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Michigan's Emerging Tribal Economies: A Presentation to the Michigan House of Representatives

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Michigan's Emerging Tribal Economies

I. Introduction

The territory now known as the state of Michigan has been populated by indigenous peoples who have governed themselves since time immemorial. Today, Michigan has twelve Indian tribes recognized by the federal government as exercising sovereignty. The 2000 Census reported that Michigan has approximately 125,000 people who identify as entirely or partially American Indian.[1] Of those who identified solely as American Indian, Michigan has the twelfth largest population nationwide and the fourth largest American Indian population east of the Mississippi River.

Each of the Tribes in Michigan exercise of the powers of self-government within the land defined as Indian country under federal law. Indian country is a legal term of art defined by federal statute, and it includes all lands within reservation boundaries, all allotments, and all dependent Indian communities.[2] Trust lands, or lands which the federal government holds in trust for the benefit of Indian tribes, also constitute Indian country.[3] In addition to Indian country, another term of art with significance for Indian self-governance is the concept of a service area. Service areas constitute clusters of counties within which each tribe provides important governmental services to the American Indian population. Examples of services include health care, housing assistance and social services.

Although Indian country and service areas are areas of critical importance for tribal governance, these areas only capture a portion of Michigan's American Indian population. Nationwide, only about one third of all tribal citizens live on reservation land. In other words, about two-thirds of all tribal citizens live off reservation. Many live in urban areas and consider themselves urban Indians. In Michigan, urban areas with large American Indian communities include Detroit, Grand Rapids and Lansing. Detroit has the tenth largest urban Indian population in the nation.

The federally recognized tribes in Michigan are each part of a larger group known as the People of the Three Fires. The Three Fires Confederacy represents the Ottawas, Potawatomis and Ojibwe.[4] Members of each of these tribes also refer to themselves as the Anishinaabeg.[5] These tribes have been active in the economy of the region since before European contact, and the presence of these sovereigns is an economic and cultural benefit to the state of Michigan.

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[1] The American Indian and Alaska Native Population: 2000, Census 2000 Brief (2002).
[2] 18 U.S.C. § 1151 (2002).
[3] *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission*, 888 F.2d 1301 (10th Cir. 1989) *aff'd in part, rev'd in part on other grounds* 498 U.S. 505 (1991).
[4] The Ottawas also refer to themselves as Odawa, and the Ojibwe also use Ojibway, Ojibwa and Chippewa to refer to themselves.
[5] Clifton, James A., George L. Cornell, James M. McClurken, *People of the Three Fires: The Ottawa, Potawatomi and Ojibway of Michigan* (The Grand Rapids Inter-Tribal Council, 1986), iv-v

II. Understanding Tribal Sovereignty

Tribes are sovereign entities and were operating as such prior to European contact. Succinctly put, tribal sovereignty is the power to exercise self-rule.[6] In *Williams v. Lee*, the first Indian law case decided by the Supreme Court in the modern era, the Court referred to tribal sovereignty as "the right of reservation Indians to make their own laws and be ruled by them."[7] Tribal sovereignty has two critical aspects. First, tribal sovereignty is an inherent power that predates European contact and the formation of the United States.[8] As such, the sovereign powers exercised by tribes today constitute retained rather than delegated powers.[9] Second, the scope and content of tribal sovereignty is not addressed in the United States constitution. Unlike the states, which waived aspects of their sovereignty to join the federal union, tribes did not participate in the Constitutional Convention and agree to the same concessions as the states.[10] As a result, the Constitution's restrictions on federal and state governments do not apply directly to tribes.[11] The Constitution only refers to tribes in three brief sections described later in this paper. To understand the nature of tribal sovereignty and the retained rights of Indian tribes, we must look principally to the treaties entered into between tribes and the federal government and the opinions of the Supreme Court that interpret those treaties. The treaties negotiated by tribes generally constituted solemn agreements in which tribes retained the right to exercise self-government and agreed to cede portions of their territory in exchange for payments, services, and the permanent right to occupy reservations and exercise the power of self-government without the interference of non-Indians. In 1871, the federal government ceased treaty-making, but the treaties entered into prior to this moratorium remain the supreme law of the land, constitutionally guaranteed by the Supremacy Clause.[12]

A. Michigan Tribes and Treaties

Treaties involving Michigan Indian tribes included provisions that provided for cessions of land by the tribes in exchange for reservations or allotments, payments, and services. For example, the Treaty with the Ottawa and Chippewa Nation of 1836, also known as the Treaty of Washington, required the federal government to set aside certain tracts as

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[6] Joseph P. Kalt & Joseph William Singer, Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule, Faculty Research Working Papers Series 7 (Harv. U. March 2004) (available at http:// ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP04-016?OpenDocument)

[7] *Williams v. Lee*, 358 U.S. 217, 219 (1959).

