

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

WILLIAM CROSS, JR.,

Plaintiff,

v.

C.A. No. 2:19-cv-11326-AJT-SDD

KEWADIN CASINOS GAMING  
AUTHORITY, a political subdivision of  
the SAULT STE. MARIE TRIBE OF  
CHIPPEWA INDIANS, a/k/a  
SAULT STE. MARIE TRIBAL  
GAMING AUTHORITY,

SENIOR U.S. DISTRICT JUDGE  
ARTHUR J. TARNOW

U.S. MAGISTRATE JUDGE  
STEPHANIE DAWKINS DAVIS

Defendant.

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**DEFENDANT KEWADING CASINOS GAMING AUTHORITY'S MOTION  
FOR PERMISSION TO FILE SUPPLEMENTAL BRIEF  
IN SUPPORT OF ITS RESPONSE TO ORDER TO SHOW CAUSE**

**SUPPLEMENTAL BRIEF IN SUPPORT OF  
RESPONSE TO ORDER TO SHOW CAUSE**

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Dated: September 25, 2019

Pursuant to LR 7.1 of the Local Rules of the United States District Court for the Eastern District of Michigan, Defendant Kewadin Casinos Gaming Authority (“Kewadin”), a governmental instrumentality of the Sault Ste. Marie Tribe of Chippewa Indians (the “Tribe”), through its undersigned counsel, moves for permission to file a Supplemental Brief in support of its Response to this Court’s Order to Show Cause, for the following reasons:

1. On May 6, 2019, Kewadin filed a Notice of Removal of Plaintiff William Cross, Jr.’s complaint against Kewadin from Wayne County Circuit Court to federal court.
2. On May 7, 2019, Kewadin filed a Motion to Dismiss Plaintiff’s Complaint under Fed. R. Civ. P. 12(b)(1) and/or (6).
3. On May 21, 2019, Kewadin granted Plaintiff’s counsel an extension of time within which to file a response to Kewadin’s Motion to Dismiss, to up to and including June 11, 2019.
4. On May 23, 2019, this Court issued an Order to Show Cause why the matter should not be remanded to state court and cancelled the scheduled status conference in this matter.
5. The Order to Show Cause provided that Kewadin file a response to the Order showing cause why the matter should not be remanded by June 7, 2019, and that Plaintiff file a response to Kewadin’s response to the Order by June 21, 2019.

6. The Court did not set a briefing schedule for the Motion to Dismiss and indicated to the parties through a case manager that Plaintiff need not file a brief in response to the Motion to Dismiss.

7. The parties requested additional briefing and oral argument by joint motion, and the Court granted the request and set the oral argument for October 1, 2019.

8. After the additional briefing, the Sixth Circuit issued its opinion in *Spurr v. Jones*, \_\_\_ F.3d \_\_\_, 2019 WL 4009131, CA 18-2174 (6th Cir. Aug. 26, 2019), and the period for filing a motion for rehearing with a suggestion for rehearing en banc has expired.

9. The *Spurr* decision discusses jurisdiction under 28 U.S.C. §§ 1331 and 1362 and recognizes that tribal sovereignty encompasses more than the defense of tribal sovereign immunity; thus, Kewadin is bringing the case to the attention of the Court as it bears on the issues raised in response to the Order to Show Cause.

10. Additionally, the *Spurr* decision has clarified that neither 28 U.S.C. § 1331 nor 28 U.S.C. § 1362 waives tribal sovereign immunity, and that conclusion implicates whether this Court can exercise its inherent jurisdiction to determine that remand in this matter would be futile and unnecessary and a waste of judicial resources as Kewadin will file an original action under 28 U.S.C. § 1362 for declaratory judgment and to enjoin any imminent state court proceeding.

11. For these reasons, Kewadin believes that the supplemental brief describing the Sixth Circuit decision attached as Exhibit 1 will assist the Court in determining whether to retain the case, and Kewadin wished to supply the case to the Court and to Plaintiff's counsel prior to oral argument, now that no motion for rehearing the case has been timely filed.

12. Kewadin makes this Motion for permission to file the Supplemental Brief discussing the *Spurr* decision without waiving its or the Tribe's sovereign immunity, for this Court may exercise sufficient federal question jurisdiction for the limited purpose of ascertaining its own jurisdiction. *United States v. Ruiz*, 532 U.S. 622, 628 (2002).

