Nos. 18-2259/18-2302

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BAY MILLS INDIAN COMMUNITY,

Plaintiff-Appellant,

v.

GRETCHEN WHITMER, Governor, in her official capacity,

Defendant-Appellee.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Paul L. Maloney

BRIEF FOR DEFENDANT-APPELLEE GOVERNOR GRETCHEN WHITMER

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendant-Appellee Governor Whitmer[1] respectfully requests oral argument. The Bay Mills Indian Community (Bay Mills or the Tribe) has requested oral argument, and Governor Whitmer agrees with the Tribe's reasoning as to why oral argument would assist the Court in this case. In addition, Bay Mills asserts that, based on its interpretation of the Michigan Indian Land Claims Settlement Act ("MILCSA"), P.L. 105-143, 111 Stat. 2652, the Tribe has virtually unlimited authority to open a casino wherever the Tribe is able to purchase property, which is a matter of first impression for this Court. That position runs directly counter to the general prohibition against gaming on newly acquired lands that Congress established in the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. (IGRA). Given the potential impact of such a claim—both within and outside the State of Michigan—Governor Whitmer believes oral argument is appropriate.

[1] Under Fed. R. of App. P. 43(c)(2), Governor Whitmer automatically substituted for former Governor Snyder in this official-capacity lawsuit when she assumed office on January 1, 2019.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1362 because Bay Mills is a federally recognized tribe and claimed a federal right to conduct Class III gaming pursuant to IGRA on lands it allegedly purchased with judgment funds under MILCSA. (Am. Compl., R. 25, Page ID #163.) Bay Mills sought declaratory judgment and such other relief as may be warranted under 28 U.S.C. §§ 2201 and 2202. (*Id.*)

This Court has jurisdiction over this appeal because final judgment disposing of Bay Mills' claims was entered on October 30, 2018, and the notices of appeal were timely filed on October 26, 2018 and November 7, 2018. (Judgment, R. 94, Page ID #939; First Notice of Appeal, R. 93, Page ID #938; Second Notice of Appeal, R. 96, Page ID #943.)

The first notice of appeal was filed before the judgment was entered, and the second notice of appeal was filed after it was entered. The district court did not alter the ruling of the court in the interim. Thus, the issues related to both notices of appeal are identical. These appeals were consolidated by this Court on December 3, 2018.

STATEMENT OF ISSUES PRESENTED

1. Canons of statutory construction dictate that "words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States,* 444 U.S. 37, 42 (1979). When MILCSA was passed in 1997, tribes could acquire and hold land with all possible titles. Did the district court correctly conclude that the phrase "held as Indian lands are held" in MILCSA § 107(a)(3) had a plain meaning that the Tribe could acquire and hold land with all possible titles?

2. By 1997 when MILCSA was passed, Congress had enacted numerous statutes defining Indian lands to include restricted-fee property. In drafting MILCSA, Congress neither considered nor included this well-known language, instead opting for the phrase "held as Indian lands are held." Does the legislative history demonstrate that Congress did not intend for the phrase "held as Indian lands are held" to impose a restriction by the United States against alienation of the land acquired?

3. The U.S. Supreme Court has directed that "courts should not lightly infer preemption." *Int'l Paper Co. v. Ouellette,* 479 U.S. 481, 491 (1987). Nothing in the explicit language of MILCSA suggests that Congress intended to preempt Michigan law. Did the district court correctly conclude that MILCSA does not preempt state law?

4. The U.S. Supreme Court has held that the Non-Intercourse Act does not apply to land purchased on the open market. *City of Sherrill, New York v. Oneida Indian Nation of New York,* 544 U.S. 197, 203 (2005). Bay Mills purchased the Vanderbilt Parcel on the open market. Did the district court correctly conclude that the Non-Intercourse Act did not apply to the Vanderbilt Parcel?

INTRODUCTION

Bay Mills asserts in this lawsuit that Congress has granted it authority to purchase land virtually anywhere and to open a casino on that property. On November 3, 2010, Bay Mills did just that, opening a casino on property it purchased in Vanderbilt, Michigan (the Vanderbilt Parcel or Parcel), over 100 miles south of Bay Mills' reservation and trust lands. Bay Mills asserts that this off-reservation casino is legal.

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 laws that strictly regulate gaming and prohibit it where not authorized. *See, e.g.*, Michigan Gaming Control and Regulatory Act, Mich. Comp. Laws § 432.201 *et seq*. Indeed, the U.S. Supreme Court has recognized a State's regulatory power over gaming outside of Indian country is "capacious." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014).

Nonetheless, Bay Mills contends that, because it purchased the Vanderbilt Parcel with earnings from its Land Trust under § 107(a)(3) of MILCSA, the land is automatically converted into "Indian lands"

eligible for gaming under IGRA. *See* IGRA, 25 U.S.C. § 2703(4) (defining "Indian lands"). 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.)

No party disputes that Indian lands can be held in several different tenures and legal statuses. But IGRA limits the types of land eligible for gaming to three categories: (a) land within an Indian 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 not within either an Indian reservation or trust land, this lawsuit rests entirely on the unsound theory that the phrase "held as Indian lands are held" means "subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."

Nothing in the plain language or legislative history of MILCSA supports Bay Mills' position, nor does federal statutory or common law. This Court should affirm the district court's decision.

STATEMENT OF THE CASE

A. 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) (1836 Treaty). In Article I of the 1836 Treaty, the signatory 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. *See id.*

In 1860, the United States established a reservation for certain Ojibwe bands by purchasing 527.85 acres of land to be held in trust. *See People v. LeBlanc*, 248 N.W.2d 199, 209 (Mich. 1976); Indian Appropriation Act, 12 Stat. 40, 58 (1860). 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 (formerly codified at 25 U.S.C. § 461 *et seq.*). *See LeBlanc,* 248 N.W.2d at 209. Bay Mills' present-day reservation is in and around Brimley, Michigan, along the shore of Lake Superior, and on Sugar Island in Michigan's St. Marys River. (Mot. Summ. J. Ex. A, R. 54-2, Page ID #435.)

B. Bay Mills' Tribal-State Gaming Compact

In 1993, Bay Mills and the State of Michigan (State) entered 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. (Am. Compl. Ex. B, R. 25-3, Page ID ##191–205.) Since entering the Compact, Bay Mills has continually operated a casino on its reservation in the Upper Peninsula. But both 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. (*Id.* at Page ID #194.)

C. 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. (Am. Compl., R. 25, Page ID #165.) 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 <https://cdm17279.contentdm.oclc.org/digital/collection/p17279coll10/id/1360/rec/1> (last accessed March 5, 2019). 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. (Am. Compl., R. 25, Page ID #165.)

