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. 1-10-cv-1278-PLM** **Honorable Chief Judge Paul L. Maloney** **District Court Judge**

REPLY BRIEF OF LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS TO DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

Defendant Bay Mills Indian Community ("BMIC") claims that the Vanderbilt Tract constitutes "Indian lands" for purposes of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("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) ("MILCSA"). Thus, BMIC opposes LTBB's Motion for Preliminary Injunction, arguing that Little Traverse Bay Bands of Odawa Indians ("LTBB"), first, cannot establish a likelihood of success on the merits of its claims because: (1) LTBB lacks standing; (2) this Court does not have subject matter jurisdiction over this case; and (3) LTBB failed to demonstrate that IGRA prohibits gaming on the Vanderbilt Property. Next, BMIC alleges that a preliminary injunction should not issue because LTBB cannot establish irreparable injury and, contrarily, that BMIC will suffer irreparable injury if an injunction issues. However, for the reasons set forth in LTBB's Motion for Preliminary Injunction, as well as those set forth in the State of Michigan's Brief In Support of Plaintiff's Preliminary Injunction Motion, and the opinions of the Department of Interior and National Indian Gaming Commission, and *infra*, LTBB has established the elements necessary for issuance of an injunction.

II. STANDARD OF REVIEW

The moving party seeking an injunction need not satisfy all four preliminary injunction factors. *See In re: DeLorean Motor Co.,* 755 F.2d 1223, 1229 (6th Cir. 1985); *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney*, 46 F.Supp.2d 689, 694 (W.D. Mich. 1999) ("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]."). Instead, the four factors are to be balanced, with each carefully considered.

III. ARGUMENT

A. LTBB Has Established a Likelihood of Success on the Merits

1. LTBB Meets Article III Standing Requirements

LTBB has standing to bring this action because it has demonstrated threatened injury and, moreover, has continually suffered actual harm since BMIC's opening of its Vanderbilt Casino. BMIC argues that LTBB lacks standing to pursue this action alleging LTBB has provided no evidence of suffering "actual harm as a result of BMIC's opening a casino in Vanderbilt." (Def.'s Br. 8.) Notwithstanding that LTBB has suffered actual harm continuously since BMIC's opening of its Vanderbilt Casino (Pl.'s Ex. 17; Pl.'s Ex. 1, Decl. of Wolf), a plaintiff need not wait until it suffers the threatened harm before gaining standing to bring suit. Courts clearly recognize "that threatened rather than actual injury can satisfy Article III standing," and that threatened injury is "by itself injury in fact." *E.g.*, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,* 204 F.3d 149, 160 (4th Cir. 2000) (citing, *e.g., Valley Force Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982.)[1]

2. IGRA Vests This Court With Jurisdiction

Although LTBB ultimately disagrees with BMIC's assertion that it is lawfully operating the Vanderbilt Casino on the Vanderbilt Property, BMIC's *reliance* upon IGRA for the operation of the Vanderbilt Casino gives rise to federal court jurisdiction in this case. Clearly, the dispute in this case concerns the construction of Section 2710(d)(7)(A)(ii) of IGRA, which vests federal

[1] *Citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc*., 454 U.S. 464, 472 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). "[O]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). *See also Covington v. Jefferson County*, 358 F.3d 626, 638 (9th Cir. 2004). "The injury alleged has not yet occurred; it is threatened. Nevertheless, the possibility of future injury may be sufficient to confer standing on plaintiff; threatened injury constitutes 'injury in fact.'" *Central Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

district courts with 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 . . . that is in effect." 25 U.S.C. § 2710(d)(7)(A)(ii) (2010).

LTBB's claim arises under a federal statute—IGRA—and, thus, constitutes a federal question pursuant to 28 U.S.C. § 1331. Regardless of whether LTBB asserts that the Vanderbilt Property does not constitute "Indian Lands," and, thereby BMIC cannot lawfully operate the Vanderbilt Casino, LTBB asks this Court to construe IGRA grants LTBB standing to do so, 25 U.S.C. § 2710(d)(7)(A)(ii) (2010). Moreover, this Court in *Bay Mills Indian Community v. Little Traverse Bay Bands of Odawa Indians*, No. 5:99-CV-88 (W.D. Mich. 1999), determined in a similar case that jurisdiction arose under Section 2710(d)(7)(A)(ii). In *Bay Mills,* plaintiff BMIC brought an action in which the defendant-tribe maintained that its casino was being operated on "Indian lands" as defined in IGRA, even though plaintiff BMIC in that case expressly contended that the casino was not located on Indian lands. *Id*., Slip Op. at 3 and 8. Contrary to statements in its current Brief, in its 1999 case, BMIC expressly argued to this Court that LTBB's site was *not* part of a reservation or otherwise Indian lands under IGRA. (*BMIC* Brief, p.2, 5:99-CV-88, "Ex. 2.") This case arises under IGRA and, thus, this Court has jurisdiction.

