UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BAY MILLS INDIAN COMMUNITY,
Plaintiff,

v

RICK SNYDER,
in his official capacity,
Defendant.

Case No. 1:11-cv-00729-PLM

Hon. Paul L. Maloney

ORAL ARGUMENT REQUESTED

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BRIEF IN SUPPORT OF DEFENDANT GOVERNOR RICK SNYDER'S MOTION FOR SUMMARY JUDGMENT

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1. Does the Michigan Indian Land Claim Settlement Act, § 107(a)(3), automatically grant a legal status to lands that the Bay Mills Indian Community acquires with funds from its Land Trust that preempts state gaming laws?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143, § 107, 111 Stat. 2652 (1997)

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)

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INTRODUCTION

On November 3, 2010, the Bay Mills Indian Community (Bay Mills or Tribe) began operating a casino on property it had purchased in Vanderbilt, Michigan (the Vanderbilt Parcel), outside of Bay Mills' reservation and trust lands. To avoid the consequences of operating an illegal casino under state law, Bay Mills brought this lawsuit seeking a declaration that the Vanderbilt Parcel is "Indian lands" as defined in the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq*.

Under *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973), activities by federally-recognized tribes and their members *outside* of Indian country are subject to nondiscriminatory state laws – like Michigan's anti-gaming laws. Indeed, the Supreme Court has recognized a State's regulatory power over gaming outside of Indian country is "capacious." *Michigan v. Bay Mills Indian Cmty*., 134 S. Ct. 2024, 2034 (2014).

Nonetheless, Bay Mills believes that its off-reservation casino is legal and contends that purchasing the Vanderbilt Parcel with proceeds from its Land Trust under § 107(a)(3) of the Michigan Indian Land Claim Settlement Act (MILCSA), Pub. L. No. 105-143, 111 Stat. 2652 (1997), automatically placed the land *inside* Indian country. In Bay Mills' view, using these MILCSA funds made the Vanderbilt Parcel "Indian lands" eligible for gaming under the Indian Gaming and Regulatory Act, 25 U.S.C. § 2701 *et seq*. Bay Mills' theory rests on a portion of a sentence in MILCSA, § 107(a)(3), which says that "[a]ny land acquired with funds from the Land Trust *shall be held as Indian lands are held*." Emphasis added.

Indian lands can be held in several different tenures and legal statuses. IGRA, on the other hand, limits the types of land eligible for gaming to three categories: (a) reservation; (b) trust lands; and (c) lands "subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." See 25 U.S.C. § 2703(4). Because the Vanderbilt Property is neither reservation nor trust land, this lawsuit rests entirely on the unsound theory that purchasing land with MILCSA funds automatically restricts alienation.

As this brief explains, Bay Mills' position concerning restricted fee under MILCSA ignores the plain language of MILCSA, MILCSA's legislative history, and federal common law. Thus, the Governor is entitled to have summary judgment entered in his favor, fully disposing of this case. The Governor respectfully requests that, when declaring the rights and legal relations of the parties under 28 U.S.C. § 2201, this Court affirmatively state that purchasing lands with the Bay Mills Land Trust does not automatically make them Indian lands eligible for gaming under IGRA and that it retain jurisdiction to grant further relief under 28 U.S.C. § 2202 in the event that gaming contrary to state law occurs in the future.

STATEMENT OF FACTS AND BACKGROUND

Bay Mills' Reservation

Bay Mills is a federally recognized tribe and the political successor in interest to certain bands that signed the Treaty with the Ottawa and Chippewa, 7 Stat. 491 (March 28, 1836). The bands of Indians that signed the 1836 Treaty ceded almost

14 million acres of land to the United States in the northwestern portion of the Lower Peninsula and the eastern portion of the Upper Peninsula.

In 1860, the United States established a reservation for the Chippewa Indians by purchasing 527.85 acres in the area reserved in Article Third of the 1836 Treaty. *See* Indian Appropriation Act, 12 Stat. 40, 58 (1860); *People v. LeBlanc*, 248 N.W.2d 199, 209 (Mich. 1976). The United States purchased an additional 1,053.91 acres in 1937 for Bay Mills pursuant to the Indian Reorganization Act, 25 U.S.C. § 5123.[1] *See LeBlanc,* 248 N.W.2d at 209. Bay Mills' present-day reservation is located in and around Brimley, along the shore of Lake Superior, and on Sugar Island in the St. Marys River. (Ex. A.)

