UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, **Plaintiff,** **v.** **THE BAY MILLS INDIAN COMMUNITY,** **Defendant.**	**Case No.**

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

The Little Traverse Bay Bands of Odawa Indians ("LTBB"), pursuant to FED. R. CIV. P. 65, seeks an order enjoining defendant, the Bay Mills Indian Community ("BMIC"), from operating an illegal off-reservation casino in Vanderbilt, Michigan ("Vanderbilt Casino"). As discussed below, BMIC is operating the Vanderbilt Casino in violation of both the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701, 2721 (2010), and its gaming compact with the State of Michigan ("BMIC Compact"). If BMIC is permitted to continue operating its illegal Vanderbilt Casino, LTBB, which owns a gaming resort just thirty-seven miles away, will sustain irreparable injury from, *inter alia*, loss of business in the form of lost market share, loss of both new and existing customers and loss of customer goodwill. Moreover, the ongoing operation of the Vanderbilt Casino will cause a significant loss of LTBB tribal-member employment, and increased burden on tribal government services, while at the same time, LTBB will have insufficient resources to meet these increased demands. Furthermore, unless an injunction issues, this illegal operation will serve as precedent to fuel an explosive proliferation of off-reservation casinos in Michigan and elsewhere without the consent or participation of surrounding state, local or tribal governments.

II. STATEMENT OF FACTS

Plaintiff, the Little Traverse Bay Bands of Odawa Indians ("LTBB"), is a federally-recognized Indian tribe located in Emmet and Charlevoix Counties, Michigan. LTBB and the State of Michigan entered into a tribal-state gaming compact in 1999, with amendments executed in 2003 and 2008. *See* Notice of Tribal-State Class III Gaming Compact Taking Effect, 73 Fed. Reg. 21,361-03 (April 21, 2008). In January 2000, LTBB opened its first class III gaming operation, the "Victories Casino," and then moved its gaming operations to the current "Odawa

Casino Resort," which is located in Petoskey, Michigan in June 2007. The Odawa Casino Resort directly employs 616 people, 167 of whom are LTBB citizens. Revenues from the Odawa Casino Resort fund approximately 50% of the governmental operations and services for LTBB's 4,350 citizens, including education, human services, housing, health, cultural preservation and enhancement, and elder care. Decl. of LTBB Chief Financial Officer Cheryl Kishigo-Lesky (hereinafter "Kishigo-Lesky Decl.") ¶ 6, which is attached hereto as "Exhibit 1."

Defendant Bay Mills Indian Community ("BMIC") is a federally-recognized Indian tribe located in Chippewa County, Michigan. In 1993, pursuant to IGRA, the State of Michigan and BMIC entered into a Tribal-State Gaming Compact (the "BMIC Compact"), a true and correct copy is attached hereto as "Exhibit 2." Notice of Approved Tribal-State Compacts, 58 Fed. Reg. 63,262 (Nov. 30, 1993). Pursuant to the BMIC Compact, BMIC legally owns and operates two class III gaming facilities (operating as the "Bay Mills Resort & Casinos") in Brimley, Michigan.

For well over a decade, BMIC has unsuccessfully sought to establish an off-reservation casino in Michigan's Lower Peninsula.[1] After its off-reservation casino efforts had been repeatedly rejected by Congress and the courts, BMIC unilaterally opened a casino on off-reservation lands. On or about August 27, 2010, BMIC purchased approximately forty 40 acres of land in the village of Vanderbilt, Michigan, in fee simple (the "Vanderbilt Tract"). A true and correct copy of the recorded deed for the Vanderbilt Tract is attached hereto as Exhibit 3. The Vanderbilt Tract is located more than 125 miles driving distance from the BMIC reservation and a mere thirty-seven (37) miles driving distance from LTBB's Odawa Resort. *See* Declaration of LTBB Geographic Information Systems Director Alan Proctor (hereinafter "Proctor Decl.") and

[1] *See Bay Mills Indian Community v. State*, 626 N.W.2d 169 (Mich.App. 2001); *Bay Mills Indian Community v. Western United Life*, No. 99-1036 (6th Cir. Mar. 8, 2000); H.R. 3412, 106th Cong. (1999); H.R. 1634, 107th Cong. (2001); S. 2986, 107th Congress (2002); H.R. 5459, 107th Cong. (2002); H.R. 831, 108th Cong. (2003); and H.R. 2176, 110th Cong. (2007).

map attached thereto, all of which are attached hereto as "Exhibit 4." On or about November 3, 2010, BMIC, without the approval of the federal, state or local governments, began operating a class III casino in a renovated building located on the Vanderbilt Tract.

The Vanderbilt Casino is located along Interstate 75, a major thoroughfare on which many patrons travel to get to LTBB's Odawa Casino Resort. As such, the Vanderbilt Casino threatens to siphon off patrons who would otherwise visit the Odawa Casino Resort, particularly if an injunction is not issued and the Vanderbilt Casino is thereby allowed to expand its size and amenities, as it currently plans to do. See attached Exhibit 5, Declaration of Dexter McNamara at attached photographs thereto; Michael Jones, *Casino expands in Vanderbilt*, GAYLORD HERALD TIMES, Dec. 7, 2010, *available at* http://articles.petoskeynews.com/2010-12-07/treetops-information-center_25182179. As described more fully below and in the attached declarations, unless enjoined, the Vanderbilt Casino will have a severe and irreparable negative impact on the revenues, health, safety and well-being of LTBB and its members, and will open the floodgates for BMIC and other tribes to unilaterally establish off-reservation casinos on fee simple lands throughout Michigan and across the country.

III. PLAINTIFF'S COMPLAINT

Congress enacted IGRA with the express purpose of establishing a statutory basis for the operation and regulation of gaming by Indian tribes. 25 U.S.C. § 2702. In order to conduct class III (i.e., casino-style) gaming under IGRA, an Indian tribe must, *inter alia*, conduct the gaming on "Indian lands within such tribe's jurisdiction," 25 U.S.C. § 2710(b)(1), (d)(1)(A)(ii), and in conformance "with a Tribal-State compact entered into by the Indian tribe and the State . . . ." 25 U.S.C. § 2710(d)(1).

Plaintiff has filed this action under 25 U.S.C. § 2710(d)(7)(A)(ii), which authorizes an Indian tribe to bring an action in federal court to enjoin gaming conducted in violation of a Tribal-State gaming compact. The Complaint alleges, *inter alia*, that operation of the Vanderbilt Casino violates both IGRA and the BMIC Compact because the Vanderbilt Tract is not "Indian land" as defined in either IGRA or the BMIC Compact.

The Complaint also alleges that the BMIC has violated IGRA, 25 U.S.C. § 2719, which prohibits gaming on off-reservation lands acquired by an Indian tribe after October 17, 1988, unless said lands are located within or contiguous to the boundaries of the reservation of the Tribe on October 17, 1988, or if one of several statutory exceptions to the prohibition applies. The Vanderbilt Tract is not within or contiguous to the BMIC reservation, and does not meet any of the statutory exceptions in Section 2719, and for this additional reason violates IGRA and the BMIC Compact.