In 1997 (nine years after IGRA was passed), 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. MILCSA does not mention either tribal gaming or IGRA. MILCSA instead focuses on dividing the judgment funds among the eligible tribes and individuals. MILCSA, § 104 (division of funds for tribes) and § 106 (distribution to individuals). MILCSA also establishes a process for tribes to seek approval for plans to use and distribute judgment funds or, alternatively, the statute incorporates approved tribal use and distribution plans. § 105 (tribal plan development); §§ 107–109 (plans for specific tribes).

Section 107 is the plan for use and distribution of judgment funds that Congress 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).

D. The Vanderbilt Parcel and Casino

Bay Mills purchased the Vanderbilt Parcel in August 2010. (Am. Compl. Ex. A, R. 25-2, Page ID ##188–90.) According to the Tribe, Bay Mills used "earnings of the Land Trust" to purchase the Vanderbilt Parcel. (Am. Compl., R. 25, Page ID #167.) The warranty deed does not reveal the purchase price or confirm the source of funds for the purchase; but it does indicate 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." (Am. Compl. Ex. A, R. 25-2, Page ID #188.)

The warranty deed notably omits any statement suggesting that the United States holds title to the Vanderbilt Parcel in trust for the benefit of Bay Mills. The deed also does not state that the property is subject to any restriction on alienation by the United States. 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. (*Id.*)

Bay Mills began operating a casino on the Vanderbilt Parcel on November 3, 2010. (Am. Compl., R. 25, Page ID #168.) Though Michigan gaming laws do not use the gaming 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. (*Id.* at Page ID ##168–69.)

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 Parcel to the National Indian Gaming Commission (NIGC), which regulates Indian gaming under IGRA. (Mot. Summ. J. Ex. B, R. 54-3, Page ID ##436–52.) The Interior Opinion concluded that using MILCSA funds "did not transform the Vanderbilt site into *Indian lands* by operation of law." (*Id.* at Page ID #443.) 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." (*Id.*) In other words, using MILCSA funds to purchase lands did not automatically impose the type of restriction on alienation by the United States that would make 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. (*Id.* at Page ID ##443–52.)

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. (Mot. Summ. J. Ex. C, R. 54-4, Page ID ##453–56.) The memorandum concluded that, because the Vanderbilt Parcel was not subject to a restriction on alienation by the United States, it was not Indian lands within the meaning of IGRA. (*Id.* at Page ID ##455–56.) Accordingly, the memorandum stated that the NIGC lacked jurisdiction over the Bay Mills casino under IGRA. (*Id.* at Page ID #456.) The NIGC continues to maintain this position. (*Id.* at Page ID #515.)

E. Procedural background leading up to the district court's order

The State of Michigan sued the Tribe in the U.S. District Court for the Western District of Michigan, Case No. 1:10-cv-01273, immediately after the federal authorities rejected Bay Mills' MILCSA argument. The State's suit was consolidated with a similar lawsuit filed in the same court by the Little Traverse Bay Bands of Odawa Indians (LTBB),

Case No. 1:10-cv-01278. On March 29, 2011, the district court issued a preliminary injunction against Bay Mills that prohibited gaming on the Vanderbilt Parcel. (Case No. 1:10-cv-0123, Page ID ##1321–38.)

In July 2011, Bay Mills filed this (third) lawsuit seeking a declaratory judgment that would allow it to operate the casino in Vanderbilt. (Compl., R. 1, Page ID #1–6.) This case was stayed while Bay Mills asserted its sovereign immunity defense in the consolidated lawsuit brought by the State and LTBB. In the consolidated cases, 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. (Case No. 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.*, 572 U.S. 782 (2014).

On remand, the State amended its complaint in Case No. 1:10-cv-01273 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*, 572

U.S. at 796. 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 opened the Vanderbilt casino and more than four years had passed since Bay Mills 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 and *Glezen* to coordinate how they would address the restricted fee issue under MILCSA. (Stipulation, R. 21, Page ID ##100–07;1:10-cv-01273, Page ID ##3028–34.) As part of that agreement, Bay Mills filed an amended complaint on November 11, 2015. (Am. Compl., R. 25, ##163–207.)

There are a variety of factual and legal bases to challenge Bay Mills' claim that the Vanderbilt Parcel is Indian lands eligible for gaming under IGRA. Those issues include: whether Bay Mills

purchased the Vanderbilt Parcel with earnings from the Land Trust; whether the Vanderbilt Parcel consolidates and enhances Bay Mills' land holdings as required in MILCSA, § 107(a)(3); and whether Bay Mills exercises governmental authority over the Parcel. This appeal, however, concerns a much narrower issue on which Bay Mills must prevail for the parties to litigate the other issues. The single issue that the parties stipulated to address was: "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?" (Stipulation, R. 21, Page ID #102.)

There is no evidence that the Vanderbilt Parcel was made part of the Bay Mills reservation or taken into trust by the United States. 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. (Mot. Summ. J. Ex. B, C, and D, R. 54-3, Page ID #439; R. 54-4, Page ID #455; R. 54-5, Page ID ##465–66.) Thus, in deciding whether to grant the relief Bay Mills seeks, the district court considered whether the Vanderbilt Parcel is held subject

to a federal restriction on alienation. (Summ. J. Order, R. 91, Page ID #913.)

F. The district court's order

The upshot of the district court's opinion is that Bay Mills did not acquire the Vanderbilt Parcel subject to federal restrictions on alienation, and therefore the property was subject to Michigan's authority. (Summ. J. Order, R. 91, Page ID #907.) The district court held that the statutory phrase "held as Indian lands are held" has a plain and ordinary meaning. (*Id.* at Page ID ##914–19.) The court rejected Bay Mills' argument that nineteenth-century treaties and case law interpreting those treaties controlled the outcome. (*Id.* at Page ID ##924–28.)

Instead, the district court looked to the contemporary meaning of Indian lands—the types of land tenures and statuses tribes currently hold—and concluded that the phrase does not designate a specific form of title for lands purchased through the Land Trust. (*Id.* at Page ID #914.) The phrase "held as Indian lands are held" allows Bay Mills, using interest from the Land Trust, to acquire land on the open market (as is common for tribes to do). In addition, because the land would be

held by an Indian tribe, Bay Mills could seek land status designations that are uniquely available to tribal lands (in addition to those that are available to both tribal and non-tribal lands), e.g. reservation, trust land, and restricted fee. (*Id.*) The district court went on to state that the legislative history was too sparse to resolve the statutory interpretation question, but noted the legislative history was not critical because the statute has a plain meaning. (*Id.* at Page ID ##919–21.)