[8] *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973) ("[the tribe's] claim to sovereignty long predates that of our own Government").

[9] *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

[10] Some courts have termed this relationship as "extraconstitutional" or even "preconstitutional." *United States v. Lara*, 541 U.S. 193, 213 (2004) (Kennedy, J., concurring) ("extraconstitutional"); *Lara*, 541 U.S. at 201 ("preconstitutional").

[11] *Talton v. Mayes*, 163 U.S. 376, 382 (1896).

[12] U.S. Const. Art. VI ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

reservations, provide annuity payments, and provide additional funds for education, agricultural necessities, and medical goods and services.[13] While there are many treaties between tribes in Michigan and the federal government, two are especially critical: the 1836 Treaty of Washington and the 1855 Treaty of Detroit.

The 1836 Treaty of Washington was an agreement between tribes in Michigan and the federal government for the tribes to cede a large portion of what became Michigan to the United States Government in exchange for money. The land ceded by the 1836 Treaty constituted roughly the northern third of Michigan's Lower Peninsula and the eastern half of its Upper Peninsula, with the exception of reservations that the tribes retained within this area. The Ottawa Chiefs and Headmen purchased lands in their name for all the members of their bands. Essentially, the tribes bought back parcels within the land that they had just sold, with the money they received in exchange for it. This was one way Michigan tribes were able to avoid the federal government's attempt to remove them west of the Mississippi.[14]

The 1855 Treaty of Detroit was an agreement between certain tribes in Michigan and the federal government in 1855. The Treaty of Detroit ended the threat of forced removal to Kansas by the federal government by withdrawing from sale certain lands within the public domain to allow for the issuance of allotments and fee patents to individual Indians.[15] The terms of this treaty required the United States Government to provide $538,400 for "the support of schools and to provide agricultural implants, household furnishings, and blacksmith shops."[16] The conditions on the land set aside for the tribes were extremely impoverished. The reduced land base led to complete economic dependence on the federal government for survival.

B. Tribes and the Federal Government

Because of the sovereign status of tribes, treaties, and certain portions of the Constitution, tribes and the federal government have a unique relationship. This relationship, sometimes called the trust relationship, is a sovereign-to-sovereign relationship. Aside from treaties, the political relationship between the tribes and the federal government can be traced to the Commerce Clause and Treaty Clause of the Constitution. The Commerce Clause states, "the Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[17] According to the Handbook of Federal Indian Law, "The commerce clause has become the linchpin in the more general power over Indian affairs recognized by Congress and the courts."[18] The Commerce Clause, therefore, "anticipat[es] and affirm[s] federal law singl[ing] out Indian nations and their members for separate treatment."[19]

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[13] Art. 4, 6 Stat. 491 (1836)
[14] Our Land and Culture: A 200 Year History of Our Land Use. Little Bay Band of Odawa Indians (Nov. 2005).
[15] Treaty of Detroit (11 Stat. 633).
[16] *Id.*
[17] U.S. Const. Art. I, §8, cl. 3; Art. II, §2 cl. 2
[18] *Cohen's Handbook of Federal Indian Law*, §5.01[4] (2005)
[19] *Cohen*, §14.03[2][b][i]

Generally, the federal government has the sole authority to deal with tribes. This has been both a curse and a blessing for tribes, as federal policy toward tribes has shifted considerably over time. In certain time periods the federal government has tried to extinguish tribes, either through allotment of tribal lands, or termination of the relationship between tribes and the federal government. In other time periods, the federal government has encouraged self-governance and tribal sovereignty. In 1970, President Nixon stated that it was time for a "new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community . . . and . . . that Indians can be independent of Federal control without being cut off from Federal concern and Federal support."[20] This has been interpreted to mean that the current federal policy era is one of tribal self-governance and self-sufficiency.

