UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BAY MILLS INDIAN COMMUNITY,

Defendant-Appellant,

v.

Case No. 11-1413
Dist. Ct. Case Nos.: 10-cv-1273; 10-cv-1278

STATE OF MICHIGAN, et al.,

Plaintiffs-Appellees.

DEFENDANT/APPELLANT'S
MOTION FOR STAY PENDING APPEAL

DISCLOSURE OF CORPORATE AFFILIATION AND FINANCIAL INTEREST

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INTRODUCTION

Appellant Bay Mills Indian Community ("Bay Mills") seeks an immediate stay of the district court's order enjoining Bay Mills from operating its casino gaming facility in Vanderbilt, Michigan. Bay Mills has appealed the injunction in accordance with 28 U.S.C. §1292(a)(1). The district court denied Bay Mills' motion for a stay. Record Entry No. 45, *Opinion and Order denying Bay Mills' Motion to Stay Injunction* (attached as Exhibit A.)

I. THE DISTRICT COURT LACKS JURISDICTION TO ENTERTAIN THIS CASE.

A. BAY MILLS IS IMMUNE FROM UNCONSENTED SUIT.

Bay Mills enjoys the same common law immunity from suit which is enjoyed by all sovereign governments in our system of jurisprudence. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). For a suit against an Indian tribe to proceed, there must be a clear waiver by the Tribe of its sovereign immunity, *C & L Enterprises, Inc., v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 532, U.S. 411 (2001), or an unequivocal abrogation of tribal sovereign immunity by Congress, which cannot be implied. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978). Neither is present here.

1. The District Court's Initial Conclusion that Tribal Sovereign Immunity Is Abrogated by 28 U.S.C. §§1331 and 1362 Is Erroneous.

It is settled that an Indian tribe's sovereign immunity is not waived by 28 U.S.C. § 1331; its terms do not constitute the clear, unequivocal intent of Congress to waive sovereign immunity. *Memphis Biofuels, L.L.C. v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009). As a threshold matter, the mere existence of tribal sovereign immunity properly results in dismissal for lack of jurisdiction. *Memphis Biofuels, supra* at 920-921, citing *Miner Electric, Inc., v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007).

Abrogation of tribal sovereign immunity is not accomplished by 28 U.S.C. §1362[1] as the district court erroneously concluded. Record Entry No. 33, *supra*, p. 6. Section §1362 does not waive a defendant government's sovereign immunity. *Blatchford v. Native Village of Noatak,* 501 U.S. 775 (1991); *See also, Keweenaw Bay Indian Community v. State of Michigan*, 11 F.3d 1341, 1347 (6th Cir. 1993) (dismissal affirmed of a case brought under §1362 by an Indian tribe for failure to join two other tribes as indispensable parties under Fed.R.Civ.P. 19(b); §1362 did not abrogate their sovereign immunity, citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahom*a, 498 U.S. 505 (1991)).

[1] "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, law, or treaties of the United States."

Nor can the district court rely upon Section 107(a)(3) of the Michigan Indian Land Claims Settlement Act, P.L. 105-143, 111 Stat. 2652[2] ("MILCSA") as its basis for federal question jurisdiction under 28 U.S.C. §§1331 and 1362. Record Entry No. 33, *supra*, p. 6. That section's language does not support even an inference that the statute constitutes any abrogation of tribal-sovereign immunity, thus the district court clearly erred in finding subject matter jurisdiction under 28 U.S.C. §§1331 and §1362.

When these errors were brought to the district court's attention, the court acknowledged that neither 28 U.S.C. §1331 nor 28 U.S.C. §1362 abrogates tribal sovereign immunity, but erroneously relied for jurisdiction on a provision of the Indian Gaming Regulatory Act, 25 U.S.C. §2701, *et seq.*, (IGRA). Record Entry No. 45, *supra*, p. 4. Under the circumstances in this case, Congress's limited abrogation of tribal-sovereign immunity in IGRA is not applicable and does not permit the district court to exercise jurisdiction as will be shown.

[2] "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."

2. Congress Intended IGRA to Permit Suit Against a Tribe Only in Limited Circumstances Which Are Not Present Here.

Section §2710(d)(7)(A)(ii)[3] of IGRA delineates the conditions under which suit may be brought against an Indian tribe.[4] The critical precondition is that the claim for relief must be founded on the conduct of gaming by an Indian tribe in violation of its compact on its "Indian lands," as that term is defined in IGRA at 25 U.S.C. §2703(4).[5]

In its opinion, denying Bay Mills' Motion for Stay at the preliminary injunction, the district court for the first time relied upon 25 U.S.C. §2710(d)(7)(A)(ii) for jurisdiction. Record Entry No. 45, *supra,* p. 4, concluding

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[3] Title 25 U.S.C. §2710(d)(7)(A) provides in relevant part that "the United States district courts shall have jurisdiction over . . .(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . ."

[4] The district court also cites 25 U.S.C. § 2719 in its opinion denying a stay, Record Entry No. 45, *supra*, p. 4, but it is not clear whether such citation represents the court's conclusion that §2719 somehow provides a basis for exercise of jurisdiction. If the district court has made such a conclusion, it is an erroneous one, as the test enunciated in such cases *as Santa Clara Pueblo v. Martinez*, *supra*, for abrogation of tribal-sovereign immunity has not been met. The language of §2719 does not imply, much less expressly state, the intent of Congress to abrogate tribal-sovereign immunity.