13. The Supplemental Brief is filed herewith, and a Proposed Order permitting its filing is also supplied via the proper ECF submission.

14. The undersigned certifies that, on September 25, 2019, the Authority's counsel sought the concurrence of opposing counsel to permit the filing of this Supplemental Brief, i.e., in the relief requested by this Motion, and that such concurrence was not supplied/

WHEREFORE, Kewadin requests that this Honorable Court permit the filing of the Supplemental Brief submitted with this Motion in advance of the hearing on this Court's Order to Show Cause.

Respectfully submitted,

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Dated: September 25, 2019

Gaming Authority

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Counsel for Defendant Kewadin  
Casinos Gaming Authority

Dated: September 25, 2019

## STATEMENT OF ADDITIONAL ISSUES PRESENTED

1. Does the new Sixth Circuit decision in *Spurr v. Jones*, 2019 WL 4009131 (6th Cir. 2019), clarify that tribal sovereignty encompasses more than tribal sovereign immunity, so that tribal sovereignty and the defense of tribal sovereign immunity are not co-extensive and should not be conflated?

Kewadin answers, “Yes.”

2. Does this Court have original jurisdiction under 28 U.S.C. § 1331 because tribal sovereignty arises under federal law and, like subject matter jurisdiction, cannot be waived or conferred by action of the parties?

Kewadin answers, “Yes.”

3. Does this Court have federal removal jurisdiction under the complete preemption corollary, where Plaintiff’s own exhibit, offered in support of remand albeit in incomplete form by Plaintiff, demonstrates (once the complete exhibit is supplied as well as excerpts from the documents under which the complete exhibit issues) that the alleged gaming-relating consulting contract attached to Plaintiff’s complaint subject to IGRA, including without limitation IGRA §20, 25 U.S.C. §2719(b)(1)(B), where Indian land claim settlement funds were used to purchase the land to be taken into trust as Indian lands for gaming purposes?

Kewadin answers, “Yes.”

4. Would remand be futile and therefore unnecessary where, as the Sixth Circuit recently clarified in *Spurr v. Jones*, 2019 WL 4009131 (6th Cir. 2019), this Court has original jurisdiction under 28 U.S.C. § 1362 and Kewadin does not waive sovereign immunity in bringing an original action under that section of the Judicature Act?

Kewadin answers, “Yes.”

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## **SIGNIFICANT OR CONTROLLING AUTHORITY**

*Grable & Sons Metal Products, Inc. v.  
Darue Engineering & Manufacturing,*  
548 U.S. 308 (2005)

*Gaming Corp. of America v. Dorsey & Whitney,*  
88 F.3d 536 (8th Cir. 1996)

*Memphis Biofuels LLC v. Chickasaw Nation  
Industries, Inc.,* 585 F.3d 917 (6th Cir. 2009)

*Missouri ex rel. Nixon v. Coeur D’Alene Tribe,*  
164 F.3d 1102 (8th Cir.), *cert. denied*, 426 U.S. 1039 (1999)

*Spurr v. Jones,*  
\_\_\_ F.3d \_\_\_, 2019 WL 4009131, CA No. 18-2174  
(6th Cir. Aug. 26, 2019)

*Ute Indian Tribe v. Lawrence,*  
875 F.3d 539 (10th Cir. 2017)

28 U.S.C. §1331

28 U.S.C. §1362

Indian Gaming Regulatory Act, 25 U.S.C. §2701 *et seq.*

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

## TABLE OF AUTHORITIES

### *Cases:*

<i>Alabama v. PCI Gaming Authority</i> , 15 F.Supp.3d 1161 (M.D. Ala. 2014)	6
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<i>Dart Cherokee Basin Operating Co. v. Owens</i> , 135 S.Ct. 547 (2014)	1
<i>Grable &amp; Sons Metal Products, Inc. v.</i> <i>Darue Engineering &amp; Manufacturing</i> , 548 U.S. 308 (2005)	5
<i>Memphis Biofuels LLC v. Chickasaw Nation</i> <i>Industries, Inc.</i> , 585 F.3d 917 (6th Cir. 2009)	3
<i>Michigan v. Bay Mills Indian Cmty.</i> , 572 U.S. 782 (2014)	4, 5
<i>Missouri ex rel. Nixon v. Coeur D’Alene Tribe</i> , 164 F.3d 1102 (8th Cir.), <i>cert. denied</i> , 426 U.S. 1039 (1999)	6
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	4
<i>Spurr v. Pope</i> , ___ F.3d ___, 2019 WL 4009131, CA No. 18-2174 (6th Cir. Aug. 26, 2019)	1 et passim
<i>Ute Indian Tribe v. Lawrence</i> , 875 F.3d 539 (10th Cir. 2017)	6-7