IV. ARGUMENT

A. STANDARDS FOR THE ENTRY OF A PRELIMINARY INJUNCTION

A preliminary injunction is warranted pending the outcome of this matter in order to prevent further irreparable harm to LTBB. In determining whether to grant preliminary injunctive relief, the Court must consider and balance the following four factors: (1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable injury in the absence of an injunction; (3) whether an injunction will cause substantial harm to others; and (4) whether an injunction would serve the public interest. *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n,* 23 F.3d 1071, 1076 (6th Cir. 1994); *Keweenaw Bay Indian Cmty v. State of Michigan*, 11 F.3d 1341, 1348 (6th Cir. 1993). The factors need not be established in the conjunctive for an injunction to issue, but rather are to be balanced, with the court carefully considering each factor. *Grand Traverse Band of Ottawa and Chippewa Indians*

v. U.S. Attorney, 46 F.Supp.2d 689, 694 (W.D. Mich. 1999). "Accordingly, the degree of likelihood of success required [to support a grant of a preliminary injunction] may depend on the strength of the other factors [considered]." *In re: DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). As discussed below, these four factors weight in favor of enjoining BMIC's operation of its Vanderbilt Casino, and the preliminary injunction should be issued.

B. LTBB HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

LTBB has a substantial likelihood of succeeding on it claims that the Vanderbilt Casino violates both IGRA and the BMIC Compact because it is not located in Indian lands, and is ineligible to be operated as an off-reservation casino under IGRA.[2]

1. THIS COURT HAS JURISDICTION OVER THIS ACTION

Section 2710(d)(7)(A)(ii) of IGRA grants federal courts jurisdiction over actions initiated by an Indian tribe seeking to, "enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect." This Court has previously ruled that Section 2710(d)(7)(A)(ii) authorizes this Court to entertain suit by an Indian tribe seeking to enjoin the operation of a casino of another Indian tribe that was allegedly not located on "Indian lands" as defined in IGRA and that Tribe's gaming compact. In fact, such ruling involved the same parties to this suit — only at that time it was the Defendant, BMIC, who was seeking to enjoin the operation of a casino owned by LTBB. In *Bay Mills Indian Community v Little Traverse Bay Bands of Odawa Indians*, No. 5:99-CV-88 (W.D. Mich. 1999), this Court ruled:

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[2] In addition, the State of Michigan has notified BMIC that the State considers the Vanderbilt Casino to be unlawful, and has demanded that BMIC immediately cease operation of the Vanderbilt Casino. Letter from S. Peter Manning, Division Chief, Michigan Department of Attorney General, to Kathryn Tierney, Bay Mills Indian Community 2 (Dec. 16, 2010) (the "Manning Letter") attached hereto as "Exhibit 6."

> This is clearly an action initiated by an Indian tribe to enjoin class III gaming activity. Nevertheless, LTBB contends that Plaintiffs have not stated a cause of action under [Section 2710(d)(7)(A)(ii)] because this provision only applies to gaming activity located on "Indian lands" and Plaintiff's entire complaint is premised upon the allegation that the casino is not located on 'Indian lands.'
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> Defendant LTBB's jurisdictional challenge is not convincing. Defendant LTBB has consistently asserted that the Victories Casino land is squarely within the Tribe's reservation under historic treaties, and that because no treaties or statutes have disestablished that reservation, the land is 'Indian land' under IGRA, 25 U.S.C. 2702(4). Given LTBB's assertion that the land is Indian land, and given LTBB's failure to assert any other authority for operating the casino, LTBB's assertion that this Court does not have jurisdiction under Section 2710(d)(7)(A)(ii) has the ring of jurisdictional gamesmanship. This Court is satisfied that it has jurisdiction under Section 2710(d)(7)(A)(ii).

Bay Mills Indian Community, No. 5:99-CV-88, slip op. at 8 (attached hereto as "Exhibit 7"). Similarly, LTBB now seeks to enjoin the Vanderbilt Casino, because it is not located on "Indian lands" as defined in IGRA and the BMIC Compact. Because BMIC (mistakenly) claims that the Vanderbilt Casino is located on "Indian lands," such claim confirms that this suit falls squarely within the jurisdictional confines of Section 2710(d)(7)(A)(ii).

2. THE VANDERBILT CASINO IS NOT LOCATED ON INDIAN LANDS AS DEFINED IN IGRA AND THE BMIC COMPACT

IGRA permits Class III gaming only when conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State, and only on "Indian lands," defined in IGRA as:

> (A) all lands within the limits of any Indian reservation; and
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4). The BMIC Compact adopts a nearly identical restriction,[3] and further requires BMIC to, "license, operate, and regulate all Class III gaming activities pursuant to . . . *IGRA, and all other applicable federal law*." Ex. 2, BMIC Compact, at 5 (emphasis added).

The Vanderbilt Tract is located in the village of Vanderbilt, Michigan, over 120 miles south of the BMIC reservation boundaries. Ex. 4, Proctor Decl. It is undisputed that the Vanderbilt Tract is not located on land held by the United States in trust for the benefit of BMIC. Memorandum from Bay Mills Indian Community to National Indian Gaming Commission, at 5-6 (May 26, 2010) (the "BMIC Memorandum"), attached hereto as "Exhibit 8."

Because the Vanderbilt Casino is not located on reservation or trust lands, it can only be operated legally under IGRA if it is located on land "held by any Indian tribe or individual subject to restriction by the United States against alienation" ("restricted fee lands"), "over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4)(B). The United States has determined that a restriction against alienation is not automatically bestowed upon parcels of land that an Indian tribe acquires in fee simple, stating "[w]hen a tribe purchases new lands off-reservation and those lands are held by the tribe in fee, then the land is not, without more, automatically subject to restrictions against alienation." Memorandum from David Bernhardt, Interior Solicitor, to Dirk Kempthorne, Sec'y of the Interior (the "Bernhardt Memorandum"), at 6 (Jan. 18, 2009), attached hereto as "Exhibit 9." Were it otherwise, any of our Nation's 565 federally-recognized Indian tribes could unilaterally purchase land on the open market located virtually anywhere, and such land would automatically be restricted from alienation, and

[3] The BMIC Compact also permits gaming on lands contiguous to the BMIC reservation, which is not at issue here. Ex. 2, BMIC Compact, at 3.

arguably eligible for gaming under IGRA.[4] Though BMIC apparently relies on such theory, it is not the law.

The title records held by the Ostego County Registrar, which is where the Vanderbilt Casino is located, do not state that BMIC is restricted from alienating the Vanderbilt Tract, nor has the federal government taken any action to bestow restricted fee status upon the Vanderbilt Tract. *See* Ex 3, Deed to Vanderbilt Tract.

According to the BMIC Memorandum, BMIC claims that the Vanderbilt Tract constitutes "Indian lands" for purposes of IGRA based solely on the fact that the land was acquired with proceeds from the Michigan Indian Land Claims Settlement Act, Pub. L. 105-143, 111 Stat. 2652 (1997) (the "Settlement Act"). Ex. 8, BMIC Memorandum. For numerous reasons, BMIC is simply wrong.

