

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

STATE OF OKLAHOMA, )  
)  
Appellee/Plaintiff, )  
)  
v. )  
)  
(1) TIGER HOBIA, as Town King )  
and member of the Kialegee Tribal )  
Town Business Committee; et al. )  
)  
Appellants/Defendants. )

Case No. 12-5134 & 12-5136

**THE STATE OF OKLAHOMA’S SUPPLEMENTAL BRIEF ADDRESSING  
WHETHER THE COURT SHOULD ABATE THIS APPEAL  
PENDING THE UNITED STATES SUPREME COURT’S RULING IN  
MICHIGAN V. BAY MILLS INDIAN COMMUNITY**

Appellee/Plaintiff the State of Oklahoma (“State”), in response to the Clerk of the Court’s August 26, 2013 order, states the Court need not abate this appeal pending the United States Supreme Court’s ruling in *Michigan v. Bay Mills Indian Community*, No. 12-515, reviewing the opinion of the Sixth Circuit Court of Appeal’s opinion, 695 F.3d 406 (6th Cir. 2012). The Supreme Court granted review of *Bay Mills* to review two questions:

1. Whether a federal court has jurisdiction to enjoin activity that violates IGRA [the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*] but takes place outside of Indian lands.
2. Whether tribal sovereign immunity bars a stated from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands.

Petition for a Writ of Certiorari, No. 12-515, at i. Abatement is not required because the issues presented in *Bay Mills* are not controlling of this appeal, and thus the Court need not await the Supreme Court's ruling to address the issues raised by Appellants/Defendants Tiger Hobia, *et al.* ("Defendants").

The Sixth Circuit reached, in the State's view incorrectly, the illogical conclusion that 25 U.S.C. § 2710(d)(7)(A)(ii) provided an abrogation of tribal immunity and subject matter jurisdiction for a State to file suit against a tribe to enjoin illegal gaming on "Indian lands" as defined by IGRA, but not if the illegal gaming occurred outside "Indian lands." *See Bay Mills*, 695 F.3d at 412, 415. By contrast, in this case brought against the Tribal Officials and the Tribal Corporation, the district court ruled it had jurisdiction under both IGRA and 28 U.S.C. § 1331, *see* Aplee. Brief at 12, and that *Ex parte Young* and the Tribal Corporation's corporate charter permitted suits against the Defendants, *see id.* at 22-25. Defendants, however, rely substantially on *Bay Mills*, *see* Aplt. Br. at 21, 22, 23, 35, contending the cases are "factually analogous," *id.* at 22, and "subject to the same jurisdictional defect," *id.* at 23, because the State's Complaint does not allege gaming located "on 'Indian lands.'" *Id.* at 22. Because Defendants' argument at most addresses an alternative jurisdictional ground, the Court need not abate oral argument.

*Bay Mills* does not control this case for three reasons. First, *Bay Mills* ruled that the district court did not have subject matter jurisdiction under IGRA § 2710(d)(7)(A)(ii) for claims alleging violation of IGRA unless the gaming was located on “Indian lands” under IGRA. 695 F.3d at 411. *Bay Mills* acknowledged that 28 U.S.C. § 1331 provides subject matter jurisdiction over a claim that an Indian casino is not located on Indian lands. *Id.* at 413. Each of the State’s claims *arise under* a federal statute—IGRA, as implemented by the federally-approved Tribal-State Gaming Compact—and therefore Section 1331 provided the district court’s subject matter jurisdiction. As the State argued in its brief to this Court, IGRA provides a jurisdictional alternative to Section 1331; even if the district court could not exercise jurisdiction under IGRA, it *could* exercise jurisdiction under Section 1331. *See* Aplee. Br. at 14-15.

Second, at issue in *Bay Mills* was whether 25 U.S.C. § 2710(d)(7)(A)(ii) abrogated the sovereign immunity of the Bay Mills Indian Community, a named defendant in the suit. In this suit, however, the State did not name the Kialegee Tribal Town as a defendant, and thus the question is not presented as to whether IGRA abrogated the sovereign immunity of a federally recognized Indian tribe. The State brought suit against the Tribal Officials of the Kialegee Tribal Town; the Kialegee Tribal Town, a federally chartered corporation; and Florence Development Partners LLC, an Oklahoma LLC. None of the Defendants is

immune from this lawsuit. Abrogation of immunity under § 2710(d)(7)(A)(ii) is not needed, as the individual Tribal Officials are proper defendants under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *See* Aplee. Br. at 22-24. The Tribal Town Corporation waived its sovereign immunity in the “sue and be sued” clause of its corporate charter. *See id.* at 24-25; *cf. Bay Mills*, 695 F.3d at 415 (noting a “sue and be sued” in an ordinance clause applied to the Tribal Gaming Commission created by the same ordinance, not the Tribe itself). And, Florence Development Partners is not a sovereign entity. *See* Aplee Br. at 5 n.2. Therefore, the sovereign immunity of the Kialegee Tribal Town is not a bar to this action whether or not *Bay Mills*’ interpretation of whether IGRA abrogates sovereign immunity is correct.