**TABLE OF AUTHORITIES cont.**

***Statutes:***

28 U.S.C. §1331	1 et passim
28 U.S.C. §1362	1 et passim
Indian Gaming Regulatory Act, 25 U.S.C. §2701 <i>et seq.</i>	2 et passim
Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143, 111 Stat. 2652 (1997)	2 et passim

## **INTRODUCTION**

Defendant Kewadin Casinos Gaming Authority (“Kewadin”), by its undersigned counsel, respectfully submits this Supplemental Brief in support of this Court’s federal jurisdiction over this matter, which Kewadin timely removed to this Court, in light of a new Sixth Circuit case noting that tribal sovereignty is not co-extensive with the defense of tribal sovereign immunity. Tribal sovereignty, properly viewed, includes, but nonetheless encompasses more than, tribal sovereign immunity, as *Spurr v. Pope*, \_\_\_ F.3d \_\_\_, 2019 WL 4009131, CA No. 18-2174 (6th Cir. Aug. 26, 2019) (attached as Exhibit 1) (period for motion for rehearing expired), recognizes. Moreover, proceeding under 28 U.S.C. §§1331 and 1362 does not waive the defense of tribal sovereign immunity. Removal under the complete preemption corollary under 28 U.S.C. §1331 and the Supremacy Clause confers jurisdiction on federal courts because tribal sovereignty arises under federal law. Moreover, an original action by a Tribe on the basis of tribal sovereignty under 28 U.S.C. §1362 for declaratory judgment and to enjoin any imminent or pending state-law proceeding also arises under federal law.

Removal jurisdiction in this Court is satisfied under the “same liberal rules” of pleading applicable to notices of removal as to other matters of pleading, i.e., “to contain a short and plain statement of the grounds for removal.” *Dart Cherokee Basin Operating Co. v. Owens*, 135 S.Ct. 547, 553 (2014).

## **ARGUMENT**

### **I. Tribal Sovereignty Supporting Jurisdiction Encompasses More Than the Defense of Tribal Sovereign Immunity**

Kewadin’s Notice of Removal, which invoked both federal question jurisdiction and removal jurisdiction, pursuant to 28 U.S.C. §§1331, 1441(a) and 1446, the Supremacy Clause, and Indian Gaming Regulatory Act, 25 U.S. §2701 *et seq.* (“IGRA”) ((Doc. 1, Pg ID 6-7, ¶¶ 7 and 9)).<sup>1</sup> IGRA gives Indian tribes exclusive jurisdiction over Class I gaming on “Indian lands,” and Class II gaming remains within the jurisdiction of the Indian tribes and subject to IGRA’s provisions. IGRA gives the federal government exclusive control of Class III gaming conducted in accordance with a negotiated tribal-state compact.<sup>2</sup>

In response to the Court’s *sua sponte* Order to Show Cause, Plaintiff has submitted exhibits expressly stating that the projects for which he seeks a “finder’s fee” are to be constructed on land purchased with settlement funds under the Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143, 111 Stat. 2652 (1997) (MILCSA), and then taken into trust as “Indian lands” by the federal government for gaming purposes under IGRA (See: ECF 9-5, Pl. Ex. C-2, Pg ID

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<sup>1</sup>At the time of Kewadin’s Notice of Removal, the Sixth Circuit had not yet clearly opined that a federal lawsuit filed by a Tribe as an original action under 28 U.S.C. §1362 would not constitute a waiver of tribal sovereign immunity. *Spurr* has now clarified that filing such an original action would not.

<sup>2</sup> IGRA §11(a)(1), 25 U.S.C. §2710(a)(1); §11(a)(2), 25 U.S.C. §2710(a)(2); and IGRA §11(d), 25 U.S.C. §2710(d), respectively.