In addition, the district court addressed two other issues the parties raised. First, the court agreed with the Governor that MILCSA contains no "unmistakably clear" language indicating that Congress intended to preempt any state law. (*Id.* at Page ID ##921–24.) Second, the district court held that the Non-Intercourse Act does not apply to lands acquired with MILCSA funds. (*Id.* at Page ID ##929–34.) The court explained that the Non-Intercourse Act restricts alienation of lands with aboriginal or Indian title. (*Id.* at Page ID #931.) However, the Non-Intercourse Act does not control the acquisition of land after aboriginal title is extinguished, such as the open-market purchase of the Vanderbilt Parcel. (*Id.*)

STANDARD OF REVIEW

Review of the district court's grant of a summary judgment motion under Rule 56 is de novo. *Booth Family Tr. v. Jeffries*, 640 F.3d 134, 139 (6th Cir. 2011) (citation omitted). "A matter requiring statutory interpretation is a question of law requiring de novo review, and the starting point for interpretation is the language of the statute itself." *Roberts v. Hamer*, 655 F.3d 578, 582 (6th Cir. 2011) (citations and internal quotations omitted).

SUMMARY OF ARGUMENT

The district court correctly concluded that the phrase "held as Indian lands are held" in MILCSA § 107(a)(3) has a plain meaning. The phrase means that when Bay Mills purchases land with Land Trust funds on the open market, the Tribe holds those lands in fee simple, but the land still differs from fee simple lands owned by a non-Indian. Because the land is Indian lands, instilled in it are special qualities unique to tribal landholdings. Bay Mills could, for example, request that the land be taken into trust, an option unavailable to non-Indians.

This interpretation does not render the phrase "held as Indian lands are held" mere surplusage. The importance of the phrase was

highlighted by the district court: "In many respects, the status of land has been a defining feature of the relationship between the Federal Government and native peoples." (Summ. J. Order, R. 91, Page ID ##914–15.) Because of the importance of land status, Congress customarily designates the title or status in federal Indian law statutes.

The nineteenth-century treaties and opinions interpreting the treaties on which Bay Mills relies do not warrant a different conclusion. They do not reflect the current status of the law, and none of the treaties relied on involve either Bay Mills or MILCSA. Moreover, the treaties all created reservations, not the restricted-fee title Bay Mills insists applies here.

In the current era of federal Indian law, Congress has explicitly described a restriction against alienation held by the United States in numerous federal laws demonstrating the legislatures' familiarity with the phraseology. Yet, Congress did not use the well-known, oft-used restricted fee language in MILCSA. That alone demonstrates that Congress did not intend for it to apply.

Not surprisingly, both the Department of Interior and the NIGC have weighed in on this dispute and disagree with the Tribe. The

Governor's interpretation is consistent with the federal government's position that "held as Indian lands are held" does not mean the land is automatically subject to a restriction against alienation by the United States and subject to the Tribe's governance, thereby making it eligible for gaming under IGRA. Interior's and the NIGC's opinions are arguably entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984). But even if *Chevron* does not apply, they are persuasive and should be afforded significant consideration by this Court.

In the alternative, if this Court finds that "held as Indian lands are held" is ambiguous, the legislative history reveals that at no point in time when MILCSA was being drafted did anyone propose or otherwise consider language that would indicate that lands purchased with Land Trust funds would be held in restricted fee and subject to the Tribe's governance. Yet, the language to place a restriction against alienation was already commonplace by the time MILCSA was enacted. This Court should not ignore Congress' decision to forgo using this well-known terminology.

Furthermore, if Bay Mills' interpretation of MILCSA were correct, it would result in the preemption of state law, including laws that prohibit gaming on the Vanderbilt Parcel. Preemption of state law should not be lightly inferred, and the lack of any explicit intention by Congress in MILCSA to preempt state law dictates the result here.

Finally, the district court correctly concluded that the Non-Intercourse Act does not apply to the Vanderbilt Parcel. The Supreme Court has already determined that the Act cannot revive aboriginal title to lands that were re-purchased by a tribe on the open market. Following the Supreme Court's direction, it is clear that Congress did not intend for the Non-Intercourse Act to be applied to lands purchased on the open market to create aboriginal title which the tribe *never* had.

ARGUMENT

I. The district court correctly held that the phrase "held as Indian lands are held" in MILCSA § 107(a)(3) has a plain meaning and is not a term of art.

The entirety of Bay Mills' "term of art" argument ignores one simple fact: tribes can *now* own land in numerous different land titles and statuses. The treaties and case law on which Bay Mills relies on all date back to a time involving a different understanding of Indian lands.

As the district court notes, "[w]hen the disputed phrase was used in the 1700s and 1800s, congressional understanding of Indian land holdings was different than it is today." (Summ. J. Order, R. 91, Page ID #926.)

The current understanding of Indian lands has evolved in the intervening 150–200 years. Yet, Bay Mills asks this Court to disregard 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). Bay Mills also asks the Court to overlook that where a court interprets a federal Indian law statute (particularly one passed as recently as 1997) as opposed to an Indian treaty, the canon directing interpretations favorable to Indian tribes is not afforded any particular weight.[2] *Chickasaw Nation v. United States,* 534 U.S. 84, 94 (2001). Moreover, the canon of construction that Bay Mills

[2] It should also be noted that Bay Mills' interpretation of the statute, while undoubtedly favorable to Bay Mills, is not favorable to tribes generally. Bay Mills interprets MILCSA to grant it a competitive advantage over all other Michigan and non-Michigan tribes by allowing it to purchase land anywhere for the purpose of opening a casino. LTBB's lawsuit against Bay Mills, which was eventually dismissed, demonstrates this point.

presses the Court to obey must give way if adherence would produce a result contrary to the intent of Congress embodied in the statute. *Id.*

Today, as one leading federal Indian law treatise explains, "[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.) (Mot. Summ. J. Ex. E, R. 54-6, Page ID #487.) Thus, even if the phrase "held as Indian lands are held" had a special meaning at one point in history (which it did not), when Congress passed MILCSA in 1997, the understanding of tribal land ownership had wholly changed. And the law dictates that MILCSA be interpreted consistent with this present-day ordinary meaning. *See Perrin,* 444 U.S. at 42.

A. Nineteenth century treaties, and the case law interpreting those treaties, do not support Bay Mills' interpretation of MILCSA.

Not only has our understanding of tribal land ownership evolved, but also, even with the declarations from lawyers it proffers[3], Bay Mills

[3] Experts may only opine on factual issues, not legal ones, including the meaning of statutory terms. *Killion v. KeHE Distributors, LLC*, 761 F.3d 574, 592 (6th Cir. 2014) (citing *Berry v. City of Detroit*, 25 F.3d

has no cohesive legal argument tying the meaning of "held as Indian lands are held" in MILCSA to the treaties and cases it cites.