3. The Vanderbilt Tract does not Constitute "Indian Lands" under IGRA

a. The Vanderbilt Tract Was Not Acquired in Conformance with MILCSA

LTBB has demonstrated a likelihood of success on the merits of its claim that the Vanderbilt Property does not constitute "Indian lands" under IGRA and, thus, BMIC is operating the Vanderbilt Casino unlawfully. Even assuming that the phrase "held as Indian lands are held" in § 107(a)(3) authorizes Indian lands, the propriety of this argument (which LTBB disputes),

BMIC overlooks that it did *not* acquire the Vanderbilt Tract in conformance with MILCSA language mandating acquisition of land only for the purpose of "consolidation and enhancement."

On December 21, 2010, the Solicitor for the United States Department of the Interior issued an "Indian lands opinion" concluding that, "under the statute's plain language, MILCSA § 107(a)(3) does not apply to the Tribe's purchase of the Vanderbilt site." Indian Lands Opinion, Op. Off. Sol. (Dec. 21, 2010). (Pl.'s Suppl. Auth. Ex. A). This Opinion, submitted to the Court by LTBB, and summarized in the State's Brief, notes that the Vanderbilt Tract "cannot have been acquired for the purpose of consolidating—or uniting—other tribal landholdings." Indeed, the Solicitor found that acquisition of the Vanderbilt tract, "actually results in a further fragmentation of the Tribe's landholdings." *Id*. at 4. The Solicitor further concluded that BMIC's claim otherwise is contrary to IGRA and that § 107(a)(3) contains a geographic limitation. *Id*. at 7.

BMIC would have this Court ignore the reasoned analysis of the Solicitor.[2] Also, the National Indian Gaming Commission ("NIGC") has concurred with the Solicitor's Opinion, concluding that the Vanderbilt Casino is not located on Indian lands under IGRA. Memorandum from Michael Gross, Associate General Counsel, National Indian Gaming Commission, to Tracie Stevens, Chairwoman, National Indian Gaming Commission (Dec. 21, 2010). (Pl.'s Suppl. Auth. Ex. B.)

[2] A Solicitor's Opinion may not be entitled to the substantial deference afforded under *Chevron*, *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but this Court may look to the opinion for guidance and is permitted to give the opinion weight. *Manning v. United States,* 146 F.3d 808, 814, n. 4 (10th Cir. 1998) (*citing Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944)).

Indeed, BMIC claims § 107(a)(3) of MILCSA imposes no geographical limitation at all on land purchased with those funds arguing that "'consolidation' mean[s] to combine multiple parcels (whether contiguous or non-contiguous) under BMIC's ownership as long as the trustee [i.e. BMIC] deemed such ownership beneficial." *Id*. at 18. Thus, under the interpretation urged by BMIC, if BMIC deemed it beneficial to acquire land adjacent to the federal courthouse in downtown Grand Rapids for the purposes of operating a full-scale casino, it could do so—without any input whatsoever from federal, state, local or tribal governments. Surely such an interpretation cannot be squared with Congress' intent in enacting MILCSA.

b. The Vanderbilt Casino Is Not Located on "Indian Lands" Pursuant to IGRA

Even assuming *arguendo* that the Vanderbilt Tract was validly acquired pursuant to MILCSA, it does not constitute "Indian lands" under the BMIC Compact or IGRA, and therefore BMIC cannot succeed on the merits of this case. In order to constitute "Indian lands" pursuant to IGRA, lands must be (1) "reservation" lands; (2) lands held in trust by the United States ("trust lands"); or (3) lands "held by an Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." BMIC concedes that the Vanderbilt Property is not "reservation" or "trust lands." Thus, even if this Court reaches this issue, the only necessary inquiry is whether the Vanderbilt Property is held by BMIC "subject to restriction by the United States against alienation and over which BMIC exercises governmental power." 25 U.S.C. § 2703(4)(B).