[5] "The term "Indian lands" means—
(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."

that the opinion issued in *Bay Mills Indian Community, et al. v. Little Traverse Bay Bands of Odawa Indians*, No. 5:99-cv-88-RHB (W.D. Mich. 1999) (*Bay Mills I*)[6] was a "remarkably similar situation involving these same two parties" and that the resulting opinion confirms "jurisdiction over a suit where the allegation is that the gaming operation is not on Indian land." Record Entry No. 45, *supra*, p. 4.

In concluding that the two cases are "remarkably similar," the district court misapplied the holding in *Bay Mills I* because the court misunderstood the facts before the *Bay Mills I* court. In *Bay Mills I*, LTBB opened a Class III gaming facility on land LTBB owned in fee, asserting those lands were "Indian lands" as defined by IGRA. However, LTBB's Class III gaming compact requires that gaming be limited to "eligible Indian lands," (defined as trust and reservation lands acquired under 25 U.S.C. §1300k-4(a)). This compact requirement means that only land taken into trust for the benefit of LTBB can be used for gaming. Record Entry No. 4, *supra*, Ex. 7, p. 3.

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[6] That suit involved litigation in which Bay Mills was the plaintiff and LTBB was the defendant. Bay Mills initially claimed that the gaming activity undertaken by LTBB was not located on "Indian lands" and that jurisdiction existed to adjudicate the claim under 25 U.S.C. §2710(d)(7)(A)(ii). Additional defendant National Indian Gaming Commission (NIGC) noted that, "it is difficult to determine how that cause of action applies in this case where Plaintiffs are alleging that the gaming is not taking place on Indian lands." *Bay Mills I,* Record Entry No. 14, *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction*, f.3, p.9 [Exhibit B]

Although the complaint filed in *Bay Mills I* alleged that the gaming parcel was not "Indian lands" as defined by IGRA, as *Bay Mills I* progressed, counsel for Bay Mills acknowledged that LTBB's parcel could be considered "Indian lands" under IGRA. (See *Bay Mills I, Plaintiffs' Supplemental Brief in Support of Motion for Preliminary Injunction*, p. 3 [Exhibit C], and August 31, 1999, *Plaintiffs'/Appellees Reply to LTBB's Emergency Application for a Stay Preliminary Injunction* in *Bay Mills Indian Community, et al. v. Little Traverse Bay Bands of Odawa Indians, et al.*, Court of Appeals No. 99-1962 (6th Cir.) (*Bay Mills II*) [Exhibit D] at 3-5.) In that case, jurisdiction, therefore, existed under 25 U.S.C. §2710(d)(7)(A)(ii) to determine whether the gaming on that particular parcel violated the Tribal-State compact because the parcel was acknowledged "Indian land." Record Entry No. 4, *supra*, Ex. 7, at 8.[7] The present dispute is the only case filed in any federal court under 25 U.S.C. §2710(d)(7)(A)(ii) in which the existence of Indian land is the matter in controversy, and in which the district

[7] In contrast, the Class III compact between Bay Mills and the State contains a definition of "Indian lands" virtually identical to that contained in IGRA, 25 U.S.C. §2703(4). Record Entry No. 1, *Complaint filed by the State of Michigan*, Ex. A, at 3. Because there is no difference between the IGRA definition of "Indian lands" and that contained in the Bay Mills compact, LTBB's assertion that "Indian lands" do not exist prevents §2710(d)(7)(A)(ii) from being invoked as abrogating tribal-sovereign immunity, and runs counter to the Plaintiffs' burden under Fed.R.Civ.P. 8(a)(1).

court has concluded even so that jurisdiction exists to adjudicate that controversy.[8] This holding misinterprets governing law and certainly warrants a stay of the injunction issued in this case during the pendency of this appeal.

B. LTBB LACKS STANDING

The district court clearly erred when it relied on LTBB's expert report from Alea Advisors, LLC ("Alea") and determined that LTBB had suffered an injury in fact as a result of Bay Mills' operations for purposes of standing despite LTBB's inability to demonstrate actual diversion of its business by Bay Mills' operations as evidence of its injury.[9] Record Entry No. 33, supra, p. 17. LTBB has provided no evidence that gamblers have stopped going to its casino in favor of Bay Mills' casino; thus there has been no demonstration by LTBB of an injury. See Record

[8] This Court's decision in *Match-e-be-nash-she-wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616 (6th Cir. 2002), exemplifies this prerequisite. Then-Governor Engler claimed that the Tribe could not bring suit under 25 U.S.C. §2710(d)(7)(A)(i) to compel good faith negotiation of a Class III compact since the Tribe had no Indian lands. This Court agreed, holding that suit cannot be initiated by an Indian tribe under 25 U.S.C. §2710(d)(7)(A)(i) unless the tribe has "Indian lands", as defined in IGRA and on which it operates or contemplates operating a gaming facility. *Match-e-be-nash-she-wish Band*, *supra* at 618.

[9] To demonstrate standing under Article III, § 2 of the Constitution, a plaintiff must show it suffers an "injury in fact"—an invasion of a legally protected interest fairly traceable to the challenged actions of the defendant which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical'", that is likely to be redressed by a decision of the court. *Lujan v. Defenders of Wildlife, 504 U.S. 555, (1992).* In the case of allegations of such injury made by the operator of a gaming facility due to competition, this Court requires that that operator "present facts and figures demonstrating and quantifying the diversion of business." *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910, 916 (6th Cir. 2002).