506 and 507-08 (Recitals B, C, and I) (2009 Agreement)<sup>3</sup> and ECF 9-4, Pl. Ex. C-1, Pg ID (Recitals B, C, and I) (2011 Agreement).<sup>4</sup>

Of particular concern to Kewadin here, tribal sovereignty issues broader than a defense of tribal sovereignty immunity, including without limitation significant tribal self-governance issues under the Sault Tribe's constitution, charters, and ordinances. According to Plaintiff's Declaration (see ECF 9-3, Pl. Ex. B, Pg ID 468, ¶ 10), Plaintiff signed the alleged agreement he attached as Exhibit A to his Complaint on November 19, 2009. Just weeks before, on November 4, 2009, the Sixth Circuit rejected the argument that there could be equitable waiver of tribal sovereign immunity by conduct by tribal officials and deferred to the tribe's self-governance where, as here, its tribal ordinances required that resolutions be attached to a contract in order to waive tribal sovereign immunity, *Memphis Biofuels LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 922 (6th Cir. 2009) (citing 10th and 11th Circuit cases and federal district court cases in New York, New Jersey and Colorado reaching similar conclusion).

Issued well after the briefs relating to the Order to Show Cause were filed, and with its period for filing for rehearing now expired, the Sixth Circuit cited

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<sup>3</sup> See also: Exhibit 2 attached, pp. 1 and 2-3, for the 2011 Amended Turnkey Agreement for JLLJ, which retained the same Recitals B, C and I.

<sup>4</sup> See also: Exhibit 3 attached, pp. 1 and 2-3, for the 2011 Amended Turnkey Agreement for Lansing Futures, which retained the same Recitals B, C and I.

*Memphis Biofuels* with approval in *Spurr v. Jones*, \_\_\_ F.3d \_\_\_, 2019 WL 4009131 \*2, CA No. 18-2174 (6th Cir. 2019) (attached as Exhibit 1), again recognized that Indian tribes exercise “inherent tribal sovereignty,” and clarified that “[t]hat sovereignty *includes* ‘common-law immunity from suit traditionally enjoyed by sovereign powers.’” (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790-91 (2014), quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)) (emphasis supplied). By using the term “includes,” the *Spurr* decision recognizes that tribal sovereignty and the defense of tribal sovereign immunity are not simply co-extensive, nor should these concepts be conflated. Tribal sovereignty encompasses an Indian tribe’s right to self-governance.

In *Spurr*, in the context of a motion to dismiss, the Sixth Circuit identified the issue of sovereign immunity from suit as a threshold question that is jurisdictional under Rule 12(b)(1) without the need to address federal question jurisdiction or diversity jurisdiction. The Court concluded that neither 28 U.S.C. § 1331 nor § 1362 constitute an express waiver by Congress of the tribal sovereignty immunity of Indian tribes. In doing so, the Sixth Circuit clearly distinguished between federal jurisdiction over claims and defenses against such claims: “[T]he fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim.” *Spurr*, 2019 WL 4009131, at \*4 (quoting *Blatchford v. Native Vill. Of Noatak & Circle Vill.*, 501 U.S. 775, 786,

n. 4 (1991).<sup>5</sup>

Significantly, the *Spurr* decision expressly recognized that “Indian tribes remain separate sovereigns that pre-existed the Constitution, and ‘courts will not lightly assume that Congress in fact intends to undermine that Congress in fact intends to undermine Indian self-government.’” *Spurr*, 2019 WL 4009131, at \*3 (quoting *Bay Mills Indian Cmty.*, 572 U.S. at 790).

Plaintiff’s claims thus necessarily require resolution of substantial issues of the federal law of tribal sovereignty embedded in the claims. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005). Kewadin respectfully submits that IGRA, the federal statute named in its Notice of Removal and expressly addressed in Plaintiff’s C-1 and C-2 agreements and the Amended Turnkey Agreements attached as Exhibits 2 and 3, addresses issues of tribal sovereignty and self-governance.<sup>6</sup>

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<sup>5</sup> Should this Court properly address the defense of tribal sovereign immunity by allowing that motion to be fully briefed, Kewadin also notes that, as to the Indian nation defendant, the Sixth Circuit in *Spurr* found it unnecessary to reach any issue other than tribal sovereign immunity. Here, only Kewadin (which the Cross Complaint alleges is a “political subdivision of the Tribe” (ECF 1-1, Ex. B to Removal Petition, Pg ID 52, ¶ 2) is sued.

