IN THE UNITED STATES DISTIRCT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

STATE OF ALABAMA	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
	)	
PCI GAMING AUTHORITY, BUFORD ROLIN, STEPHANIE BRYAN, ROBERT MCGHEE, DAVID GEHMAN, ARTHUR MOTHERSHED, SANDY HOLLINGER, GARVIS SELLS, EDDIE TULLIS, KEITH MARTIN, BRIDGET WASDIN, MATTHEW MARTIN, BILLY SMITH, and TIM MANNING,	)	**Civil Action No. 2:13-cv-00178-WKW-WC**
	)	
	)	
Defendants.	)	

STATE OF ALABAMA'S RESPONSE TO BRIEF OF THE UNITED STATES AS *AMICUS CURIAE* (DOC. 21) AND NOTICE OF PUBLICATION OF A REQUEST FOR COMMENTS (DOC. 24)

The United States' *amicus* brief (Doc. 21) is unsupported by the text of the Indian Gaming Regulatory Act and conflicts with positions the U.S. Solicitor General has taken in the U.S. Supreme Court. Many of the United States' contentions are already addressed in the State's opposition to Defendants' motion to dismiss (Doc. 17). Others are tangential to the legal issues presented by this case. To avoid repetition, the State will only briefly respond to the main

contentions in the United States' *amicus* brief and will incorporate its briefing in opposition to Defendants' motion to dismiss wherever possible.

The United States' Notice of Publication of a Request for Comments (Doc. 24) is a much more significant document. In it, the United States concedes that the Poarch Tribe is violating federal law. The State's Amended Complaint explains that "[a]ll it takes to operate some of the gambling devices at Defendants' casinos is a single touch of a button." Doc. 10 ¶14. This feature makes these machines illegal under the National Indian Gaming Commission's *own* understanding of federal law. *See, e.g.*, Disapproval Letter from National Indian Gaming Commissioner Philip Hogen to Mayor Karl S. Cook (June 4, 2008). But the United States' response is emphatically *not* to enforce the federal government's longtime understanding of federal law. Instead, it proposes to "reinterpret[]" federal law to transform what Congress has declared to be illegal into something that is legal. Doc. 24. The United States' unwillingness to enforce Congress's statutes is presumably why Congress reserved a role for state enforcement through civil actions like the one at issue here.

I. Defendants Are Not Protected by Tribal Immunity for the Reasons Explained in the State's Opposition to the Motion to Dismiss.

The State has already explained at length that it can sue Defendants, despite their asserted tribal immunity, under the doctrine of *Ex parte Young*. *See* Doc. 17 at 16-20. To wit, this lawsuit is for declaratory and injunctive relief filed against

tribal officers who have "some connection" with the tribe's gambling activities by virtue of their offices. *See* Doc. 17 at 18. The defendants here also happen to be the tribe's *only* officers—so they are the only *possible* official defendants for such an action. Although the United States says in several places that it agrees with Defendants' tribal-immunity argument, it does not address *Ex parte Young*. The United States also fails to address *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), which clearly holds that "[p]ersonal action by defendants individually is not a necessary condition of injunctive relief against [] officers in their official capacity." *Id.* at 1015. Because the United States has not addressed *Ex parte Young* or *Lucky v. Harris*, its ruminations on tribal immunity are nothing short of whistling past the graveyard.

II. The United States Does Not Have Exclusive Jurisdiction To File Civil Lawsuits Under Section 1166.

The United States barely addresses Count II of the State's Amended Complaint—the *federal-law* public-nuisance claim. As explained in the State's brief, the United States has long taken the position that 18 U.S.C. § 1166 incorporates a civil public-nuisance action in States like Alabama where such an action is provided for by state law. *See* Doc. 17 at 23-27. Accordingly, the United States' brief concedes, as it must, that "Section 1166 makes state gambling laws applicable to gaming in Indian country," including civil laws that provide for public-nuisance actions. Doc. 21 at 14. Nonetheless, the United States argues that

it is the only party that can bring a *civil action* under Section 1166 because Section 1166 gives it exclusive jurisdiction over *criminal prosecutions*. *See* Doc. 21 at 15. In this respect, the United States is wrong.

