



Hidden Reservation

A lawsuit filed by the Little Traverse Bay Bands of Odawa Indians seeks to claim a reservation over thousands of acres in northern Michigan. If the tribe wins the case, it could upset property rights, taxes, existing laws, and regulations.

BY TOM BEAMAN

ILLUSTRATION BY CRAIG LAROTONDA

A lawsuit filed in August 2015 in the United States District Court, Western District of Michigan, will upend the commercial and jurisdictional status quo enjoyed by businesses and residents in northwest Michigan. Or maybe not.

In *Little Traverse Bay Bands of Odawa Indians v. Rick Snyder, et al.*, the tribe is asking the court to recognize an Indian reservation that it claims was created in the 19th century on 337 square miles in northwest Michigan, including Petoskey, Harbor Springs, and Charlevoix, and 103 miles of Lake Michigan shoreline.

The Little Traverse Bay Band of Odawa Indians claims its 4,579 “citizens,” 679 of whom actually live in the disputed area, constitute one of 12 federally recognized Indian tribes in Michigan.

The tribe (LTBB) has asked the court to issue a permanent injunction “forever barring” the state from “asserting jurisdiction over the Tribe or Tribal citizens in any way inconsistent with the Reservation’s status as Indian country” and “from taking any actions that would interfere with the rights of the Tribe and its citizens under federal law to be otherwise free of state law and regulation within the Little Traverse Reservation.”

The trial is expected to run for several years, so its ultimate impact on the region at this point is only hypothetical. Still, the cities of Charlevoix, Petoskey, and Harbor Springs, along with Charlevoix County, Emmet County, 10 townships, and the nonprofits Emmet County Lakeshore Association and Protection of Rights Alliance have joined the suit to advocate for the existing state of affairs.

Both sides have fervent arguments. "I fully appreciate the impacts and chaos that will unfold if the Little Traverse Bay Bands of Odawa Indians prevails in its quest for power over Emmet and Charlevoix counties," wrote Lance Boldrey, an attorney at Dykema in Detroit, earlier this year in the *Petoskey News*. He represents the Emmet County Lakeshore Association. "If the tribe wins a decree that 337 square miles is 'Indian Country,' governance of this land will be forever changed, and conflicts over tribal jurisdiction will play out in the courts for decades."

Harbor Springs City Manager Tom Richards voiced concern at a State of the Community meeting earlier this year: "We're concerned about what could change and how it could affect the residents and property owners in the area. Our goal is to protect all of our residents so that they can be confident that regardless of someone's ancestry, that our neighbor will not be exempt from zoning regulations that protect the stability of our neighborhoods, our neighbor will be paying the same taxes and supporting our local schools and services and government programs, our neighbor will be subject to the same legal system that we are, and if we're in a conflict with a neighbor, it won't be decided in a tribal court, and that our neighbor will not be able to unfairly compete with our businesses because of an unlevel playing field when it comes to regulations, taxes, and opportunities."

In a later interview with *DBusiness*, Richards says, "The concern is that it will create uncertainty in the area, and certainty is what's necessary for people to decide to live here and invest their money here and start a business. If they feel they don't know what to expect in Harbor Springs or the western portion of Emmet County, maybe they'd rather be somewhere else."

Jim Bransky, general counsel of the tribe, sees things differently. "The tribe is not trying to create a reservation; it's simply asking the court to affirm what it believes has been in place since 1855. We all live in overlapping jurisdictions, where there are cities within townships within counties within states. The tribe is viewing this as just another jurisdictional layer that tribes and local governments have dealt with effectively throughout the country."

To trace the roots of the dispute, a brief history lesson is in order. The LTBB and other Ottawa and Chippewa tribes once lived on 17 million acres west and south of lines drawn roughly between Grand Rapids, Alpena, and Escanaba. In 1836, one year before Michigan gained

statehood, the tribes agreed, in the Treaty of Washington with the United States government, to cede that territory in an effort to retain their homeland and avoid government pressure to move west to frontier territories.

The tribes thought they had a deal, but Congress later amended the treaty to limit the tribes' possession of the land to five years. Once again, in order to avoid removal, the tribes agreed to the amended treaty, with the understanding that they could continue hunting and fishing throughout the entire ceded area until the lands were required for settlement.

