TURTLE MOUNTAIN BAND OF CHIPPEWA

FROM THE OFFICE OF THE CHAIRMAN

4180 HIGHWAY 281
BELCOURT, ND 58316
TMBCI.ORG

JAMIE AZURE
TRIBAL CHAIRMAN
JAMIE.AZURE@TMBCI.ORG
701.477.2673

February 2, 2021

Senate Finance & Taxation Committee
North Dakota Legislature

Re: SB 2315

Dear Senate Finance and Taxation Committee:

Please accept this letter of support for SB 2315 submitted on behalf of the Turtle Mountain Band of Chippewa Indians.

SB 2315 repeals N.D. Century Code Section 54-58-03(5), which reads as follows:

> *The compact may not authorize gaming to be conducted by an Indian tribe at any off-reservation location not permitted under a tribal-state gaming compact in effect on August 1, 1997, except that in the case of the tribal-state gaming compact between the Turtle Mountain Band of Chippewa and the state, gaming may be conducted on land within Rolette County held in trust for the Band by the United States government which was in trust as of the effective date of the Indian Gaming Regulatory Act of 1988 [Pub. L. 100-497; 102 Stat. 2467; 25 U.S.C. 2701 et seq.].*

This paragraph prohibits the Governor from negotiating a tribal-state compact pursuant to the Indian Gaming Regulatory Act that would authorize operation of a Class III gaming facility outside the boundaries of a reservation.

N.D. Century Code Section 54-58-03(5) is a severely restrictive limitation on tribal sovereignty and tribal authority. The Indian Gaming Regulatory Act sets forth a definition of "Indian lands," where tribal gaming is permitted under the Act, which includes lands within the reservation and lands held in trust for the benefit of the tribe. 25 U.S.C. 2703(4). IGRA also prohibits gaming on land acquired in trust for the tribe after October 17, 1988 (when IGRA was passed by Congress). 25 U.S.C. 2719(a). But IGRA also provides specific, limited exceptions for post-1988 trust acquisitions. 25 U.S.C. 2719(b).

It is unnecessary for the state to further restrict the geographical scope, because IGRA's restrictions and limited exceptions provide ample safeguards to protect the state's interests. Because IGRA covers the area completely and specifically, N.D. Century Code Section 54-58-03(5) is arguably unlawful because it is preempted by IGRA. The North Dakota prohibition is so extreme that, despite tribal-state gaming compacts in twenty-five other states, no other state has a provision like it. Other states rely on the definitions and restrictions set forth in IGRA, and North Dakota should too. This provision never should have been adopted in the first place, and

should be repealed now as a simple matter of cleaning up the Code and permitting IGRA to work as it was intended.

History and the Turtle Mountain Exception

N.D. Century Code Section 54-58-03(5) was adopted into law in North Dakota in the mid-1990s. The compacts signed between the tribes and the state prior to 1999 specifically limit Class III gaming to "within the exterior boundaries" of the relevant reservation, but state law did not require that restriction. The tribal-state gaming compacts entered into in 1999 and later all add language that restates the first sentence of N.D. Century Code 54-58-03(5): "This Compact shall not be construed as authorizing gaming at any location outside the exterior boundaries of the Tribe's reservation unless such off-reservation location was expressly permitted in the Tribe's gaming compact in effect on August 1, 1997."

The only Tribe with a gaming compact in effect on August 1, 1997 that expressly permitted gaming at a location outside the exterior boundaries of the Tribe's reservation is Turtle Mountain. The Tribe's 1992 compact provided for gaming within the exterior boundaries of the Tribe's reservation and at "the San Haven property, located and described as follows: The SW1/4 of the SE1/4 in Section 19, the E1/2 of the NW1/4, the NE1/4, the NE1/4 of the SW1/4, the N1/2 of the SE1/4 of Section 30 and the SW1/4 and the W1/2 of the SE1/4 of Section 29, approximately 640 acres."

The fact that N.D. Century Code 54-58-03(5) contains a specific exception for Turtle Mountain, and the fact that Turtle Mountain's compact has been the only one in the state that contains an exception to the requirement that gaming facilities be located within the exterior boundaries of the reservation, would lead one to the conclusion that these exceptions are intended to work together. Unfortunately, that is not the case. N.D. Century Code 54-58-03(5) permits Turtle Mountain to go outside its reservation boundaries, but only to land in Rolette County that was in held in trust for the benefit of the Tribe in 1988. San Haven was not in trust in 1988, and indeed is still not in trust. Therefore, the exception for Turtle Mountain in the N.D. Century Code and in Turtle Mountain's compact, taken together, provide no exception for Turtle Mountain at all.

State Control

Repealing N.D. Century Code 54-58-03(5) does not automatically open to the door to more tribal Class III gaming facilities. The Governor must negotiate compacts that permit Class III gaming at new locations. The state maintains veto authority over new locations.

Federal Barriers are Significant

Developing off-reservation Class III facilities under existing federal law is costly and time-consuming. There are significant barriers to entry. It makes more sense for state policy to permit those barriers to operate as a disincentive, which permits the state to approve extraordinary projects on a case-by-case basis, rather than to prohibit such projects altogether.