No text or logic supports the United States' claim of exclusive jurisdiction over civil actions. The United States almost always has exclusive authority to bring criminal prosecutions under federal laws, but that does not stop other parties from bringing *civil actions* when those same federal laws provide for one. *E.g.* Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq*. Moreover, as explained in the State's brief and as the United States concedes, Section 1166 broadly and expressly incorporates all state laws, including civil laws. *See* Doc. 17 at 27-33. It then carves out a narrow slice of "exclusive jurisdiction" for the federal government for "criminal prosecutions." *See id.* The only plausible reading of this text is that the federal government does not have exclusive authority to bring civil actions to address prospective violations, although it does have exclusive authority to put violators in jail. *See id.* The import of *expressio unius est exclusio alterius* could not be stronger.

The United States could have responded to the State's analysis of the text of Section 1166, but it chose not to do so. Instead, the United States' entire assertion of "exclusive jurisdiction" over civil actions rests on out-of-context snippets from legislative history and a single inapposite Tenth Circuit case. *See* Doc. 21 at 16-17.

In the Tenth Circuit case, the plaintiff never tried to sue under Section 1166, which "necessarily limit[ed] the [plaintiff's] arguments to supporting application of the Assimilative Crimes Act, 18 U.S.C. § 13—the only other federal law expressly at issue in the record below." *United Keetoowah Band of Cherokee Indians v. State of Okl. ex rel. Moss*, 927 F.2d 1170, 1174 (10th Cir. 1991). The United States' snippets of legislative history are equally irrelevant; they are about the compact process through which a State can choose to allow class III gambling and expand its criminal jurisdiction over Indian Lands, not Section 1166. In fact, if those snippets were about Section 1166, they would be expressly contradicted by its text, which plainly states that "all State laws pertaining to the licensing, regulation, or prohibition of gambling . . . shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." *See* 18 U.S.C. § 1166(a).

The text of Section 1166 grants the United States exclusive authority to bring criminal prosecutions, but it does not grant a similar exclusive authority for civil lawsuits. In the Eleventh Circuit, "[t]he language of our laws is the law." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1227 (11th Cir. 2001). Accordingly, the the State has authority to bring a civil action under Section 1166.

III. The State-law Nuisance Count Is Not Preempted or an Impermissible Collateral Attack.

The United States' brief focuses on Count I of the Amended Complaint—the *state-law* claim for public nuisance. *See* Doc. 21 at 6-13. The gist of the United States' argument is that, because the land upon which the casinos sit is purportedly being held in trust by the United States, the state-law claim is either: (1) an improper collateral attack on the procedures the Secretary of Interior used to take the land into trust or (2) preempted. The United States also argues that it is an indispensible party. There are several problems with these arguments, including Defendants' failure to raise them.

A. Defendants have not moved to dismiss for failure to join an indispensable party and the United States cannot do it for them.

As an initial matter, the United States' arguments about being an indispensable party are not properly before the Court. Defendants have not moved to dismiss this lawsuit for the failure to join the United States under Rule 19 or because this lawsuit is an "impermissible collateral attack," and it is hornbook law that *amici* cannot raise issues that the parties themselves have failed to raise. *See United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60, n.2 (1981) (Court does not decide issues raised by amici that were not decided by lower court or argued by the interested party); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 163 n.8 (2d Cir. 2004) (same); *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 861-62 (9th Cir.

1982) (same); 16AA FEDERAL PRACTICE & PROCEDURE § 3975.1 (4th ed.) (collecting cases). The Court cannot dismiss on these grounds because Defendants have not raised them.

B. This lawsuit is not an impermissible collateral attack on the lands' status and the United States is not an indispensable party.