C. Tribes and the Supreme Court

Because the federal government has exclusive authority to deal with tribes, most litigation surrounding tribes takes place in the federal court system. The Supreme Court has been hearing Federal Indian law cases since 1823. Starting with *Johnson v. M'Intosh* in 1823 and ending with *Worcester v. Georgia* in 1832, the Supreme Court heard three Indian law cases now termed "The Marshall Trilogy" after then-Chief Justice John Marshall. The trilogy forms the base for what is termed "Federal Indian law," the Supreme Court's interpretation of treaties and statutes applying to American Indian tribes. Like the federal government, the Supreme Court has swung dramatically between affirming tribal sovereignty and limiting tribal authority.[21] There are a few principles on which, however, the Court has been relatively consistent.

1. Political Status of Tribes and Tribal Members

In 1974, the Supreme Court upheld hiring preferences for qualified Indians to vacancies in the Bureau of Indian Affairs in the landmark case of *Morton v. Mancari*.[22] The basis for giving preference in hiring was *not* an affirmative action, but based on the political status tribal members and tribal sovereignty. In *Morton v. Mancari*, Justice Blackmun reasoned that "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." An equal protection analysis requiring a compelling state interest to justify overt racial discrimination is inapplicable to legislation

[20] Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363, 91st Cong., 2nd Sess. (July 8, 1970), reprinted in Cases and Materials on Federal Indian Law, ed. David Getches, (4th ed., 1998) 226-7.
[21] For example, compare *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) to *United States v. Winans*, 198 U.S. 371 (1905), or *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968) to *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
[22] *Morton v. Mancari*, 417 U.S. 535 (1974).

or governmental action toward tribal members because the policy of preference has been determined by the Court to be based on a political relationship, not race.[23]

Since that time, the Court has continued to affirm the political status of tribes and tribal members, and rarely subjects legislation to strict scrutiny under the 14th Amendment which would likely not pass constitutional muster if targeted at other protected groups. But since Congressional classifications in this field are political rather than racial, the courts apply the rational basis test and tend to uphold these statutes.[24] In 2004, a U.S. Court of Appeals held "we therefore hold that the preference in § 8014(3), by promoting the economic development of federally recognized Indian tribes (and thus their members), is rationally related to a legitimate legislative purpose and thus constitutional."[25]

2. Tribal Sovereign Immunity

As sovereigns, tribes also enjoy the protection of sovereign immunity. A tribe cannot be sued without its permission, either in tribal, federal or state courts. Sovereign immunity is an inherent aspect of sovereignty, and both states and the federal government have sovereign immunity, except when expressly abrogated.

Tribal sovereign immunity has been recognized by the U.S. Courts since 1895. In *Thebo v. Choctaw Nation,* the U.S. Court of Appeals for the Eighth Circuit held that

> it has been the policy of the United States to place and maintain the Choctaw Nation . . . so far as relates to suits against them, on the plane of independent states. A state, without its consent, cannot be sued by an individual. It is a well-established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or any other without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals or by another state.[26]

The Supreme Court, in *Santa Clara Pueblo v. Martinez*, also recognized that tribes have "long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers."[27] However, both cases also recognize Congress's power to waive tribal sovereign immunity for specific cases and controversies, though the waiver must be express and unequivocal, much like the abrogation of a treaty.[28] As

[23] *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed. 2d 740 (1979).
[24] For example, see *United States v. Antelope*, 430 U.S. 641, 646; and *Mancari*, 417 U.S. at 554
[25] *American Federation of Government Employees, AFL-CIO v. United States*, 330 F.3d 513, 523-4 (D.C. Cir.) cert. denied, 540 U.S. 1033 (2004).
[26] *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 375 (8th Cir. 1895).
[27] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).
[28] *Santa Clara Pueblo*, 436 U.S. at 60.

recently as 1998, in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*., the Court upheld the doctrine and deferred to Congress for express abrogation of immunity.[29] This area, like all areas of Federal Indian law, is still subject to litigation, particularly as tribes operate both as tribes and corporations.