Over the ensuing years, the U.S. Office of Indian Affairs evolved from taking Indians out of their natural habitat to allowing them to stay permanently and assimilate into the region's agrarian society. In an effort to clarify the 1836 accord, the Treaty of Detroit was signed in 1855, temporarily halting the sale of all public lands throughout the 17-million-acre region, including the area referenced in the lawsuit, to allow Indians to establish homesteads.

The 1855 treaty read, in part, "The United States will give to each Ottawa and Chippewa Indian being the head of a family, 80 acres of land, and to each single person over 21 years of age, 40 acres of land. ... Each Indian entitled to land under this article may make his own selection of any land within the tract reserved herein to the band to which he may belong."

That history and its implications for the entire region will play out in Federal Judge Paul L. Maloney's Kalamazoo courtroom in a non-jury trial expected to begin by early 2019. Maloney has divided the case into two parts, with the first verdict set to decide only whether the 1855 treaty established a reservation. If the tribe wins, the court will then move on to consider what the decision, in fact, means to life in northwest Michigan.

The judge said that laches, a defense sometimes attempted in cases where a plaintiff is thought to have "slept" on a complaint too long for it to be considered in court (in this case, the interpretation of a 162-year-old treaty), applies only to the second part of the case. The state cannot claim laches as a defense until the court first hears arguments on the existence of a reservation.

The tribe argues that the word "reservation" is used throughout the 1855 treaty and in subsequent documents, including correspondence from 1856 and 1858 between U.S. Indian agents and multiple surveying teams. It also says the state of Michigan and local municipalities have, in effect, acknowledged the existence of the reservation and the tribe's sovereignty through a variety of "inter-governmental coordinations and agreements" such as cooperative local management of U.S. Environmental Protection Agency rules and partnerships with police departments.

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— Jim Bransky

Back on the Market

On the other hand, "Our primary argument here is that if you read the treaty language and you understand what was happening, even from the Indian perspective at that time, the treaty simply did not create a reservation," Boldrey says. "It was a very temporary withdrawal of land that was pulled back from the public market for a relatively short period, for the Indians to be able to select their pieces, which were then scattered within this 337 square miles — and then the whole rest of the land was put back on the market by the United States government through acts of Congress that passed in the 1870s."

Bransky, LTBB's general counsel, argues the case has deep philosophical and practical ramifications for the tribe. "The philosophical (aspect) is to honor its history and let its future generations know this is its reservation. As a practical matter, there are issues that primarily involve the tribe's authority over its own members. In child welfare proceedings, for example, it's clear under federal law that tribes have exclusive jurisdiction within the boundary of a reservation when their children are in need of protective services assistance."

"The State of Michigan recognizes only what we call 'Indian Country' — the limited parcels of land that are held in trust by the United States, roughly a thousand acres spread out throughout the reservation — whereas the tribe's perspective is that this is all Indian Country for child welfare purposes. The tribe has worked well with local courts and social services to transfer such cases to the tribe, but we need to clarify certain issues, like who has the right to enter a tribal home on a reservation."

For Bill Fraser, mayor of Petoskey, the case is the most important legal issue the community has faced in many years. "I think the ramifications are yet to be fully fleshed out," he says. "When the tribe first approached us (in November 2015), they said all we're asking is for our Indian children, when they have to go through probate court, to go through the Indian court rather than the county court. Then the term jurisdiction came up. I think jurisdiction could wash over into planning and zoning, law enforcement, the courts, everything. Our rhetorical question is, assuming they prevail, then how do they pay for all this overhead? Could they tax us?"

Bransky says he doesn't see tax issues impacting local residents or governments at all. "The U.S. Supreme Court precedent has been very cognizant of, and protective of, non-Indian landowners and governments within Indian Country. The only land that for sure comes off of property tax roles are the parcels that are transferred to the U.S. in trust for the tribe, just like the U.S. doesn't pay taxes on post office land."

Except in limited circumstances, the sole regulatory authorities over nontribal persons and businesses in a reservation are state and local governments. In the 1981 decision *Montana v. U.S.*, the U.S. Supreme Court limited tribal jurisdiction over non-tribe members only to circumstances where the nonmember either has entered into a consensual relationship (a contract) with the tribe or its members, or is engaging in conduct that directly

threatens the political integrity, economic security, or health and welfare of the tribe.