Enacted by Congress in 1997, the purpose of the Settlement Act was to effectuate the payment of Indian Claims Commission ("ICC") judgments[5] in 1975 in favor of the Ottawa and Chippewa Indians of Michigan. The stated purpose of the Settlement Act was, "to provide for the fair and equitable division of the judgment funds among the beneficiaries and to provide the opportunity for the tribes to develop plans for the use or distribution of their share of the funds." Pub. L. 105-43, § 102(b).[6]

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[4] The tribe would need also to exercise governmental power over such lands as a prerequisite to meeting the definition of Indian lands under IGRA, 25 U.S.C. 2703(4), and also meet one of the exceptions to IGRA's general prohibition of gaming on lands acquired after October 17,1988. 25 U.S.C. § 2719. *See infra*, at § c.

[5] There are numerous Settlement Acts implementing Indian Claims Commission Judgments. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §. 5.06[3]-[7] (2005 Ed.).

[6] The Settlement Act was enacted under the authority of the Distribution Judgment Funds Act, 25 U.S.C. §§ 1401-1407 (2010), which required the Secretary of the Interior to prepare and submit to Congress a plan for distribution that was in the best interest of all those entitled to receive a share of the funds. The funds Congress appropriated to pay these ICC judgments had been held by the DOI pending "a division of the funds among the beneficiaries in a manner

Section 107 of the Settlement Act was comprised of a "Plan for Use and Distribution of Bay Mills Indian Community Funds," which required BMIC to set aside twenty percent of its share of the judgment funds into a fund known as a "Land Trust." The sole trustee of the Land Trust was to be the governing body of the BMIC, the Executive Council. *Id.*, at Pub. L. 105-43, § 107(a)(2). Section 107(3) of the Settlement Act provides:

> The earnings generated by the Land Trust shall be used exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange. Any land acquired with funds from the Land Trust shall be held as Indian lands are held.[7]

There is no indication that the purpose of this section was to permit BMIC to acquire lands located far from its reservation boundaries, much less authorize BMIC to unilaterally designate distant lands for gaming. This is evidenced by the plain and unambiguous language of the Settlement Act. Section 107(a)(3) states that "[t]he earnings generated by the Land Trust ***shall*** be used ***exclusively*** for improvements on tribal land **or** the ***consolidation and*** enhancement of tribal landholdings through purchase or exchange." (emphasis added). This provision mandates that Land Trust proceeds only be used for either: 1) improvements on existing tribal land, or 2) consolidation and enhancement of tribal landholdings. The use of the conjunction "or" after the term "improvements," verses "and" between "consolidation" and "enhance," makes the latter a single category. This construction is consistent with the Bureau of Indian Affairs' interpretation of this section. *See* Letter from Larry Morrin, Regional Director, Bureau of Indian Affairs, to L. John Lufkins, President, Bay Mills Indian Community 4 (Sept. 10, 2002) (the "Morrin Letter") ("The Act requires a determination that the land to be purchased or exchanged

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acceptable to the Tribes pending the development of plans for the use and distribution of the respective tribes' share." Pub. L. 105-143, § 102(a)(2).

[7] As discussed below, in earlier drafts of the Settlement Act the last sentence of this section reads as follows: "*Any land so acquired shall be held in trust by the United States for the benefit of the Bay Mills Indian Community.*" H.R. 105-352, 105th Cong. (1997) (emphasis added).

is for the 'consolidation and enhancement of tribal land holdings'"), which is attached hereto as "Exhibit 10."[8] The purchase of distant off-reservation parcels, be they in Vanderbilt, Port Huron, or some distant part of the country, is not an option under the plain language of Section 107(a)(3). Indeed, such an acquisition *fragments*, rather than *consolidates*, BMIC's land holdings, and as such, BMIC violated Section 107(a)(3) of the Settlement Act by purchasing the Vanderbilt Tract with earnings from the Land Trust.[9] At a minimum, this acquisition cannot qualify to be "held as Indian lands are held," if such term means anything other than fee simple. For this reason alone, the lands cannot constitute "Indian lands" under IGRA or the BMIC compact.

Even assuming that the Settlement Act permitted BMIC to purchase the Vanderbilt Tract with Land Trust proceeds, this parcel still does not constitute restricted fee lands eligible for gaming under IGRA or the BMIC Compact. The language of Section 107(a)(3), on its face, does not support the proposition that lands unilaterally acquired with Land Trust proceeds automatically become subject to federal restrictions against alienation. The term "Indian lands" (as used in the phrase, "shall be held as Indian lands are held") is not defined in the Settlement Act. Generally, lands located off-reservation may be "held" by an Indian tribe in one of several ways: fee simple, trust, or (in rare instances) restricted fee status. The latter two categories require federal superintendence, while fee simple lands do not. *See United States v Bowling*, 256

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[8] Notably, this document indicates that BMIC is required to obtain a "determination" from the BIA that the lands to be acquired meet this purpose. There is no evidence that BMIC ever obtained such a determination.

[9] The purpose of Section 107(a)(3)'s purpose to consolidate BMIC's land holdings is consistent with an overarching federal policy to consolidate tribal land holdings. *See, e.g.*, Indian Lands Consolidation Act, 25 U.S.C. §§ 2201-2219 (2010); *Hodel v Irving*, 481 U.S. 704, 712 (1987) ("We agree with the government that encouraging the consolidation of Indian lands is a public purpose of high order. The fractionation problem on Indian reservations is extraordinary and may call for dramatic action to encourage consolidation. . .").

U.S. 484, 486-87 (1921). Because the Settlement Act does not specify (much less require) that land acquired with the proceeds from the Land Trust be held in trust or restricted status, there can be no presumption that lands acquired with such funds automatically take on trust or restricted status without further action by Congress or the Department of Interior to impose federal superintendence over such lands.

Also, as a factual and legal matter, tribal lands in Michigan have *never* been held in restricted fee status. Individual tribal members of only two Michigan Indian tribes, the Keweenaw Bay Indian Community and the Saginaw Chippewa Indian Tribe hold restricted fee lands based on allotments under their respective tribal treaties, but no tribe in Michigan, as a tribal government, holds restricted fee lands. Indian tribes in Michigan *have* held lands in fee simple, however, and certainly held lands in fee simple status at the time of the enactment of the Settlement Act. For example, the Sault Ste. Marie Tribe of Chippewa Indians held fee simple land in downtown Detroit, Michigan for the state-regulated Greektown Casino. Currently, most of the tribes have various holdings in fee simple which range from 1,000 acres at the Grand Traverse Resort by the Grand Traverse Band of Ottawa & Chippewa Indians, to a large race track in Muskegon by the Little River Band of Ottawa Indians, to small, taxable holdings that have not yet been placed into trust. Given this history, there can be no presumption that Congress intended that lands acquired by BMIC with proceeds from the Settlement Act automatically be held in restricted fee status as opposed to in fee simple. This conclusion is consistent with the Bureau of Indian Affairs' construction of the Settlement Act:

> The use of the language, 'Any land acquired with funds from the Land Trust shall be held as Indian Lands are held' is not a clear statement . . .. Indian lands may be held in a variety of ways, including, in trust by the United States, subject to restrictions on alienation, *or owned in fee by the Indian Tribe*.

