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

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INTRODUCTION

Bay Mills asks this Court to hold that the phrase "held as Indian lands are held" in the Michigan Indian Land Claims Settlement Act (MILCSA), Pub. L. No. 105-143, 111 Stat. 2652 (1997) does two remarkable things. First, it preempts 180 years of Michigan's governmental power over the Vanderbilt Parcel. Second, it automatically imposes a federal restriction on alienation. Bay Mills' authority does not support either conclusion. Even if MILCSA restricted alienation *or* granted Bay Mills governmental powers over lands it acquires with Land Trust funds, the land would not be eligible for gaming because it does not meet *both* conditions imposed under the Indian Gaming and Regulatory Act (IGRA), 25 U.S.C. § 2703(4)(B).

Bay Mills also argues that the Indian Non-Intercourse Act, 25 U.S.C. § 177, makes the Vanderbilt Parcel eligible for gaming and that IGRA preempts state gaming laws. But the Supreme Court has not held that the restriction on alienation in the Non-Intercourse Act applies to all property that the United States has already made alienable to non-Indians and subject to a State's sovereign power. Further, even if the Non-Intercourse Act restricts fee, Bay Mills has not cited any authority that the Act grants tribes governmental power over lands they purchase in fee. Thus, the Non-Intercourse Act alone does not grant the Vanderbilt Parcel the legal status necessary for IGRA to apply and preempt state law.

Congress was well-versed in the language used to express a restriction on alienation and the tribal governmental powers necessary to make lands eligible for gaming under IGRA. Congress chose not to use that language in MILCSA. Thus, this Court must grant summary judgment to Governor Snyder.

ARGUMENT

I. MILCSA's plain language requires Bay Mills to take the steps needed to obtain a land status eligible for gaming under IGRA.

Statutory language is the most probative evidence of Congressional intent. MILCSA, § 107(a)(3), plainly states that when Bay Mills acquires land with the earnings from its Land Trust, those lands may be "held as Indian lands are held," i.e., owned collectively in any of the land tenures available to a federally-recognized Indian tribe. (PageID.487-88.) *See United States v. Jim*, 409 U.S. 80, 82 (1972) (Indian title is in tribe for common use and benefit of members). Because MILCSA does not prescribe a land tenure, Bay Mills may apply for the land status it seeks under applicable laws if the land is eligible under those laws. In other words, MILCSA allows Bay Mills to take the steps to obtain a specific land tenure. But Bay Mills obtained only fee title to the Vanderbilt Parcel, not the trust, reservation, or the type of restricted fee necessary to make it eligible for gaming under IGRA.

II. The term "held as Indian lands are held" in MILCSA does not make the Vanderbilt Parcel eligible for gaming under IGRA.

Bay Mills contends that the term "held as Indian lands are held" as used in MILCSA developed from Supreme Court precedent and in treaties addressing tribal "ownership and jurisdiction." (PageID.761.) But even with the declarations from lawyers it proffers, Bay Mills has no cohesive legal argument tying the meaning of "held as Indian lands are held" in the cases and treaties it cites to MILCSA.[1]

[1] Governor Snyder preserves his objection that Fed. R. Evid. 702 does not allow a court to qualify a lawyer as an expert to give an opinion on the meaning of the law. That role is reserved for the court.

A. *Worcester*, *New York Indians*, and *Kansas Indians* are irrelevant to understanding MILCSA.

Bay Mills cites three Supreme Court cases to argue that "the United States has consistently acknowledged that Indians exercised governmental authority over their lands, free from state regulation, subject to a restraint on alienation." (PageID.763.) *See In re N.Y. Indians*, 72 U.S. 761, 770-71 (1866) (no state tax on Indian reservation lands where tribe retained aboriginal title recognized in treaty); *In re Kansas Indians*, 72 U.S. 737, 757 (1866) (no state tax on Indian reservation created in treaty); *Worcester v. State of Ga.*, 31 U.S. 515, 561-62 (1832) (Supremacy Clause required giving effect to treaties establishing aboriginal Cherokee lands separate from state, preempting state law). These cases are irrelevant because they do not: interpret the term "held as Indian lands are held"; describe the tenure that applies to lands a tribe purchases in an open market transaction with a private party; or hold that fee simple lands purchased by a tribe are automatically subject to either a restriction on alienation or tribal governmental power.

Rather, these cases addressed whether state law applies inside of aboriginal Indian lands or Indian reservations recognized in treaties. *See*, *generally*, *Cayuga Indian Nation of N.Y. v. Cuomo*, 758 F. Supp. 107, 110 (N.D.N.Y. 1991) (explaining aboriginal and reserved title). Bay Mills does not claim that it has aboriginal title to the Vanderbilt Parcel or that the Vanderbilt Parcel is a treaty reservation. Thus, Bay Mills fails to connect the holdings in *Worcester*, *Kansas Indians*, and *New York Indians* to MILCSA and the Vanderbilt Parcel. Further, those opinions no longer reflect the Supreme Court's approach to state jurisdiction inside reservations. *See*

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980) (no longer following *Worcester's* view of state law preemption); see also *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("State sovereignty does not end at a reservation's border.").

