CASE NO. 13-1438

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF MICHIGAN
Plaintiff - Appellee

v.

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
Defendant – Appellant

On Appeal from the United States District Court
Western District of Michigan

AMICUS CURIAE BRIEF IN SUPPORT OF STATE OF MICHIGAN'S PETITION FOR PANEL REHEARING WITH A SUGGESTION FOR REHEARING EN BANC

William J. Brooks P43104
Chief Legal Counsel
Nottawaseppi Huron Band
of the Potawatomi
2221 1/2 Mile Road
Fulton, MI 49052
Telephone: (269) 729-5151

John Petoskey, MI P41499
Fredericks Peebles & Morgan LLP
2848 Setterbo Road
Peshawbestown, MI 49682
Telephone: (231) 271-6391

Attorneys for Nottawaseppi Huron Band of the Potawatomi

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

The undersigned federally-recognized Indian tribe, Nottawaseppi Huron Band of Potawatomi ("NHBPI," the "proposed *amici*"), has moved to appear as *amici curiae* in support of the State's Petition for Rehearing En Banc and pending the Court's ruling on that motion, the proposed *amici* offers this proposed brief arguing that, under FRAP 35(a)(2), the issue of off-reservation gaming is a "question of exceptional importance" that requires reconsideration by the full panel. Proposed *amici* has sought and was granted consent from Plaintiff State of Michigan. Proposed *amici* was not granted consent from Defendant Sault Ste. Marie Tribe of Chippewa Indians (the "Sault Tribe"); however, the Sault Tribe does not oppose the filing.

II. STATEMENT IN SUPPORT FOR REHEARING EN BANC

Off-reservation casino development by the fee-to-trust process and the necessarily related issue of federal court jurisdiction and tribal immunity is a question of exceptional national importance addressed by a number of circuit and district opinions. The establishment of new off-reservation Indian gaming enterprises implicates the interests of State governments, tribal governments and private citizens. *See Gila River Indian Community v. United States,* 729 F.3d 1139 (9th Cir. 2013) (Indian tribe challenged a fee to trust application for gaming purposes of another Indian tribe); *Wyandotte Nation v. Salazar,* 939 F. Supp. 2d 1137 (D.

Kan.) (Indian tribe sued Secretary of the Interior claiming that mandatory trust required the Secretary to take land into trust where Secretary raised questions on whether the source of funds or acquisition of fee land came from the Congressional Act); *Akiachak Native Community v. Salazar*, 935 F. Supp. 2d 195 (D.D.C. 2013) (Alaska Natives challenged federal regulation preventing acquisition of land into trust under Section 5 of the Indian Reorganization Act); *Stand up for California v. US Department of the Interior,* 919 F. Supp. 2d 51 (D.D.C. 2013) (citizens, community groups, and Indian tribe challenged the Secretary's acquisition of trust land for gaming purposes as inconsistent with *Carcieri*). NHBPI files this *amicus* brief in support of the State of Michigan arguing that Section 9 of Sault Ste. Marie's Tribal-State Gaming Compact (the "Compact") is a material provision of the Compact. This Court's opinion issued on December 18, 2013 holding that the Sault Tribe's submission of a fee-to-trust application without a revenue sharing agreement would not violate Section 9 of the Compact was in error. Opinion, RE Doc. 006111913515 (the "Panel Decision").

Section 9 of the Compact contains a provision identical to six other tribes[1] and nearly identical to the Section 9 in NHBPI's (and four other tribes') compact.[2] These provisions require that that respective tribe have a prior written agreement among the other federally-recognized Indian tribes in Michigan for revenue sharing prior to

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[1] The Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Hannahville Indian Community, Keweenaw Bay Indian Community, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Saginaw Chippewa Indian Tribe of Michigan and the Sault Tribe all entered into tribal-state gaming compacts with the State of Michigan in 1993, all containing the following Section 9:

> An application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application.

R. 1, Ex. A, P. 15 (Compl.). "R." refers to the record entry number in the district court docket. Page citations refer to the "Page ID #" shown on the pages of the record entry being referenced. *See* 6th Cir. R. 28(a)(1).

