

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

<p>STATE OF OKLAHOMA,  Plaintiff-Appellee,  v.  TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee; et al.,  Defendants-Appellants,  and  FLORENCE DEVELOPMENT PARTNERS, LLC, as Oklahoma limited liability company,  Defendant-Appellant.  -----  The STATE OF NEW MEXICO, et al., Amici Curiae.</p>	<p>Case Nos.: 12-5134 &amp; 12-5136</p>
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**SUPPLEMENTAL BRIEF OF APPELLANTS**  
**CONCERNING ABATEMENT**

Pursuant to the Court’s Order of August 26, 2013, Defendants-Appellants Tiger Hobia, et al. (“Tribal Defendants”) and Florence Development Partners, LLC (collectively, the “Defendants”) hereby submit their supplemental brief in support of abating these appeals pending the Supreme Court’s resolution of *Michigan v. Bay Mills Indian Community*, 695 F.3d 406 (6th Cir. 2012), cert. granted, 133 S.Ct. 2850 (2013) (“*Bay Mills*”).

The unprecedented decisions rendered by the district court in this Action go directly and

indirectly to matters that concern issues of territorial jurisdiction and government authority of three separate but absent sovereigns. Their repercussions on the Tribal Defendants' ability to govern and promote the social and economic welfare of the Kialegee Tribal Town's members have been calamitous and have created significant legal and jurisdictional uncertainty leaving the Tribal Town unable to obtain the necessary federal authorizations needed for it to make viable, non-gaming economic use of the subject property in the interim. Short of further action to prompt the federal government to fulfil its trust responsibilities to the Tribe – which the Tribe can ill afford – Appellants will endure the consequences of the State's unmerited action and the district court's rulings and not object to abatement pending the Supreme Court's resolution of *Bay Mills*.

The power to stay proceedings is incidental to the Court's power to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. *See Kittel v. First Union Mortgage Corp.*, 303 F.3d 1193 (10th Cir. 2002), *citing Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936), objectives an abatement would materially assist. The Court's precedent permits abatement pending rulings by the Supreme Court where, as here, the questions certified to the Supreme Court are the same as those posed by the parties to the appeal, *see, e.g., Coparr, Ltd. v. City of Boulder*, 942 F.2d 724, 725 (10th Cir. 1991), or where the question for which cert was granted would dispose of the original appeal. *U.S. v. Pablo*, 625 F.3d 1285, 1295 n.10 (10th Cir. 2010) (denying motion to stay appeal pending decision of Supreme Court where the question certified would not dispose of the appeal).<sup>1</sup> This is the case here.

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<sup>1</sup> It also permits abatement where, as here, a prolonged stay of proceedings is not indicated. *Cisneros v. Wilson*, 226 F.3d 1113, 1118 n.4 (10th Cir. 2000), *overruled on other grounds, Bd. of Trs. of Univ. of Ala. v. Garrett*, 551 U.S. 356 (2001).

*Bay Mills* involved the appeal from a grant of a preliminary injunction to the State of Michigan to enjoin tribal Class III gaming operations by the Bay Mills Indian Community at a casino site in Vanderbilt, Michigan. The State's complaint alleged that the Vanderbilt site was not "Indian lands" of the tribe, for which reason the alleged gaming activities violated the compact and IGRA section 2710(d)(7)(A)(ii), which confers federal jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact ... that is in effect."

On review, the Sixth Circuit Court of Appeals ruled that the jurisdictional prerequisites of 2710(d)(7)(a)(ii) are conjunctive and that *each* must be satisfied before an action will lie. *Bay Mills*, 695 F.3d at 412. Determining its federal jurisdiction based on what necessarily appeared in Michigan's complaint – which expressly alleged that the Vanderbilt casino was not Indian lands of the Bay Mills Indian Community – the Sixth Circuit held that a statutory prerequisite to jurisdiction under IGRA had not been met. *Id.* The Sixth Circuit also noted another defect in Michigan's claims: the impossibility of redressing its alleged injuries. If the Vanderbilt site was not Indian lands, there was no jurisdiction under IGRA; but if the Vanderbilt site *was* Indian lands, then the casino complied with the compact and Michigan's claims were without merit. A determination in either instance would therefore be purely advisory. *Id.* The Sixth Circuit also found that even though federal question jurisdiction existed, its exercise was barred by Bay Mills' sovereign immunity, which had not been waived by the Tribe and or expressly abrogated by Congress. *Id.* at 413. It did not consider whether such immunity could be stripped via *Ex parte Young*.