Even if these arguments were properly before the Court, they should be rejected. The State's lawsuit is not a purported "collateral attack" on the "Secretary's decisions to take land into trust" such that the United States might be an indispensible party or such that the claim might be time-barred or preempted. *See* Doc. 21 at 7-8. The State's lawsuit does not seek to divest the United States of title to any lands that it has acquired nor does it seek to unwind the decisions of the Secretary of the Interior. Instead, the State's lawsuit seeks to enjoin the officers of an Indian tribe from operating an open and notorious public nuisance. The only reason the Poarch Band's trust status is implicated by this lawsuit is that Defendants claim to have the right to operate their casinos because of federal law. Defendants' preemption defense does not morph this lawsuit into a lawsuit about the title of land.

First, as explained in the State's opposition, the reason this issue has arisen is that Defendants have not substantiated their preemption argument sufficiently to meet their burden at the motion-to-dismiss stage. Doc. 17 at 34-35. Defendants have not "conclusively establish[ed]" that they are conducting gambling on lands

that are "Indian Lands" outside of the State's jurisdiction. Doc. 17 at 34. Defendants have "never established in any administrative or judicial forum that [the tribe] was 'recognized' and 'under federal jurisdiction' in 1934." Doc. 17 at 35. Accordingly, although Defendants purport to be covered by IGRA, they have not shown that they actually are. The state-law cause of action is not preempted unless Defendants meet their burden to establish preemption..

Second, Defendants' preemption argument does not make the United States an indispensable party to any part of this litigation. "Rule 19 provides the rules for mandatory joinder of parties" and "is a two-step inquiry." *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1344 (11th Cir. 2011). The Court must first determine whether the person is a necessary party that should be joined. *Id.* The Court must then determine, *if the person cannot be joined*, whether the case must be dismissed because of equitable factors. *Id.* The United States has not cleared any of these hurdles.

1. The United States is not a party that must be joined. A person must be joined if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a). But the United States' interest here is no greater than it is in any other lawsuit in which a party raises a disputed preemption argument. The relief

requested is not that the United States be divested of title, but that Defendants be ordered to cease and desist their gambling activities. This Court can grant or deny the State that relief without affecting the United States' interest in the land, whatever it might be. Litigation about Defendants' gambling activities will not impair or impede the United States' interest in retaining title to any land that it claims to own. The Court may not even reach the question of Indian Lands, given that Section 1166 provides an alternative federal claim. And this Court's decision will not be binding with respect to the United States, as long as it is not a party.

2. The United States can, in fact, be joined. The United States says it cannot be joined because a claim under the Administrative Procedure Act ("APA"), for which it has waived sovereign immunity, would be time-barred.[1] Doc. 21 at 8. In fact, there are exceptions to the statute of limitations when an old agency action affects a person anew. *See Legal Envtl. Assistance Found., Inc. v. U.S. Envtl. Prot. Agency*, 118 F.3d 1467, 1473 (11th Cir. 1997) (allowing plaintiffs to challenge regulations contrary to a statute in claim brought outside statutory period); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) (holding "the government should not be permitted to avoid . . . challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone

[1] The U.S. Supreme Court recently held in *Match-E-Be-Nash-She-Wish Band of Pottwami Indian v. Patchak*, 132 S. Ct. 2199, 2212 (2012), that the United States has waived sovereign immunity to APA claims about the status of land that it has taken into trust. Presumably for this reason, the United States claims to have a statute of limitations defense instead of a sovereign immunity defense.

discovered the true state of affairs"); *Oppenheim v. Coleman*, 571 F.2d 660, 663 (D.C. Cir. 1978) (permitting challenge to 30 year old agency decision). At the very least, if this Court believes that the United States is a necessary party, the State of Alabama should be allowed to sue it. The United States could then litigate its asserted statute-of-limitations defense as a party to the case.

