UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STATE OF MICHIGAN,
Plaintiff,

No. 1:10-cv-1273

-v-

HONORABLE PAUL L. MALONEY

BAY MILLS INDIAN COMMUNITY,
Defendant.

--AND--

LITTLE TRAVERSE BAY
BAND OF ODAWA INDIANS,
Plaintiff,

No. 1:10-cv-1278

-v-

HONORABLE PAUL L. MALONEY

BAY MILLS INDIAN COMMUNITY,
Defendant.

OPINION AND ORDER DENYING DEFENDANT'S MOTION TO STAY INJUNCTION

On March 29, 2011, this Court issued a preliminary injunction enjoining the operation of Defendant Bay Mills Indian Community's ("Bay Mills") gaming operation in Vanderbilt, Michigan. (ECF No. 33 "Order".[1]) Bay Mills filed a notice of interlocutory appeal (ECF No. 39) and a motion to stay the injunction pending appeal (ECF No. 40). Plaintiffs Little Traverse Bay Band of Odawa Indians ("Little Traverse Bay") and State of Michigan ("State") filed responses. (ECF Nos. 43 and 44.) The parties have not requested oral argument and, having reviewed the briefs, oral argument is not necessary. *See* W.D. Mich. LCivR 7.2(d) and 7.3(d).

LEGAL FRAMEWORK

A court may suspend an injunction while an appeal is pending from an interlocutory order

[1]Except where specifically noted, all references to docket numbers in the electronic case file are to the docket sheet and record in 1:10-cv-1273.

granting an injunction. Fed. R. Civ. P. 62(c); *see Brown v. City of Upper Arlington*, ___ F.3d. ___, 2011 WL 1085642, at * 5 (6th Cir. Mar. 25, 2011) ("The traditional way to obtain a stay after the dismissal of a request for an injunction is under Civil Rule 62(c), which allows a court to 'suspend, modify, restore, or grant' an injunction pending appeal.") When determining whether to issue a stay of an injunction, courts consider the same four factors used to evaluate whether to grant a preliminary injunction: (1) whether the party requesting the stay has made a strong showing that he or she is likely to succeed on the merits, (2) whether the party requesting the stay will be irreparably harmed absent a stay, (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) whether the public interest supports the issuance of a stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (holding that the factors for issuing a stay under Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a) are the same); *see also Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) ("In determining whether a stay should be granted under Fed. R. App. P. 8(a), we consider the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction.")

ANALYSIS

A. Likelihood of Success on the Merits

Bay Mills makes two claims under this first factor. First, Bay Mills argues this court lacks jurisdiction over Bay Mills. Second, Bay Mills argues this court erred as a matter of law that the Michigan Indian Land Claim Settlement Act ("MILCSA") § 107(a)(3) did not authorize Bay Mills to purchase land in Vanderbilt, Michigan.[2]

[2]Bay Mills also argues Little Traverse Bay lacks standing because the tribe has not established an actual injury. This argument overlaps with Little Traverse Bay's assertion of irreparable injury.

1. Jurisdiction

Bay Mills asserts this court lacks jurisdiction because it is immune from suit. On the face of the jurisdictional allegations in the complaint, and because Bay Mills neglected to address all of the jurisdictional allegations in its response, this court found "[f]or the purpose of deciding this motion, this Court has jurisdiction over the subject matter in the complaint." (Order, 6.) The Sixth Circuit Court of Appeals has acknowledged that courts must frequently make decisions whether to grant or deny preliminary injunction motions on the basis of "incomplete factual findings and legal research." *Michigan Coal.*, 945 F.2d at 153 (quoting *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 537 (6th Cir. 1978)). Bay Mills now opts to address, for the first time, the jurisdictional allegations in the complaint unrelated to 25 U.S.C. § 2710(d)(7)(A)(ii).[3] Bay Mills has never filed a motion to dismiss for lack of jurisdiction.[4] Through this motion to stay, Bay Mills has functionally asked this court to predict whether the Sixth Circuit will dismiss the complaint for lack of jurisdiction, for reasons never fully briefed or presented here.