1. Nineteenth century treaties creating reservations in Wisconsin have no connection to Bay Mills or MILCSA.

The five treaties that Bay Mills relies on have no relation to Bay Mills or MILCSA. As explained below, they arise out of a set of Indian land cessions that moved Wisconsin from a territory into statehood. (Reply Brief Ex. A, R. 81-2, Page ID #879.) This set of treaties created reservations (as opposed to "restricted fee" lands) for tribes that had been or would be removed from their aboriginal lands. (*Id.*) Bay Mills, however, does not have lands in Wisconsin, and it did not sign any of these treaties. MILCSA also did not compensate Bay Mills for removal claims. 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

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1342, 1353 (6th Cir.1994)). The Clinton and Hughes declarations filed by Bay Mills below attempt to interpret statutory terms and are, therefore, inadmissible under Federal Rule of Civil Procedure 702. (Clinton Decl., R. 70, Page ID ##808–16; Hughes Decl., R. 72, Page ID ##822–42.)

the Vanderbilt Parcel is eligible for gaming because it is part of Bay Mills' reservation.

In addition, each of these Wisconsin treaties that use some variation on the term "held as Indian lands are held," do not use the term in the abstract, as if it had a well-known meaning. Instead, each treaty names the general location of the reservation to be "held as Indian lands are held," designates 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, on the other hand, provides none of these details. Moreover, Bay Mills has no evidence that use of this term spread beyond a group of treaty negotiators in Wisconsin to somehow develop a specialized or common understanding that reappeared roughly 150 years later in MILCSA.

The Department of Interior's Indian Lands opinion interpretation of these treaties, which the district court found "persuasive," (Summ. J. Order, R. 91, Page ID #919), reaches a similar conclusion:

> The phrase [held as Indian lands are held] does not have a special meaning relating to the Bay Mills Indian Community, because the Tribe has not provided, and our own research has not uncovered, any treaty signed by a political predecessor of the Bay Mills Indian Community that used such language.

> In each of the treaties where the phrase was used, it was in the context of creating what today we would call a reservation for the subject tribes. The phrase was used in place of a more definitive directive regarding the nature of the underlying land ownership. But this created a legal uncertainty, because the title derived by an Indian tribe on its reservation depends entirely upon the terms of the treaty. Some treaties called for the United States to grant ownership of the reservation lands to the subject tribes in fee simple. Other treaties granted fee ownership to the tribes, but subject to a restriction against alienation. Many other treaties have language that has been interpreted to mean that the United States retained fee title to the lands, with a right of use and occupancy or beneficial interest held by the tribe. Given such a varied background, it was undoubtedly difficult for 19th century treaty drafters to describe a definitive tribal estate. By using the circular phrase held as Indian lands are held, the drafters tried to avoid the problem.

(Mot. Summ. J. Ex. B, R. 54-3, Page ID ##444–45.) Solicitor Tompkins concluded that if anything was to be gleaned from these nineteenth century treaties, it was that Congress once again declined to specify a land title or status by using the phrase "held as Indian lands are held" in MILCSA:

> Instead of defining with particularity how the tribal estate would be owned pursuant to MILCSA Land Trust purchases, Congress borrowed the phrase held as Indian lands are held as a way of declining to change the standard rules. It follows that the standard Indian land rules apply. The Tribe may use Land Trust earnings to purchase land in fee simple; the Tribe may then request the Secretary to take such lands into

> trust for the benefit of the Tribe; the Secretary retains discretion under 25 C.F.R. part 151 to take such lands into trust; and with any such trust acquisition for gaming purposes, the Tribe is subject to the standard analysis for newly acquired trust lands under IGRA Section 20.

(*Id.* at Page ID #450.)

The Solicitor's construction is consistent with that of the district court and the Governor. When Congress stated that the land would be "held as Indian lands are held," it did not specify a particular land title. It merely noted that the standard rules applicable to land purchased by tribes on the open market would apply.

2. Case law interpreting nineteenth century treaties also has no connection to Bay Mills or MILCSA.

Bay Mills also attempts to shore up its term-of-art argument with several U.S. Supreme Court cases, but these cases suffer the same shortcoming as the treaties: They do not relate to Bay Mills or involve land held in restricted fee.

The two primary Supreme Court cases Bay Mills relies on—*United States v. Cook,* 86 U.S. 591 (1973) and *Menominee Tribe of Indians v. United States,* 391 U.S. 404 (1968)—both interpreted the Wisconsin treaties that lack any relation to Bay Mills or MILCSA. A

closer look at these cases does not establish that the term "held as Indian lands are held" automatically converts land into gaming-eligible restricted-fee land under IGRA.

The first of these cases, *Cook,* involved the Treaty with the Oneidas, 7 Stat. 566 (Feb. 3, 1838). This treaty succeeded the Treaty with the Menominee, 7 Stat. 342 (Feb. 8, 1831), whereby the Menominee Indians of Wisconsin ceded portions of their lands to the United States to resolve ongoing land disputes. The United States' goal in the Treaty of the Menominee was to relocate several tribes from New York to Wisconsin and settle them on the Menominee lands west of the Fox River. To that end, the first paragraph of the Treaty with the Menominee stated that the lands provided to the New York Indians, "*are to be held by those tribes, under such tenure as the Menomonee Indians now hold their land* subject to such regulations and alteration of tenure, as Congress and the President of the United States shall, from time to time, think proper to adopt." Treaty with the Menominee, 7 Stat. 342 (Feb. 8, 1831) (emphasis added). Thus, those New York Indians that removed to Wisconsin held their lands under the same tenure as the Menominee Indians.

Several years later, two groups of the New York Indian tribes that had removed to the land ceded by the Menominee entered the Treaty with the Oneidas, 7 Stat. 566 (Feb. 3, 1838). Through that treaty, the groups retroceded most of the lands they had received back to the United States. However, in Article 2 they reserved from that cession one hundred acres "to be held as other Indian lands are held." The most natural reading of the "held as Indian lands are held" language in the Treaty with the Oneidas is that the status of the lands reserved by the New York Indian tribes would not change; they would continue to hold them in the same tenure as the Menominee held their lands as established in the earlier treaty. Thus, nothing in the language of these treaties establishes that the phrase specifies a restricted-fee status as that term is used in IGRA.