Congress has also given tribes power over nonmembers in some areas such as liquor regulation, environmental programs, and domestic violence crimes. In applying the *Montana* standards, the Supreme Court also rejected the notion that tribal zoning would apply to nonmember lands within a reservation marked by non-Indian ownership.

Furthermore, in 2002, seven Michigan tribes, including the LTBB, signed Tribal-State Tax Agreements with the State of Michigan that clarified the extent to which Michigan's Indian tribes and tribal citizens are exempt from and subject to several state taxes. The levies in the agreements include sales and use, individual income, motor fuel, and tobacco, and the then-single business tax, but not property taxes. Exemptions from sales and use taxes include "Purchases of vans and buses by the Tribe for use in transporting passengers to and from a Tribal gaming facility..." and "...modular homes and mobile homes used (by resident Tribal members) as their principal residence."

The tax agreement also specifies that the LTBB will collect sales tax from all "Tribal, Tribal Member, and Tribal Entity retailers engaging in taxable sales within Tribal and Trust lands." On the first \$5 million of annual gross receipts from taxable sales, the tribe retains two-thirds of the tax collected with the rest paid to the state. Taxes collected on annual gross receipts greater than \$5 million are split 50-50 between the tribe and the state.

Bingo Gaming

As a result, Bransky says the tribe has funded 25 road improvement projects in Emmet County and Petoskey.

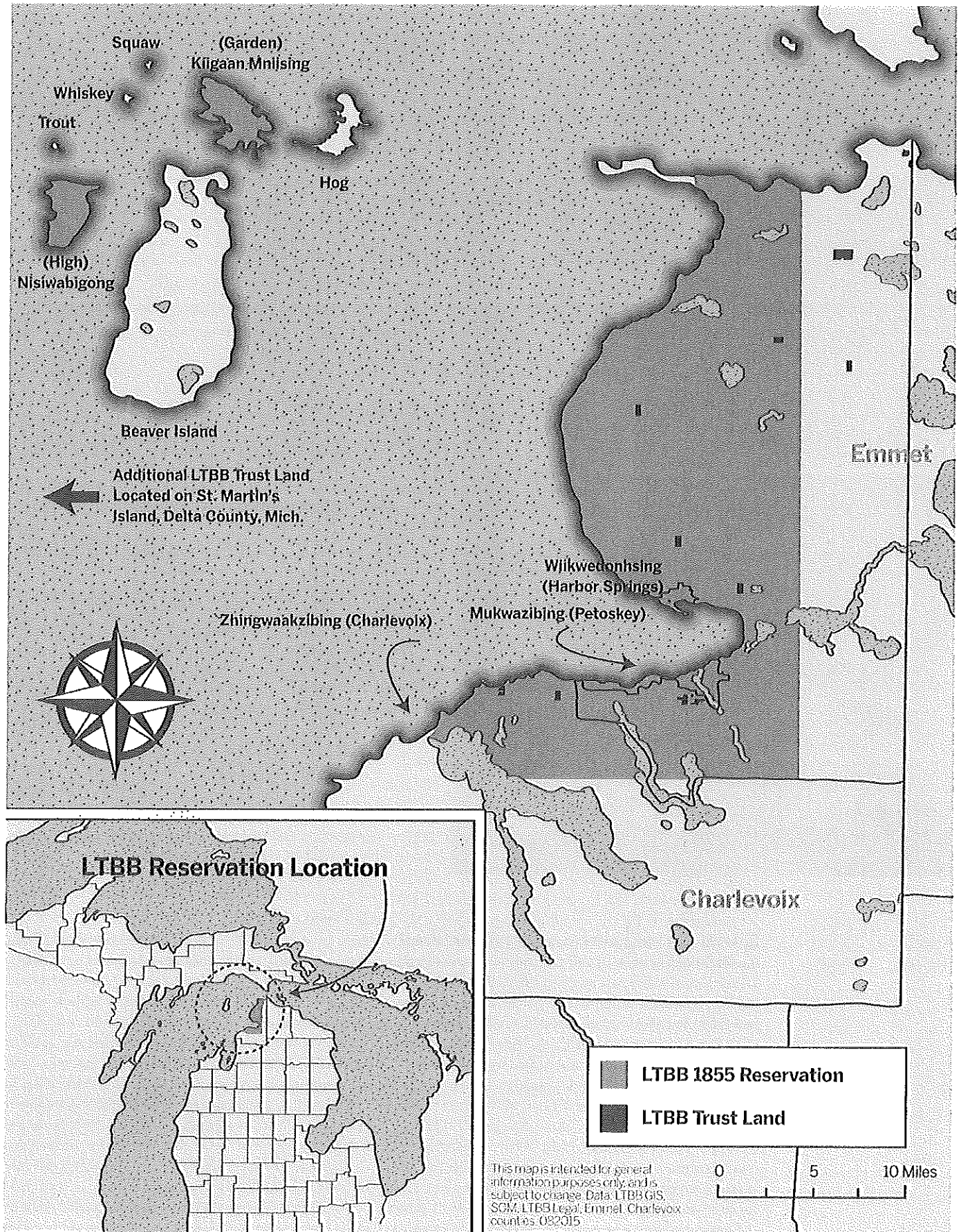
"To the extent there are concerns about zoning or gaming issues," Bransky says, "like we keep hearing about the McDonald's in downtown Harbor Springs with Class II (bingo) gaming machines next to the cash register, certainly the tribe's history from treaty times through the present ... has been to place a high premium on preservation of the character of the area. About half of the land the tribe has purchased and placed into trust has been specifically for preservation."