Bay Mills has demonstrated a likelihood of success on the merits of the claim that neither 28 U.S.C. § 1331 or 28 U.S.C. § 1362, standing alone, provides a basis for this court to exercise subject matter jurisdiction over the action. "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of*

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[3]Bay Mills characterized the complaint as relying on § 2710(d)(7)(A)(ii) as the sole authority to abrogate its immunity from suit. (ECF No. 14 Bay Mills Resp., 8.) Bay Mills did not explicitly address the other statutory bases for jurisdiction asserted in the complaint: 28 U.S.C. § 1331 and 28 U.S.C. § 1362. (Compl. ¶ 3 in 1:10-cv-1278.) Neither did Bay Mills address whether 25 U.S.C. § 2719, the statutory basis for the third count in the complaint, would provide a basis for jurisdiction. (*Id.* ¶¶25-29.)

[4]At oral argument, counsel for Bay Mills expressed his intention to file full written motions on both standing and jurisdiction after a scheduling order issued.

Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998). "[A]brogation of tribal-sovereign immunity must be clear and may *not* be implied." *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009) (emphasis in original) (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). The federal question statute, § 1331, does not clearly abrogate tribal immunity. *See Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007). Section 1362 authorizes federal jurisdiction over civil suits brought by Indian tribes, not suits against Indian tribes, and the statute does not explicitly waive sovereign immunity. *See Blatchford v. Native Village*, 501 U.S. 775, 786 n. 4 (1991).

Bay Mills has not established a substantial likelihood of success on the merits on its jurisdictional argument when other statutes are considered. Where another statute provides a waiver of tribal sovereign immunity, or when the tribe has waived its immunity, § 1331 may confer subject matter jurisdiction over an action involving a federal question. *Miner Elec.*, 505 F.3d at 1011. Whether the provisions of the Indian Gaming Regulatory Act ("IGRA") identified in the complaint, 25 U.S.C. § 2710(d)(7)(A)(ii) and § 2719, provide a basis for jurisdiction is a difficult question. This court has previously held, in a remarkably similar situation involving these same two parties, that § 2710(d)(7)(A)(ii) provides jurisdiction over a suit where the allegation is that the gaming operation is not on Indian land. *See Bay Mills Indian Cmty. v. Little Traverse Bay Band of Odawa Indians*, No. 5:99-cv-88 (W.D. Mich. Aug. 30, 1999) (Bell, J.) (opinion).[5] The majority of courts to consider the issue have found that the "IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions at issue and where only declaratory or injunctive relief

[5]ECF No. 4-7.

is sought." *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385-86 (10th Cir. 1997) (collecting cases).

2. MILCSA § 107(a)(3)

Bay Mills asserts three errors in the manner in which this court interpreted MILCSA § 107(a)(3). Bay Mills' assertions do not persuade this court that its prior conclusion was erroneous. The statutory language at issue has a plain and obvious meaning. The alternative interpretations suggested by Bay Mills, in order to establish that the provision is ambiguous, render portions of the statutory provision as mere surplusage. Although the preference for avoiding surplusage constructions is not absolute, Bay Mills has not established that such a situation is present here. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94-95 (2001). Because the court does not find the statute ambiguous, there was no need to review the legislative history of MILCSA. *See Ex parte Collett*, 337 U.S. 55, 61 (1949) ("The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.'") (quoting *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945)).

B. Irreparable Harm to Bay Mills

Bay Mills argues its substantial investment in the facilities in Vanderbilt are suffering. Furthermore, its reputation and goodwill in the community are suffering.

Any irreparable harm to Bay Mills from the injunction in this situation must arise from something other than the injunction on its gaming operations. Prior to the opening of the casino in Vanderbilt, Bay Mills argued to the Department of Interior and the National Indian Gaming