Moreover, in *Cook,* the Supreme Court was asked to address the question whether the United States could maintain an action of replevin for the unlawful cutting and selling of timber on the lands that had been reserved by the New York Indian tribes. 86 U.S. at 593–94. In answering the question, the Court did not rely on the phrase "held as Indian lands are held" itself. In fact, the phrase "held as Indian lands

are held" does not appear once in the Court's opinion. The phrase appears only in the statement of the case, which was written by the reporter of decisions who published the Supreme Court's decisions. *Id.* at 592. The Court did not focus on the specific language of the treaty but instead on the then-prevailing understanding of tribal land ownership. *Id.* at 593–94.

Furthermore, the Supreme Court in *Cook* did not conclude that the land was held in restricted fee as that term is described in modern statutes such as IGRA. Instead, the Supreme Court concluded that the United States retained fee title to the lands, with a right of use and occupancy or beneficial interest held by the tribe. *Cook,* 86 U.S. at 593. The Treaty with the Menominee and the Treaty with the Oneidas created reservations for the Menominee and New York Indian tribes where the United States retained fee title, and the tribes had a right of use or occupancy or beneficial interest. *Id.* at 592. This is a very different land status than the restricted-fee title that Bay Mills argues applies to the Vanderbilt Parcel.

An approach similar to the one in *Cook* was taken by the Supreme Court in *Menominee Tribe of Indians,* 391 U.S. 404. In that case, the

Supreme Court did not find that the phrase "held as Indian land are held" to be a term of art with a particular meaning under federal Indian law. Nor did the Court hold that the phrase meant subject to a restriction on alienation held by the United States. To the contrary, the Court simply looked to the specific context in which that treaty—the Treaty of Wolf River, 10 Stat. 1064 (May 12, 1854)—was entered and found that the phrase "held as Indian lands are held" included the right to hunt and fish. *Menominee Tribe of Indians,* 391 U.S. at 406 ("The essence of the Treaty of Wolf River was that the Indians were authorized to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing.") Hunting and fishing rights are appurtenant to several different types of tribal land statuses, including reservations, and may even exist where the tribe has no ownership interest in the land. *Montana v. United States*, 450 U.S. 544, 557 (1981) (recognizing a tribe's hunting and fishing rights on lands within its reservation and trust lands); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765–66 (1985) (recognizing that a tribe's hunting and fishing rights are independent of any land ownership by the tribe). Thus, the Supreme Court's

conclusion that the Menominee retained hunting and fishing rights has no bearing on whether the Vanderbilt Parcel became automatically eligible for gaming under IGRA when Bay Mills purchased it.

A third case (one outside the context of the Wisconsin treaties) that Bay Mills relies on—*Worcester v. State of Ga.*, 31 U.S. 515 (1832)—likewise does not involve either Bay Mills or MILCSA. Rather, it concerns the nation's early treaty-making era of federal Indian law and provides an explanation of a state's authority in Indian land, concluding that state laws can "have no force" in Indian territory. *Worcester*, 31 U.S. at 520. But the Supreme Court's approach to state jurisdiction inside reservations has changed since *Worcester*. *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."). Moreover, *Worcester* analyzes 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). But there is no evidence in the record showing that Bay Mills

ever had aboriginal title to the Vanderbilt Parcel, nor does Bay Mills claim aboriginal title to the Vanderbilt Parcel or that the Vanderbilt Parcel is a treaty reservation. Because *Worcester* "do[es] not consider the nature of tribal authority over land purchased on the open market," (Summ. J. Order, R. 91, Page ID #927), it does not advance Bay Mills' argument.

Worcester, therefore, is irrelevant to this analysis because it does 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 by the United States or tribal governmental power.

These cases expose the fundamental flaw in Bay Mills' interpretation of the case law. Bay Mills erroneously equates a restriction on alienation and the exercise of tribal governance as meeting the "Indian lands" definition of restricted-fee land for gaming-eligible lands under IGRA § 2703(4)(B). In doing so, Bay Mills erroneously draws broad and sweeping conclusions from the treatment of Indian land ownership during a different era in federal Indian law

and applies these conclusions to a tribe that has no connection to those treaties. The district court correctly cautioned against such an approach:

> "Indian law" draws upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.

(Summ. J. Order, R. 91, Page ID #926) (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978)). Heeding this warning is especially prudent in a case like this one because it involves a statute that was passed relatively recently and in which the relevant provisions are specific to one tribe. The law directs the court to look, *not* to Congress' understanding of Indian land title in the 1700s and 1800s, but instead to its understanding in the 1990s when MILCSA was passed.

In the modern era, several types of tribal titles and statuses are subject to both a restriction on alienation held by the United State and to a tribe's governance. Indeed, all three types of Indian landholdings that are eligible for gaming under IGRA (reservation, trust land, and

restricted fee) have these attributes. Yet, Bay Mills presents no reason why the case law describing these attributes in treaties that created reservations should be applied to MILCSA. Nor does Bay Mills attempt to explain why these cases mean that the phrase "held as Indian lands are held" in MILCSA should precisely mean that purchased lands are automatically eligible for gaming, i.e., meet the "Indian lands" definition in § 2703(4)(B).

B. In 1997, Congress knew how to indicate restricted-fee status, but declined to do so in MILCSA.

MILCSA was passed in 1997. At the time, Congress was well aware that "Indian lands" could have different meanings in different contexts. As explained below, Congress has clarified the term "Indian lands" by defining it in a variety of statutes. While these definitions vary, many include restricted-fee lands, e.g., the Federal Cave and Resources Protection Act of 1988, 16 U.S.C. § 4302(3) (trust lands and restricted-fee lands), the National and Community Service Act of 1990, 42 U.S.C. § 12511(20) (fee lands, trust lands, restricted-fee lands), and the National Indian Forest Resources Management Act of 1990, 25 U.S.C. § 3103(10) (trust land, owned by a tribe, or subject to restriction

on alienation). Inclusion of restricted-fee lands in these statutes shows that Congress knows how to specify restricted-fee status when that is its intent.

Indeed, Congress has even specified restricted-fee status in a different land claim settlement act—the Seneca Nation Settlement Act (SNSA), P.L. 101-503, 104 Stat. 1292 (1990). Like MILCSA, the SNSA appropriated funds to an Indian tribe to purchase lands. But instead of using the phrase "held as Indian lands are held," Congress specified that these purchased lands "shall be held in *restricted fee status* by the Seneca Nation." *Id.* at § 8(c) (emphasis added).

Unlike the many statutes that define "Indian lands" to include restricted-fee lands, the Second Circuit has recognized that the SNSA 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). In other words, today, Congress does not frequently impose a restricted-fee status on newly acquired tribal lands. That is 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 alienation 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.

