury.

75. Because the licensing and continued operation of the Vanderbilt Casino violated the Gaming Ordinance which requires that licenses be issued only to gaming establishments that are located on Indian lands, Council Members that authorized and operate the casino, and the Tribal Officials that approved the license for the Vanderbilt Casino and allowed its continuing operation exceeded their authority under Tribal law and they are therefore subject to prospective relief Ordered by this Court.

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino exceeds the scope of Defendants' authority under federal law; (2) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino; and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT V—VIOLATION OF MICHIGAN GAMING CONTROL AND REVENUE ACT

76. Plaintiff incorporates paragraphs 1-75 above as if fully stated in Count V.

77. M.C.L. 432.220 states in relevant part:

> In addition to other penalties provided for under this act, a person who conducts a gambling operation without first obtaining a license to do so . . . is subject to a civil penalty equal to the amount of gross receipts derived from wagering on the gambling games, whether unauthorized or authorized, conducted on that day as well as confiscation and forfeiture of all gambling game equipment used in the conduct of unauthorized gambling games.

78. Defendants did not first obtain a State-issued license before operating the Vanderbilt casino.

79. On information and belief, Defendants derived gross receipts from wagering at the Vanderbilt casino on some or all of the days it was operated before being closed by Order of this Court, in a total amount that Plaintiff believes is in the range of at least hundreds of thousands of dollars.

80. Gambling game equipment was used in the conduct of unauthorized gambling games at the Vanderbilt casino.

81. The violation of M.C.L. 432.220 subjects the above-described gross receipts and gambling game equipment to forfeiture.

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order requiring (1) an accounting and forfeiture of all gross receipts obtained and gambling game equipment used by Defendants in violation of M.C.L. 432.220 and (2)

granting Plaintiff such other relief as the Court deems appropriate.

COUNT VI—NUISANCE

82. Plaintiff incorporates paragraphs 1-81 above as if fully stated in Count VI.

83. As set forth above, any continued operation of the Vanderbilt casino is proscribed by law.

84. Any continued operation of the Vanderbilt casino would therefore be a public nuisance.

85. Defendants do not have authority to operate the Vanderbilt casino.

86. Any continued operation of the Vanderbilt casino harms the public interest and the balance of harm caused by such operation weighs heavily in favor of the State.

87. There is no adequate remedy at law for the continued operation of the Vanderbilt casino which causes the State irreparable injury.

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino is a public nuisance, (2) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino and (3) granting Plaintiff such other relief as the Court deems appropriate.

Plaintiff further requests that it be awarded its costs and attorney fees incurred in bringing this action.

Respectfully submitted,

Bill Schuette
Attorney General

/s/ Louis B. Reinwasser

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Dated: July 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, I electronically filed the foregoing document with the Clerk of the court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States

Postal Service the same to any non-ECF participants.

/s/ Louis B. Reinwasser

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