Commission, without success, its claim that any land purchased pursuant to MILCSA § 107(a) was necessarily "Indian land." (*See* ECF No. 36 - Department of Interior Opinion Letter, 3 n. 1.) Bay Mills made three separate requests, but withdrew the request each time before any final decision was issued. (*Id.*) Bay Mills also discussed with the State of Michigan whether its Vanderbilt gaming operation complied with the IGRA. After reviewing Bay Mills' submissions, the Attorney General for the State of Michigan sent Bay Mills a letter demanding that Bay Mills cease operation of the Vanderbilt casino. (ECF No. 4-6 12/16/2010 Letter.) Although it was aware its legal position, that the Vanderbilt property was Indian land, was tenuous, Bay Mills opted to build, begin operating, and continue its gaming operations in Vanderbilt. After these two suits were filed, Bay Mills expanded its operation from 38 to 84 slot machines. (Order, 4.) When a party is aware of the risk of going forward, the assumed risk cannot form the basis for a claim for irreparable harm. *See United States v. Edward Rose & Sons*, 384 F.3d 258, 264 (6th Cir. 2004) (finding the party enjoined would not suffer irreparable injury when the construction of apartments was halted because the design violated the disability portions of the Fair Housing Act and the party enjoined had been warned of that fact); *Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 930 (6th Cir. 2002) (per curiam) ("[W]hen a party knew of the risk that it undertook when it undertook the enjoined activity, monetary losses from [] complying with the injunction will seldom be irreparable."); *Ty v. Jones Group, Inc.*, 237 F.3d 891, 903-04 (7th Cir. 2001) (upholding the magistrate judge's balancing of harms where the magistrate judge excluded from the irreparable harm calculation any burden the defendant voluntarily assumed when he proceeded in the face of a known risk); *South Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot.*, 145 F.Supp.2d 446, 501-02 (D.N.J. 2001) ("It is clear from the record that SLC was aware of the NJDEP's Title VI obligations and of the demographics of the

neighborhood and the residents' concerns about potential civil rights violations prior to its construction of the facility, and yet chose to proceed with construction of the facility. SCL cannot now argue that it will suffer irreparable harm based on its own assumption of the risk in constructing the facility."); *Floralife, Inc. v. Floraline Int't, Inc.*, 633 F.Supp. 108, 114 (N.D. Ill. 1985) ("In assessing the defendant's irreparable harm, we exclude the burden it voluntarily assumed by proceeding in the face of a known risk.").

C. Irreparable Harm to Little Traverse Bay

Bay Mills argues Little Traverse Bay has not offered sufficient proof that Bay Mills' casino in Vanderbilt has caused Little Traverse Bay's casino in Petoskey to lose revenue. Experts' opinions presented by both Bay Mills and Little Traverse Bay concluded that the Bay Mills' casino in Vanderbilt would cause a reduction in gambling revenue for Little Traverse Bay's casino in Petoskey. (Order, 14-15.) Bay Mills' reliance on *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910 (6th Cir. 2002) does not require a different conclusion. The standing issue in that case was presented in the context of a summary judgment motion, after remand, where the issue on remand was whether the Tribe could establish injury for the purpose of standing. *Id.* at 916. In contrast, this action is in the very early stage of litigation, where no discovery has yet occurred. In further contrast to the proceedings here where affidavits have been submitted, the circuit court noted the Sault St. Marie Tribe "[i]n lieu of affidavits or similar evidence supporting its claim of competitive injury, the Sault Tribe invited the district court to take judicial notice, in effect, of the undisputed fact that its casino at St. Ignace is only 40 miles away from Little Traverse's casino in Petoskey." *Id.* at 915. At this early stage in the litigation, the evidence in the record supports Little Traverse Bay's claim for irreparable injury and for injury-in-fact standing.

D. Public Interest

Bay Mills insists the Vanderbilt community will suffer if the injunction remains in place during its appeal. The individuals employed by the casino will lose their source of income. Local businesses will suffer from the loss of tourists. Local governments suffer through the loss of revenues.

This factor weighs in favor of maintaining the injunction. Assuming the casino is operating illegally, the benefits enjoyed by the local community cannot be properly considered. Wages and revenue streams from an illegal enterprise are, at best, ill-gotten booty. Furthermore, by operating an illegal casino, Bay Mills invites the general public to violate Michigan's prohibition on attending a gambling house. The competition between Bay Mills' casino in Vanderbilt and Little Traverse Bay's casino in Petoskey, even if not zero-sum, will result in reduced revenues for the casino in Petoskey, which results in reduced revenue for the State. (Order, 16.)

CONCLUSION

Bay Mills is not entitled to a stay of the injunction pending appeal. The four factors the court must consider favor maintaining the injunction.

ORDER

For the reasons provided in the accompanying opinion, Bay Mills' motion to stay the injunction pending appeal (ECF No. 40) is **DENIED. IT IS SO ORDERED.**

Date: April 14, 2011

/s/ Paul L. Maloney
Paul L. Maloney
Chief United States District Judge