Entry No. 6, *Amended Exhibit 17 to Record Entry 4, supra*, ("Alea Report") (analyzing the impact on Odawa Casino Resort a "potential new competitor located in Vanderbilt, Michigan."[10] Emphasis added.). Instead, the Alea Report assesses the historical trend of losses suffered by LTBB as early as 2007, *Id.* at 5; contemplates the long-term unemployment trends in the region as a factor of LTBB's decline in revenue, *Id.*; and concludes that the Odawa Casino could potentially suffer losses based upon a model of events and circumstances occurring in Reno Nevada in 2004. *Id.* at 21, Table 14.[11] The district court's best information as to the likelihood of actual harm is that the Odawa Resort may lose money. Record Entry No. 33, p. 14 (citing *Declaration of Odawa Casino General Manager David Wolf*, pp. 8-11, Ex. A to Record Entry No. 27, *LTBB Reply to Response to Motion for Preliminary Injunction.*

The district court erred further by distinguishing this Court's holding in *Sault Sainte Marie Tribe* based on its procedural posture. Record Entry No. 45, p.

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[10] The district court reliance on Bay Mills' expert testimony is misplaced. Record Entry No. 33, supra, p. 14, citing Record Entry No. 14, Ex. R, *Declaration of Jake Miklojcik*. ("Bay Mills Report"); Record Entry No. 45, supra, p. 7. The Bay Mills Report refutes the allegations made by Alea regarding their assumptions and methodology, with no reliance on data quantifying any actual injury to LTBB but only general models. Bay Mills Report, p. 2-3, paragraph 4. However, the district court relies on the Bay Mills Report's rebuttal to LTBB's assertions as fact. Record Entry No. 33, supra, p. 14. Such reliance belies the fundamental requirements for standing—the injury alleged must be actual, not speculative or theoretical. *Lujan, supra.*

[11] *See also, Id.* at 5 ("If visitation were to decline, it would have a very detrimental impact."); and *Id.* at 12 (analyzing the potential impacts on the Odawa Resort).

7. Because the district court has enjoined Bay Mills from operating of the Vanderbilt Facility, further discovery will be fruitless. Without an ongoing gaming activity, no court will be provided with any additional evidence of actual, concrete, present injury other than that already made by LTBB in its motion for preliminary injunction. Conversely, to the extent that the court's reasoning implies that further discovery will allow an opportunity for Bay Mills to refute the injury to LTBB, it not only contradicts the court's own conclusion that injury has been established, but also turns the burdens of proof and persuasion on their heads.[12]

II. THE DISTRICT COURT'S DETERMINATION THAT LTBB IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIM IS CLEARLY ERRONEOUS.

A. LTBB CANNOT DEMONSTRATE THAT IT IS LIKELY TO SUCCEED ON THE MERITS WHEN SERIOUS QUESTIONS HAVE BEEN RAISED ABOUT THE COURT'S JURISDICTION

The district court committed clear error in its legal analysis by reducing the substantive question concerning jurisdiction to merely an element to be considered in its analysis of the likelihood of LTBB's success. In *Memphis Biofuels, Inc., supra* at 919, this Court was clear that consideration of the court's lack of jurisdiction based on sovereign immunity of an Indian tribe is a threshold question

[12] The burden of production and persuasion rests with the movant. *See, Sault Sainte Marie Tribe*, at 916.

to be addressed before consideration of the merits.[13] So too has this court instructed when issues have been raised as to a party's standing. *Sault Sainte Marie Band of Chippewa Indians v. U.S.* 9 Fed.Appx. 457, 2001 WL 549409 (6th Cir. 2001) ("[A]ny analysis on the merits must await a determination of appellant's standing; for if appellant has no standing we have no jurisdiction[.]")

The district court failed to recognize that "if jurisdiction is lacking a movant faces no likelihood of success on the merits of its claims." *Corus Staal BV v. U.S.*, 493 F.Supp.2d 1276, 1284 (ITRD 2007) (citing *U.S. Ass'n of Importers of Textiles and Apparel v. Dep't of Commerce*, 413 F.3d 1344, 1348 (Fed. Cir. 2005), and analyzing jurisdiction as a threshold question). *U.S. Ass'n of Importers* ultimately considered its jurisdiction separately from its analysis on the merits. *Id* at 1348, 1350, and 1353. Thus, no court decision indicates that serious jurisdictional questions can be overcome by other factors in a merits consideration as suggested by the district court. Record Entry No. 33, *supra*, p. 5.

Had the district court given proper weight to Bay Mills' assertions concerning the lack of jurisdiction of the court, it could not have determined that LTBB was likely to succeed on the merits of its arguments. The district court's decision is not based in the law of this Circuit and is legal error.

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[13] "As a threshold matter, we must determine if CNI enjoys tribal-sovereign immunity. If so, a dismissal for lack of jurisdiction was proper." *Id. at 919-20,* citing *Lovely v. U.S.*, 570 F.3d 778, 782 n. 2 (6th Cir. 2009).

B. THE DISTRICT COURT'S INTERPRETATION OF MILCSA IS ERRONEOUS

In concluding that Bay Mills' property in Vanderbilt was not "Indian lands" under IGRA, the district court reviewed MILCSA, §107(a), which directed the governing body of Bay Mills to establish a non-expendable trust known as the "Land Trust" with 20% of Bay Mills' share of certain judgment funds, identified in MILCSA.[14] MILCSA Section 107(a)(3) provides the terms and conditions under which the Tribe is to utilize Land Trust funds, and describes the status of the lands so acquired.[15] The district court exclusively focused on the first sentence of the subsection, and sought to determine whether the purchase of the Vanderbilt parcel by Bay Mills complies with the purpose of "consolidation and enhancement of tribal landholdings." It concluded in the negative, construing this phrase as "unambiguous" and limiting Bay Mills to "use of earnings from the land trust to acquire additional land next to, or at least near, its existing tribal landholdings." Record Entry No. 33, *supra*, p. 11. In support of its holding, the district court relied upon dictionary definitions of "consolidate" and "enhance", and the use of the connector "and" between the two. It reasoned that "[i]n order for the purchase of land to be an 'enhancement' authorized by the §107(a)(3), the purchase must