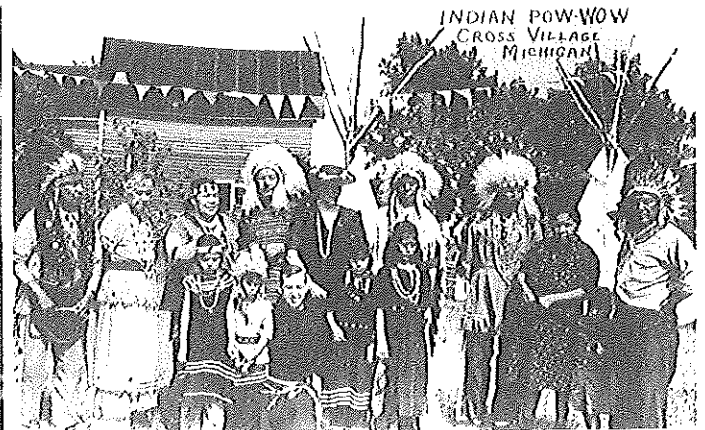
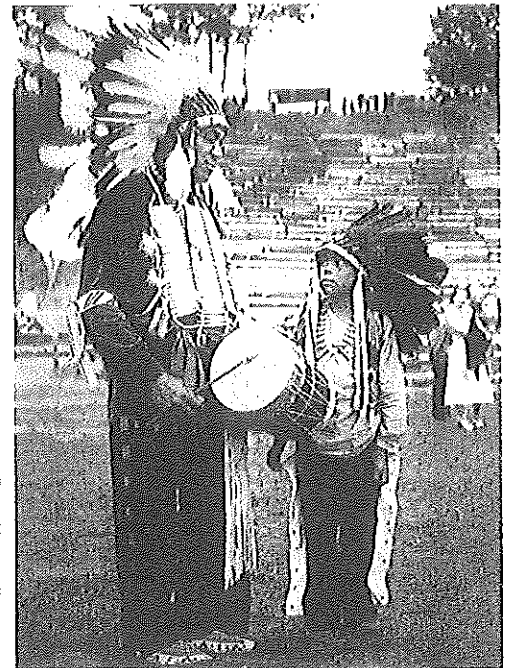
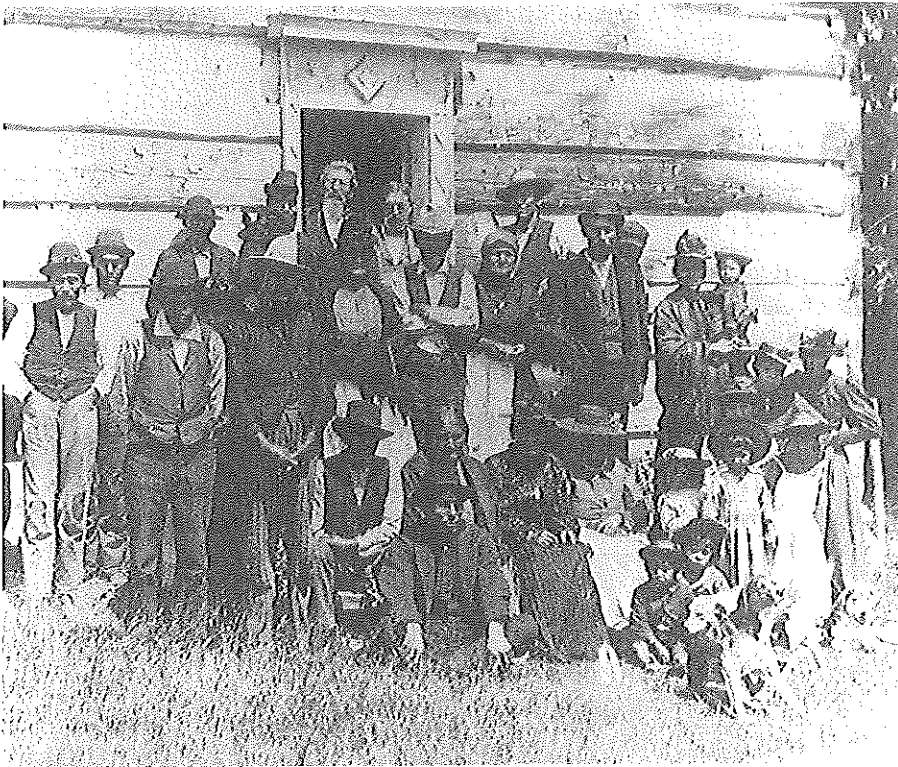
LTBB chairperson Regina Gasko-Bentley says she doesn't see the possible proliferation of gaming as a realistic concern. "At this point, I don't see putting slot machines in businesses," she says. "We have two casinos now (in Petoskey and Mackinaw City). I mean, why would we want to compete against ourselves?"