Ex. 10, Morrin Letter 3-4 (emphasis added).

Also, an examination of other, contemporaneous federal legislation reveals that, when Congress intends that an Indian Tribe acquire land in restricted fee status, it uses the term "restricted fee" on the face of the statute. For example, the Seneca Indian Land Claims Settlement Act, enacted in 1990, provides that lands acquired by the Seneca Nation pursuant to that Act, "*shall be held in restricted fee status by the Seneca Nation.*" Seneca Nation (New York) Land Claims Settlement, 25 U.S.C. § 1774f(c) (2010) (emphasis added).

It is also worth noting that, under the Seneca Indian Land Claims Settlement Act, lands acquired by the Seneca Nation could only be held in restricted fee status after the state and local governments had received notice and an opportunity to comment, *and* the Secretary had thirty (30) days after the close of the comment period to determine that the land should not be placed in restricted fee status. 25 U.S.C. § 1774f(c). By contrast, state and local governments were given no notice or opportunity to comment on BMIC's acquisitions under the Michigan Land Claim Settlement Act, nor did Congress give the Secretary any role whatsoever in the acquisition. Considering the potential consequences of designating land as restricted fee, it defies credulity to believe that Congress would permit BMIC to do so unilaterally, without similar opportunities for input from federal, state and local governments. Thus, to find that the phrase "shall be held as Indian lands are held" must mean restricted fee status, as opposed to the more commonplace fee simple status, defies logic, reason and contemporary congressional policy and practice.

The legislative history of the Settlement Act also indicates that lands unilaterally acquired by BMIC with Land Trust proceeds would not automatically become restricted fee lands. As originally drafted, Section 107(a)(3) of the Settlement Act provided that lands acquired by BMIC with proceeds from the Land Trust "*shall be held in trust by the United States for the Bay Mills Indian Community.*" H.R. 105-352, 105th Cong. (1997) (emphasis added). This specific

language was scrapped, however, in favor of the more generic, "shall be held as Indian lands are held." The obvious effect of the change was to eliminate any federal trust responsibility for such lands, thus indicating Congress' desire that the federal government *not* automatically have ongoing superintendence responsibility over lands unilaterally acquired by BMIC with Land Trust proceeds. In fact, the change from the original language appears to have been in response to an objection to the original, mandatory trust language from the Assistant Secretary for Indian Affairs. Letter from Ada Deer, Assistant Sec'y-Indian Affairs, to Hon. Don Young, Chairman, Committee on Resources 3 (July 15, 1997), attached hereto as "Exhibit 11." After the Assistant Secretary's objection, the last sentence of Section 107(a)(3) in the draft legislation was changed to read, "Any land acquired with funds from the Land Trust shall be held as Indian Lands are held." Significantly, *after* the draft legislation was changed, the Acting Assistant Secretary-Indian Affairs appears to have suggested that this revised language be *deleted* "*because it is unnecessary.*" Letter from Michael J. Anderson, Assistant Sec'y-Indian Affairs, to Hon. Senator Ben Nighthorse Campbell 2 (Nov. 12, 1997)(emphasis supplied), attached hereto as "Exhibit 12." This suggestion is consistent with the notion that the phrase, "shall be held as Indian lands are held" means that the lands will be held in fee simple unless there is further action by Congress or the Secretary of the Interior to designate the lands as trust or restricted fee lands. In other words, this language was intended to mean that *there would not be automatic federal supervision over lands unilaterally acquired by BMIC with proceeds from the Land Trust.* Such lands thus lack federal superintendency, and therefore cannot constitute restricted fee lands. *Oklahoma Tax Comm'n v Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991).

Section 107(a)(6) also reflects the conclusion that Congress wanted to avoid the automatic imposition of federal supervisory responsibility over lands acquired pursuant Section 107(a)(3), which provides:

> Notwithstanding any other provision of law, the approval of the Secretary of any payment from the Land Trust shall not be required and *the Secretary shall have no trust responsibility for the investment, supervision, administration, or expenditure of funds from the Land Trust.*

(emphasis supplied). By expressly prohibiting the imposition of federal "trust responsibility" and "supervision" over the expenditure of Land Trust proceeds, Congress made it clear that such expenditures were to impose no additional duties on the federal government. In fact, the Congressional Budget Office ("CBO") statement accompanying the legislation estimated that the Settlement Act would "have no impact on the federal budget . . . and would not affect state and local governments." H.R. REP. NO. 105-332, at 10-11 (1997), attached hereto as "Exhibit 13." Had Congress intended to grant BMIC the unilateral authority to designate off-reservation land as a casino site, and thereby impose substantial new duties upon NIGC, the CBO would surely have noted those increased costs in its estimate.[10] The CBO would have also noted the substantial costs to the federal government resulting from the enforcement of federal criminal laws to the newly acquired lands. Additionally, the impacts to state and local governments from Indian gaming are well-documented, and include removal of lands from state and local tax rolls, and increased costs for state and local governments from additional traffic, law enforcement and

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[10] This point becomes even clearer when considering that, in enacting IGRA, Congress was particularly sensitive to the notion of Indian tribes acquiring off-reservation lands for gaming purposes. This sensitivity is revealed by the fact an entire section of IGRA was enacted to prohibit Indian tribes from gaming on after-acquired lands except in very limited circumstances, and *only then* after a rigorous review by the Secretary of the Interior, with input (and in some instances, concurrence) from State and local governments (whose jurisdictional authority would be effectively revoked), *and* only then if such federal action could survive the rights of State and local governments to judicial review, if exercised, under the Administrative Procedures Act. *See* 25 U.S.C. § 2719.

emergency services, to name a few. Surely the CBO would have noted such impacts had Congress anticipated that BMIC could use Land Trust proceeds to unilaterally remove land from state and local jurisdiction and establish a casino on off-reservation lands located far from BMIC's reservation. However, the CBO did no such thing, confirming that Congress had no intention of permitting BMIC to unilaterally designate land as restricted fee land.

Considering the tremendous impacts that result from granting BMIC unilateral authority to remove land from state and local jurisdiction and operate a casino on such land, and considering that the Settlement Act and its legislative history are completely devoid of *any* reference to gaming, there is no possibility that Congress intended that BMIC be able to unilaterally establish a casino on off-reservation land purchased with Settlement Act earnings. Because the Vanderbilt Casino is not located on Indian land as defined in IGRA and the BMIC compact, it is illegal, and must be enjoined from further operation.

a. BMIC Does Not Exercise Governmental Power Over the Vanderbilt Tract.