[14] The complete text of MILCSA is found at Record Entry No. 14, *supra*, Ex. I.
[15] Section 107(a)(3) 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."

also be a 'consolidation.' The statute requires any land purchase to be *both* a consolidation *and* an enhancement." *Id.*

The district court's interpretation incorrectly characterizes the language as unambiguous, making little effort to delineate what is meant by "consolidation and enhancement of tribal landholdings".[16] Although, as the Supreme Court has observed, "there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language," *United States v. Turkette,* 452 U.S. 576, 580 (1981), there do exist definitions which the district court should have considered in identifying the ambiguity inherent in the language of §107(a)(3) of MILCSA. For example: *Chickasaw Nation v. United States,* 534 U.S. 84, 90 (2001), (defining "ambiguous" as "capable of being understood in two or more possible senses or ways."); and *Scottsdale Insurance Co. v. Flowers*, 513 F.3d 546, 565 (6th Cir. 2008) (defining "ambiguous" as:

> In ordinary language this term is often confined to situations in which the same word is capable of meaning two different things, but in relation to statutory interpretation, judicial usage sanctions the application of the word "ambiguity" to describe any kind of doubtful meaning of words, phrases or longer statutory provisions. Black's Law Dictionary 88 (8th ed. 2004).)

Bay Mills has consistently stated that the phrase "consolidation and enhancement of tribal landholdings" is ambiguous due to the uncertainty the terms

[16] Interpretation of §107(a)(3) is a question of law, subject to *de novo* review by this Court. *See,* e.g., *Associated General Contractors of Ohio, Inc., v. Drabik,* 250 F.3d 482, 484 (6th Cir. 2001).

create as to the nature, location and extent of the tribal landholdings subject to the Land Trust acquisition requirements, and provided reasonable alternative readings to those propounded by LTBB and adopted by the district court. See, e.g., Record Entry No. 14, *supra*, pp. 17-19. The district court rejected any of those alternatives, reasoning that adoption of any of them renders the term "consolidation" to be mere surplusage. Record Entry No. 33, *supra*, p. 12; Record Entry No. 45, *supra*, p. 5.[17] The district court's interpretation of the phrase actually creates additional ambiguity by limiting the acquisition of additional lands with Land Trust earnings to those "next to, **or at least near**, its existing tribal landholdings." Record Entry No. 33, *supra*, p. 11 (emphasis added). The district court's pronouncement provides no guidance as to what the district court considers to be "near" existing tribal landholdings, other than its apparent conclusion that the Vanderbilt parcel is not "near."[18]

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[17] By contrast, the district court's interpretation of "consolidation and enhancement of tribal landholdings" renders the term "enhancement" mere surplusage, as it concludes that "[e]very purchase of land from the earning of the Land Trust is an enhancement of tribal landholdings." Record Entry No. 33, *supra*, p. 12. Since any purchase of land must be an enhancement of tribal landholdings by the terms of the statute, the district court's interpretation renders the term nugatory; under the court's construction, the only term with any meaning is "consolidation."

[18] Under these circumstances, the district court's continued insistence that the phrase in §107(a)(3) is unambiguous is an erroneous legal conclusion. This conclusion is particularly troubling, as nothing in the record identifies the location and relative proximity of Bay Mills' landholdings, nor was there any consideration of the inherent geographic restrictions that Bay Mills must consider when acquiring additional property.

Even if the district court could reasonably conclude that the phrase in question is not ambiguous, the district court's literal interpretation of the phrase creates internal inconsistencies and effectuates a result inconsistent with Congressional intent. In this Circuit:

> The court must look beyond the language of the statute, however, when the text is ambiguous or when, although the statute is facially clear, a literal interpretation would lead to internal inconsistencies, an absurd result, or an interpretation inconsistent with the intent of Congress.

Vergos v. Gregg's Enterprises, Inc., 159 F.3d 989, 990 (6th Cir. 1998); *Accord*, *Chickasaw Nation v. United States, supra.*

The district court's insistence that the statutory language is plain, with only one obvious and possible meaning, clearly discernible by the court, flies in the face of this rule of statutory construction. Since the district court interprets any purchase to constitute an enhancement, and construes "consolidate" as bring together or unify, it imposes sui generis a geographic component to the Tribe's exercise of its discretion as trustee to the purchase of any land with Land Trust funds. Record Entry No. 33, *supra*, pp. 10-11. The district court's rationale is that use of the word "and" requires *each* purchase to "consolidate *and* enhance" tribal landholdings. *Ibid.* The use of the conjunction "and" in the phrase at issue cannot logically result in the district court's conclusion. A simple exercise demonstrates this point: Gene Kelly was a singer and a dancer. Sometimes he sang. Sometimes

he danced. Sometimes he sang and danced. Neither element alone makes the aforementioned statement untrue; Gene Kelly sang and danced.[19]

However, the district court's error goes beyond logical inconsistency. The district court's interpretation fails to take into account all the other provisions on the Land Trust's creation and use in § 107(a) of MILCSA.[20] The district court's interpretation not only limits the exercise of the trustee's discretion as to what land is eligible for purchase (whatever "near" means, and whenever that requirement is somehow determined), but also will preclude any acquisition by the Tribe from Land Trust funds when, inevitably, no eligible property (as defined by the district court) is available for purchase. The district court's interpretation therefore also frustrates the intent of Congress and the purpose of the Act in enacting MILCSA.

