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September 10, 2013

Tracie Stevens, Chairwoman
National Indian Gaming Commission
1441 L Street NW, Suite 9100
Washington, DC 20005
Fax: (202) 632-7066

Re: NIGC Action Regarding *Michigan v. Bay Mills*

Dear Chairwoman Stevens:

I write on behalf of the National Congress of American Indians to request that you take action in your position as Chair of the National Indian Gaming Commission regarding the Bay Mills Indian Community casino in Vanderbilt, Michigan. There is a significant opportunity for you to exercise leadership at the NIGC at this time given the recent grant of the writ of certiorari by the Supreme Court of the United States in *Michigan v. Bay Mills Indian Community, et al.* (No. 12-515), and the unpalatable threat of another Supreme Court decision undermining tribal sovereignty.

As you know, Bay Mills built the Vanderbilt casino as a test case to determine the scope of its rights under the Michigan Indian Land Claims Act of 1997(MILCSA).   Bay Mills has taken the legal position that any lands purchased with MILCSA trust funds are lands eligible for tribal gaming under Section 20 of the Indian Gaming Regulatory Act (IGRA). Both Interior and the NIGC have issued legal opinions that the Vanderbilt site does not qualify as "Indian lands" under the IGRA.

Unfortunately the litigation has gone significantly off course. In the absence of any final agency action under the IGRA, the State of Michigan has pursued a remedy through the federal courts seeking to enjoin gaming on the Vanderbilt parcel. In response, the Bay Mills Indian Community asserted tribal sovereign immunity. The U.S. Court of Appeals for the Sixth Circuit acknowledged the "irony" of its decision, but held that federal courts lack subject matter jurisdiction under IGRA over an allegation that the Tribe's casino is not on Indian lands, and that the other claims brought by the State are barred by the doctrine of tribal sovereign immunity.

NCAI is extremely concerned that the Supreme Court has accepted review of this case in spite of the recommendation from the U.S. Solicitor General that certiorari be denied. The Court has not been a good forum for Indian tribes in recent years, and we do not believe the Justices will have patience with the implication that the Bay Mills Indian Community, or any other tribe, can build a casino outside of Indian country without either the relevant State or the Federal government having regulatory and enforcement authority under IGRA. The Justices' impatience with such a position could well lead them to make sweeping pronouncements – as has been their practice – with disastrous implications for tribal sovereignty, Indian gaming, tribal sovereign immunity, Indian land status and federal jurisdiction.

We have reviewed the NIGC legal opinion dated December 10, 2010 asserting that NIGC has no jurisdiction over the disputed Vanderbilt casino because it is not on Indian lands. We respectfully request that you reconsider that legal opinion in order to avoid the "irony" and unnecessary legal dilemma that the Supreme Court intends to resolve. Although the NIGC authority to approve tribal gaming ordinances may be limited to Indian country (*AT&T v. Coeur d'Alene Tribe*, 283 F. 3d 1156 (9th Cir., 2002)), IGRA is structured to authorize the NIGC to take final agency action regarding Indian gaming operating outside of Indian country. Bay Mills maintains that it is operating the Vanderbilt facility pursuant to a NIGC approved tribal ordinance within the authority of IGRA. IGRA authority lies clearly within the NIGC to assess the validity of Bay Mills' claim.

NIGC closure authority under 25 USC 2713(b) extends to all violations of IGRA, and Indian gaming is explicitly limited to "Indian lands within such tribe's jurisdiction" under 2710(b)(1). In addition, under 25 USC 2713(b), the Chair of the NIGC has the power to order closure of an Indian game for violation of any "tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title." Under 25 USC 2710(d), Class III gaming activities are lawful only if such activities are authorized by a tribal ordinance or resolution that is adopted by the governing body of the Indian tribe "having jurisdiction over such lands." The Bay Mills gaming ordinance itself is limited to Indian lands "over which the Tribe exercises governmental power." Ordinance to Regulate the Operation of Gaming by the Bay Mills Indian Community, Sections 2.21 and 5.5.

NIGC action is warranted because of the plain language of 1713(b) and is much needed. One of the oddest features of this case is that the Bay Mills Indian Community has not received a final agency action or Indian land determination that it can appeal. The State of Michigan is also stuck in limbo where it does not want to violate 18 USC 1166(d) (exclusive federal jurisdiction over state gambling laws in Indian country), but also cannot receive a final determination on Indian land status. The NIGC has been delegated the

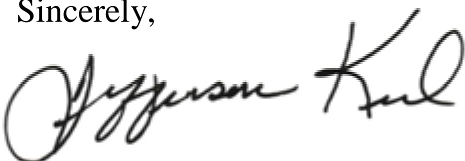
authority to regulate Indian gaming and ostensible Indian gaming facilities that violate IGRA should be subject to an appealable final agency decision. We believe it will be embarrassing for the Supreme Court to hear that Indian tribes can set up Indian casinos outside of Indian country, that the NIGC is unwilling to issue a closure order in such situations, and that the Attorney General is unwilling to enforce after referral from the NIGC. This argument has been made explicitly by the State of Oklahoma: "Even when the NIGC has properly declared tribal gambling illegal it has declined to initiate enforcement. Waiting on the federal government to act has not proved a viable option." Brief Amicus Curiae of the State of Oklahoma at 3-4. If NIGC inaction continues, the NIGC will appear weak and ineffective in front of the Supreme Court of the United States. This cannot be good for the future of Indian gaming, or the federal trust responsibility to protect Indian tribes from state intrusion on tribal sovereignty.

With an NIGC closure order in place, the State of Michigan's request for an injunction will be unnecessary because there will be a federal closure of the facility. Involuntary cessation under a federal order will establish mootness in a manner that voluntary actions by Bay Mills cannot. See, *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). After federal closure order is in place, the Solicitor General and the Tribe could file a joint letter or motion with the Clerk of the Supreme Court requesting that further proceedings be remanded so that the case can proceed on the merits of the Bay Mills MILCSA claim. Even if the entire case is not mooted, the posture will be significantly improved by proactive NIGC leadership.

Our sense is that the Supreme Court would welcome this or a similar development. If a tribe is operating what is purportedly Indian gaming outside of Indian country, most likely because of a mistake or legal disagreement on land status, then either the state or the federal government must have jurisdiction to make an Indian land determination. NIGC jurisdiction over these decisions is significantly preferable to a broadly worded Supreme Court decision granting state governments the ability to override tribal sovereign immunity and bring separate legal actions regarding the land status of tribal gaming operations.

Thank you for considering this request. We look forward to your leadership and action in this very important case.

Sincerely,



Jefferson Keel