D. Tribes and the State

As self-governing sovereign communities, tribes are not political subdivisions of the state. They co-exist within the state, but are not of the state. The Michigan Supreme Court recently acknowledged that Indian tribes are "'distinct political communities,'" whose sovereignty can be limited only by Congress.[30] An older Michigan Supreme Court case has also held, "[Indians and Indian tribes] did not occupy their territory by our grace and permission, but by a right beyond our control. They were placed by the constitution of the United States beyond our jurisdiction, and we had no more right to control their domestic usages than those of Turkey or India."[31] While this is the case, tribes and states still need to find ways to address pragmatic concerns from policing to taxation to shared economies. A strong, sovereign-to-sovereign relationship between a tribe and a state can lead to solutions that make sense for both governments.

In 2002, the State of Michigan entered into a Government-to-Government Accord with the 12 federally recognized tribes, acknowledging tribal sovereignty, tribal self-governance and cooperation between the state and tribes. This Accord was reaffirmed by the Governor in a 2004 Executive Directive. In doing so, the Governor demonstrated understanding of and respect to tribes as sovereigns, making it easier for the two governments to work together in other areas.

Tax Agreement

In 2002, seven tribes in Michigan signed Tribal-State Tax Agreements with the State of Michigan through the Department of Treasury.[32] The tax agreements constitute negotiated agreements that clarify the extent to which Michigan's Indian tribes and tribal citizens are exempt from and subject to several Michigan taxes. The clarification offered by the tax agreements is beneficial for the state and Michigan's tribes because it offers certainty in an area where federal Indian law is riddled with broadly defined standards whose application is often difficult to predict. The taxes addressed by the tax agreements include the sales and use tax, the individual income tax, the motor fuels tax, the tobacco tax, and the single business tax. The tax agreements provide for limited waivers of sovereign immunity to allow for enforcement of the agreement's terms, and they create "agreement areas" that specify the geographical areas within which the tax agreement's provisions apply.

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[29] 523 U.S. 751 (1998).
[30] *Taxpayers of Michigan Against Casinos v. State*, 685 N.W.2d 221, 227 (Mich. 2004) (quoting *Worcester v. Georgia*, 31 U.S. 515, 557 (1832)), *cert. denied*, 543 U.S. 1146 (2005).
[31] *Kobogum v. Jackson Iron Co.*, 43 N.W. 602, 605 (1889)
[32] Copies of the Michigan Tribal-State Tax Agreements are available at http://www.michigan.gov/taxes/0,1607,7-238-43513_43517---,00.html.

Economic Accord

In 2006, the Governor and many Michigan tribes entered in to an Intergovernmental Accord to expand joint economic activities. In it, the tribes and the governor established a Tribal-State economic forum to work on joint economic activities to benefit both the state and tribes. Both the tribes and the state benefit from this type of agreement, where both the tribes and the state are treated as equal sovereigns. As sovereigns, both can agree that economic development is important for government and its citizens.

III. Michigan Tribal Economies, Past and Present

Tribal economies are not a recent development. Prior to European contact, tribes ran successful trading enterprises and were not simply subsistence farmers and hunters. Disruption to tribal economies through European contact and later federal policies put tribes at a great disadvantage. For example, because land is held in trust by the federal government, tribes and tribal members are usually unable to use it as collateral for a loan. In addition, due to some Supreme Court decisions, tribes have a very limited tax base for government services. However, in recent years tribes, especially in Michigan, have developed successful tribal business which not only provide for tribal resources, but in many cases provide for support for local state municipalities.

A. Pre-Contact Tribal Economy

Prior to contact with the French or English indigenous peoples had a long standing presence in the region. The tribes occupied areas where resources were abundant. Depending on the tribe's location their major source of sustenance would change, but typically they would hunt, fish, trap, gather wild foods, and raise corn, beans, and squash.[33]

The tribes of Michigan also had sophisticated trading routes. Ottawa men would travel trade routes by water, acting as middlemen for the Chippewa to the north and the Huron further south. The Ottawa supplied the Chippewa with Ottawa and Huron corn and received in return the furs they later traded to the Huron. Each Ottawa Family owned its own trade route, which was both a geographical path or waterway and a set of relationships with trading partners along the way.[34]