Even assuming that the Vanderbilt Tract (the land on which the Vanderbilt Casino is located) could be considered restricted lands under IGRA, BMIC does not "exercise governmental power," over the Tract and, thus, the Tract does not constitute "Indian lands" under Section 2703(4)(B) of IGRA.

In order to exercise governmental power over a particular parcel, an Indian tribe must first have jurisdiction over the land. *Miami Tribe of Oklahoma v. United States*, 927 F.Supp. 1419, 1423 (D. Kan. 1996); *Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001). While jurisdiction is presumed for any federally-recognized tribe acting within the limits of "Indian Country," the Vanderbilt Tract is not Indian Country. *South Dakota v. Yankton Sioux*

Tribe, 522 U.S. 329, 341 (1998). "Indian Country" is defined by 18 U.S.C. § 1151 (2010) as follows:

> (a) All lands within the limits of an Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, including rights of way running through the reservation,
> (b) All dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territories thereof, and within or within the limits of a state, and
> (c) All Indian allotments, the Indian titles to which have not been extinguished including rights of way running through the same.

The Vanderbilt Tract does not fall within any of these definitions. The Supreme Court has held that Indian Country also includes land "validly set apart for the use of the Indians as such, under the superintendence of the [federal] Government." *Oklahoma Tax Comm'n*, 498 U.S. at 511 (citations omitted). "[L]and is 'validly set apart for the use of Indians as such' only if the federal government takes some action indicating that the land is designated for use by Indians. Superintendency over the land requires the active involvement of the federal government." *Buzzard v Oklahoma Tax Comm'n,* 992 F.2d 1073, 1076 (10th Cir. 1993). In *Buzzard*, the United Keetoowah Band of Cherokee Indians ("UKB") maintained that certain lands that the Tribe held in fee simple constituted Indian country because the Tribe's federally-approved charter prohibited the Tribe from alienating the land without approval of the Secretary of the Interior. *Id.* at 1075. The Tenth Circuit rejected this argument, holding:

> A restriction against alienation requiring government approval may show a desire to protect the UKB from unfair dispositions of its land, but does not of itself indicate that the federal government intended the land to be set aside for UKB's use.
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> . . . The federal government has not retained title to this land or indicated that it is prepared to exert jurisdiction over the land. At most it has agreed to approve transactions disposing the land. But the ability to veto a sale does not require the sort of active involvement that can be described as superintendence of the land. . .
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> Consideration of the consequences of determining that land is Indian country

> supports this conclusion. Within Indian country the federal and tribal governments have exclusive jurisdiction over the conduct of Indians and interests of Indian property. This limits a state's criminal jurisdiction over activities that occur in Indian country and involve Indians, *see* 18 U.S.C. §§ 1152-1153, and its authority to tax those activities. If the restriction against alienation were sufficient to make any land purchased by the UKB Indian country, the UKB could remove land from state jurisdiction and force the federal government to exert jurisdiction over that land without either sovereign having any voice in the matter.

Id., at 1076-77 (citations omitted). The Vanderbilt Tract is legally in the same position as the land at issue in *Buzzard*. As in *Buzzard,* the federal government has not retained title to the Vanderbilt Tract or indicated that it is prepared to exert jurisdiction over the land. Nor has the federal government indicated that it would veto the sale of the Vanderbilt Tract by BMIC, or in any way indicated that it will exercise any superintendency over the land. As in *Buzzard*, there is absolutely no indication that the federal government intended that BMIC, simply by purchasing fee simple lands with proceeds from the Settlement Act, could unilaterally remove land from state jurisdiction and force the federal government to exert jurisdiction over the Vanderbilt Tract without either sovereign having a voice in the matter. Accordingly, the Vanderbilt Tract is not Indian Country, and BMIC does not presumptively have jurisdiction over it.

Even assuming for the sake of argument that BMIC somehow has jurisdiction over the Vanderbilt Tract, under IGRA it is not enough that a tribe can exert primary jurisdiction over the land, but in addition, the tribe must affirmatively exercise its governmental power over the land. *Citizens Against Casino Gambling in Erie County v. Hogen*, 704 F.Supp.2d 269, 276 (W.D. N.Y. 2010). Although the NIGC has not formulated a uniform definition of "exercise of governmental power," it makes decisions regarding that question on a case-by-case basis,[11] federal courts have provided useful guidance on the question of "exercise of governmental powers." For example, in

[11] National Indian Gaming Comm'n, Definitions Under the Indian Gaming Regulatory Act, 57 Fed Reg. 12.382, 12.388 (1992) (to be codified at C.F.R. pt. 502).

Rhode Island v Narragansett Indian Tribe, 19 F.3d 685, 703 (1st Cir. 1994), the First Circuit held that governmental power involves "the presence of concrete manifestations of authority." Examples of concrete manifestations of governmental authority include the establishment of a housing authority, administration of health care programs, job training, public safety, conservation, and other governmental programs. *Id.*

In this case, there is no concrete manifestation of governmental power by BMIC over the Vanderbilt Tract. Indeed, BMIC manifested no authority whatsoever over the Vanderbilt Tract prior to purchasing the parcel just a few months ago. BMIC will likely claim that it exercises governmental power over the Vanderbilt Tract through its gaming ordinance, but such claim is circular, at best. If an Indian Tribe could satisfy the "exercise of governmental power" requirement solely by regulating a casino on newly acquired lands, then this provision would be meaningless.

Accordingly, even if the Vanderbilt Tract could be considered restricted lands, it cannot constitute Indian lands under IGRA, 25 U.S.C. § 2703(4), because BMIC does not exercise governmental power over it.

3. BMIC IS PROHIBITED FROM GAMING ON THE VANDERBILT TRACT UNDER SECTION 20 OF IGRA

In enacting IGRA, Congress was concerned about Indian tribes' ability to acquire off-reservation lands for the purpose of gaming, thereby creating a nationwide proliferation of tribal casinos. To avoid this situation, Congress enacted a provision which prohibits tribal gaming on lands acquired after the enactment of IGRA, with a few very narrowly-defined exceptions. 25 U.S.C. § 2719. The exceptions ordinarily involve the participation and input of state and local governments, and require the approval of the federal government as a prerequisite to the operation of such an off-reservation casino. Section 2719 provides, in relevant part:

(a) Prohibition on lands acquired in trust by Secretary
Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and--
(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions
(1) Subsection (a) of this section will not apply when—
(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or
(B) lands are taken into trust as part of—
(i) a settlement of a land claim,
(ii) the initial reservation of an 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.