Notably, the SNSA was passed in 1990, seven years before MILCSA. This timing leaves no doubt that at the time Congress drafted MILCSA in 1997, it already knew how to draft a law that would transfer newly acquired lands into restricted-fee status. What is also clear is that Congress chose not to do so in MILCSA.

C. The district court correctly concluded that the lack of procedural safeguards in MILCSA supports the Governor's interpretation.

The district court found that the "lack of procedural safeguards in MILCSA for tribal acquisition of land does weigh in favor of [the Governor's] interpretation of the statute, that Congress did not intend

for the lands acquired to be held with restrictions on alienation." (Summ. J. Order, R. 91, Page ID #916.) The court noted that while there was great variability among settlement acts regarding the procedures for acquisition of land, only *one*, the SNSA, provides for the acquisition of land to be held in restricted fee. (*Id.* at Page ID #917.) Moreover, unlike MILCSA, the SNSA contained various procedural safeguards, including a notice and comment procedure that allows both state and local governments to have some input into the decision to remove the property from the tax rolls.

These procedures are also common in settlement acts that provide for acquiring land in trust. Where Congress intends for a special status—such as 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").

The SNSA is a good example of these types of congressional procedural safeguards Congress embeds in a statute that grants a special status to land, saying:

> 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). 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.

Procedural safeguards play a particularly important role in balancing tribal, state, local, and federal interests in the context of tribal gaming. That is because 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.

The procedural safeguards in the SNSA affirm that Congress understood 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. The absence of similar safeguards in MILCSA speaks volumes. If this Court accepts Bay Mills' interpretation, the Tribe could purchase property anywhere within the State, and possible outside it, without any input or recourse from state or local governments. This directly contradicts Congress' approach in every other settlement act and other law providing for tribal acquisition of property to balance federal, state, local, 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).

What Bay Mills is asserting 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, 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. It is simply not plausible that Congress chose to do so by using the phrase "held as Indian lands are held," especially since such language clearly indicates that the land would be held in a usual and ordinary manner.

In addition to the lack of input from federal, state, and local governments, the lack of federal superintendence in MILCSA indicates 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.

D. Both the Department of Interior and the National Indian Gaming Commission have rejected Bay Mills' restricted-fee theory.

Finally, Bay Mills' interpretation of MILCSA is inconsistent with the well-reasoned Interior Opinion and NIGC decision concerning the Vanderbilt Parcel. (Mot. Summ. J. Ex. B, C, and D, R. 54-3, Page ID ##437–52; R. 54-4, Page ID ##454–56.) 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. (Mot. Summ. J. Ex. B, R. 54-3, Page ID #450.) 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. (*Id.*) 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.

Although the district court found Interior's and NIGC's letters "persuasive," (Summ. J. Order, R. 91, Page ID #919), there is a strong argument that Interior's interpretation is entitled to *Chevron* deference. *Chevron*, 467 U.S. at 845. In § 105(b) of MILCSA, Congress charged Interior with approving the plan submitted by Bay Mills (as well as the Sault Ste. Marie Tribe of Chippewa Indians' plan) for the use and distribution of the judgment funds and submitting a plan for use and distribution to Congress. The plan Bay Mills proposed, and which Interior approved and submitted to Congress, became § 107 of MILCSA. Thus, Interior's interpretation of the language should be given considerable weight because of its role in submitting that language, not to mention its overall responsibility and authority for administering federal law to Indian tribes. 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).

As in *Mead Corp.,* it applies here. Interior not only has broad authority in the administration and regulation of Indian affairs, but also had a specific role in submitting the language to Congress that became § 107 of MILCSA. This certainly gives Interior's statutory interpretation 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, which would unquestionably be entitled to *Chevron* type deference in a dispute. Furthermore, the conclusion in the Interior Opinion is entirely consistent with the design of both MILCSA and IGRA.

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. Alternatively, if "held as Indian lands are held" is ambiguous, then the legislative history shows that the phrase does not mean subject to a restraint against alienation held by the United States.

Consulting legislative history in this case is not necessary given the plain language of MILCSA. *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 392 (6th Cir. 2016). Nonetheless, a brief review of the events

leading up to MILCSA's enactment further confirms that Congress never intended for lands purchased with Land Trust funds to automatically convert into Class III gaming-eligible restricted-fee lands under IGRA.

What is clear from the documented legislative history is that *no one* ever proposed adding language to say that land purchased with Land Trust funds would be subject to a restriction against alienation held by the United States and would subject the land to the Tribe's governance. It would have been easy to do so. The language was not foreign to Congress or any of Bay Mills' attorneys and lobbyists who were involved in the drafting. (*See* Tierney Decl., R. 74, Page ID ##845–47.) To the contrary, the language had appeared many times before in numerous federal tribal statutes, including the SNSA. Yet, that language was *never* even put forward, much less agreed upon.

The original version of § 107(a)(3) stated that lands purchased with Land Trust funds would be "held in trust by the United States for the Bay Mills Indian Community." (Mot. Summ. J. Ex. F, R. 54-7, Page ID #495.) Not surprisingly, this language got the attention of the Department of Interior, which found it objectionable precisely because it

could potentially make such lands eligible for gaming under section 20 of IGRA, 25 U.S.C. § 2719. (Mot. Summ. J., R. 54, Page ID ##428–29.) Ada Deer, Assistant Secretary of Indian Affairs, voiced Interior's concerns in a letter to the Committee Chairman 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." (Mot. Summ. J. Ex. G, R. 54-8, Page ID ##503–07.)

Congress responded to Interior's concern by omitting the mandatory trust acquisition language. In its place was what eventually became part of the law—the phrase "held as Indian lands are held." MILCSA § 107(a)(3). Bay Mills argues that Congress made this change to remove the need for administrative action to make the land gaming eligible, instead subjecting the land to a restraint against alienation automatically. (Bay Mills Appeal Br., p. 52.) That Congress would for only the second time (the first being the SNSA discussed above) create a mechanism for newly acquired lands to be taken into restricted fee, but this time without using explicit language to do so, is simply not plausible. If this were truly Congress' intent, it undoubtedly had the

proper tools to achieve that end. If Congress wanted to say that the land would be "held subject to a restriction against alienation held by the United States," it could have said so, just like it did in the SNSA. But that is not what happened because that is not what Congress chose to do. Instead, Congress opted to allow the usual rules applicable to tribal land acquisitions to apply by stating the lands would be "held as Indian lands are held."