B. Post-Contact Tribal Economy

Trading

In 1615, French explorers looking for new alliances and fur resources met the Ottawa and formed a relationship based on the North American fur trade. The Ottawa traded their corn and hand-crafted goods with the Ojibwa, who lived farther north, for furs. In turn, the Odawa delivered the furs to the French. By 1670, the tribes in Sault Ste. Marie and Mackinac were sending hundreds of canoes full of furs to Montreal and Quebec from Sault Ste. Marie and Mackinac. These two important fur trading posts were primarily controlled by the Anishnabeg.[35]

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[33] Tanner, Helen Hornbeck, ed. *Atlas of Great Lakes Indian History*, (University of Oklahoma Press, 1987)
[34] McClurken, James J. Gah-Baeh-Jhagwah-Buk, *The Way it Happened*, (MSU Museum, 1991)
[35] Clifton, James A., George L. Cornell, James M. McClurken, *People of the Three Fires: The Ottawa, Potawatomi and Ojibway of Michigan* (The Grand Rapids Inter-Tribal Council, 1986)

In the late 1730s the Little Traverse Bay Bands of Odawa Indians no longer controlled the trade into their country or carried goods to distant nations for furs. This role had been taken over by the French, who brought goods into the region themselves and traded directly with the various tribes. The Odawa began to supply the traders with the necessities required for their trading expeditions such as corn, other foodstuff, and the large canoes used by the traders on their travels. The Odawa traded these things for the goods that they wanted. During the winter the French traders lived among the various tribes trading furs for goods. At the same time the tribe traded with the French, tribal members continued to hunt, fish, trap, and gather other natural resources.

Separate from the fur trade, Odawa chiefs and headmen would travel, during the autumn, to the French and English forts in the region. During these visits items would be exchanged, the Odawa giving corn and other items that they had grown. The French and English giving guns, knives, kettles, cloth, traps, gunpowder and other items that they would need throughout the winter.[36]

Logging and Hospitality

Around 1870, the cash payments from the 1855 Treaty of Detriot ended. This caused an economic change for the tribes who were receiving payments, especially for the group which forms the Little Traverse Bay Bands of Odawa Indians (Waganakising Odawak). A principle means of providing for families became wage labor. A principle occupation at the time involved the lumber industry; either cutting trees or working at the sawmill or as "sawyers," those who kept the saws and axes sharpened.[37]

After the end of the lumber era, around the 1830s, there were few economic options left for the native population. The railway that was built to transport the lumber began to bring people from the south to vacation. Resorts were established at Charlevoix, Petoskey, Harbor Springs, Bay Shore, and Mackinac Island. These resorts provided local residents source of day labor. For those who had attended school or learned a trade there was the possibility of finding work in a large hotel or small shop. It also became common for the female in the household to begin earning the family income. Those who lived near towns waited on customers, sewed, and cleaned. Many Odawa women were employed as domestic servants for wealthy restorers.[38]

Fishing

Fishing had long been a part of the Anishnaabeg way of life. Fish were a reliable food source, which could also be preserved and saved for the winter. The right to fish and hunt were reserved in the treaties negotiated between tribes in Michigan and the federal

[36] *Our Land and Culture: A 200 Year History of Our Land Use*, Little Traverse Bay Bands of Odawa Indians (Nov. 2005).
[37] *Our Land and Culture: A 200 Year History of Our Land Use*. Little Bay Band of Odawa Indians (Nov. 2005).
[38] McClurken, James J. Gah-Baeh-Jhagwah-Buk, *The Way it Happened*, (MSU Museum, 1991)

government. These rights came under attack in the 1960s and 1970s which lead to a series of court decisions guaranteeing Anishnaabeg fishing rights.

The Fox Decision

The Fox decision of 1979, which was written by Federal District Judge Noel Fox in Grand Rapids, determined that the 1836 Treaty of Washington reserved the right to fish, without regulation by the state of Michigan, for Anishnaabeg tribal members who filed suit.[39]

Many opponents claimed, at the time the decision was rendered, that the right to fish in Great Lakes waters was "given" to the tribes in 1979 by the federal court. However, a long held understanding of treaty rights is that any right was not specifically ceded by a tribe is retained by them.[40] The right to fish was retained by tribal leaders in treaty negotiations; the Anishnabeg never ceded their fishing rights. Judge Fox held,

> The mere passage of time has not eroded, and cannot erode the rights guaranteed by solemn treaties that both sides pledged on their honor to uphold. The Indians have a right to fish today wherever fish are to be found within the area of cession – as they had at the time of cession – a right established by aboriginal rights and confirmed by the Treaty of Ghent and the Treaty of 1836. The right is not a static right today any more than it was during treaty times. The right is not limited as to the species of fish, origin of fish, the purpose of use or the time or manner of taking. It may be exercised utilizing improvements in fishing techniques, method and gear.