The BMIC's own conduct reveals that the Vanderbilt Property is *not* "subject to restriction by the United States against alienation and over which BMIC exercises governmental power." Indeed, had BMIC truly believed that property acquired by MILCSA funds automatically constituted "Indian lands," BMIC surely would not have requested an opinion

from the Bureau of Indian Affairs that lands purchased with MILCSA funds are subject to mandatory trust acquisition by the United States, which it did. (Pl.'s Ex. 10.) Yet now, some fifteen years after passage of MILCSA, BMIC claims that the language in § 107(a)(3) is somehow self-executing and automatically converts any lands purchased therewith into restricted fee lands, thereby granting BMIC a unilateral power to establish off-reservation casino sites without notice or consideration of any federal, state or tribal interest. This attempted justification for its unlawful conduct is statutorily implausible and lacks merit.

BMIC next improbably alleges that it was singled out for this unique treatment as legislative repayment for the United States' unfair treatment of BMIC in past treaty relations. Contrary to the hyperbole expressed in BMIC's Opposition Brief, BMIC was not the only beneficiary of MILCSA; it was simply one of several tribes that were the beneficiaries of MILCSA based on the underlying ICC judgment. All ICC cases are predicated on unconscionable actions of the United States. As noted in LTBB's Brief, there were 370 ICC cases filed throughout the United States involving hundreds of tribes. Thus, the notion that Congress would have intended to single out BMIC for unilateral off-reservation casino creating status is not plausible nor supported by the language in § 107(a)(3).

Nor does BMIC's reliance on its strained rendition of behind the scenes, unofficial, legislative history establish that any lands purchased with MILCSA funds would automatically constitute "Indian lands" under IGRA. First, resorting to legislative history is not necessary if the plain meaning of MILCSA and § 107(a)(3) is unambiguous.[3] The plain meaning of the phrase "as Indian lands are held" in § 107(a)(3) *is* unambiguous and can be determined without a

[3] A statute should initially be read for its plain meaning. *Caminetti v. United States*, 242 U.S. 470 (1917); *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987).

resort to legislative history. The phrase unambiguously means lands held in some manner by or for a tribe. Nevertheless, because BMIC uses § 107(a)(3) and the phrase "as Indian lands are held" in such an extreme manner, BMIC finds it necessary to construct an implausible legislative history based wholly upon infirm evidence and self-serving remembrance and testimony of non-Congressional participants and the use of an undated letter with handwritten notations on the side. (Def.'s Br. 17; Def.'s Ex. E; Def.'s Ex. H). This is not legislative history.

Even if BMIC is correct on the sequence of events in this bill development that created MILCSA, it proves absolutely nothing of Congress' specific intent. BMIC further cites rules of statutory construction and concludes that "it must be concluded that Congress intended to say what it said," Def.'s Br. 11, which unfortunately for BMIC's position was not "restricted fee." If it was Congress's intent to eliminate off-reservation casino IGRA restrictions for BMIC, Congress would have made this clear. Even BMIC's own history uncovers nothing to support such a far-reaching interpretation, but simply relies heavily on negative inferences from an affidavit and an unsigned, hand-notated letter, none of which are admissible evidence. The only explicit mention of gaming anywhere in the history of MILCSA is found in the letters from the Assistant Secretary-Indian Affairs and Acting Assistant Secretary noting that § 107(a)(3) did not create new gaming opportunities.[4]

Finally, BMIC argues that the Indian canons of construction support its construction of MILCSA, overcoming the administrative agency's interpretation thereof. This is contrary to established law on the interpretation of legislative history in the Indian gaming context. *Chickasaw Nation v. United States,* 122 S.Ct. 528, at 533-536, (citations omitted) (2001).

[4] See Letter from Ada Deer, Assistant Sec'y-Indian Affairs, to Hon. Don Young, Chairman, Committee on Resources (July 15, 1997) (Pl.'s Br. Ex. 11); Letter from Michael J. Anderson, Acting Assistant Sec'y-Indian Affairs, to Hon. Senator Ben Nighthorse Campbell 2 (Nov. 12, 1997) (Pl.'s Br. Ex. 12).