III. THE BALANCE OF HARMS FAVORS BAY MILLS

As discussed above, LTBB has not demonstrated injury-in-fact for the purpose of standing, *a fortiori*, it has not established harm to warrant the injunction

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[19] Such a construction of "consolidation and enhancement of tribal landholdings" is consistent with the intent of Congress. Over time some purchases will consolidate and some will enhance Bay Mills' landholdings. However, Bay Mills' landholdings will certainly be enhanced and consolidated.

[20] The Land Trust established by §107(a) of MILCSA is a fund of unlimited duration. It was created to provide funding for Bay Mills to expand its landholdings by multiple purchases over time. The Tribe's governing body manages the fund as its trustee.

issued by the court below as a matter of law.[21] Thus the district court erred when it concluded that LTBB had suffered harm and would suffer additional harm without the protection afforded by the preliminary injunction.[22]

Contrary to LTBB, Bay Mills has shown that it actually has and will continue to suffer economic harm as a result of the district court's injunction. Record Entry No. 14, *supra*, pp. 27-29. Bay Mills has demonstrated an investment of more than seven hundred fifty thousand dollars ($750,000.00) in startup costs. *Declaration of Rodney Jones*, at ¶6, Ex. A to Record Entry, No. 41, *supra*. This

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[21] A court must consider the substantiality of the harm, the likelihood of its occurrence (certain and immediate, rather than speculative or theoretical), and the adequacy of the proof provided by the movant in determining that harm exists to issue a preliminary injunction. *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). The district court's harm analysis suggesting loss of market share or other unrecoverable damages by LTBB does not cure its original error in finding injury in fact. Record Entry No. 33, *supra*, p. 14. The cases upon which the district court has relied as justifying irreparable harm have more than alleged a loss, they have substantiated it: *QEP Field Servs. Co. v. Ute Indian Tribe of Uintah and Ouray Reservation*, 740 F.Supp.2d 1274, 1281 (D. Utah 2010), (seeking relief from an tribal court order); and *Novartis Consumer Health, Inc. v. Johnson & Johnson - Merck Consumer Pharm. Co.*, 290 F.3d 578, 595 (3d Cir. 2002) (seeking relief pursuant to the Lanham Act, where loss of market share had been substantiated). *Chamber of Commerce of United States v. Edmondson*, 594 F.3d 742 (10th Cir. 2010), is not on point as its analysis is based on threats of future harm. Id. at 756.

[22] To the extent that the State of Michigan's assertions of jurisdiction and standing are necessarily dependent on LTBB's claims of injury and harm, these claims are also deficient. *See,* Record Entry No. 13, *State of Michigan Brief in Support of LTTB Preliminary Injunction*, p. 7; *see also* Record Entry No. 43, *State of Michigan Response to Motion to Stay*, p. 9.

investment already has generated significant goodwill which is steadily devaluing due to the closure of the Vanderbilt Facility. *Id. at ¶11.* Finally, Bay Mills must continue to either bear the cost of its 17 new employees (approximately $30,000 monthly) or incur the significant costs and expenses of rehiring and retraining new employees when the facility reopens. *Id.* at ¶¶7-8.

In addition to the seventeen local families who have lost or will lose a wage earner should the injunction not lift, Bay Mills has demonstrated that the local governments and businesses are losing actual revenues by the closure of the facility, as opposed to the purely conjectural losses asserted by LTBB and the State of Michigan. *See*, Record Entry, No. 41, *supra*, p. 9 (noting that local governments are entitled to share in revenues through the revenue-sharing commitments set forth in *Sault Sainte Marie Tribe of Chippewa Indians et al. v. Engler*, Case No. 1:90-cv-611, Record Entry No. 100, *Consent Judgment* ¶6); *see also* Declarations of Elizabeth Haus and Ed Posgate, Record Entry No. 25, *Response of Bay Mills to State of Michigan's filing in support of Motion for Preliminary Injunction filed by LTBB*, Exs. B and C, respectively.

The district court's additional conclusion in its Opinion, Record Entry No. 45, *supra*, pp. 5-6, that Bay Mills assumed a risk of a financial loss in opening the Vanderbilt Facility despite warnings from the U.S. Department of the Interior ("Interior") or the State, or aggravated its losses by continuing its expansion

construction despite a "tenuous" legal position, is not supported by the record and is clearly erroneous. The record is clear that Interior did not issue an opinion that Vanderbilt Facility was not located on "Indian Lands" until December 21st, 2010, roughly 7 weeks after operations began at Vanderbilt on November 3rd, 2010. Record Entry No. 36, *Department of Interior Opinion Letter.*[23] The record also indicates that the State of Michigan did not object to Bay Mills' position until its letter of December 16, 2010.[24] Record Entry No. 4, *supra,* Ex. 6. Finally, LTBB's own brief in support of its motion for preliminary injunction demonstrates that Bay Mills' planned expansion from 35 to 84 slot machines was substantially underway before it received correspondence from the State, and before the instant litigation was filed. Record Entry No. 4, *supra*, Ex. 5 (selected photographs showing expansion construction and dated December 14, 2010).

The district court ignores these facts. Instead it relies on Bay Mills' prior contacts with Interior, the National Indian Gaming Commission ("NIGC") and the State in 2009 and 2010 to conclude that Bay Mills had argued its legal position "without success" to these entities, inferring Bay Mills received a negative opinion or was somehow warned of a forthcoming negative opinion or action. Record Entry No. 45, pp. 5-6. This conclusion is contradicted directly in the court's own

[23] This letter is not addressed to Bay Mills, nor is Bay Mills listed as a recipient.
[24] Though Bay Mills does not deny prior conversations with the State of Michigan, it disagrees and the record does not reflect that such conversations included a warning of the State's position before Bay Mills opened its facility at Vanderbilt.

findings as well as by Interior, "[t]he Tribe withdrew each of these . . . requests before receiving responses from the NIGC or the Department." Record Entry No. 45, *supra*, p. 6, citing Record Entry No. 36, *supra*, p. 3 n. 1. To the extent such inferences were made by the district court to find that Bay Mills had knowingly assumed a risk, the court's reliance thereon were error and improper.