25 U.S.C. § 2719.

None of the exceptions listed in Section 2719 apply to the Vanderbilt Tract, and BMIC thus is in violation of IGRA and the BMIC Compact. As an initial matter, there can be no dispute that the Vanderbilt Tract does not qualify under the exceptions contained in Section 2719(a), the two-part determination exception in 2719(b)(1)(A), the "Initial Reservation" exception in 2719(b)(1)(B)(ii), or the "Restored Lands" exception contained in 2719(b)(1)(B)(iii). BMIC may claim that the Vanderbilt Tract qualifies for gaming under the "Settlement of a Land Claim" exception contained in Section 2719(b)(1)(B)(i). *See* Ex. 8, BMIC Memorandum at 22, n.18. That provision permits gaming on lands that are acquired after the

enactment of IGRA as part of the settlement of a land claim. It is clear, however, that the Vanderbilt Tract was not acquired as part of the settlement of a land claim. Instead, the lands were, at best, acquired by BMIC with proceeds of a judgment that was entered by the ICC nearly forty (40) years ago, pursuant to a statute that did not itself settle any land claims, but instead merely addressed how prior ICC judgment funds would be distributed. Thus, the Vanderbilt Tract was not acquired ***as part of*** the settlement of a land claim.

The Department of Interior's regulations implementing Section 2719 also make clear that the Vanderbilt Tract does not qualify for gaming under the land claim settlement exception. The regulations provide, in relevant part:

> **When can gaming occur on newly acquired lands under a settlement of a land claim?**
>
> Gaming may occur on newly acquired lands if the land at issue is either:
> (a) Acquired under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, in legislation enacted by Congress; or
> (b) Acquired under a settlement of a land claim that:
> (1) Is executed by the parties, which includes the United States, returns to the tribe all or part of the land claimed by the tribe, and resolves or extinguishes with finality the claims regarding the returned land; or
> (2) Is not executed by the United States, but is entered as a final order by a court of competent jurisdiction or is an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue.

25 CFR § 292.5. Even assuming that the Vanderbilt Tract was purchased with proceeds from the Settlement Act, the Act itself did not "resolve[] or extinguish[] with finality" any land claim of BMIC, nor did it result "in the alienation or loss of possession" of any lands claimed by BMIC. Instead, the Act merely distributed funds from a prior ICC judgment —funds that had been appropriated by Congress decades earlier. Pub. L. 105-143 § 102.

Any other conclusion would lead to a massive expansion of off-reservation gaming, as there are literally hundreds of Indian land claims settlements that involve the distribution of millions of dollars of funds previously appropriated by Congress.[12] If all that is required to render fee simple land eligible for gaming is that an Indian tribe use ICC judgment proceeds to acquire lands, there will surely be a rush by some Indian tribes to use such proceeds for the purchase of off-reservation lands near populated areas for the purpose of operating casinos. This is precisely what Congress intended to avoid in enacting Section 2719.

LTBB anticipates that BMIC will claim that Section 2719 only applies to "trust lands," and because the Vanderbilt Tract is not in trust, it is not subject to the prohibitions and protections for surrounding tribes and communities contained in Section 2719. *See* Ex. 8, BMIC Memorandum at 18-22. It would be contrary to the intent of Congress to permit BMIC to evade the protections for surrounding communities that are part of both the trust acquisition process and Section 2719 through a dubious loophole, however. In fact, the Secretary of the Interior concluded as much in a 2002 decision approving gaming on restricted lands of the Seneca Nation of New York:

> We have reviewed whether Congress intended, by using the words, "in trust" in Section 20 of IGRA, to completely prohibit gaming on lands acquired in restricted fee status by an Indian tribe after October 17, 1988. I cannot conclude that Congress intended to limit the restriction to gaming on after-acquired land to only *per se* trust acquisitions. . . . To conclude otherwise would arguably create unintended exceptions to the Section 20 prohibitions and undermine the regulatory regime prescribed by IGRA.

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[12] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 5.06[3]-[7]. The total number of petitions/complaints filed under the ICCA was 370; these were separated into 617 dockets. (Final Report of the Indian Claims Commission at 7-8, Library of Congress Control Number 79602155.) Hundreds of decisions rendered by the ICC and the Court of Federal Claims involved the payment of damages to Indian tribes to resolve land claims, and required either a Secretarial implementation of the decision or a separate Act of Congress for distribution of funds.

Letter from Sec'y of the Interior Gayle Norton to Hon. Cyrus Schindler 7 (Nov. 12, 2002) (the "Norton Letter"), attached hereto as "Exhibit 14." The NIGC has also previously concluded that Section 2719 applies to restricted fee lands:

> Although section 2719 of IGRA refers only to trust land, the NIGC interprets this section to include land held by an Indian tribe in restricted fee. . . . If section 2719 only applied to trust lands, Tribes could avoid the prohibition against gaming on lands acquired after October 17, 1988, by taking land into restricted fee rather than having the United States take it into trust. It is unlikely that Congress intended to create such an exception.

Seneca Nation of Indians Class III Gaming Ordinance, Indian Land Op. NIGC 4 (July 2, 2007), attached hereto as "Exhibit 15." This NIGC Opinion was upheld by the Court in *Citizens Against Casino Gambling in Erie County v Hogen*, No. 07-CV-0451S, 2008 WL 2746566 (W.D.N.Y. July 8, 2008) ("*CACGEC II*"):

> ***Given the existing state of the law and Congress's careful construction, the Court finds that Congress intended to prohibit gaming on all after-acquired land,*** unless one of the section 20 exceptions applies. . . .Where "the literal application of a statute will produce a result demonstrably at odds with the intent of the drafters ... the intention of the drafters, rather than the strict language, controls." *Ron Pair Enters.*, 489 U.S. at 242 (internal citation and quotation marks omitted).

Id. at *53-54.[13]

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[13] Despite the longstanding position of the DOI and the NIGC that Section 2719 applies to restricted fee lands, on May 20, 2008, the DOI reversed course on the issue of Section 2719's application to restricted fee lands. Gaming on Trust Lands Acquired after October 17, 1988, 73 Fed. Reg. 29.354, 29.376-77 (May 20, 2008) (to be codified at C.F.R. pt. 292). *See also* Ex. 9, Bernhardt Memorandum; Letter from P. Hogen, Chairman, NIGC, to Hon. Barry E. Snyder (Jan. 20, 2009) (the "Hogen Letter"), attached hereto as "Exhibit 16." Clearly this sudden reversal is entitled to little deference from this Court. Where an agency has "chang[ed] its course, [it] must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Shays v. U. S. Federal Election Com'n*, 508 F.Supp.2d 10, 51-52 (D.D.C. 2007)(citation omitted). In this instance, neither DOI nor NIGC has provided a legitimate, reasoned analysis for their change of course. The basis for changing course is that the plain language of Section 2719 only applies to trust lands. Ex. 9, Bernhardt Memorandum, at 4; Ex. 16, Hogen Letter, at 16-20. However, this conclusion lacks credibility, and is not well-reasoned, in light of the fact that DOI and NIGC had previously concluded that this same

BMIC's claim that Congress intended the term "shall be held as Indian lands are held" authorizes BMIC to *unilaterally* remove land from State and local jurisdiction, and thereby impose substantial supervisory burdens on the federal government, and completely circumvent IGRA's prohibition of gaming on newly-acquired off-reservation lands, goes far beyond any reasonable construction of the Settlement Act.

