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 *MICHIGAN V. BAY MILLS INDIAN COMMUNITY* AND MOOTNESS

Pursuant to the Court's May 30, 2014 order, Appellee/Plaintiff, the State of Oklahoma ("Oklahoma"), submits this supplemental brief addressing the impact of the Supreme Court's opinion in *Michigan v. Bay Mills Indian Community*, ___ U.S. ___, 134 S. Ct. 2024, ("*Bay Mills*"), and the National Indian Gaming Commission's ("NIGC") correspondence dated May 24, 2012. First, *Bay Mills* fully supports the district court's rulings in this case because the Supreme Court affirmed that (1) 28 U.S.C. § 1331 provides subject matter jurisdiction for a claim arising under the Indian Gaming Regulatory Act, 25 U.S.C. § 2501-25 ("IGRA"), and (2) tribal sovereign immunity does not bar claims against individual tribal officials under the doctrine of *Ex parte Young*. Second, the NIGC's opinion that the proposed casino is not on property that qualifies as the Kialegee Tribal Town's lands eligible for gaming under IGRA does not moot this case. The agency's determination, while consonant with and supportive of the district

court's decision, neither affords relief for the Compact violation nor ousts the federal court of jurisdiction to afford a remedy. This Court has jurisdiction to consider this appeal and should affirm the district court's orders.

I. *BAY MILLS* SUPPORTS AFFIRMANCE OF THE DECISION BELOW.

The Supreme Court's *Bay Mills* opinion unqualifiedly supports affirmance of the district court's decision. In this suit against Tribal Officials and the Tribal Corporation of the Kialegee Tribal Town, a federally recognized Indian tribe ("Tribal Town"), the district court ruled it had jurisdiction under 28 U.S.C. § 1331, *see* Aplee. Brief at 12, and that *Ex parte Young*, 209 U.S. 123 (1908), allows suit against Tribal Officials and the Tribal Corporation's corporate charter permits suits against the Tribal Corporation, *see id.* at 22-25. *Bay Mills* reinforces the propriety of these rulings. While *Bay Mills* held IGRA did not abrogate *tribal* sovereign immunity, the holding is not relevant to this appeal, which does not involve an action against a tribe. Rather, the Supreme Court in *Bay Mills* expressly reaffirmed that district courts have federal question subject matter jurisdiction over IGRA claims, and, under *Ex part Young*, tribal immunity does not shield tribal officials acting in violation of federal law from suit. Thus *Bay Mills* supports affirmance in this appeal.

In *Bay Mills*, Michigan and the Bay Mills Indian Community, a federally recognized Indian tribe ("Bay Mills"), entered into a tribal-state gaming compact. Bay Mills subsequently purchased property in Vanderbilt, approximately 175 miles away from its reservation, and opened a new casino. 134 S. Ct. at 2029. Michigan filed suit

against the tribe under IGRA for injunctive relief, arguing that the Vanderbilt casino was not located on the tribe's "Indian lands" as defined by IGRA and thus was not permitted by the gaming compact. *Id.* The district court granted the injunction, but the Sixth Circuit reversed, ruling that IGRA did not abrogate Bay Mills' tribal sovereign immunity from suit by the State and did not provide subject matter jurisdiction for Michigan's suit. *Id.* at 2029-30.

Bay Mills affirmed the Sixth Circuit's holding that IGRA's grant of jurisdiction for certain suits, *see* 25 U.S.C. § 2710(d)(1)(c), did not abrogate tribal sovereign immunity for a lawsuit by a State against a tribe seeking to enjoin off-reservation gaming. *Id.* at 2032. It recognized that 25 U.S.C. § 2710(d)(7)(A)(ii) abrogates tribal immunity where it applies, but concluded the waiver did not apply to Michigan's case, because it interpreted the statute *not* to apply to claims by a State to enjoin gaming activity *outside* Indian lands. *Id.* Regarding subject matter jurisdiction, however, the Court held the Sixth Circuit's "reasoning is wrong" in ruling the district court did not have subject matter jurisdiction to consider the claims of IGRA violation. *Id.* at 2039 n.2. Rather, "[t]he general federal-question statute, 28 U.S.C. § 1331, gives a district court subject matter jurisdiction to decide any claim alleging a violation of IGRA." *Id.* (citing *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 643-44 (2002)). In this case, Oklahoma invoked Section 1331 as a basis of the district court's subject matter jurisdiction, and the district court ruled Section 1331 supplied jurisdiction. Aplt. App. 386, 521. Thus *Bay Mills* affirms the district court's exercise of jurisdiction over the case.