United States v. Michigan, 471 F. Supp. 192 (1979).

Opposition to Indian fishing continued after the Fox ruling from non-Indian sports fishermen, commercial fishermen, and the Michigan Department of Natural Resources (DNR). Those opposing Indian fishing rights claimed that unregulated fishing by Indians in Great Lakes waters had the effect of depleting the lakes of sport and commercial fish, thus depriving other fishermen of their livelihood.[41]

Decisions by the U.S. Court of Appeals in 1980 and 1981 modified The Fox ruling and was upheld by ruling of the Michigan Supreme Court in *People v. LeBlanc*. The ruling in

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[39] Clifton, James A., George L. Cornell, James M. McClurken, *People of the Three Fires: The Ottawa, Potawatomi and Ojibway of Michigan* (The Grand Rapids Inter-Tribal Council, 1986).

[40] *United States v. Winans*, 198 U.S. 371, 380 (1905)(" In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them, a reservation of those [rights] not granted.").

[41] Clifton, James A., George L. Cornell, James M. McClurken, *People of the Three Fires: The Ottawa, Potawatomi and Ojibway of Michigan* (The Grand Rapids Inter-Tribal Council, 1986)

Leblanc determined that the State may regulate fishing if "it is necessary for the preservation of fish protected by the regulation."[42]

Continuing disputes over fishing rights between Indian and non-Indian fishers led to the 1985 Consent Agreement. It was negotiated under the direction of the US District Judge Richard Enslen, and signed March 28, 1985, by the State of Michigan, the federal government, the Bay Mills Indian Community, the Sault St. Marie Tribe of Chippewa Indians, the Grand Traverse Band of Ottawa/Chippewa Indians, the Michigan United Conservation Clubs, the Grand Traverse Area Sport Fishing Association, the Michigan Charterboat Association and the Michigan Steelhead and Salmon Fisherman's Association. The resulting consent agreement was a geographical allocation establishing exclusive and shared fishing zones. The consent agreement reduced the areas of the lakes where all parties could fish, and it established a process for the tribes and the State to coordinate enforcement and resource management.[43]

Gaming

Tribes in Michigan were some of the first in the nation to establish gaming operations. These gaming operations have been generally successful, and the state had benefited from the various gaming compacts between the tribes and the state. In 2006 alone, tribes gave over $14 million to local units of governments in accordance with the tribal-state gaming compacts and a consent judgment entered into in 1993 by the state and seven of Michigan's gaming tribes. In addition, tribes generally have good employment packages in comparison to other hospitality industries and employ a large number of both tribal and non-tribal employees. Tribal enterprises, gaming and otherwise, currently employ more than 10,000 people.

Because tribes are not generally not subject to state laws, Congress passed the Indian Gaming Regulatory Act, a statute which regulates gaming in Indian Country.[44] The National Indian Gaming Commission (NIGC), within the Department of the Interior, has authority to administer IGRA.

IGRA divides gaming into three categories based on the type of activity being conducted. Each category is subject to a different regulatory jurisdiction. Class I gaming includes social and traditional games and is within the exclusive jurisdiction of the tribes. Class II gaming involves bingo and games similar in nature to bingo. Class II gaming can be conducted by a tribe if the state in which the tribe is located permits that type of activity for any purpose by any individual or entity. Class III gaming is any gaming that does not fall under the definition of Class I or II. A tribe may conduct Class III gaming if, in addition to the requirements under Class II gaming, the state and the tribe enter into a gaming compact, which defines how the gaming will be conducted.

[42] *People v. LeBlanc*, 399 Mich. 31, 36 (1976)
[43] *Mem-ka-weh*, by Weeks, G. (1992); *United States v. Michigan*, 471 F. Supp. 192 (1979).
[44] 25 U.S.C.A. §§ 2701 et seq.