B. Early American treaties setting boundaries for aboriginal Indian lands are irrelevant to understanding MILCSA.

The first two treaties Bay Mills relies on have no connection to the instant case. They were signed during the early years of Indian policy and neither use the term "held as Indian lands are held." Both treaties were specific to the tribes, places, disputes, and aboriginal land rights addressed.

Bay Mills contends that the Treaty with the Wyandot, 7 Stat. 49 (Aug. 3, 1795), established what it means to hold "Indian lands." (PageID.764.) Bay Mills relies on Article V, which states that when the signatory tribes "shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States . . . ." But this restriction was part of the treaty's effort to make peace in the Ohio Territory by establishing a boundary that would keep settlers out of aboriginal Indian lands that had not been ceded. It is undisputed that the Vanderbilt Parcel was ceded to the United States and Bay Mills has never held aboriginal title to it.

Bay Mills also argues that the Treaty with the Creeks, 7 Stat. 56 (June 29, 1796), extended restrictions on alienation to future Indian land acquisitions. That treaty set a boundary between settlers and aboriginal Indian lands in Georgia. Article III allowed the United States to establish military and trading posts inside Indian lands. Article IV provided that when the posts were no longer necessary, "the same shall revert to and become a part of the Indian lands." Thus, the treaty

barred the *United States* from conveying the aboriginal Indian lands to settlers. It did not restrict *tribal* alienation. This treaty does not advance Bay Mills' position.

Bay Mills cites no authority suggesting that the express terms of any treaty should be read into an unrelated federal statute enacted more than two hundred years later involving unrelated facts. If either treaty had any relevance here, it would be to underscore how important it is to define terms expressly as the treaty negotiators were able to do. Had Congress followed the example set by either treaty when enacting MILCSA, it would have expressly stated in § 107 that "held as Indian lands are held" means a restriction on alienation subject to tribal governmental powers and the preemption of state law. But Congress did not use language conveying that meaning and it cannot be grafted onto the statute now.

C. The treaties from the Wisconsin Territory are irrelevant because MILCSA is not a response to removal.

The five other treaties Bay Mills cites arise out of a set of related Indian land cessions that moved Wisconsin from a territory into statehood. (Ex. A.) The treaties created reservations for tribes that had been or would be removed from their aboriginal lands. But Bay Mills is not a Wisconsin tribe, it did not sign any of these treaties, MILCSA did not compensate Bay Mills for removal claims, and MILCSA did not threaten removal. There is no evidence that Congress intended Bay Mills to use MILCSA funds to acquire lands for a new reservation, given its existing reservation in the Upper Peninsula. Nor does Bay Mills contend that the Vanderbilt Parcel is reservation land eligible for gaming. As a result, the "held as

Indian lands are held" language in MILCSA has no connection at all to the context in which these treaties used the same or similar term.

Further, though each of these Wisconsin treaties use some variation on the term "held as Indian lands are held," none of them use the term in the abstract, as if it had a well-known meaning separate from the circumstances underlying the treaty negotiations and treaty language. Instead, each treaty names the general location of the reservation to be "held as Indian lands are held," an amount of land, and anticipates a further process (survey, agreement, etc.) to establish the reservation if the lands were not identified in advance. MILCSA does not establish a location, amount of land, or further process for identifying land acquired with Land Trust funds. Moreover, Bay Mills has no evidence that usage of this term spread beyond a group of treaty negotiators in Wisconsin to develop a specialized or common understanding that reappeared roughly 150 years later in MILCSA.

By relying on treaties from a much earlier era, Bay Mills asks this Court to ignore the fundamental canon of statutory construction that, absent a definition, "words will be interpreted as taking their ordinary, *contemporary*, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979) (emphasis added). Since the United States signed these treaties, Congress has defined and treated the legal status of "Indian lands" in numerous ways, including in IGRA. (PageID.419-20.) These modern legal developments make it far-fetched to assume that "held as Indian lands are held" in MILCSA has the same meaning as in these treaties.

III. The Non-Intercourse Act does not make the Vanderbilt Parcel eligible for gaming under IGRA.

Bay Mills asserts for the first time that the Indian Non-Intercourse Act, 25 U.S.C. § 177, subjects the Vanderbilt Parcel to a restriction on alienation, a claim it does not make in its amended complaint. (PageID.163-207.) The Act states in relevant part: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, *from* any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177 (emphasis added). Importantly, the lands at issue in this case were purchased *by* an Indian tribe, not *from* one.