Bay Mills' Gaming Compact

In 1993, Bay Mills and the State of Michigan (State) entered into a Tribal-State Gaming Compact (Compact) that allows the Tribe to operate and regulate Class III gaming activities on its own Indian lands pursuant to IGRA. *(*PageID.191-205.) IGRA, 25 U.S.C. § 2710(d)(1), and the Compact, § 3(A), prohibit Bay Mills from operating a casino outside of "Indian lands" as that term is defined in IGRA. (PageID.194.) Since entering the Compact, Bay Mills has continually operated a casino on its reservation in the Upper Peninsula.

[1] The Indian Reorganization Act was formerly codified at 25 U.S.C. § 461 *et seq.*

The Michigan Indian Land Claims Settlement Act

In 1946, Congress created the Indian Claims Commission to resolve historic claims by Indian tribes against the United States. *See* 25 U.S.C. § 70a *et seq*. Bay Mills filed claims in the Commission as early as the 1950s to challenge the valuation of lands under the 1836 Treaty and to raise other claims. (PageID.165, ¶ 13.) In 1972, the Commission entered an amended final award in favor of Bay Mills and others in the amount of $10,109,003.55. *See* Docket Nos. 18-E and 58, Amended Final Award, 27 Ind. Cl. Comm. 94 (March 15, 1972), available at <http://digital.library.okstate.edu/icc/v27/iccv27p097.pdf>. More than twenty years later the United States still had not paid the judgment. Bay Mills then sued the Secretary of the Interior to enforce payment and prevailed. (PageID.165, ¶ 15.)

Congress enacted MILCSA to pay Bay Mills, other Michigan tribes, and individuals the money they were due in different land claim dockets brought in the Indian Claims Commission. MILCSA, § 102. In addition to dividing the judgment funds among the eligible tribes and individuals, MILCSA established a process for tribes to seek approval for plans to use and distribute judgment funds or, alternatively, incorporated established tribal use and distribution plans. MILCSA, § 104 (division of funds for tribes); § 105 (tribal plan development); § 106 (distribution to individuals); §§ 107-109 (plans for specific tribes).

MILCSA, § 107, is the plan for use and distribution of judgment funds the Department of Interior approved for Bay Mills. The plan specifically required the Bay Mills Executive Council to establish a "nonexpendable" Land Trust to receive twenty percent (20%) of the Tribe's share of the judgment funds. MILCSA, §

107(a)(1). MILCSA further provides that the "earnings generated by the Land Trust shall be used exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange. Any land acquired with funds from the Land Trust *shall be held as Indian lands are held*." MILCSA, § 107(a)(3) (emphasis added).

The Vanderbilt Parcel and Casino

In August 2010, Bay Mills purchased the Vanderbilt Parcel. (PageID.188-190.) Bay Mills allegedly used "earnings of the Land Trust" to purchase the Vanderbilt Parcel. (PageID.167, ¶ 25.) The warranty deed does not reveal the purchase price or confirm the source of funds for the purchase, but indicates that the sale was for "the sum set forth in a valuation affidavit and in accordance with Section 107(a)(3) of the Michigan Indian Land Claims Settlement Act, P.L. 105-143, Dec. 15, 1997; 111 STAT. 2658." (PageID.188.)

The warranty deed notably omits any statement suggesting that the United States holds title to the land in trust for the benefit of Bay Mills. Nor does the deed state that the property is subject to any restriction on alienation. Rather, the warranty deed references issues that arise under state law in an ordinary transaction for land sold on the open market: certification that taxes on the property had been paid to Otsego County; the right to make land divisions under state law; a warning that the parcel may be located near a farm with activities protected by state law; and a stamp and seal indicating that the deed was filed with the Otsego County register of deeds. (PageID.188.)

Bay Mills began operating a casino on the Vanderbilt Parcel on November 3, 2010. (PageID.168.) Though Michigan gaming laws do not use the classification system in IGRA, the gaming Bay Mills operated on the Vanderbilt Parcel would be Class III gaming under 25 U.S.C. § 2703(7)(B). On December 16, 2010, after discussions with Bay Mills' representatives failed to resolve the situation, the State sent a letter to Bay Mills demanding it immediately cease operation of all Class III gaming at the Vanderbilt Parcel because the Tribe's operations violated state and federal civil and criminal laws. (PageID.168-169.)