The legal questions presented in *Bay Mills* are directly on point with those in this Appeal, as evidenced by the arguments thus far submitted. *See, e.g.,* Aplt. Br. 21-23; Reply Br. 3-6;

Aplee. Br. 15-18; *see also* Amicus Br. of Michigan; Amicus Br. of New Mexico. The fundamental legal issues at stake concern (1) whether Indian land is a jurisdictional requirement for causes of action under IGRA section 2710(d)(7)(A)(ii), and (2) whether, absent its waiver or clear abrogation, tribal sovereign immunity is a bar to federal question jurisdiction in a suit to enjoin tribal gaming activities for which no cause of action lies under IGRA.

Here, Appellants argue that Oklahoma's complaint is fatally flawed on jurisdictional grounds because it alleges that Defendants' purported activities occurred off Indian lands, just as the State of Michigan did in *Bay Mills*. Aplt. Br. 23. If the gravamen of Oklahoma's complaint concerns activities *off* Indian lands, then by definition there can be no breach of the State's compact with the Kialegee Tribal Town, whose mutually-agreed-to provisions regulate activities only on the Kialegee Tribal Town's Indian land. Aplt. Br. 23.

If the Supreme Court affirms *Bay Mills*, it will make clear that a plaintiff must satisfy *each* of the requirements of § 2710(d)(7)(A)(ii). Hence it will make clear that Oklahoma's efforts to regulate Tribal gaming activities outside Indian lands as defined by IGRA cannot give rise to a cause of action under section 2710(d)(7)(A)(ii).

It will also confirm that the elements of § 2710(d)(7)(A)(ii) are fundamentally jurisdictional in nature, and that where a state seeks to use IGRA to challenge tribal activities beyond Indian land, as here, then federal courts have no subject matter jurisdiction over such claims which must instead be dismissed. It would also confirm that the causes of action alleged by Oklahoma against the Tribal Defendants in this Action are insufficient to satisfy Article III standing, since, if the challenged activities take place outside Indian land, there can be no injury under IGRA or the Compact, leaving nothing for the courts to redress.

In short, the affirmance of *Bay Mills* would confirm that the activities alleged by

Oklahoma in this Action fall beyond the geographic scope of IGRA's jurisdiction. This means, in turn, that IGRA's limited abrogation of tribal sovereign immunity cannot apply. It would also confirm that, absent an allegation of ongoing violations of some other federal law, federal question jurisdiction would not lie. *Bay Mills* incorrectly found that, notwithstanding the requirements of § 2710(d)(7)(A)(ii), the legal status of the site raised a federal question under IGRA sufficient to warrant jurisdiction under 28 U.S.C. § 1331. It nevertheless reached the correct conclusion, however, that even if federal question jurisdiction did lie (it did not), it was barred by the Bay Mill tribe's sovereign immunity, which had never been waived. The same is true of the Tribal Defendants in this Action, whose sovereign immunity formed the predicate for the application by the district court of *Ex parte Young* as an alternative means for assuming jurisdiction over the State's claims.

Should the Sixth Circuit's decision in *Bay Mills* be upheld by the Supreme Court, it will confirm that Indian land is a jurisdictional prerequisite for Oklahoma's cause of action under 2710(d)(7)(A)(ii), that federal question jurisdiction does not lie against Tribal Defendants here or, that if it does, its application is barred by sovereign immunity, and, finally, that the district court's preliminary injunction should be vacated and Oklahoma's complaint should be dismissed.

For these reasons, Appellants do not object to abatement of this Appeal pending a decision by the Supreme Court in *Bay Mills*.

Respectfully submitted this 30th day of August 2013.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C), this brief complies with the type-volume limitation of 1,400 words set forth in the Court's Order. This brief contains 1,369 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point Times New Roman.

Dated: August 30, 2013

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**CERTIFICATE OF DIGITAL SUBMISSION**

I certify that a copy of the foregoing Appellants' Supplemental Brief was submitted in digital form via the Court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses using Viper Anti-Virus, last updated August 30, 2013. In addition, no privacy redactions are necessary.

DATED: August 30, 2013

/s/ Catherine Bonilla  
(Digital)  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of Appellants' Supplemental Brief was served on this 30<sup>th</sup> day of August 2013, via the Court's CM/ECF system, which will send notification of such filing to all parties of record as follows:

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