IV. CLOSURE OF THE VANDERBILT FACILITY DOES NOT SERVE THE PUBLIC INTEREST

Finally, the district court erred when it also held that Bay Mills Vanderbilt Facility is a public nuisance, sapping revenues from the State. Record Entry No. 33, *supra*, p. 16 and Record Entry No. 45, *supra*, p. 8. Due to the prevalence of casino-style gaming throughout Michigan, the issues concerning casino-style gaming are regulatory in nature and do not implicate the public welfare. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Atty for the Western Dist. of Michigan, et al.*, 46 F.Supp.2d 689, 705 (W.D. Mich. 1999), citing *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 209-11 (1987). Thus, the assertion that Bay Mills is operating its facility in violation of IGRA is not a factor weighing toward the issuance of a preliminary injunction, particularly when, as here, the asserted illegality turns directly on the merits of the case. *See, Grand Traverse Band, supra* at 705.

In addition, as has been discussed above, the State of Michigan has not established a loss of revenues to warrant even a showing of an injury in fact.

The district court's further reliance on this erroneous conclusion to find a disservice to the public interest is clearly not borne out by the facts asserted by LTBB and relied upon by the State. The district court's finding that the public interest is served by enjoining the Vanderbilt Operations is clearly erroneous.

CONCLUSION

For the above reasons, this Court should maintain the status quo and stay the injunction issued by the district court during the pendency of this appeal.

Respectfully submitted,

BAY MILLS INDIAN COMMUNITY

By /s/ Kathryn L. Tierney
Kathryn L. Tierney (P24837)
12140 W Lakeshore
Brimley, MI 49715
Phone: (906) 248-3241
e-mail: candyt@bmic.net

Chad P. DePetro (P58482)
12140 W Lakeshore
Brimley, MI 49715
Phone: (906) 248-3241
e-mail:cdepetro@bmic.net

ADDENDUM OF RELEVANT DOCUMENTS FROM THE DISTRICT COURT

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2011, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants, if any.

By /s/ Kathryn L. Tierney
Kathryn L. Tierney (P24837)
12140 W Lakeshore
Brimley, MI 49715
Phone: (906) 248-3241
e-Mail: candyt@bmic.net

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.

EXHIBIT -A-

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

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

The BAY MILLS INDIAN COMMUNITY and The SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS; UNITED STATES OF AMERICA *ex rel.* The BAY MILLS INDIAN COMMUNITY and The SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Plaintiffs,

v.

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS; NATIONAL INDIAN GAMING COMMISSION,

Defendants.

No. 5:99-CV-88

Hon. Robert Holmes Bell

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendant National Indian Gaming Commission ("NIGC") respectfully opposes Plaintiff Bay Mills Indian Community and Sault Ste. Marie Tribe of Chippewa Indians' ("Plaintiff Tribes") request for injunctive relief. In order to prevail as a movant under Fed. R. Civ. P. 65, a party must establish that: (1) there is a strong or substantial likelihood of success on the merits; (2) it will suffer irreparable injury if the preliminary injunction does not issue; (3) other interested parties will not suffer substantial harm if the injunction is granted; and, (4) the public interest will be protected by issuance of the injunction. Connection Distributing Company v. Reno, 154 F.3d 281, 288 (6th Cir. 1998), cert. denied, ___ U.S. ___, 119 S.Ct. 1496 (1999); Mascio v. Public Employees Retirement System, 160 F.3d 310, 312 (6th Cir. 1998); Blue Cross & Blue Shield v. Columbia/HCA Healthcare Corp., 110 F.3d 318, 322 (6th Cir. 1997). While none of these factors

EXHIBIT -B-

alone is determinative, a trial court considering whether to grant or deny a preliminary injunction should balance and weigh them collectively. See Sandison v. Michigan High Sch. Athl Ass'n, 64 F.3d 1026, 1030 (6th Cir. 1995) (citing In re Eagle-Picher Industries, 963 F.2d 855, 858 (6th Cir. 1992)).

FACTUAL AND LEGAL BACKGROUND

The Indian Gaming Regulatory Act ("IGRA") was passed in October of 1988. IGRA governs all gaming on Indian lands. See 18 U.S.C. §§ 1166-68; 25 U.S.C. §§ 2701, et seq. Among other things, the statute authorizes states and Indian tribes to enter into compacts concerning the conduct of Class III gaming, which is defined to include most traditional casino games, including slot machines and parimutuel betting. IGRA provides that no Class III gaming activities are lawful unless conducted pursuant to a tribal-state compact or procedures established by the Secretary of the Interior ("the Secretary"). 25 U.S.C. § 2710(d)(1)(C). In December 1998, the Little Traverse Bay Bands of Odawa Indians ("LTBB") entered into a compact with the State of Michigan to open a casino and conduct Class III gaming on Indian lands under LTBB's control.[1]

This cases arises because LTBB, pursuant to that compact, has since opened its gaming operation on properties identified as the "Victories Tract" located in Petoskey, Michigan. In July 1999, Class III gaming commenced at the Victories Tract prior to a determination by the Secretary either that the land is within LTBB's reservation pursuant to 25 U.S.C. § 2703(4)(A);

[1] The definition of what constitutes Indian lands is contained in 25 U.S.C. § 2703(4). It includes: (1) all lands within the limits of any Indian reservation; and (2) 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.