Less than a week later, on December 21, 2010, Department of Interior Solicitor Hillary Tompkins issued an Indian lands opinion (Interior Opinion) concerning the Vanderbilt Property to the National Indian Gaming Commission (NIGC), which regulates Indian gaming under IGRA. (Ex. B.) The Interior Opinion concluded that using MILCSA funds "did not transform the Vanderbilt site into *Indian lands* by operation of law." (Ex. B, p. 7.) Further, Indian lands may be held in a variety of ways and, therefore, the phrase in MILCSA § 107(a)(3) that property shall be "held as Indian lands are held" did not "identify a particular land tenure." (Ex. B, p. 7.) In other words, using MILCSA funds to purchase lands did not automatically impose a restriction on alienation that made the lands eligible for gaming under IGRA. The Interior Opinion reached that conclusion after extensively considering MILCSA's language, the use of similar terms in treaties with other tribes, and MILCSA's legislative history. (Ex. B, pp. 7-16.)

Relying on the Interior Opinion, Michael Gross, the Associate General Counsel for the NIGC, sent a memorandum to the chair of the NIGC on the same day. (Ex. C.) The memorandum concluded that, because the Vanderbilt Parcel was not subject to a restriction on alienation, it was not Indian lands within the meaning of IGRA. (Ex. C, pp. 2-3.) Accordingly, the memorandum stated that the NIGC lacked jurisdiction over the Bay Mills casino under IGRA. (Ex. C, p. 3.) The NIGC continues to maintain this position. (Ex. I, p. 2.)

Procedural Background

Immediately after the federal authorities concluded that they lacked jurisdiction to stop Bay Mills from operating its casino on the Vanderbilt Parcel because it is not Indian lands, the State sued the Tribe in this Court. (1:10-cv-01273.) The State's suit was consolidated with a similar lawsuit filed by the Little Traverse Bay Bands of Odawa Indians (LTBB). (1:10-cv-01278.) This Court issued a preliminary injunction against Bay Mills on March 29, 2011, that prohibited gaming on the Vanderbilt Parcel. (1:10-cv-0123 PageID.1321-1338.)

In July 2011, Bay Mills filed this (third) lawsuit seeking a declaratory judgment that would allow it to operate the casino in Vanderbilt. (PageID.1-6.) This case was stayed while Bay Mills asserted its sovereign immunity defense in the lawsuits brought by the State and LTBB. The Sixth Circuit vacated the preliminary injunction on tribal sovereign immunity grounds. *See Michigan v. Bay Mills Indian Cmty.*, 695 F.3d 406, 409 (6th Cir. 2012). LTBB decided not to appeal the Sixth Circuit's decision and its case was dismissed. (1:10-cv-01278 Page.ID.

2413.) The State appealed, but the Supreme Court affirmed the Sixth Circuit. *See Michigan v. Bay Mills Indian Cmty.,* 134 S. Ct. 2024 (2014).

On remand, the State amended its complaint to allege claims against members of the Bay Mills Executive Council and Gaming Commission under a theory analogous to *Ex parte Young*, in accord with the Supreme Court's instruction in *Bay Mills,* 134 S. Ct. at 2035. (1:10-cv-01273 PageID.2891-2979.) Since 2015, the State's case has been known informally as *Glezen* after the first named defendant.

As of 2015, almost five years had passed since Bay Mills had opened the Vanderbilt casino and more than four years had passed since Bay Mills had stopped gaming at the casino due to the preliminary injunction. Yet, the parties still had not litigated any of the MILCSA issues. The parties concluded that it would be efficient to address the threshold legal question concerning a restriction against alienation under MILCSA in Bay Mills' lawsuit because it avoids tribal sovereign immunity issues. They also agreed to stay further proceedings in *Glezen* until all appeals of this issue are exhausted. The parties entered stipulations in this case (PageID.100-107) and *Glezen* (1:10-cv-01273 PageID.3028-3034) to coordinate how they would address the restricted fee issue under MILCSA in both cases.

There are a variety of factual and legal bases on which to challenge Bay Mills' claim that the Vanderbilt Parcel is Indian lands eligible for gaming under IGRA. Those issues include whether the Vanderbilt Parcel consolidates and enhances Bay Mills' land holdings as required in MILCSA, § 107(a)(3). This motion,

however, tests a much narrower issue on which Bay Mills *must* prevail for the parties to litigate the other issues. Because Bay Mills cannot establish that the phrase "as Indian lands are held" in MILCSA automatically imposes a federal restriction on alienation, it cannot prevail on its claim that gaming at the Vanderbilt Parcel is subject to IGRA rather than state law. Accordingly, Governor Snyder is entitled to summary judgment.