There has been considerable litigation over the application of IGRA. Two important Michigan cases include *Taxpayers of Michigan Against Casinos v. Norton* and *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan.*

Taxpayers of Michigan Against Casinos v. Norton

The Pokagon Band of Potawatomi Indians, attempting to restore its land base and fund tribal governmental activities and services after being reaffirmed as a federal tribe, determined that the only tribal venture that would produce adequate capital would be a gaming and recreational facility. The tribe and the State of Michigan entered into a gaming compact in compliance with IGRA, which allowed the tribe to conduct Class III gaming. To complete this project the tribe purchased land on which they planned to build their casino. The tribe appealed to the Department of Interior's Bureau of Indian Affairs (BIA) requesting that this land be put into trust for the tribe. The secretary agreed. The Taxpayers of Michigan Against Casinos (TOMAC) challenged the secretary's decision. "TOMAC first alleged that the secretary's trust acquisition decision violated NEPA, because the gaming and recreation complex will significantly impact the area surrounding the site. Second, TOMAC asserted that the Secretary violated IGRA, because the Restoration Act did not 'restore' the tribe within the meaning of IGRA such that the Tribe qualified for the 'restored land exception' to IGRA gaming ban on lands acquired after October 17, 1988. Finally, TOMAC contended that Congress unconstitutionally delegated to the Secretary unlimited authority to acquire land for the tribe under the Restoration Act."[45]

The Court of Appeals rejected all of TOMAC's challenges. The holding relevant to IGRA was the finding by the court that the tribe was "restored" under the meaning of § 20 of IGRA. Section 2 of the Restoration Act states that the tribe's status of federal recognition was "affirmed." The court found this to be consistent with restored federal recognition under 25 U.S.C. § 2718(b)(1)(B)(iii), which is what is required for IGRA.

Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan.

In *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan,* the Grand Traverse Band sued seeking a determination of the legality of its Turtle Creek Casino operation. The U.S. Court of Appeals for the Sixth Circuit concluded that the Turtle Creek casino site constitutes restored land for an Indian tribe that has been restored to federal recognition under Section 20 of IGRA, rendering it within an exception to IGRA's general prohibition of gaming on lands acquired in trust after October 17, 1988.[46]

[45] *TOMAC v. Norton*, 433 F.3d 852, 858 (2005).
[46] *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for the Western District of Michigan*, 369 F.3d 960 (6th Cir. 2004).

C. Tribal Economic Development

As Michigan's tribes pursue economic development beyond the domains of treaty fishing and gaming, they engage in a multi-pronged approach to creating an environment that is conducive for economic growth and the overall well-being of their communities. This multi-pronged approach can be understood to include three essential components. The first is the development of the legal and physical infrastructure that economic growth requires. The second is the establishment of a diversified array of successful tribally-owned enterprises. The third is the nurturing of a healthy private sector within tribal economies. In each of these separate spheres of development, tribes are engaged in groundbreaking work that often produces benefits that spill over to their surrounding non-Indian communities.

The work that tribes are engaged in to improve the legal and physical infrastructure of their communities is quite diverse. To note just a few examples, tribes across the nation are engaged in examining the styles of governance that are most conducive to economic growth. Through the research of groups like the Harvard Project on American Indian Economic Development, a consensus has developed that tribal economic development requires institutions that provide for separation of powers, political stability, independent judiciaries and a cultural match between the tribal government's structure and processes and the values of the tribal community. In Michigan, each of the tribes is engaged in work to ensure that they have these necessary components. An example of Michigan tribes' work in this realm is their effort to develop their tribal court systems. Another example of efforts by Michigan tribes to improve the legal infrastructure of their communities is their enactment of commercial codes that harmonize with state law and the Uniform Commercial Code in general. Several Michigan tribes have enacted secured transactions codes to provide for legal certainty regarding the creation and perfection of security interests in Indian country. The effort to develop model tribal codes that harmonize with other uniform commercial codes enacted by states is also an area where states have been engaged in a cooperative effort with tribes. Through the work of a special American Indian Liaison Committee of the National Conference of Commissioners on Uniform State Laws (NCCUSL), state lawmakers and other state-appointed commissioners have worked with tribal representatives to draft a model secured transactions code for tribes that harmonizes with state law while also respecting tribal sovereign immunity and tribal custom.