or within its "last recognized reservation" pursuant to 25 U.S.C. § 2719(a)(2)(B); or, that the land is in trust as part of the "restoration of lands for an Indian tribe that is restored to Federal recognition" pursuant to 25 U.S.C. § 2719(b)(1)(B)(iii). The second question -- whether the land is within LTBB's last recognized reservation -- was submitted to the Department of the Interior's Solicitor's Office in Washington, D.C., and is still under consideration. However, LTBB also initiated the process to "take the land into trust," so that the parcel upon which gaming is being conducted would qualify as Indian land under 25 U.S.C. § 2719(b)(1)(B)(iii). This process is nearly completed, with ministerial acts remaining, and when it is, the lands will be taken into trust. Nevertheless, Plaintiff Tribes' contend that LTBB is illegally gaming on the Victories Tract because they are not Indian lands as defined in 25 U.S.C. § 2703(4).

A. The Procedure for Acquisition of Indian Lands Into Trust

The Secretary of the Interior is authorized under various statutory authorities to accept title to land on behalf of individual Indians and Indian tribes, thereby placing the land "in trust." The primary statutory authority for acquiring trust title is Section 5 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 465.[2] The process by which land is accepted into trust pursuant to the Secretary's discretionary authority under IRA is set out in regulations at 25 C.F.R. Part 151. The regulations define the policy and procedures governing the acquisition of

[2] Section 5 of IRA provides:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> 25 U.S.C. § 465.

land into trust by the United States for the benefit of individual Indians and Tribes, 25 C.F.R. § 151.1, and list the criteria for evaluating applications for taking land into trust both on and off reservation. 25 C.F.R. §§ 151.10, 151.11.

However, in many cases, Congress has specifically acted and passed legislation concerning the acquisition of trust title for the benefit of a particular Tribe. In 1994, Congress enacted the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act ("LTBB Act"). 25 U.S.C. § 1300k (1994). In the LTBB Act, Congress mandated that the Secretary acquire real property for the benefit of the LTBB. The Act specifically provided:

> The Secretary shall acquire real property in Emmet and Charlevoix Counties for the benefit of the Little Traverse Bay Bands. The Secretary shall also accept any real property located in those Counties for the benefit of the Little Traverse Bay Bands if conveyed or otherwise transferred to the Secretary, if at the time of such acceptance, there are no adverse legal claims on such property including outstanding liens, mortgages or taxes owed.

25 U.S.C. § 1300k-4 (a). The Secretary is mandated by this legislation to accept real property in Emmet and Charlevoix Counties for the benefit of the LTBB. When Congress mandates that the Secretary accept land into trust for the benefit of a Tribe, certain provisions of the Part 151 process described above do not apply. The Associate Solicitor for Indian Affairs has opined that the LTBB Act is mandatory in nature, and section 151.10 is thus "inapplicable to these acquisitions because these are mandatory, rather than discretionary acquisitions." (Exhibit A, Memorandum dated November 12, 1997). In processing an application to accept land into trust pursuant to the LTBB Act, the Secretary must determine only that property is located in either Emmet and Charlevoix County, and that there are no adverse legal claims on the property. After that decision is rendered, a 30-day notice period commences. Although notice to local

governments is not required because the acquisition is mandatory in nature, publication in the Federal Register is required. 25 C.F.R. § 151. 12(b). Once the 30-day notice requirement is satisfied, the Secretary has no discretion. He must accept the land into trust for the benefit of the LTBB.

B. The Application Process for the Gaming Parcel Identified as the "Victories Tract"

In August 1996, the LTBB originally sought to place 13 tracts of land in Emmett and Charlevoix Counties into trust pursuant to the LTBB Act, which included 11 non-gaming parcels and two gaming parcels located in Mackinaw City. One month later, the Field Solicitor's Office of the Department of the Interior ("DOI") issued preliminary title opinions requiring LTBB to satisfy certain objections related to the title of each of these properties before all of the parcels could be taken into trust. In January 1999, interim title opinions were issued by the Field Solicitor's Office for nine parcels. At that point, however, the LTBB was no longer requesting trust status for the Mackinaw City gaming tracts.

Instead, the LTBB had substituted three new parcels located in Petoskey, Michigan, one of which, the Victories Tract, was designated for gaming. On December 14, 1998, the LTBB submitted a request to the Bureau of Indian Affairs (BIA) to take the Victories Tract into trust. On February 5, 1999, a preliminary title opinion was issued on this parcel outlining objections to be cured prior to accepting the land into trust. (Exhibit B, Preliminary Title Opinion, Victories Tract). The LTBB submitted additional documentation over a period of time to satisfy these objections. On August 6, 1999, the Field Solicitor's Office issued an interim title opinion which advised the LTBB what was needed to satisfy any remaining objections regarding the title to this parcel. (Exhibit C, Interim Title Opinion, Victories Tract).

In anticipation of having this land in trust, the LTBB planned to open a Class III gaming facility on the Victories Tract in the summer of 1999. After learning of this, the State of Michigan informed the LTBB by letter dated June 29, 1999, that until the Victories Tract was in trust, the State considered such opening a violation of the Tribal-State compact and it would proceed against the LTBB with all remedies available to it. (Exhibit D, Letter from the State of Michigan). The LTBB then began negotiating with the State of Michigan regarding the opening of the casino. On July 2, 1999, the State of Michigan and LTBB entered into a memorandum of understanding which would allow the LTBB to open at such time as it was "substantially certain" that the Department of the Interior would take the Victories Tract into trust. (Exhibit E, Letter of Understanding). The State of Michigan agreed that it would not challenge the opening of a casino if the "land in trust" process for the Victories Tract had proceeded to the point that only ministerial acts remained to be performed by DOI. On July 16,1999, the State of Michigan informed LTBB that the conditions precedent had been satisfied and that the casino could open. (Exhibit F, Letter to LTBB Tribal Chairman, dated July 16, 1999). On July 16, 1999, the LTBB's casino on the Victories Tract did open.