LEGAL STANDARD

Summary judgment is appropriate when the record reveals that there are no genuine issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 362 (6th Cir. 2012). The standard for determining whether summary judgment is appropriate is "whether 'the evidence presents a sufficient disagreement to require submission to a [factfinder] or whether it is so one-sided that one party must prevail as a matter of law.'" *Pittman v. Cuyahoga County Dep't of Children & Family Servs.*, 640 F.3d 716, 723 (6th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986)). "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). A court draws all justifiable inferences in favor of the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, "[i]f the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (internal citations omitted).

ARGUMENT

Indian Lands Under MILCSA and IGRA

Bay Mills seeks a declaration from this Court that the Vanderbilt Parcel meets the definition of "Indian lands" eligible for gaming under IGRA because it claims it was purchased using earnings from its Land Trust. (PageID.167, ¶ 25.) The definition of Indian lands under IGRA, 25 U.S.C. § 2703(4), is limited to:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

To grant Bay Mills the relief it seeks, the court must first conclude that the Vanderbilt Parcel is: (1) within a reservation; (2) held in trust; or (3) subject to a restriction by the United States against alienation (restricted fee lands). *Id.* MILCSA does not state that lands acquired with the earnings from the Bay Mills Land Trust fit any one of these land statuses.

Had the Vanderbilt Parcel been made part of a reservation or taken into trust since Bay Mills acquired title in 2010, the Department of Interior would have engaged in an administrative process that would have included publishing a notice in the Federal Register. *See* 25 U.S.C. § 5110 (proclamation for reservation lands); 25 C.F.R. § 151.12 (trust process), *see, e.g.*, Bay Mills Reservation Proclamation, 81 Fed. Reg. 38733 (June 14, 2016). However, there is no evidence that the Vanderbilt Parcel was made part of the Bay Mills reservation or taken into trust. To the contrary, the Vanderbilt Parcel is located about 100 miles by road from Bay Mills'

reservation, and it is undisputed that the Vanderbilt Parcel is not held in trust. (Ex. B, p. 3; Ex. C, p. 2; Ex. D, pp. 5-6.) Thus, to grant the relief Bay Mills seeks, this Court must conclude that the Vanderbilt Parcel is held subject to a federal restriction on fee.

I. Under the plain language of MILCSA, § 107(a)(3), lands purchased with Land Trust funds are not subject to a restriction on alienation.

A. Indian lands under MILCSA are not restricted to the three categories of Indian lands under IGRA.

Section 107(a)(3) of MILCSA states in part, "Any land acquired with funds from the Land Trust shall be held as Indian lands are held." The term Indian lands is not defined in MILCSA. Nonetheless, Bay Mills alleges here that the term should be construed as restricted fee in the IGRA definition of Indian lands in 25 U.S.C. § 2703(4). Under this reading, lands purchased by Bay Mills with MILCSA Land Trust funds would be eligible for gaming regulated by the NIGC under IGRA.

The problem with Bay Mills' position is that IGRA provides a limited definition of Indian lands, but federally-recognized Indian tribes may actually hold lands in a much wider variety of tenures or statuses. One leading treatise on federal Indian law explains that, "[i]n the whole range of ownership forms known to our legal system, there is probably no form of property right that has not been lodged in an Indian tribe at one time or another." Cohen's Handbook of Federal Indian Law, § 15.02 (2012 ed.) (Ex. E, pp. 995-96). An "incomplete" list of the tribal rights in property would "include: (1) fee simple ownership; (2) equitable ownership; (3) leasehold interests; (4) rights of reverter . . . ; (5) easements for

hunting, fishing, gathering, and other purposes; (6) ownership of subsurface estates; and (7) water rights." (Ex. E, pp. 995-96.) Neither the text of MILCSA nor the text of IGRA create a connection between the Indian lands addressed in either act. MILCSA does not mention IGRA or gaming. IGRA, in turn, does not mention gaming on lands acquired with MILCSA funds. *Cf.* 25 U.S.C. § 2719(B)(2) and (3) (allowing gaming on specified lands of named tribes). Thus, there is no basis to assume that Congress used the term "held as Indian lands are held" in MILCSA to refer to the three categories of Indian lands defined in IGRA, much less the restricted fee category.