A second sphere where tribes are engaged in economic development work involves the promotion and diversification of tribally-owned businesses. The tribes in Michigan that operate gaming facilities are also involved in developing businesses that expand beyond gaming but that also complement gaming's place in the hospitality industry. The operation of tribally-owned hotels is an example of this effort, and the Grand Traverse Band of Ottawa and Chippewa Indians' ownership and operation of the Grand Traverse Resort is an important illustration. Michigan's tribes are also engaged in businesses that extend beyond the hospitality industry, as this paper's later description of the Bay Mills Indian Community will demonstrate.

As Michigan's tribes diversify their economies by expanding tribally-owned enterprises beyond their traditional revenue generators, the local economies surrounding tribally-owned businesses receives multiple economic benefits. The gains for Michigan's economy include increased employment opportunities, health and retirement benefits for tribal employees, increased contracts with suppliers and consumers, increased tax revenues for the state, and enhancement of the Michigan's attraction as a tourist destination.

The third sphere in which Michigan's tribes engage in economic development work includes the expansion of the private sector within tribal economies. The work that Michigan tribes pursue to promote their private sectors includes the establishment of small business technology and development centers to provide counseling services for small business entrepreneurs and the operation of community development financial institutions. As Michigan tribes expand opportunities for tribal members to receive access to credit, they also enhance the local economies of their communities.

D. Tribal Economic Case Study

The Bay Mills Indian Community is located fifteen miles west of Sault Ste. Marie, and it was one of the first federally recognized tribes in the state of Michigan. Historically, the economy of the tribe was based on commercial fishing. In the early 1980s, the Bay Mills Indian Community became the first tribe in Michigan, and one of the first in the United States, to operate a gaming facility. That operation has grown from a small blackjack parlor to two moderately-sized gaming facilities, a first-class golf course, and an assortment of small businesses. Revenues from those businesses fund government programs that serve the 1,700 citizens of the tribe.

Like many other tribes, the Community is looking to diversify its economy beyond gaming and hospitality. One program the tribe is exploring is the manufacturing of thermoplastics. Below is a summary of the project.

- **Direct Reinforcement Fabrication Technology (DRIFT)**: This technology allows for the creation of reinforced plastic that is 100% recyclable.

- **Uses**: Plastic created through this technology may be used to reinforce or replace metal piping in the production of ethanol, which corrodes metal manufacturing equipment. This plastic may also be produced in the form of a tape, or film, to reinforce and extend the use of drainage pipes in public-right-of-ways. Finally, the plastic may replace traditional fiberglass in showers, recreational boats, and automobiles, allowing producers to use 100% recyclable material.

- **Business Model**: The Bay Mills Indian Community has acquired rights to issue licenses on use of the technology (DRIFT), and will manufacture products using the technology at a facility in the Eastern Upper Peninsula. As a federally recognized Indian tribe, the Bay Mills Indian Community is also in an advantageous position to procure federal and other public contracts.

- **Research & Development**: Through a partnership with the Bay Mills Community College, the Bay Mills Indian Community has established the Great Lakes Composite Institute, which will assist in research & development related to the technology. The Great Lakes Composite Institute will assist in the development of future uses of the technology and provide educational and employment opportunities.

- **Economic Impact**: Through this economic opportunity, the Bay Mills Indian Community will bring modern manufacturing jobs to a traditionally depressed area of Michigan. The businesses will employ both tribal and non-tribal workers, with most of those workers paying taxes on their earnings to the state and local government.

- **Economic Diversification**: The Bay Mills Indian Community projects that this business venture will net tens of millions of dollars in revenue for the tribe, mitigating reliance on casino gaming. Additionally, as a licensor of the technology, the Bay Mills Indian Community will be able to assist other tribes throughout the United States in using this technology to diversify their own local economies.

IV. Resources

A. Online

Indigenous Law and Policy Center, MSU College of Law
http://www.law.msu.edu/indigenous

National Council of State Legislators
http://www.ncsl.org/programs/statetribe/statetribe.htm

Government-to-Government Consultation with Native American Tribes, Michigan Department of Transportation,
http://www.michigan.gov/documents/mdot/MDOT_SLRP_TribalConsultation_190694_7.pdf

Arizona Native Net, Multimedia Resources
http://www.arizonanativenet.com/multimedia/index.cfm

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McClurken, James J. Gah-Baeh-Jhagwah-Buk, *The Way it Happened*, (MSU Museum, 1991)

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