<sup>6</sup> In this case, given what it presumed to be the context of Plaintiff’s alleged consulting contract, Kewadin immediately followed its Notice of Removal with a motion to dismiss on the bases of the defense of sovereign immunity (pursuant to Fed. R. Civ. P. 12(b)(1)) and unenforceability of the contract as incomplete and in violation of tribal ordinances (pursuant to Fed. R. Civ. P. 12(b)(6)). This Court refused to issue a briefing schedule on the motion to dismiss, but issued its Order to Show Cause instead.



## **II. Under the Complete Preemption Doctrine, Removal Was Proper, and Remand Would Waste Judicial Resources After *Spurr***

In its Notice of Removal and its briefs opposing remand, Kewadin has set forth the purposes of IGRA, its comprehensive statutory scheme, the Sault Tribe's tribal governance reflecting IGRA purposes and requirements, conformity to those requirements and to reviews by NAIC or BIA, and review of gaming-related consulting contracts (not simply management contracts) by NAIC or by the Bureau of Indian Affairs in an era of renewed concern about money-laundering by various organized crime entities, whether their origins are known or unknown to the consultant, a purpose of IGRA never denied by Plaintiff. Under such circumstances, removal to this Court was proper. *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 542-48, 550 (8th Cir. 1996) (reversing remand); and *Missouri ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102 (8th Cir.), *cert. denied*, 426 U.S. 1039 (1999) (reversing remand); *Alabama v. PCI Gaming Authority*, 15 F.Supp.3d 1161, 1169 (M.D. Ala. 2014) (approving removal discussing IGRA's preemptive force.)

Alternatively, even if this Court were to conclude that IGRA did not completely preempt state law, this Court has sufficient inherent jurisdiction to determine whether remand would be futile or waste judicial resources. *Spurr* has now clarified that, in the Sixth Circuit, an original action by the Tribe under 28 U.S.C. §1362 will not cause the Tribe to waive its tribal sovereignty immunity

defense. 2019 WL 4009131 at \*4. Accord: *Ute Indian Tribe v. Lawrence*, 875 F.3d 539, 543-44 (10th Cir. 2017) (permitting original action of tribe to pending or imminent state action under 28 U.S.C. §1362 brought by independent contractor seeking 2% fee on revenues, even where prior federal case by contractor based on anticipated defense of tribal sovereign immunity dismissed). To seek a declaratory judgment and to enjoin a state court proceeding revived on remand in an action under 28 U.S.C. § 1362, the Tribe need not demonstrate the complete preemption corollary. In such an original action, this Court has subject matter jurisdiction to address tribal sovereignty, the defense of tribal sovereign immunity, or the issue of whether IGRA displaces state law given the gaming-related nature of Plaintiff's alleged contract under IGRA.

### CONCLUSION

Kewadin Casinos Gaming Authority respectfully requests that this Honorable Court also consider the reasons addressed in this supplemental brief and conclude that it should not remand this matter to state court.

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 Counsel for Defendant Kewadin Casinos  
 Gaming Authority

Dated: September 25, 2019

### **Local Rule 5.1 Certification**

I, Diane M. Soubly, certify that this document complies with Local Rule 5.1(a), including: double-spaced (except for quoted materials and footnotes); at least one-inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that is no smaller than 10-1/2 characters per inch (for non-proportional fonts) or 14-point (for proportional fonts). I also certify that it is the appropriate length. Local Rule 7.1(d)(3).

/s/ Diane M. Soubly

Diane M. Soubly (P32005)

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Defendant.

\_\_\_\_\_ /

**CERTIFICATE OF SERVICE**

The undersigned certifies that, on September 25, 2019, she caused to be served on the counsel for Plaintiff of record Defendant's Motion for Leave to File Supplemental Brief in Response to the Court's Order to Show Cause and exhibits thereto via ECF to counsel of record.

/s/ Diane M. Soubly

Diane M. Soubly (P32005)