More significantly for the consideration of *Bay Mills*' impact on this appeal is that Oklahoma did *not* sue the Tribal Town. *Bay Mills* specifically addressed the propriety of suits against tribal officials, and expressly recognized tribal immunity does not bar suits seeking prospective relief against individual tribal officials under the *Ex parte Young* doctrine. *Id.* at 2035 (citing *Ex parte Young*, 209 U.S. 123). The court explained that "tribal immunity does not bar . . . a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)). *Bay Mills*' ruling that IGRA does not abrogate tribal sovereign immunity under § 2710(d)(7)(A)(ii) is therefore inapplicable to this case. Oklahoma sued the officials of the Tribal Town, the Town Corporation, and Florence Development Partners, LLC, a private party. The Tribal Officials are proper defendants under *Ex parte Young*, the Town Corporation waived its immunity in its corporate charter, and Florence is not a sovereign entity. *See* Aplee. Brief at 5 n.2, 12, 22-25.

Bay Mills thus reinforces the district court's conclusions that it was seized of subject matter jurisdiction under 28 U.S.C. § 1331 and the sovereign immunity of the Kialegee Tribal Town is not a bar to this suit.

II. THE NIGC'S DETERMINATION DID NOT MOOT THIS APPEAL.

"Constitutional mootness doctrine is grounded in the Article III requirement that federal courts may only decide actual, ongoing cases or controversies. However, the conditions under which a suit will be found constitutionally moot are stringent." *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1028 (10th Cir. 2003) (internal quotation marks, citations, brackets omitted). The NIGC's determination

that the land in Broken Arrow, Oklahoma (the "Property") is not the Tribal Town's "Indian lands" eligible for gaming, while consistent with the district court's rulings, does not moot this appeal because it does not necessarily bar future commencement of gaming but is rather a threat of future action if gaming is commenced.

After the district court made its oral ruling granting Oklahoma its requested preliminary injunctive relief, the NIGC's Chairwoman, Tracie Stevens, issued the Tribal Town a letter conveying the NIGC's conclusion that the Property "does not qualify as Kialegee's Indian lands eligible for gaming because Kialegee has not established that it has legal jurisdiction over the Proposed Site for purposes of IGRA." NIGC Letter to Mekko Hobia, 5/25/12, Aplee. Supp. App. 5-22.[1] The Chairwoman's letter to Mekko Hobia dated May 25, 2012,[2] states, "if gaming is commenced on the Proposed Site [the Property] pursuant to a license issued by the Kialegee Tribal Town, I will exercise my enforcement authority to issue a notice of violation and temporary closure order." *Id.* 5. Among other concerns with the Tribal Town's intended gaming operations, the Chairwoman stated she adopted an opinion of the NIGC Office of General Counsel, and concurred in by the Department of the Interior Solicitor's Office ("NIGC Memo"). *Id.* 6. In support of its threat to issue a notice of violation and temporary closure order at some future, unspecified date, the NIGC cited 25 U.S.C. § 2713 (providing the NIGC

[1] The NIGC subsequently denied the Tribal Town's request for reconsideration. NIGC Letter to Mekko Hobia, 6/8/12, Aplee. Supp. App. 26-29.

[2] The Court's May 30, 2014 Order refers to NIGC correspondence dated May 24, 2012. An NIGC memorandum of that date was included in the NIGC's letter to Mekko Hobia the following day.

chairperson with authority to issue temporary closure notices for substantial violations of IGRA, and requiring a vote on whether the closure is to be permanent within 60 days) and 25 C.F.R. §§ 573.3(a) (providing authority to issue a notice of violation) and 573.6(a)(13)[3] (providing that a temporary closure order may be granted when "[a] gaming facility operates on Indian lands not eligible for gaming under the [IGRA]"). Aplee. Supp. App. 6.

Despite the NIGC's determination that the Property is not the Tribal Town's "Indian lands" under IGRA—the same conclusion reached by the district court here—this appeal remains a "live controversy," invoking the district court's and this Court's jurisdiction. *Moongate Water Co., Inc. v. Dona Ana Mut. Domestic Water Consumers Ass'n*, 420 F.3d 1082, 1088 (10th Cir. 2005). The letter from the NIGC's Chairwoman and the NIGC Memo do not provide any relief with respect to Oklahoma's claims in its Verified Complaint, as it is simply a threat of future action, which, if taken, is then subject to review in federal court.[4]

The NIGC investigated the Tribal Town's intent to license and operate a casino on the Property in response to a notice of intent submitted by the Tribal Town under 25 C.F.R. Part 559. Aplee. Supp. App. 9. The NIGC's letter to Mekko Hobia, however, is

[3] 25 C.F.R. 573.6 was redesiganted as § 573.4. 77 F.R. 47517, 47519 (Aug. 9, 2012).