The Indian canons of construction cannot be used to infer that only restricted fee land (to the exclusion of "reservation" or "trust lands," or, for that matter, "fee simple") is created by the phrase "as Indian lands are held."

c. BMIC Does Not Have Jurisdiction or Exercise Governmental Authority over the Vanderbilt Property

BMIC cannot demonstrate that it "exercises governmental power" over the Vanderbilt Property. To exercise governmental power over a particular parcel, an Indian tribe must first have jurisdiction over the land. BMIC claims jurisdiction over the Vanderbilt Property based on an erroneous and confused understanding of the jurisdictional concept, Indian Country, contained in 18 U.S.C. § 1151, and the assumption that the phrase "as Indian lands are held" shows an intent by Congress to set aside lands and "protect them with the force of the federal government as guardian of BMIC's lands." (Def.'s Br. 20 and 21.)[5]

Even assuming that BMIC somehow has jurisdiction over the Vanderbilt Property, under IGRA it is not enough that a tribe can assert 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. D 269, 276 (W.D. N.Y. 2010). Although the

[5] Section 1151 is a criminal statute, but the Supreme Court has found that it "generally applies as well to questions of civil jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). Def.'s Br. 20 n.14, n.15 asserts that *United States v. Sandoval*, 231 U.S. 28 (1913) and *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 520 (1998) apply to the purchase of the Vanderbilt Property as dependent Indian communities. Reliance on *Sandoval* is absurd because those lands are "held in communal, fee-simple ownership under grants from the King of Spain, made during the Spanish sovereignty, and confirmed by Congress since the acquisition of that territory by the United States." (10 Sta. 309.) Similarly, reliance on *Venetie* is equally absurd since those lands are held under the Alaska Native Claims Settlement Act 43 U.S.C. 1600, et seq., and in any event *Venetie* held that the land was *not* Indian country. (emphasis supplied).

NIGC has not formulated a uniform definition of "exercise of governmental power," it makes decisions regarding that question on a case-by-case basis.[6]

BMIC asserts that its construction and operation of the Vanderbilt casino, along with subsequent agreement with the Otsego County Sheriff, demonstrate an exercise of governmental authority. (Def.'s Br. 23.) Such an assertion puts the cart before the horse and renders the IGRA requirement meaningless.

B. Balance of Harm Favors the Entry on an Injunction

1. LTBB Has Shown Irreparable Injury

BMIC mistakenly argues that the LTBB must provide evidence that the harm has *already* occurred in order to show irreparable injury. (Def.'s Br. 23-24.) However, in the case BMIC cites for this proposition, the court found irreparable injury where the harm is "certain to occur." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 155 (6th Cir. 1991). As noted above, a plaintiff need not wait until *after* an injury occurs to bring suit.[7]

Incredibly, BMIC also argues that LTBB's claim of "illegal" competition does not constitute irreparable harm. (Def.'s Br. 25.) Rather, LTBB characterized the unfair advantage gained by BMIC from illegal competition as one of many types of harm that cannot be measured. (Pl.'s Br. 26.) BMIC cites *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney*, 46 F.Supp.2d 689, 704 (W.D. Mich. 1999) in support its claim; however, that is a mischaracterization because in *Grand Traverse Band*, the federal government argued that "where an injunction is authorized by statute, the agency to whom the enforcement right is entrusted is

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[6] 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).

[7] "One does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending that is enough." *Friends of the Earth, Inc.*, 204 F.3d at 160 (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). "Threats or increased risk thus constitutes cognizable harm." *Id.*

not required to show irreparable injury." *Id.* Here, LTBB made no claim that, by simply showing a violation of IGRA, the Court should automatically issue an injunction. Instead, LTBB has addressed each of the four factors that the Court must consider in addressing a motion for a preliminary injunction. Specifically, LTBB has provided evidence that the type of injury it will suffer is irreparable because it cannot be compensated after the fact by monetary damages. (Pl.'s Br. 23-28.)

While BMIC asserts that goodwill is too speculative to justify preliminary injunctive relief, LTBB has in fact provided evidence in an analysis prepared by Alea Advisors, LLC. (Pl.'s Br. 24-26.) Further, BMIC sought to undermine LTBB's efforts in cultivating goodwill through its Optimum Rewards program. Ex. 1, Decl. of Wolf, ¶¶ 4-10.

2. BMIC's Assertions of Harm to BMIC Have No Merit

Amazingly, BMIC argues that harm to its employees and BMIC for opening the Vanderbilt Casino precludes the issuance of an injunction. Any harm to BMIC is self-inflicted.

C. The Public Interest Favors the Entry of an Injunction.

With the joining of the State of Michigan's request for preliminary injunction based on probable illegal behavior and public nuisance, the public interest for the issuance of an injunction is clearly established.

IV. CONCLUSION

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: February 2, 2011.

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