B. Congress knew how to impose a restricted fee status on lands, but did not do so in MILCSA.

Congress is well aware that the term Indian lands can have different meanings in different contexts. Congress has clarified the term Indian lands by defining it in statutes, and these definitions vary. Some definitions are more restrictive than IGRA. For example, the Federal Cave and Resources Protection Act, 16 U.S.C. § 4302(3), does not list "reservation" when it defines Indian lands as "lands of Indian tribes or Indian individuals which are either held in trust by the United States for the benefit of an Indian tribe or subject to a restriction against alienation imposed by the United States." Other statutes are broader than IGRA because they include lands held in fee simple as Indian lands. *See, e.g.,* National and Community Service Act, 42 U.S.C. § 12511(20) (fee lands, trust lands, restricted fee lands); National Indian Forest Resources Management Act, 25 U.S.C. § 3103(10)

(trust land, owned by a tribe, or subject to restriction on alienation). Congress knows how to specify restricted fee status when that is its intent.

Restricted fee status is exactly what Congress expressly stated in the Seneca Nation Settlement Act (SNSA), Pub. L. No. 101-503, 104 Stat. 1292 (1990). Like MILCSA, SNSA is a land claim settlement act that appropriated funds to an Indian tribe to purchase lands. Congress specified that these purchased lands "shall be held *in restricted fee status* by the Seneca Nation." SNSA, § 8(c) (emphasis added). SNSA, however, is "unique in creating a mechanism for newly acquired tribal lands to be held in restricted fee." *Citizens Against Casino Gambling in Erie Cty. v. Chaudhuri*, 802 F.3d 267, 274 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2387 (2016). Congress does not frequently impose a restricted fee status on newly acquired tribal lands today because "[m]ost restricted fee lands attained this status under the allotment system of the late nineteenth and early twentieth centuries, when the federal government transferred parcels of tribal lands to individual Indians via either 'trust patents' or 'restricted fee patents.'" *Id.*; *see also* General Allotment Act of 1887, 25 U.S.C. § 348 (restrictions on alienation in federal allotment policy). Congress largely abandoned the allotment policy that used restricted fee when it enacted the Indian Reorganization Act in 1934. *See* 25 U.S.C. § 5101. Thus, restricted fee status is generally a relic of the Indian policies of prior centuries rather than an advantageous status for lands acquired by tribes today.

Moreover, SNSA was passed in 1990, seven years before MILCSA was enacted. Accordingly, as Congress drafted MILCSA in 1997, it already knew how to draft a law that would transfer lands purchased in fee simple into restricted fee status. But Congress chose not to use the term "restricted fee" in MILCSA, instead opting to use the term "held as Indian lands are held." Interpreting "held as Indian lands are held" to mean "restricted fee," as Bay Mills insists, would exclude the other types of legal statuses in which Indian lands can be held (*e.g.*, fee simple and trust). This result ignores that "where words differ . . . Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 63 (2006) (internal citation omitted).

C. The absence of procedural safeguards in MILCSA indicates that Congress did not intend to impose a restricted fee status on lands acquired with Bay Mills Land Trust funds.

Where Congress intends for a special status – such as restricted fee or trust – to apply to lands acquired by a tribe, federal statutes typically explain the procedure for land to transfer into or acquire that status. Following that process balances important federal, state, local, and tribal interests. *See City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 220 (2005) (trust process under the Indian Reorganization Act "takes account of the interests of others with stakes in the area's governance and well-being").

Again, SNSA is a good example of the procedural safeguards Congress provides for lands to acquire a restriction on alienation:

> Land within [the Seneca Nation's] aboriginal area in . . . [New York] State or situated within or near proximity to former reservation land may be acquired by the Seneca Nation with funds appropriated pursuant to this subchapter. State and local governments shall have a period of 30 days after notification by the Secretary [of the Interior] or the Seneca Nation of acquisition of, or intent to acquire such lands to comment on the impact of the removal of such lands from real property tax rolls of State political subdivisions. Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177) [(the Non–Intercourse Act)], such lands shall be subject to the provisions of that Act and shall be held in restricted fee status by the Seneca Nation.

SNSA, § 8(c). Note that even this short provision: limits the geographic area where lands may be acquired with SNSA funds; requires notice of the land acquisition to state and local governments; grants state and local governments a comment period; requires the Secretary of the Interior to make a decision on the land acquisition; provides automatic approval if the Secretary does not reject the lands; and ultimately ensures that the federal agency that would enforce a restriction on alienation of lands knows where the restriction exists.