Before the law was passed, Michael J. Anderson, Deputy Assistant Secretary of Indian Affairs, sent a letter to the Chairman, dated November 12, 1997, recommending that the "held as Indian lands are held" language that appears in the enacted version be removed because it was "unnecessary." (Mot. Summ. J. Ex. H, R. 54-9, Page ID ##509–12.) It is unclear whether his letter was received before the Senate acted the next day on November 13, 1997. (Mot. Summ. J. Ex. B, R. 54-3, Page ID #448.) In any event, Bay Mills asserts that leaving the phrase in the text had the legal effect of subjecting lands purchased with Land Trust funds to a restriction against alienation held by the United States and the Tribe's governmental power. (Bay Mills Appeal Br., p. 40.) According to Bay Mills, Congress' direct rejection of Mr.

Anderson's suggestion that the phrase was "unnecessary" demonstrates that Congress intended to subject the land to a restriction against alienation. (*Id.*)

Yet, a much more plausible explanation exists. Mr. Anderson's comment that the phrase "held as Indian lands were held" was "unnecessary" merely reflected his understanding, that even without it, the Secretary of the Interior would have authority to make trust determinations. In other words, the language was not "necessary" to addressing the Department's concerns that Bay Mills would be able to sidestep IGRA's prohibition against gaming on after acquired property.

What is also evident from Mr. Anderson's letter is that he had no concerns that the phrase "held as Indian lands are held" would have the potential to make lands purchased with Land Trust funds automatically eligible for gaming under IGRA like the trust language in the earlier draft of MILCSA. Yet, Bay Mills insists that is exactly *why* Congress left the language in—because it knew it would have the same effect of avoiding the restrictions in IGRA as the rejected trust language. But, assuming Congress received the letter in time, the more probable explanation is that Congress left the language in MILCSA because Mr.

Anderson's letter confirmed that the "held as Indian lands are held" language would not raise the same concerns raised by Ms. Deer.

Finally, Bay Mills asserts that since Congress rejected Mr. Anderson's suggestion and left the "held as Indian lands are held" language in MILCSA, the language must have *some* meaning, and that the district court's interpretation renders the language mere surplusage. (Bay Mills Appeal Br., p. 50.) Again, Mr. Anderson's letter does not insist that the language is surplusage; he merely states that it is unnecessary to address the concerns raised in Ms. Deer's earlier letter regarding avoiding the limits on gaming on after acquired property. But even if Mr. Anderson *did* think that the phrase was mere surplusage, that is not the case. As the district court explained:

> The phrase is not a mere statement of the obvious. In many respects, the status of land has been a defining feature of the relationship between the Federal Government and native peoples. . . . As a result, when Congress enacts legislation implicating land ownership by tribes, Congress typically addresses the status of the land, even when the title acquired is fee simple.

(Summ. J. Order, R. 91, Page ID #914–15.)

Congress' decision to leave the language in achieved two important goals. It clarified that land purchased by Bay Mills with

Land Trust funds would be subject to IGRA's limitation on gaming on after-acquired property, thereby assuaging the concerns raised by Interior. And it confirmed that the usual rules would apply to lands purchased with Land Trust funds, no specific title would automatically attach, and Bay Mills could ask for the land to be taken in trust or seek other land statuses uniquely available for tribal lands.

Finally, Bay Mills asserts that the legislative history for the Sault Ste. Marie Tribe of Chippewa Indians (Sault Tribe) under MILCSA § 108 also supports the Tribe's construction. The Sault Tribe's provisions treat acquired land in two different ways. One section, § 108(b)(4), states that lands purchased with Self-Sufficiency Fund principal funds are to be "held as Indian lands are held." The other section, §108(f), states that lands purchased with Self-Sufficiency Fund interest and income are to be "held in trust by the Secretary for the benefit of the tribe." According to Bay Mills, Congress' decision to leave both sections in MILCSA despite Mr. Anderson's recommendation they be removed shows that lands "held as Indian lands are held" are already "imbued" with the qualities unique to Indian lands. (Bay Mills Appeal Br., p. 54.) Put another way, Congress did not mean for Bay

Mills to have to request that lands acquired with Land Trust funds be taken into trust for them to have the qualities unique to Indian lands.

The Governor agrees that lands purchased by Bay Mills with Land Trust funds are instilled with certain qualities unique to lands owned by a tribe. For one, Bay Mills can request that the lands purchased with Land Trust funds be taken into trust. But the leap in logic Bay Mills makes from Congress' treatment of the Sault Tribe's use and distribution plan assumes too much, and it illustrates the point made in Argument I.A.2 that it is important to look at each tribal treaty and law in context.

It is certainly reasonable for Congress to decide that some of the lands acquired by the Sault Tribe would be taken into trust, while other newly acquired lands would be subject to the land-into-trust process. That difference in treatment, however, does not lead to the inevitable conclusion that the properties that are not held in trust are automatically held in restricted fee. To the contrary, because Congress used the usual trust language in the Sault Tribe's distribution plan to denote that land title, it is reasonable to believe that if Congress had wanted to designate a restricted-fee title to any other acquired lands, it

would have similarly used the contemporary, well-known language to do so.

III. The district court correctly concluded that Congress did not intend MILCSA to preempt State gaming laws.

The district court correctly concluded that the MILCSA does not preempt state law, including those that prohibit Bay Mills from operating a casino on the Vanderbilt Parcel. (Summ. J. Order, R. 91, Page ID ##921–24.) While States may regulate the activities of tribal members *on* tribal lands only if "state interests outside the reservation are implicated," *Nevada*, 533 U.S. at 362, a state has "capacious" regulatory power over gaming outside of Indian country, *Bay Mills*, 572 U.S. at 795.

It is well settled that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero*, 411 U.S. at 148–49. That premise applies equally to the state's civil and criminal laws, and it has been applied in cases involving off-reservation ski resorts and fishing enterprises. *Id.* at 149 (citation omitted). State law applies with equal force to an off-reservation tribal casino.

The Supreme Court has directed that "courts should not lightly infer preemption." *Int'l Paper Co. v. Ouellette,* 479 U.S. 481, 491 (1987). Traditionally, there has 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 authority states have to regulate 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. *See* IGRA, 25 U.S.C. § 2710(d)(1)(B) and (C).

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).

Nothing in MILCSA suggests, much less makes explicit, that it preempts state law, including Michigan's anti-gaming laws. Nor does MILCSA in any way diminish Michigan's sovereign authority over the Vanderbilt Parcel, which has been Michigan's sovereign territory for over 180 years. MILCSA makes no mention of either 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. MILCSA is simply devoid of any indication that the State's gaming laws were meant to be preempted. Far from expressing a "clear and manifest purpose," MILCSA lacks any indication that Congress intended to preempt state law.