C. LTBB WILL SUFFER IRREPARABLE INJURY IN THE ABSENCE OF AN INJUNCTION.

LTBB will suffer irreparable injury resulting from BMIC's illegal operation of the Vanderbilt Casino. A plaintiff satisfies the irreparable injury requirement for an injunction by demonstrating "a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Irreparable harm occurs when monetary damages are either difficult to ascertain or would be inadequate. *Mobil Oil Corp. v. Henriksen Enterprises, Inc.*, 490 F.Supp. 74, 77 (W.D. Mich. 1980).

In addition to financial injury resulting from lost profits due to the proximity of the Vanderbilt Casino to the Odawa Casino Resort, LTBB suffers and will continue to suffer from non-compensable injury. First and foremost, LTBB faces and will continue to face loss of business in the form of lost market share, loss of both new and existing customers, loss of goodwill, and harm to its reputation. These types of injuries have been consistently recognized as irreparable. *See, e.g., Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992) ("Loss of customer goodwill and fair competition can support a finding of irreparable harm. Such losses amount to irreparable injury because the resulting damages are difficult to calculate."); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th

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provision was ambiguous. Ex. 14, Norton Letter, at 7. The better reasoned conclusion, set forth in the *CACGEC II*, is that Section 2719 applies to restricted fee lands.

Cir. 1994) (threat of permanent loss of customers and potential loss of goodwill support a finding of irreparable harm); *R.J. Reynolds Tobacco Co. v. Phillip Morris Inc.*, 60 F.Supp.2d 502, 509 (M.D. N.C. 1999) (loss of market share, threatened loss of existing and potential customers are types of irreparable injury); *i4i Ltd. Partnership v. Microsoft Corp.*, 670 F.Supp.2d 568, 600 (E.D. Texas 2009) ("This continuing loss of market share and brand recognition is the type of injury that is both incalculable and irreparable."). Directly related to these injuries, LTTB also faces long-term and severe non-financial injuries related to the mental health and wellness of tribal members, increased demand for human services resources, and decreased supply and strain on existing health and human services resources. The non-financial injuries are irreparable as monetary damages would be inadequate.

First, courts have held that a loss of market share to constitute an irreparable harm that cannot be measured. *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, 290 F.3d 578, 596 (3rd Cir. 2002); *Microaire Surgical Instruments, LLC*, --- F.Supp.2d at *21; *Freedom Holdings v. Spitzer*, 408 F.3d 112, 114-115 (2nd Cir. 2005); *i4i Ltd. Partnership v. Microsoft Corp.*, 670 F.Supp.2d 568, 600 (E.D. Texas 2009); *Grand River Enterprise Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 67 (2nd Cir. 2007). LTBB obtained an independent analysis prepared by Alea Advisors, LLC, which sets forth the impacts that a potential new competitor would have on the Odawa Casino Resort. ALEA ADVISORS, LLC, ASSESSMENT OF IMPACT OF A NEW CASINO IN VANDERBILT, MI ON ODAWA CASINO RESORT AND LTBB (Dec. 17, 2010) (the "Alea Report"), attached hereto as "Exhibit 17." As the Alea Report demonstrates, LTBB will suffer irreparable harm resulting from the loss of market share, significant decline in gaming revenues, and the loss of customer loyalty and goodwill because of the establishment of the Vanderbilt Casino. The Alea Report concludes that 91.6%, of LTBB's

customer base will be threatened by the Vanderbilt gaming venue. *Id.* at 17. Due to its challenging location away from direct access to a major interstate, LTBB has focused on developing customer loyalty as the basis of its marketing strategy. *Id.* at 9. Indeed, 78% of all gaming at the Odawa Casino is attributed to known players, and "very loyal" patrons account for 22% of LTBB gaming revenue. *Id.* at 9, 26. The Alea Report concludes that LTBB's developed customer loyalty is fundamentally threatened by the Vanderbilt Casino. *Id.* at 14. All three categories of LTBB's loyal customer base—immediate area, 60 mile drive area, and beyond 60 miles—are threatened by the Vanderbilt Casino's advantageous location on a major interstate highway. *Id.* The Vanderbilt Casino "resides squarely in the midst of [LTBB's] current market." *Id.* In addition, the Vanderbilt Casino's location on an interstate highway puts it "in an ideal position to intercept and capture . . . traffic that would otherwise go to the Odawa Casino" from locations south of Petoskey. *Id.* at 20. The Alea Report presents the analogous case of the decline of the Reno market based on the location of another casino that intercepted customers en route to Reno from the primary populated feeder market of San Francisco. *Id.* at 20, 21. It is "simply unlikely that a patron would consistently drive past one casino to get to another further away." *Id.* at 20. Even though the Reno market, like LTBB, had invested millions of dollars in cultivating customer loyalty, patrons "nonetheless diverted their gaming play to a more proximate casino." *Id.* at 21. Such a loss of customer loyalty is inevitable and LTBB will suffer irreparable harm by the loss of customer loyalty and gaming revenue. The Alea Report estimates that 60% of current gaming revenue of LTBB will be lost due to the more advantageous location of the Vanderbilt Casino. *Id.* at 30. If the Vanderbilt Casino continues to exist, this loss to LTBB will be continuing and increasing. *Id.* at 33. The Alea Report further concludes that "[D]espite all of [LTBB's] effort, time and money, location still trumps all. . . . [O]nce a

customer's gaming pattern has been disrupted by a second casino, that customer loyalty has suffered irreparably. And once a pattern of loyalty to a property is broken, it is very difficult to re-establish." *Id.*

The unfair advantage gained by BMIC from illegal competition cannot be measured. *See Basicomputer Corp.v. Scott*, 973 F.2d 507, 512 (Loss of fair competition resulting from breach of non-competition covenant likely constitutes irreparable harm). Unfair competition and unfair advantage are by their nature not measurable in standard business indexes. Because BMIC intends to expand the size of its current illegal casino, the net potential consequent impact on LTBB is not only devastating, but also irreparable. ALEA ADVISORS, LLC, *supra*, at 23, 26, 32 (finding an immediate impact of millions of dollars based on the decline of gross gaming revenue and a continuing destructive impact that is not measurable).

In addition, the Vanderbilt Casino will cause long-term severe deleterious impacts to LTBB members and their families. Also, the strain on LTBB health and human service programs, particularly substance abuse services, from layoffs caused by illegal competition, are irreparable and cannot be measured. Decl. of LTBB Health Director Sharon Sierzputowski, attached hereto as "Exhibit 18"; Decl. of LTBB Substance Abuse Department Director/Manager Cheryl Samuels, Ph.D., attached hereto as "Exhibit 19"; Decl. of LTBB Human Services Director Denneen Smith, attached hereto as "Exhibit 20"; Ex. 1, Decl. of Kishigo-Lesky. The revenue required to meet these continuing needs of LTBB members is directly dependent upon the success of the Odawa Casino Resort. *Id.*, ¶ 9.