On a related front, the U.S. Environmental Protection Agency delegates authority to the states to administer Clean Air Act and Clean Water Act rules. States do not have the authority to operate such programs in Indian reservations, so developers must work directly with the federal government to obtain permits. Indian tribes, however, can skirt this requirement if they pass an ordinance that gives them the right to manage such delegated federal programs.

"You have some manufacturing facilities up in that area that today have Clean Air Act permits that are

Little Traverse Bay Bands of Odawa Indians Reservation and Trust Lands





CEREMONIAL GROUNDS

The Little Traverse Bay Bands of Odawa Indians have long held ceremonial activities in northwest Michigan, including a pageant and a Pow-Wow in Harbor Springs and Cross Village (two right photos). Francis Tabasashi, an Odawa from Cross Village, poses with the rifle he used while serving in the famed Company K of the Union Army during the Civil War (lower left), while Odawa/Ojibway Indians gather at a church near Charlevoix (upper left).

issued by the Michigan Department of Environmental Quality," Boldrey says. "If this is a reservation, under the Tribe's Clean Water Act, any real estate developers who have to pull stormwater discharge permits would now be subject to tribal regulations." The concern is that environmental permits issued by the tribe might impose more stringent rules than those issued by the state.

Rule of Law

"There's a strong partnership between the environmental community and the business community because it's all based on preserving the natural beauty of the area for tourism and second homes," Bransky says. "I think the environmental concerns are perhaps overblown, as

these are concerns we all share. We've been able to bring in money to help monitor water and air quality throughout the reservation, working with local governments and the Tip of the Mitt Watershed Council to address things like invasive species."

Federal statutes have generally resolved the issue of criminal jurisdiction within a reservation. For non-Indian offenders, if the victim is a non-Indian or the crime is victimless, the state has exclusive jurisdiction to prosecute. If the victim is a member of the LTBB tribe or any federally recognized tribe, then except for certain domestic violence cases, the federal government is the only body with the authority to prosecute.

For Indian offenders, if the victim is a non-Indian or if the crime is victimless, either the federal government

or the tribe may prosecute, but the state cannot. If the victim is an Indian and the offense is not a major crime, only the tribe may prosecute.

"The 1972 U.S. Supreme Court's Oliphant decision said tribes do not have criminal jurisdiction over non-Indians," Bransky says. "A couple years ago, Congress amended the Violence Against Women Act and included a provision that would give tribes jurisdiction over non-Indian perpetrators of domestic violence against a tribal member."

In recent years, several lawsuits regarding tribes claiming reservations have been upheld in court.