[4] In fact, NIGC is far from consistent in following through on its determinations with enforcement action. For example, in a dispute with the United Keetoowah Band where the tribe was operating a Class III facility that the NIGC determined was not on "Indian lands," the NIGC disavowed jurisdiction over the casino site—allowing the casino to continue to operate with impunity from federal enforcement action. *See* Memorandum to Tracie Stevens dated July 18, 2011, available at nigc.gov/Reading_Room/Indian_Land_Opinions.aspx.

not a self-effectuating order. Defendants could open and operate a casino on the Property in derogation of the letter from Chairwoman Stevens, and the penalty they would face—if any—would be a temporary closure issued at some later date, which would then be subject to review in federal court. *See Seneca-Cayuga Tribe*, 327 F.3d at 1025 (defining an NIGC opinion requested by a tribe as an "advisory opinion"). The relief Oklahoma sought was a binding declaration and permanent injunction that prevents any further action to open and operate an illegal casino and would be immediately enforceable by the authority of the federal courts.

Beyond declaring a position, the NIGC letter does nothing to address the violation. Under the NIGC letter, Defendants can continue to construct and prepare the casino for opening—in fact, the NIGC has no authority to issue a notice of violation or temporary closure until gaming has commenced. *See* 25 U.S.C. § 2713(a)(1) (permitting the NIGC to impose civil penalties against an entity "engaged in gaming"); 25 C.F.R. § 573.3(a) (stating a notice of violation is issued for violation of IGRA or its regulations); *id.* § 573.4(a)(11), (13) (stating a temporary closure order may be issued when a gaming facility "operates" in violation of a gaming compact or on lands not eligible for gaming). The preliminary injunction issued by the district court, however, properly maintained the status quo by enjoining Defendants' preparatory actions. Aplt. App. 539; *see Seneca-Cayuga Tribe*, 327 F.3d at 1028 (concluding a civil case was not moot despite the issuance of an advisory opinion by the NIGC because "but for the legal impediment presented by the district court's . . . declaratory judgment" the gaming declared illegal

could have continued for a number of years unprosecuted). The post-ruling order did not moot the case. Injunctive relief was necessary to preserve the status quo.

Even if the Court were to conclude, however, that the NIGC's letter may technically moot this case, the Court should then apply the exception for matters capable of repetition, yet evading review. That exception "applies when: (1) the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *United States v. Seminole Nation of Okla.*, 321 F.3d 939, 943 (10th Cir. 2002) (internal quotation marks, citations, alterations omitted). While the NIGC has not issued any binding order, the authority of the NIGC Chairperson extends to issuing temporary closure orders only. This Court has recognized that a challenge to a temporary closure order fits within this mootness exception because "temporary closure orders are too short in duration to be fully litigated in court prior to their administrative expiration or replacement by permanent orders." *Id.* Dismissal of this appeal for mootness would permit Defendants to proceed with their intentions to construct and operate a casino in violation of IGRA and the tribal-state gaming compact.[5]

[5] The voluntary cessation exception to the mootness doctrine may apply as well. While Defendants ceased their activity due to the lawsuit brought by Oklahoma, declaring this case moot would leave Defendants with the option to resume their actions on the Property. There is nothing in the record before the Court that makes it "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Seneca-Cayuga Tribe*, 327 F.3d at 1028 (internal quotation marks and citations omitted); *see also United States v. Generix Drug Corp.*, 460 U.S. 453, 456 n.3 (1983) ("The possibility that respondent may change its mind in the future is sufficient to preclude a finding of mootness.").

This Court's *Kansas v. United States* opinion is not to the contrary. 249 F.3d 1213 (10th Cir. 2001). In *Kansas*, on appeal was a final NIGC decision on Indian lands status, for which IGRA provides judicial review, 25 U.S.C. § 2714, under the Administrative Procedures Act. *Id.* at 1220. The defendants argued that the dispute between Kansas and the Miami Tribe was not ripe because gaming compact negotiations had not commenced. *Id.* at 1223. This Court rejected that argument because the status of land was germane to whether the Tribe could "successfully negotiate" a compact. *Id.* Nothing in *Kansas* reflects that the NIGC decision here is self-effectuating, or negates that the State suffers concrete injury not remedied by a mere NIGC declaration. Here, *Kansas* supports the propriety of relief because the Tribal Town and Oklahoma have negotiated a gaming compact, and the Tribal Town's casino on the Property would be in violation of that compact and of Oklahoma's sovereign interests.

As the NIGC's letter to Mekko Hobia is either of insufficient finality to invoke the mootness doctrine, or an exception to the mootness doctrine applies, the appeal is not moot and the Court has jurisdiction over the appeal.

III. CONCLUSION.

Oklahoma respectfully requests the Court proceed to rule on this appeal and affirm the district court's orders.

Respectfully submitted this 3rd of July, 2014,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this **THE STATE OF OKLAHOMA'S STATUS REPORT** was served on this 3rd day of July, 2014, 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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