Recent history demonstrates the irreparable injury that would accompany LTBB job losses that result from the illegal Vanderbilt Casino. In August of 2008, LTBB laid off 100 employees of the Odawa Casino Resort. Ex. 20, Decl. of Smith, ¶ 6. Substance abuse and

mental health charts maintained by the LTBB Substance Abuse Department show, following the layoffs, an over 200% increase in services provided in 2008 and a nearly 1000% increase in services from the pre-layoff numbers. Ex. 19, Decl. of Samuels, ¶ 5. The requests for services have remained at a high-level, consistent with long-term effects of economic downturns. *Id.* Those affected by the layoffs suffered a variety of mental health problems, including an extremely high rate of suicidal thoughts, family break-up, increased stress, alcohol and drug use, Mixed Anxiety Disorder, and depression. *Id.* LTBB's Contract Health Service referrals and corresponding costs also increased by approximately 250% from the pre-layoff period. Ex. 18, Decl. of Sierzputowski, ¶ 6 Similar to the increase in health costs, human services, particularly child protective services, increase as a result of unemployment. Following the 2008 layoffs at the Odawa Casino Resort, the LTBB Department of Human Services faced an over 500% increase in children's protective service referrals, an over 250% increase in preventive/crisis intervention referrals, and a 40% increase in referrals for families and individuals seeking daycare assistance payments, low income energy assistance and USDA food commodity assistance. Ex. 20, Decl. of Smith, ¶¶ 7-8. A common element of the referrals was the recent loss of employment from the Odawa Casino Resort. *Id.*, ¶ 6

Clearly LTBB members will suffer irreparable harm, as manifested by specific indexes of health, human services and substance abuse related events as a direct result of LTBB's unemployment brought about by the location of the illegal Vanderbilt Casino and the decline of LTBB's income from the Odawa Casino Resort. An increase of demand for services has historically corresponded to decreases in employment opportunities at LTBB while at the same time the ability to meet this increased demand is diminished by a decrease in casino profits transferred to the general fund. Ex. 1, Decl. of Kishigo-Lesky, ¶¶ 9-11. Revenue from Odawa

Casino Resort accounts for 100% of the LTBB General Fund; the LTBB general fund makes up over half of the LTBB budget, which is used to fund tribal government programs, including the mental health services programs and the Department of Human Services. *Id.*, ¶ 6 Clearly, the absence of an injunction will lead to further strain on LTBB's human services resources and cause irreparable harm to the LTBB community.

D. THERE WILL BE NO SUBSTANTIAL HARM TO OTHERS SHOULD THE INJUNCTION BE ISSUED.

The balance between the harm to LTBB and the harm created by granting the injunction weighs in favor of issuing an injunction. Given that LTBB has established a strong likelihood of success on its claims, including a likelihood that the operation of the Vanderbilt Casino is illegal, there can be no serious claim that BMIC or others will suffer substantial harm from the issuance of a preliminary injunction. BMIC cannot sustain substantial injury as a result of an order that requires BMIC to obey the law. *MediaOne of Delaware, Inc. v. E & A Beepers and Cellulars*, 43 F.Supp.2d 1348, 1354 (S.D. Fla. 1998). Even if BMIC were to be completely deprived of revenue at the Vanderbilt Casino, BMIC has no vested right to earn money by violating the law. *Storer Communications, Inc. v. Mogel*, 625 F.Supp. 1194, 1203 (S.D. Fla. 1985).

In contrast, should the preliminary injunction not be issued, other Indian tribes could also suffer irreparable injuries due to illegal competition and a tarnished reputation of Indian gaming. As set forth below, the public interest in favor of issuing a preliminary injunction outweighs any hardship to the BMIC. A greater weight should be given to this factor given that Congress has already declared the public's interest by creating a regulatory and enforcement framework that balanced the need for regulation against the harm of closure. *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litigation*, 340 F.3d 749, 760 (8th Cir. 2003).

E. PUBLIC INTEREST WOULD BE SERVED BY ISSUING A PRELIMINARY INJUNCTION.

The injunction will not be adverse to the public interest. The public clearly has an interest in having the laws enforced. *Video Gaming Technologies, Inc. v. Bureau of Gambling Control*, 356 Fed.Appx. 89, 94 (9th Cir. 2009). The public will not be harmed by issuance of the preliminary injunction, as set forth below.

First, issuance of an injunction will halt BMIC's lawless operation of its class III gaming establishment in violation of both IGRA and the BMIC Compact. Surely the public interest cannot be served by BMIC's violation of a federal statute. Granting the preliminary injunction would instead further the purposes of IGRA and poses little risk to the public. *Wolf Appliance, Inc. v. Viking Range Corp.*, 686 F.Supp.2d 878, 893 (W.D. Wis. 2010). Congress has declared the public's interest in enacting IGRA to establish a federal regulatory regime for the regulation of gaming on Indian lands. *See* 25 U.S.C. § 2702. IGRA's statements of purpose demonstrate the high priority Congress placed on the regulation of gaming. Congress viewed effective regulation of gaming by Indian tribes as well as respect for regulatory authority as being within the public's interest. *In re Sac & Fox Tribe of Mississippi in Iowa*, 340 F.3d at 760. The plain text of IGRA shows that Congress understood the public interest that would be served by issuance of an injunction, as Section 2710(d)(7)(A)(ii) specifically recognizes a right of action for this particular purpose.

Next, the public interest will be served by the issuance of an injunction, because absent an injunction, the State will lose substantial revenues that it currently earns from LTBB as an economic incentive for the State to prevent new casinos from competing with LTBB's Odawa Casino Resort. *See* Second Amendment to Tribal-State Gaming Compact, at 2, attached hereto as "Exhibit 21." By contrast, BMIC is under no obligation to pay revenues to the State from its

Vanderbilt Casino. Thus, every dollar spent at the Vanderbilt Casino instead of LTBB's Odawa Casino Resort results in lost revenue to the State of Michigan. Accordingly, the public interest will be served by the entry of an order enjoining the Vanderbilt Casino, as it will prevent millions of dollars in losses to the public on an annual basis.

Finally, the State of Michigan has also weighed in on this matter in favor of closure of the Vanderbilt Casino. *See* Ex. 6, Manning Letter. The public interest of the State of Michigan is against operation of a casino in violation of the BMIC Compact. *Id.* The State views the operation of the Vanderbilt Casino as violation of both the BMIC Compact and IGRA and has requested that BMIC "immediately cease operation of all class III gaming at the Vanderbilt casino." *Id.*, at 2.

V. CONCLUSION

The Little Traverse Bay Bands of Odawa Indians has demonstrated that it is entitled to a preliminary injunction order enjoining Bay Mills Indian Community from operating a class III gaming establishment at the Vanderbilt Casino. LTBB has demonstrated a substantial likelihood of success on the merits. LTBB is experiencing and will continue to experience severe and substantial irreparable harm without the issuance of the preliminary injunction. In contrast, there will be no substantial harm to BMIC or the public resulting from the injunction, and the public interest weighs in favor of granting the preliminary injunction.

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an order enjoining the Bay Mills Indian Community from conducting class III gaming at the Bay Mills Casino operating on lands in Vanderbilt, Michigan, until trial can be conducted on this action for a permanent injunction.

Dated: December 22, 2010.

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