Nonetheless, Bay Mills argues that IGRA preempts the state's gaming laws for its on-reservation casino, and MILCSA confers the same legal protection for the Vanderbilt Parcel. This argument presumes that lands purchased with MILCSA funds are subject to a restriction against alienation held by the United States and are also subject to the Tribe's governmental power. "But, the fact Bay Mills can conduct gaming operations on Indian land does not compel the conclusion that Congress intended land acquired through the Land Trust to be Indian land, as that term is defined in the IGRA." (Summ. J. Order, R. 91, Page ID #923.) As the district court correctly points out, such a "conclusion . . . would create a gaping hole, an end-around, to the tribal-state compact negotiations mandated by the IGRA." (*Id.* at Page ID #922.) The district court went on to warn against confounding

questions about gaming on Indian land with questions about title to land owned by a tribe with the following quote from the Tenth Circuit:

> [A]djudicating the question of whether a tract of land constitutes 'Indian land' for Indian gaming purposes is 'quite conceptually distinct' from adjudicating title to that land. One inquiry has little to do with the other as land status and land title 'are not congruent concepts in Indian law.' A determination that a tract of land does or does not qualify as 'Indian land' within the meaning of IGRA in no way affects title to the land.

(*Id.* at Page ID #923) (citing *Kansas v. United States*, 249 F.3d 1213, 1225 (10th Cir. 2001) (internal citation omitted)).

IV. The district court correctly concluded that the Non-Intercourse Act does not apply to land purchased by a tribe on the open market, such as the Vanderbilt Parcel.

Finally, the district court correctly concluded that the Non-Intercourse Act does not apply to the Vanderbilt Parcel. The Non-Intercourse Act provides, in relevant part:

> No purchase, grant, lease, or other conveyance of lands, or 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). Notably, the lands at issue in this case were purchased *by* an Indian tribe, not *from* one. If this case involved the purchase of land *from* Bay Mills, perhaps this issue would

require further analysis. But since the lands at issue were purchased *by* Bay Mills, under the statute's plain terms, the Act does not apply.

Moreover, 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) (Non-Intercourse Act prevents "unfair, improvident or improper disposition" of tribal lands, disposition without Congressional consent can be vacated).

A sovereign act has already extinguished aboriginal Indian title to the portion of Michigan where the Vanderbilt Parcel is located—the 1836 Treaty. *See United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1942) (listing ways to sever aboriginal title, including by treaty). The United States also affirmed its consent to the sale of this Parcel when it first issued a patent to an individual land owner in 1880. (Reply Br. Ex. B, R. 81-3, Page ID #881.)

Because aboriginal title has already been extinguished, Bay Mills must show that its purchase of the Vanderbilt Parcel somehow revived that ancient sovereignty. The Supreme Court has yet to hold that the

Non-Intercourse Act "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). Moreover, the Supreme Court rejected a claim by the Oneida Indian Nation of N.Y. that it could re-establish its sovereign powers over fee lands it purchased within its historical reservation where it had held aboriginal title, even though that aboriginal title had never been properly severed by a sovereign act. *See Sherrill,* 544 U.S. 197.

Bay Mills' argument runs even farther afield than the one pressed by the Oneida Indian Nation of N.Y., who sought to *reinstate* their lost aboriginal title. Bay Mills does not look to re-establish sovereign territory, but instead asks this Court to find that the Non-Intercourse Act actually *creates* aboriginal title to land that Bay Mills never had aboriginal title to in the first place. But if "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 any tribe could buy lands anywhere, using any funds, and the lands would be held in restricted fee and gaming eligible. 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.

Finally, Bay Mills argues that Congress confirmed that the Non-Intercourse Act applies to land "held as Indian lands are held" by passing a law that makes lands owned by the Sault Tribe alienable. (Bay Mills Appeal Br., p. 45 (citing P.L. 110-453, 122 Stat. 5027, § 203 (Dec. 2, 2008))). But the law addressing the Sault Tribe's right to sell land does not use the phrase "held as Indian lands are held," nor does it mention MILCSA, Bay Mills, tribal gaming, or the Non-Intercourse Act. Even a quick review of MILCSA demonstrates how different each tribe's acquired lands are treated under federal law. Tribes have been given singular consideration by Congress that has resulted in a plethora of treaties, land settlement acts, and other federal laws—all of which address the various landholdings and acquisitions of each individual tribe. This specialized treatment alone counsels against making the type of broad assumption Bay Mills makes regarding 122 Stat. 5027. Because this law only applies to the Sault Tribe, it is implausible to assume that it demonstrates the Non-Intercourse Act applies to land purchased by *any* tribe on the open market, makes all purchased lands subject to a restriction against alienation, and in so doing makes these lands eligible for gaming under IGRA. And as noted above, since the

Supreme Court has not yet answered whether the Non-Intercourse Act applies to land rendered alienable by Congress which is later reacquired by an Indian tribe, it is reasonable to believe that this statute is simply aimed at clearing up any ambiguity regarding the Sault Tribe's land's restricted-fee status regardless of whether that land was purchased with settlement funds.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reason, Governor Whitmer asks that the district court's order granting summary judgment be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This document contains 12,616 words.

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CERTIFICATE OF SERVICE

I certify that on March 6, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendant-Appellee, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Complaint	07/15/2011	R. 1	1–6
Stipulation	09/24/2015	R. 21	100–07
Am. Compl.	11/11/2015	R. 25	163–207
Am. Compl. Ex. A	11/11/2015	R. 25-2	188–90
Am. Compl. Ex. B	11/11/2015	R. 25-3	191–205
Mot. Summ. J.	01/13/2017	R. 54	428–29
Mot. Summ. J. Ex. A	01/13/2017	R. 54-2	435
Mot. Summ. J. Ex. B	01/13/2017	R. 54-3	436–52
Mot. Summ. J. Ex. C	01/13/2017	R. 54-4	453–56
Mot. Summ. J. Ex. D	01/13/2017	R. 54-5	465–66
Mot. Summ. J. Ex. E	01/13/2017	R. 54-6	487
Mot. Summ. J. Ex. F	01/13/2017	R. 54-7	495
Mot. Summ. J. Ex. G	01/13/2017	R. 54-8	503–07
Mot. Summ. J. Ex. H	01/13/2017	R. 54-9	509–12
Clinton Decl.	03/17/2017	R. 70	808–16
Hughes Decl.	03/17/2017	R. 72	822–42

Tierney Decl.	03/20/2017	R. 74	845–47
Reply Brief Ex. A	04/07/2017	R. 81-2	879
Reply Brief Ex. B	04/07/2017	R. 81-3	881
Summ. J. Order	09/28/2018	R. 91	907, 913–34
First Notice of Appeal	10/26/2018	R. 93	938
Judgment	10/30/2018	R. 94	939
Second Notice of Appeal	11/07/2018	R. 96	943

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