According to Bay Mills, the restraint on alienation under the Non-Intercourse Act "applies automatically" to *all* lands an Indian tribe owns in fee. (PageID.767.) But the Non-Intercourse Act "merely codified the principle that a sovereign act was required to extinguish aboriginal title." *Oneida Cty., N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 245 (1985); see also *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960) (Act prevents "unfair, improvident or improper disposition" of tribal lands, disposition without Congressional consent can be vacated).

The Treaty with the Ottawa, etc., 7 Stat. 491 (Mar. 28, 1836), severed aboriginal Indian title to the part of Michigan where the Vanderbilt Parcel is located. *See United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1942) (listing ways to sever aboriginal title). The United States also consented to the sale of this land when it first issued a patent to an individual land owner in 1880. (Ex. B.) (PageID.190.) The Supreme Court has yet to hold that the Non-Intercourse "applies

to land that has been rendered alienable by Congress and later reacquired by an Indian tribe." *Cass Cty., Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 fn 5 (1998). Thus, it is unclear why the Non-Intercourse Act applies here.

Bay Mills essentially argues that the Non-Intercourse Act can *create for it* the aboriginal title it never had. This runs even farther afield than the tribe's assertion in *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), that it could re-establish its sovereign powers over fee lands it purchased within its historical reservation where it had held aboriginal title. If the "standards of federal Indian law and federal equity practice preclude the Tribe from rekindling embers of sovereignty that long ago grew cold," *Sherrill*, 544 U.S. at 214 (internal quote marks omitted), then certainly they stamp out any spark of new sovereign powers that Bay Mills seeks to stoke by purchasing lands to which it has never held aboriginal title.

Even if Bay Mills had at one time held aboriginal title to the Vanderbilt Parcel, the Supreme Court has made clear that the process to transfer Indian lands held into trust, found in 25 U.S.C. § 1508 (formerly § 465), "provides the proper avenue . . . to reestablish sovereign authority over the territory." *Sherrill*, 544 U.S. at 221. Likewise, Bay Mills must apply for and obtain the proper land tenure granted to Indian lands under any one of numerous federal statutes in order to exercise governmental power over lands it purchases with MILCSA funds. The Non-Intercourse Act does not grant that governmental power even where it might restrict alienation. Thus, the Non-Intercourse Act on its own cannot make lands eligible for gaming under IGRA as Bay Mills contends.

Taking Bay Mills' argument to its logical end would mean that a tribe could buy lands anywhere, using any funds, and the lands would be held in restricted fee. Congress never intended that result because it would nullify IGRA's exception to the general prohibition against gaming on lands taken into trust after October 17, 1988 and also make the fee-to-trust process unnecessary. *See* 25 U.S.C. § 2719.

IV. MILCSA does not preempt state gaming laws.

Bay Mills contends that it is unnecessary for MILCSA to preempt state law because IGRA serves that function. But this argument simply assumes that purchasing lands with MILCSA funds makes them eligible for gaming under IGRA. Because MILCSA does not have that extraordinary effect, Bay Mills has to prove the impossible to survive this motion – that MILCSA itself preempts state law.

Michigan assumed sovereign power over its lands when it was admitted "into the Union on an equal footing with the original states, in all respects whatever" in 1837. Act Admitting Michigan to the Union, 5 Stat. 144 (Jan. 26, 1837); *see also United States v. State of Tex.*, 339 U.S. 707, 716 (1950) (equal footing doctrine "create[s] parity as respects political standing and sovereignty"). Abrogating a state's sovereign power requires a "clear and manifest" expression of Congressional intent. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). MILCSA has no language preempting Michigan's sovereignty or diminishing any form of its jurisdiction.

Using the phrase "held as Indian lands are held" in MILCSA, § 107, falls woefully short of "clear and manifest" Congressional intent to abrogate Michigan's sovereign power to regulate gaming on lands Bay Mills acquires with MILCSA

funds. Congress had already developed statutory language to describe the types of Indian lands eligible for gaming when it enacted IGRA in 1988. Congress could have easily stated that the lands that Bay Mills acquires with MILCSA funds are subject to a "restriction by the United States against alienation" and Bay Mills' "governmental power" to communicate that the lands are eligible for gaming under IGRA despite state laws that prohibit the gaming. Yet, there is no restricted fee or tribal governance language in MILCSA, § 107.

Bay Mills' argument flies in the face of the "cardinal rule" of statutory construction that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 254 (1992); *see also Carcieri v. Salazar*, 555 U.S. 379, 392-93 (2009). There is no clear and manifest intent to preempt state sovereignty and jurisdiction over lands Bay Mills acquires using MILCSA funds.

CONCLUSION AND RELIEF REQUESTED

For these reasons, summary judgment should be granted to Governor Snyder.

Respectfully submitted,
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