The barriers to an off-reservation Class III gaming facility are as follows:

1. For land that is not in trust already, the Bureau of Indian Affairs must process a fee to trust application pursuant to the regulations set forth at 25 C.F.R. § 151. The application must contain a legal description of the land to be acquired, the legal name of the eligible tribe or individual, proof of an eligible tribe or eligible individual(s), the specific reason the applicant is requesting that the United States acquire the land for the applicant's benefit, a title insurance commitment addressing the lands to be acquired and information that allows the Secretary of the Interior to comply with the National Environmental Policy Act (NEPA), which for a gaming acquisition usually requires a full Environmental Impact Statement, and 602 Departmental Manual 2 (602 DM 2) – Hazardous Substances. Then, the BIA must conduct a site inspection, consult with State and local officials that have regulatory jurisdiction over the land to be acquired, 25 C.F.R. § 151.11(d), and comply with the National Historical Preservation Act (NHPA) and the U.S. Department of Justice Title Standards, *see id.* § 151.13. The process is also subject to public notice and comment. Gaming acquisitions cannot be approved at the local level, they must be approved by the Assistant Secretary's office in Washington, D.C., and often require political approval from the Secretary of the Interior's office as well.

2. Land acquired in trust for the benefit of a tribe after 1988 is not eligible for gaming unless it meets one of the exceptions set forth in the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719, as interpreted by the Department of the Interior at 25 C.F.R. § 292:

    a. the lands are contiguous to the current reservation;

    b. the tribe did not have a reservation in 1988, and "the lands are located. . . within the Indian tribe's last recognized reservation within the state or states where the tribe is presently located;"[1]

    c. the "lands are taken into trust as part of: (i) the settlement of a land claim; (ii) the initial reservation of and Indian tribe acknowledged by the Secretary under the Federal acknowledgment process; or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition;" or

    d. the trust land meets the requirements of IGRA's "two-part determination" exception. 25 U.S.C. § 2719(b)(1)(A). Under this test, gaming can occur on the land if, after consultation with appropriate state and local officials, and officials of nearby tribes, the Secretary determines that a gaming establishment on newly-acquired land will be (1) in the best interest of the tribe and its members and (2) not detrimental to the surrounding community. The governor of the state where the tribe is located must concur with the Secretary's determination. *Id.*

[1] There is also a specific exception for lands taken into trust in Oklahoma for Oklahoma tribes.

In general, we can expect that the limitations on post-1988 acquisitions under IGRA will restrict Class III gaming in North Dakota to existing reservations, lands contiguous to existing reservations, trust allotments, and lands approved for gaming pursuant to a two-part determination.

Trust allotments can be acquired by a tribe from the individual trust allottees through a transfer facilitated and ultimately approved by the BIA. This is a time-consuming process, NEPA environmental considerations are taken into account, and a tribe cannot force individual allottees to sell.

Two-part determinations are difficult to obtain and take a long time. For example, while the Ho-Chunk Nation of Wisconsin submitted its fee to trust application in March of 2012, the Secretary did not make its determination until April 2020. It is not uncommon for it to take a decade for the Secretary to make a determination. The governor must also concur, which is discretionary, providing another check on the process. Many projects that begin down that road never get approved.

North Dakota Prohibition is Unique in the Country

We reviewed the following states' codes and representative compacts: Arizona, California, Colorado, Florida, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Washington, Wisconsin, and Wyoming.

These states' statutory codes do not include language either identical or substantially similar to the North Dakota prohibition at N.D. Century Code 54-58-03(5).

The only partial exception is Arizona, where the code includes a provision preventing the Governor from concurring in any determination by the United States Secretary of Interior that would permit gaming on after-acquired lands (lands acquired after October 17, 1988 pursuant 25 U.S.C. § 2719). Ariz. Rev. Stat. Ann. § 5-601. This is effectively a prohibition against the Governor approving two part-determinations without legislative approval.

The majority of states with codes that address gaming locations defer to the IGRA definition of Indian Lands. The other states do not address the issue at all, effectively leaning on IGRA without specific reference.

Specific geographic restrictions are commonly found in Tribal-State Gaming Compacts. Compacts frequently discuss gaming locations and often restrict Class III gaming to specific locations. This is the standard nationwide, and the North Dakota Century Code should be updated to reflect this more commonsense approach.

ETABS

The explosion of ETAB machine gaming opportunities around the State of North Dakota makes any argument that the State has a policy to restrict gaming locations for moral or religious

reasons ring hollow. The cat is out of the bag, so to speak, and there is no reason that tribes should be subject to a restriction on the potential locations of their gaming activities.

Thank you for the opportunity to submit written testimony and to appear before this Committee in person regarding SB2315. The Turtle Mountain Band of Chippewa Indians appreciates its government to government relationship with the State of North Dakota, and this opportunity to work together for the betterment of all our citizens.

Sincerely,

Jamie Azure, Tribal Chairman
Turtle Mountain Band of Chippewa