Third, even if *Bay Mills* were correct, it is inapplicable here, because the Broken Arrow Property may be “Indian lands” in a generic sense, as the Property is owned under federal restrictions against alienation, but Defendants failed to establish the substantive prerequisite that the Property is the Indian lands of the Kialegee Tribal Town as defined by IGRA, 25 U.S.C. § 2703(4), and as required by the Gaming Compact. The term “Indian lands,” defined in a separate IGRA definitional section, 25 U.S.C. § 2703(4), should be read as substantive and not as limiting federal court jurisdiction under § 2710(d)(7)(A)(ii). *See Leeson v.*

*Transamerica Disability Income Plan*, 671 F.3d 969, 978-979 (9th Cir. 2012), citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006).

Fourth, in *Bay Mills*, the Sixth Circuit acknowledged that, during the pendency of that appeal, Michigan amended its complaint to assert claims against the tribal officials under *Ex parte Young*. 695 F.3d at 416. The court expressly disclaimed any application of its opinion to the subsequently joined individual tribal official defendants. *Id.* Motions to dismiss the amended *Bay Mills* complaint are pending. See No. 1:10-cv-01273-PLM (W.D. Mich.) (indicating briefing completed on December 17, 2012). In this case, the Tribal Officials are properly sued under *Ex parte Young*. *Bay Mills* is not precedential for the claims against the tribal officials.

Even if the Supreme Court were to affirm the Sixth Circuit's opinion in *Bay Mills*, it would neither erect a sovereign immunity bar to the State's Complaint, nor divest the district court of jurisdiction over the suit. Therefore this Court need not abate its decision on this appeal until the Supreme Court rules in *Bay Mills*. If, however, the Court determines it will be beneficial to await any guidance the Supreme Court's opinion in *Bay Mills* may provide on application of IGRA to suits between a State and a Tribe—even though it will not directly control the outcome of this appeal—the State will not object to abatement until such time as *Bay Mills* is decided.

Respectfully submitted,

OKLAHOMA OFFICE OF THE ATTORNEY GENERAL  
E. Scott Pruitt, Attorney General  
Patrick R. Wyrick, Solicitor General  
M. Daniel Weitman, Assistant Attorney General  
313 NE 21<sup>st</sup> Street  
Oklahoma City, Oklahoma 73105  
Telephone: (405) 521-4274  
Dan.Weitman@oag.ok.gov

and

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By: /s/Lynn H. Slade  
Lynn H. Slade  
William C. Scott  
Sarah M. Stevenson  
Post Office Box 2168  
500 Fourth Street, N.W., Suite 1000  
Albuquerque, New Mexico 87103-2168  
Telephone: (505) 848-1800  
Lynn.Slade@modrall.com  
bscott@modrall.com  
sms@modrall.com

*Attorneys for the State of Oklahoma*

**CERTIFICATE OF TYPE-VOLUME COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify the foregoing brief is proportionally spaced and contains 1,115 words, exclusive of the items identified in Fed. R. App. At P. 32(A)(7)(B)(iii) as not counting toward the type-volume limitation. This figure was calculated through use of the word count function of Microsoft Word 2010, which was used to prepare the brief.

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By: /s/Lynn H. Slade  
Lynn H. Slade

## CERTIFICATE OF SERVICE

I hereby certify that a copy of this **State of Oklahoma's Supplemental Brief Addressing Whether The Court Should Abate This Appeal Pending The United States Supreme Court's Ruling In Michigan v. Bay Mills Indian Community** was served on this 30<sup>th</sup> day August, 2013, via the Court's CM/ECF system which will send notification of such filing to all parties of record as follows:

MARTHA L. KING  
FREDERICKS PEEBLES & MORGAN LLP  
1900 PLAZA DRIVE  
LOUISVILLE, CO 80027

MATTHEW J. KELLY  
FREDERICKS PEEBLES & MORGAN, LLP  
1301 CONNECTICUT AVE., NW  
SUITE 450  
WASHINGTON, DC 20036

ATTORNEYS FOR  
TIGER HOBIA, AS TOWN KING AND MEMBER OF THE KIALEGEE TRIBAL TOWN  
BUSINESS COMMITTEE, THOMAS GIVENS, AS 1ST WARRIOR AND MEMBER  
OF THE KIALEGEE TRIBAL TOWN BUSINESS COMMITTEE, JOHN DOES NOS. 1-7,  
AND KIALEGEE TRIBAL TOWN, A FEDERALLY CHARTERED CORPORATION

DENNIS J. WHITTLESEY  
DICKINSON WRIGHT  
1875 EYE ST. N.W.  
SUITE 1200  
WASHINGTON, D.C. 20006

ATTORNEYS FOR  
FLORENCE DEVELOPMENT PARTNERS, LLC

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By: /s/Lynn H. Slade  
Lynn H. Slade



*Y:\dox\client\84982\0003\DRAFTS\W1989454.DOCX*