These procedural safeguards are particularly important in the gaming context. IGRA is currently interpreted to allow gaming on newly acquired restricted fee lands even though the act bars gaming on most trust lands acquired after October 17, 1988. See 25 U.S.C. § 2719. Congress certainly knew it was granting the Seneca Nation an opportunity to conduct gaming under IGRA on newly acquired lands when it created this restricted fee process in SNSA. Consequently, Congress included the procedural requirements in SNSA as essential safeguards against an unchecked expansion of off-reservation Indian gaming. Acquiring lands for gaming under SNSA was, therefore, directly consistent with Congress's

approach to balancing federal, state, and tribal interests in IGRA. *See Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002), *aff'd sub nom. Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003) (discussing cooperative federalism).

Noticeably absent in MILCSA are the same procedural safeguards Congress provided to balance federal, state, and tribal interests in SNSA. What Bay Mills is asserting in this lawsuit is that simply by saying "held as Indian lands are held" in MILCSA, Congress intended to grant the Tribe unilateral power to purchase lands and to remove those lands immediately from state and local jurisdiction and subject it to federal jurisdiction and superintendence ***without***:

- providing any notice of the land acquisition to federal, state, or local governments;
- receiving any input from federal, state, or local governments on whether the land should become eligible for gaming;
- requiring any action or decision by a federal official or agency;
- designating a federal official or agency to enforce the restriction on alienation; and
- including any notice on the face of a deed or publication in the Federal Register to warn potential future purchasers of the restriction on alienation.

Bay Mills' theory would also leave it with no apparent method to lift the restriction on alienation, effectively requiring a new act of Congress to sell lands acquired with MILCSA funds. Giving this type of unilateral power to a tribe to acquire land for gaming without considering state and local concerns would be unprecedented. And imposing restrictions on the sale of land in this manner would be unfavorable to tribes in almost any context other than gaming under IGRA.

D. Congress did not intend for lands purchased with earnings from the Land Trust to be subject to federal superintendence.

Other sections of MILCSA also support this conclusion that Congress did not intend to restrict the alienation of lands purchased with Land Trust funds. Restricted fee lands and lands held in trust require federal superintendence. *United States v. Bowling*, 256 U.S. 484, 486-87 (1921). Section 107(6) of MILCSA, however, shows that Congress did not want the federal government to supervise lands that Bay Mills purchases with its earnings on the Land Trust. That provision states, "Notwithstanding any other provision of law, the approval of the Secretary of any payment from the Land Trust shall not be required and the Secretary shall have no trust responsibility for the investment, supervision, administration, or expenditure of funds from the Land Trust." If Congress did not intend to impose trust responsibilities on the federal government, it would make no sense to assume it wanted to burden the government with the supervisory obligations associated with restricted fee lands – and that it did so in complete silence in the statute.

E. Bay Mills' restricted fee theory is inconsistent with the conclusions reached by the Department of Interior and NIGC.

Finally, Bay Mills' interpretation of MILCSA is inconsistent with the well-reasoned Interior Opinion and NIGC decision concerning the Vanderbilt Parcel. (Exs. B and C.) The Interior Opinion is a comprehensive interpretation and application of MILCSA to this dispute that concludes the phrase "shall be held as Indian lands are held" does not subject lands to a restriction on alienation. (Ex. B, p. 14.) To the contrary, that phrase means that Bay Mills can use Land Trust funds

to purchase lands in fee simple and that the standard regulations and procedures concerning Indian lands apply. (Ex. B, p. 14.) If Bay Mills wanted the federal government to take lands purchased with Land Trust funds into trust, the Tribe could ask Interior to do so pursuant to the federal tribal land acquisition regulations under the Indian Reorganization Act. 25 C.F.R. § 151 *et seq*. Those are the same regulations that the Supreme Court determined to be the appropriate mechanism to balance the many governmental interests impacted by Indian land acquisitions. *See Sherrill*, 544 U.S. at 221.

There is a strong argument that Interior's interpretation is controlling here pursuant to *Chevron U.S.A., Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Interior has a significant role in interpreting and applying MILCSA, which lends considerable weight to its interpretation. *See Confederated Tribes of the Grande Ronde Community of Oregon v. Jewell,* __ F.3d __ (D.C. Cir. 2016), available at 2016 WL 4056092, *3 (applying *Chevron* deference to Interior's interpretation of a statute it is authorized to implement). In MILCSA, Congress charged Interior with approving plans submitted by the tribes for the use and distribution of the judgment funds and submitting a plan for use and distribution to Congress. MILCSA, § 105(b). The plan Bay Mills proposed, and which Interior approved and submitted to Congress, became § 107 of MILCSA.