[2] The Little Traverse Bay Bands of Odawa Indians, NHBPI, Pokagon Band of Potawatomi Indians, and the Little River Band of Ottawa Indians all entered into tribal-state gaming compacts with the State of Michigan in 1998, all containing the following Section 9:

> An application to take land in trust for gaming purposes outside of eligible Indian lands, as defined in Section 2(B) of this Compact, shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of any gaming facility that is the subject of the application to take lands in trust for gaming purposes outside of eligible Indian lands.

NHBPI Amicus Curiae Br., RE Doc. 006111731386, Page ID #35. "RE Doc." refers to the document number generated for each item filed with this Court.

an application to take land into trust for gaming purposes being submitted as a condition for off-reservation gaming.

III. BACKGROUND

The Panel Decision held that Section 9 of the Compact did not provide a basis for an injunction under § 2710 (d)(7)(A)(ii), nor did it abrogate the immunity of the Sault Tribe based on the five part test established in *Michigan v. Bay Mills Indian Comty.*, 695 F.3d 406, 412 (6th Cir. 2012), *cert. granted*, 133 S. Ct. 2850 (U.S. 2013) (oral argument held December 2, 2013).[3] Panel Decision at 6 fn 2.

Contrary to the Panel Decision, Section 9 is a central, material provision of Michigan compacts and Section 9 protects all tribes from the impacts of off-reservation gaming by only permitting such gaming after a tribal revenue sharing provision has been established for the proposed off-reservation gaming site. Section 9 was agreed to by all tribes in Michigan and the provision was negotiated under the provisions of § 2710 (d)(3)(C)(i-vii) that form the subject of matter of items Congress authorized to be negotiated under Tribal-State compacts. As Section 9 was negotiated under § 2710(d)(3)(C)(i-vii), Section 9 thus meets the five part test.

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[3] The Court found jurisdiction under § 2710(d)(7)(A)(ii) where: "(1) the plaintiff is a State or an Indian tribe; (2) the cause of action seeks to enjoin a class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal–State compact; and (5) the Tribal–State compact is in effect."

IV. ARGUMENT

A. All the elements of the Court's five part test under § 2710(d)(7)(A)(ii) have been met, thus abrogating the immunity of the Sault Tribe.

The Panel Decision held that the second element (suit to enjoin gaming activity) of the five-part test was not met and therefore "it is not necessary …to determine…the third and fourth requirement." Panel Decision at 6 fn 2. Rather, the Panel Decision held that the pending *Bay Mills* Supreme Court decision would only address the third and fourth elements and, since the submission of the application was not a suit to enjoin gaming activity, the injunction should be vacated. *Id.* This is incorrect as all the elements of the five part test have been met.

Recasting the test in terms of a Section 9 fee-to-trust application results in the following:

1. Plaintiff is a State supported in *amici* capacity by two Indian tribes;
2. The State's cause of action seeks to enjoin a class III gaming related activity—the gaming related activity is the submission of a fee-to-trust application for gaming purposes by the Sault Tribe;
3. The actions of the Sault Tribal government authorizing the submission of the fee-to-trust application, a gaming related activity, occur on Indian land;
4. The submission of the fee-to-trust application will not contain an inter-tribal revenue sharing agreement under Section 9; therefore, the application submission is a material breach of the Compact; and

5. The Compact is in effect.

Michigan v. Bay Mills Indian Comty., 695 F.3d at 412-13 (6th Cir. 2012).

B. Section 9 is gaming related activity covered by § 2710(d)(3)(C)(i-vii).

The five part test identified in *Michigan v. Bay Mills Indian Community* and recognized by the Panel Decision has been met for purposes of § 2710(d)(7)(A)(ii). The State is seeking to enjoin a class III gaming related activity under Section 9 of the Compact. The court in *Wisconsin v. Ho-Chunk Nation* found that "so long as the alleged compact violation relates to one of these seven items, a federal court has jurisdiction over a suit by a state to enjoin a class III gaming activity." *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 934 (7th Cir. 2008). Section 9 relates to one of the seven items and is thus gaming related activity.