The village of Pender, Neb., was established on a portion of an Omaha Tribe reservation that had been set aside for nonmembers. The village, with a small Indian population, had been subject to state jurisdiction for years. In 2006, the tribe enacted a liquor ordinance and directed non-Indian bars to obtain a tribal license and pay a tribal tax. The village and the state of Nebraska challenged whether the land is an Indian reservation, but lost before the U.S. Supreme Court in 2006.

In *Ute Indian Tribe of the Uintah and Ouray Reservation v. Myton*, in which the town of Myton, Utah, argued unsuccessfully that it was not part of a reservation, then Judge Neil Gorsuch of the 10th Circuit U.S. Court of Appeals (since appointed to the U.S. Supreme Court) wrote that it's common for Indians and non-Indian communities to coexist within a reservation.

"For that matter, checkerboard jurisdiction is a fact of daily life throughout the West, the result of many different congressional commands like those at issue here, and something many localities have lived with successfully," Gorsuch wrote.

Closer to home, the city of Mount Pleasant in 2010 settled a case with the Saginaw Chippewa Tribe that dealt with the existence of a reservation. The settlements included the cross-deputization of tribal police and the Michigan State Police, with each having the authority to enforce the laws of the other government; taxation that mirrors the state-tribal tax agreements that were negotiated with other tribes; and within the city of Mount Pleasant, land owned by tribal members is subject to zoning, but the city can enforce zoning requirements only in tribal court.

Outside of the city limits, all zoning of land owned by tribal members is done solely by the tribe.

"The reason we had success in settling was because we already had somewhat of a good relationship between the city and the tribal leadership before we even got into the lawsuit," says Mount Pleasant City Manager Nancy Ridley.

"So when we started talking about settlement options, and ours ended up being a negotiated settlement, we were able to draw on that relationship to come up with the agreements that met the fears that both sides had about what land being identified as Indian Country would mean to both sides."

Ridley says the Saginaw Chippewa Tribe has limited its gaming presence to its nearby Soaring Eagle Casino, possibly allaying concerns that children would be exposed to bingo machines in fast-food restaurants. She

says the tribe pays 2 percent of its net slot machine revenue to local units of government. "The city itself has been quite fortunate to have a number of not only our public works projects funded, but also some of our law enforcement and other items funded on a regular basis from the tribe," Ridley says.

Discovery Phase

According to the Saginaw Chippewa website, as of May 2015, the tribe had distributed \$230 million to local businesses and schools.

Ridley also notes that there has been no change in city tax revenue since the agreement was signed, because the only land that isn't taxable is land that the tribe itself owns and has put in trust with the federal government.

"(Mount Pleasant) was a bad, bad settlement," says attorney and ECLA President Gary Rentrop. "The Saginaw Chippewa settlement went in over the objection of the attorney general of Michigan, and (Gov. Jennifer) Granholm overruled it. The circumstances are much different there. The city of Mount Pleasant was allowed to maintain its zoning authority, but the townships that surrounded it were not. That's not an acceptable premise for us. It's no precedent as far as we're concerned."

The lawsuit, which Bransky says has been in the works for years, is in discovery phase until April 2018, with the trial tentatively set to begin later that year. Michigan Attorney General Bill Schuette's office referred *DBusiness* magazine's questions to Gov. Rick Snyder's office, where a spokeswoman said the state doesn't comment on pending legislation. "We're open to seeking a negotiated settlement," Bransky says. Boldrey declined to comment on that option.

Whatever direction the case takes, there are hints of goodwill on both sides. But a century from now, with different tribal leaders and local politicians in place, the tribe's potential jurisdiction of the disputed land could change. Such changes could impact property rights, taxes, and affect a host of other issues.

"This isn't something we like to see happen," Rentrop says of the prospect that the tribe would take over jurisdiction of the 337 square miles in northwest Michigan. "The Indian culture is a part of this area; we celebrate their history in the community. To now be defendants in a lawsuit filed by them, it seems so contrary to the way things have been historically. They've been embraced and included. We feel embraced and included by them."

Harbor Springs City Manager Tom Richards says he "certainly think the community has had good relations with its Indian neighbors. The tribe has been doing a lot of good in the community through revenue from the casino; it provides assistance in the community for certain projects and road improvements."

LTTB Chairperson Gasko-Bentley says she "personally does not feel that (non-Indians) have anything with the lawsuit to be concerned with. We're not here to take their land; we're not here to make them pay taxes. We just want to be able to take care of our citizens within our reservation." db