Interior's interpretation of the language in § 107 of MILCSA must be given considerable weight because of its role in submitting that language, as well as its

overall responsibility and authority for administering federal law to Indian tribes.[2] NIGC recognized Interior's central authority in its decision, noting that MILCSA is "the Department's [Interior's] to interpret." (Ex. C, p. 2.) Although *Chevron* deference generally applies following notice and public comment, it may still apply in other circumstances. *E.g., United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001) ("[A]s significant as notice-and-comment is in pointing to *Chevron* authority . . . we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded[.]"); *NationsBank of N. C., N. A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257, 263 (1995) (giving "controlling weight" to Comptroller of Currency's "reasonable" interpretation and broad authority in context that did not involve rulemaking or notice and comment).

Likewise, in the case at hand, Interior not only has broad authority in the administration and regulation of Indian affairs, it had a specific role in submitting the language to Congress that became § 107 of MILCSA. This certainly gives any interpretation of the language by Interior special – and controlling – weight when it is in dispute. Interior's role in developing, approving and submitting the language of the statute is similar to its role in promulgating regulations that are submitted to Congress for review,[3] which would unquestionably be entitled to *Chevron* type

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[2] 25 U.S.C. §§ 2, 9; *Board of Comm'rs v. United States*, 139 F.2d 248, 251-252 (10th Cir. 1943) (Sec. of Interior has historical power to act as "guardian of the Indian ward; to administer the affairs of its Indians, and to that end as been granted wide discretionary powers in the enforcement of the declared Congressional policy.").

[3] 5 U.S.C. § 801. Bay Mills was given significant input into the language that was ultimately adopted by Congress. Thus the policy underlying *Chevron* deference that is served by notice and comment was satisfied.

deference in a dispute. Furthermore, the conclusion in the Interior Opinion is entirely consistent with the design of both MILCSA and IGRA. There is no reason to deny Interior's interpretation of MILCSA controlling weight.

Even if Interior's interpretation is not binding as a matter of law, case law strongly suggests that its opinion must be given serious consideration. As the Sixth Circuit has noted in connection with agency actions "lacking force of law,"

> [a]lthough *Chevron* deference does not apply to these other agency interpretations, they still enjoy some deference whatever its form due to the agency's institutional expertise and in the interests of judicial uniformity. The weight of deference accorded depends on the agency authority's inherent persuasiveness. Specifically, we consider the thoroughness evident in [the agency authority's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Thornton v. Graphic Communs. Conf. of the Int'l Bhd. of Teamsters Suppl. Ret. & Disability Fund, 566 F.3d 597, 615 (6th Cir. 2009) (internal citations and quote marks omitted, alterations in *Thornton*). Given the "thoroughness evident" in the Interior Opinion and its valid reasoning, it is certainly persuasive and should be given considerable weight by this Court.

II. MILCSA's legislative history does not support Bay Mills' position.

The drafting history of MILCSA reinforces the conclusion that the term "held as Indian lands are held" does not mean held in restricted fee. Although consulting legislative history is not necessary given the plain language of MILCSA, it confirms that Congress did not intend for the automatic application of restricted fee status.

As originally drafted, MILCSA stated that lands purchased with Land Trust funds would be "held in trust by the United States for the Bay Mills Indian Community." (Ex. F, p. 5.) But the final version of MILCSA omitted the mandatory trust acquisition language. Restricted fee land carries with it federal involvement the same as trust lands. *Bowling*, 256 U.S. at 486-87. Omitting the mandatory trust language in the final version supports the conclusion that "held as Indian lands are held" does not burden lands with a special status, including restricted fee.

This conclusion is supported by an explanation for the change to the mandatory trust language provided by Ada Deer, Assistant Secretary of Indian Affairs. When MILCSA was pending as a bill, she sent a letter to the Chairman of the Committee on Resources in the U.S. House of Representatives asking that it "be clarified that the Secretary [of the Interior] retains discretion under existing regulations (25 C.F.R. Part 151) and that this section does not repeal the limitations in section 20 of the Indian Gaming Regulatory Act." (Ex. G.) 25 C.F.R. Part 151 provides the Secretary discretionary authority to grant or deny an application for the United States to take land into trust on behalf of a tribe. The limitations in section 20 of IGRA, 25 U.S.C. § 2719, generally prohibit gaming on lands acquired by the United States in trust after October 17, 1988, with few exceptions. By referencing these two sources of Interior's authority, Assistant Secretary Deer was clarifying that Interior would retain its discretion to approve (or deny) tribal applications to take land into trust and its discretion to approve lands for gaming under IGRA. Neither source of discretionary authority under IGRA or the land-to-

trust rules would be relevant if land purchased with MILCSA funds automatically transferred into restricted fee status eligible for gaming under IGRA.