"[J]urisdiction exists only when the alleged violation relates to a compact provision agreed upon pursuant to the IGRA negotiation process." *Id.* at 933. Section 9 of the Compact is consistent with § 2710(d)(3)(C)(i-vii) and the standards set out in *Wisconsin v. Ho-Chunk*. Romanette (vii) of IGRA provides that any tribal-state compact may include provisions relating to "any other subjects that are directly related to the operation of gaming activities." Section 9 of the Compact, mandating a revenue sharing agreement prior to the submission of a fee-to-trust application, was first agreed upon by all the Tribes in 1993 and that inter-tribal revenue sharing provision exists in every subsequent compact in Michigan. Revenue sharing,

therefore, is a central provision of the all Michigan compacts that protects the interests of all tribes while at the same time making accommodation for gaming expansion with the consent of all tribes. Revenue sharing among the tribes in gaming has been recognized as a central provision of the compacting process. *In re Indian Gaming Related Cases*, 331 F. 3d 1094 (9th Cir. 2003).

Thus, the full panel should consider an extension of *Ho-Chunk* to the Sixth Circuit based on the tribal agreement in Section 9. This Section 9 was ratified by Sault Ste. Marie and in all subsequent Michigan compacts and entered into under the authority of § 2710(d)(3)(C)(i-vii). These compact provisions identified in IGRA control the items subject to negotiation, which in turn, control the application of § 2710(d)(7)(A)(ii) on the congressional abrogation of the Sault Tribe's immunity based on gaming related activity.

C. The Panel Decision is internally inconsistent and should be reconsidered.

Although the Panel Decision prohibits the present injunction against filing an application to take land into trust, it specifically provides for a "later suit to enjoin, as a violation of either § 9 of the Compact or § 2710(d)(7)(A)(ii), *class III gaming* on the land taken into trust." Panel Decision at 8. It also includes a colloquy at oral argument in which counsel for Defendant concedes that trust status of the land does not preclude a Section 9 cause of action. *Id.* at 8 fn 4. As such, nothing prevents the State from amending its current complaint to include a request for a permanent

injunction against class III gaming at the site and seeking a preliminary injunction to maintain the status quo until the question of whether class III gaming is permitted is resolved. State's Pet. for Rehearing En Banc, RE Doc. 006111939210, at 9-10. This procedural result can be avoided by the full panel recasting the five-part test in *Michigan v. Bay Mills Indian Community* opinion as applied herein.

V. CONCLUSION

The State's Petition for reconsideration should be granted.

Respectfully submitted this **22nd** day of January, 2014.

By /s/ John Petoskey

John Petoskey (MI #P41499)
FREDERICKS PEEBLES & MORGAN LLP
2848 Setterbo Road
Peshawbestown, MI 49682
Telephone: (231) 271-6391
Fax: (231) 271-6391

William J. Brooks (P43104)
Chief Legal Counsel
Nottawaseppi Huron Band
of the Potawatomi
2221 1/2 Mile Road
Fulton, MI 49052
(269) 729-5151

Attorneys for Nottawaseppi Huron Band of the Potawatomi

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1856 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14 point Times New Roman.

/s/ John Petoskey
John Petoskey (P41499)
Fredericks Peebles & Morgan LLP
2848 Setterbo Road
Peshawbestown, MI 49682
(231) 271-6391

William J. Brooks (P43104)
Chief Legal Counsel
Nottawaseppi Huron Band
of the Potawatomi
2221 1/2 Mile Road
Fulton, MI 49052
(269) 729-5151

CERTIFICATE OF SERVICE

I hereby certify that on January **22nd**, 2014, I filed the above document via the Court's Electronic Case Filing System, which will service Notice of Electronically Filing to:

Seth P. Waxman
Danielle Spinelli
Kelly P. Dunbar
Nicole Ries Fox
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006

R. John Wernet, Jr.
General Counsel
SAULT STE. MARIE TRIBE OF
CHIPPEWA INDIANS
523 Ashmun Street
Sault Ste. Marie, MI 49783

Aaron Lindstrom
Department of Attorney General
PO Box 30212
Lansing, MI 48909

Louis B. Reinwasser
Environment, Natural Resources and Agriculture Division
P.O. Box 30755
Lansing, MI 48909

/s/ John F. Petoskey