Just as the statute of limitations does not bar judicial review of an old regulation when that regulation is applied in the present day, the statute of limitations under APA should not bar judicial review on the facts of this case. If it were to join the United States, the State would argue that the actions at issue exceeded the Secretary's authority and are void *ab initio*. Moreover, the State was not aware of the need to contest these issues until (1) the Poarch Band built casinos under the purported protection of the United States and (2) the U.S. Supreme Court circumscribed the Secretary's authority in *Carcieri v. Salazar*, 555 U.S. 379 (2009). Just as someone has the right to challenge an old regulation as void *ab initio* when the regulation is first applied to him, the State should be able to challenge the Secretary's decision to take the land into trust because it has only recently affected the State's interests.

3. Finally, even if the United States were a necessary party and even if it could not be joined, it would still not be an *indispensible* party because, "in equity and good conscience, the action should proceed among the existing parties," not be

dismissed. *See* Fed. R. Civ. P. 19(b). An action should only be dismissed for the failure to join a party that cannot be joined if the following equitable factors weigh against continued litigation: "(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder." Fed. R. Civ. P. 19(b). None of these considerations favor dismissal, and the United States does not even argue that they do. This Court can craft an injunction that enjoins Defendants from continuing their unlawful gambling activities without infringing on the United States' title to the land. The United States can even participate as an *amicus* to make sure that this Court accounts for its interests in crafting such an injunction. For its part, the State can get full relief through an injunction that requires Defendants to cease their unlawful gambling; the State does not need or want the United States to be a party. On the other hand, the State will be left without any remedy if this case were dismissed for the failure to join the United States. For all of these reasons, the state-law claim cannot be dismissed for the failure to join the United States.

C. This state-law claim is exactly what the United States *now* says it believes the State of Michigan can pursue.

On June 24, 2013, the U.S. Supreme Court granted Michigan's petition for certiorari in *Michigan v. Bay Mills* (No. 12-515) over the United States' objection. We will soon know whether the Supreme Court continues to recognize the doctrine of tribal immunity and how that doctrine affects a State's attempts to ensure a tribe's compliance with the Indian Gaming Regulatory Act.

For now, the Court should take note that the United States has taken several positions in this case that are contrary to positions that the United States took in *Michigan v. Bay Mills*. *See* Doc. 17 at 24. The United States attempts to qualify its previous concessions in a footnote, but that qualification only digs a deeper hole. In its brief, the United States now characterizes its position in *Bay Mills* as conceding only that "States may also apply their laws to gaming outside of Indian country." Doc. 21 at 15 n.12. The key difference between the Michigan case and this one, the United States says, is that Michigan "alleged a violation of State public nuisance law" outside of Indian Lands. But the United States' gloss on its concession in the U.S. Supreme Court still contradicts its position here —just in a different way. Count I of the Amended Complaint is the precise kind of claim that the United States says Michigan made: a state-law public-nuisance claim about gambling that is alleged to be occurring off properly-recognized Indian lands. Just as the Poarch Tribe has done in this case, the Bay Mills tribe contested Michigan's

allegation that the tribe was gambling off of Indian lands. *See Michigan v. Bay Mills Indian Community*, 695 F.3d 406, 412 (6th Cir. 2012) ("Bay Mills, the defendant here, alleges that the Vanderbilt casino is located on 'Indian lands'"). But the mere fact that the land's status was contested did not mean that the United States was an indispensable party. The United States cannot simultaneously take the position that Michigan's state-law claim may go forward (a position it has reiterated in its brief here) and that the State of Alabama's case must be dismissed. In other words, even if the Court accepts the United States' gloss on its previous concession in *Michigan v. Bay Mills*, its position here is still inconsistent with its position there.

CONCLUSION

The United States' *amicus* brief does not change the result here. United States' Notice of Publication of a Request for Comments merely underscores the importance of denying the motion to dismiss. Defendants' motion to dismiss should be denied for the reasons explained in the State's opposition brief.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and service will be perfected upon the following counsel of record on this day the 26th of June, 2013:

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