The same conclusion can be deduced from a letter by Michael J. Anderson, Deputy Assistant Secretary of Indian Affairs, dated November 12, 1997. (Ex. H.) Deputy Assistant Secretary Anderson recommended removing the "held as Indian lands are held" language that appears in the enacted version because it was unnecessary, meaning the language would have no legal impact on the Secretary's authority to make trust determinations. It is likely his letter was not received prior to the final action taken by the Senate the next day on November 13, 1997.

Finally, the Congressional Budget Office's (CBO) statement accompanying the legislation shows Congress did not mean restricted fee. (Ex. F.) The CBO estimated MILCSA would "have no impact on the federal budget . . . and would not affect state and local governments." (Ex. F, pp. 9-11.) The CBO would have noted the cost to the federal government of enforcing criminal laws and IGRA (not to mention the costs imposed on local and state governments from a casino) if MILCSA were intended to allow gaming on lands acquired with MILCSA funds.

III. Congress did not intend to preempt State gaming laws.

According to Bay Mills, MILCSA confers a legal status on the Vanderbilt Parcel that requires it to be afforded the same protection from state laws as Bay Mills would have when conducting gaming on its own reservation. Bay Mills is therefore arguing that Michigan's anti-gaming laws conflict with MILCSA and federal Indian law principles and, as a result, those state laws cannot be enforced

against it. (PageID.170, ¶ 45.) To succeed on this claim, Bay Mills must establish that MILCSA preempts Michigan's anti-gaming laws.

Federal law will "supersede" state law only when Congress expressly preempts state law or occupies a field pervasively. *See Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). Moreover, federal Indian law principles make equally clear that federal law does *not* preempt all state laws when applied to Indian tribes. See *Mescalero,* 411 U.S. at 147–48 (rejecting generalizations regarding exclusive federal jurisdiction over tribes "for all purposes"). Instead, the Supreme Court has recognized that activities by tribes outside of a reservation "present different considerations." *Id*. at 148. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Id*. at 148-49.

The preemption analysis must also consider that there has traditionally been a presumption against federal preemption of state law. *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 997 (6th Cir. 1994). There is also a related judicial "'assumption that the historic police powers of the States [are] not to be superseded by . . . Federal [law] unless that was the clear and manifest purpose of Congress.'" *Interstate Towing Ass'n, Inc. v. Cincinnati*, 6 F.3d 1154, 1161 (6th Cir. 1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Consequently, if a state statute encompasses subject matter traditionally within the state's powers, the party arguing federal preemption must show that Congress had a "clear

and manifest purpose" to preempt that power. *Pacific Gas & Elec. Co. v. State Energy Resources & Dev. Comm'n*, 461 U.S. 190, 206 (1983). A State's traditional police powers to protect the welfare, safety, and morals of its citizens includes its well-recognized authority to regulate (and even prohibit) casino gaming. *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986); *Ah Sin v. Wittman*, 198 U.S. 500, 505–06 (1905). Indeed, even IGRA recognizes the States' role in regulating gaming by prohibiting tribal gaming in states that otherwise prohibit gaming and by requiring a tribe that seeks to conduct Class III gaming to enter into a Tribal-State gaming compact. 25 U.S.C. § 2710(d)(1)(B) and (C).

Thus, the presumption against preemption and the State of Michigan's traditional police powers require Bay Mills to establish MILCSA that Congress expressed a "clear and manifest purpose" to preempt Michigan's anti-gaming laws when it enacted MILCSA. But nothing in MILCSA's language indicates this was Congress's intent. To the contrary, MILCSA does not mention tribal gaming or IGRA. Nor does MILCSA include the procedural protections typically included in statutes designed to enable a tribe to purchase lands for the purpose of gaming. Thus, far from expressing a "clear and manifest purpose," MILCSA lacks any indication that Congress intended to preempt the State's anti-gaming laws.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above and in the accompanying motion, Defendant Governor Rick Snyder requests this Court grant judgment fully in his favor and declare that purchasing lands with funds from the Bay Mills Land Trust does not automatically make those lands Indian lands eligible for gaming under IGRA. In addition, Governor Snyder asks that this Court retain jurisdiction so that any future gaming activities contrary to state law may be subject to further remedies pursuant to 28 U.S.C. § 2202.

Respectfully submitted,

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