Meanwhile, on July 9, 1999, the LTBB requested that DOI separate the Victories Tract from the remaining parcels in its trust application and process it separately. In an effort to expedite the process, and because a number of parcels were being reviewed at the same time, DOI acceded to this request. All remaining objections to clear title of the Victories Tract were resolved by the LTBB. On August 11, 1999, the Area Director of the Field Solicitor's Office formally recommended to the Director of the Indian Gaming Management Staff of the Bureau of Indian Affairs that the Victories Tract be taken into trust. The Indian Gaming Management Staff

referred it to the Assistant Secretary of Indian Affairs to formally approve or disapprove this recommendation. A decision is expected shortly. After formal approval by the Assistant Secretary, a notice will be published in the Federal Register pursuant to 25 C.F.R. § 151 12(b). The Secretary of the Interior will take the parcel into trust for the benefit of the LTBB at the expiration of the 30 day notice period. It is estimated that this process will take another two months.

ARGUMENT

Preliminary injunctive relief "is looked upon as an 'extraordinary remedy' and is granted only in unusual circumstances." American Hospital Ass'n v. Harris, 477 F. Supp. 665 (N.D. Ill. 1979)(quoting Fox Valley Harvestore, Inc. v. A.O. Smith Harvestore Products, Inc., 545 F.2d 1096, 1097 (7th Cir. 1976)), aff'd, 625 F. 2d 1328 (7th Cir. 1980). Plaintiffs are requesting that this Court enjoin the LTBB from illegal gaming because the NIGC has not exercised its prosecutorial discretion to close the LTBB's Victories Tract casino and/or levy administrative fines against the LTBB. In their complaint, Plaintiffs request that the Court direct the Chairman of the NIGC to take action to fine and close down the LTBB casino for violations of IGRA. However, Plaintiffs do not and cannot cite any statutory authority or case law to support their argument that they should be allowed to act in place of the federal or state government in determining whether to prosecute the LTBB for its gaming activity. Thus, Plaintiffs do not have a substantial likelihood of success on the merits.

Nor can Plaintiff Tribes show irreparable injury in the absence of a preliminary injunction. Plaintiffs have not identified any concrete injury to themselves from allowing the LTBB's gaming to go forward, especially in light of the fact that the trust application process is moving to

completion within a matter of weeks. Moreover, because of the mandatory nature of the acquisition, Plaintiffs cannot point to any reason why the Victories Tract will not be taken into trust in the near future, barring any heretofore unanticipated impediments to clear title of the land in question. Rather, Plaintiffs' proposed closure of the casino and forfeiture of gaming profits and equipment will cause substantial harm to the LTBB tribal members and employees of the casino. The total lack of specific individualized injury to the Plaintiffs must be weighed against the disruption and damage that this action would cause the LTBB, its members, and the surrounding community. This exercise demonstrates that the balance of hardship does not favor Plaintiff Tribes and that the public interest weighs against issuing an injunction. In addition, it is not in the public interest for a private litigant to usurp the discretionary authority of the United States to enforce its laws. Accordingly, Plaintiff Tribes' motion for a preliminary injunction should be denied.

I. PLAINTIFFS HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiff Tribes cannot demonstrate probable success on the merits. They cannot meet Article III standing requirements. (Complaint, Count III). The overwhelming weight of case law establishes that they do not have standing to challenge the prosecutorial decision-making of the NIGC or federal or state authorities. The Administrative Procedures Act ("APA") and a mandamus action are inappropriate in this instance, where the agency's action in declining to prosecute an enforcement action is committed to agency discretion and thus, unreviewable. (Complaint, Count IV). Moreover, Plaintiffs are not parties aggrieved by any agency action or inaction, and there is no clear legal duty owed to them which would warrant the extraordinary remedy of mandamus against NIGC officials. (Complaint, Count V).

Plaintiffs' argument that they are acting as *qui tam* relators is also unpersuasive. In an effort to circumvent the exclusive authority granted governmental entities to enforce the law, Plaintiffs argue that they are bringing this action on behalf of the United States. However, the civil and criminal statutes referenced in Counts I and II of their Complaint confer no right upon them to act as *qui tam* relators. (Complaint, Counts I and II).

A. Plaintiff Tribes Lack Standing to Bring This Action.

IGRA gives exclusive jurisdiction to federal officials to enforce the Indian gaming criminal and civil violations of its terms. Railway Labor Executives Association v. Dole, 760 F.2d 1021, 1024 (9th Cir. 1985). See also Santee Sioux Tribe of Nebraska v. Nebraska, 121 F.3d (8th Cir. 1997). Because exclusive jurisdiction for prosecution of violations of IGRA resides with federal officials, Plaintiff Tribes do not meet the requirements for Article III standing. The most "pertinent one here is whether the person seeking party status is someone upon whom the statute confers a right of enforcement." Ragsdale v. Turnock, 941 F.2d 501, 509 (7th Cir. 1991) (Judge Posner concurring)(citing North Shore Gas Co. v. EPA, 930 F.2d at 1239, 1243 (7th Cir. 1991), cert. denied sub nom. Murphy v. Ragsdale, 502 U.S. 1035 (1992). Absent a compact that secures some element of jurisdiction over Indian gaming violations, exclusive jurisdiction is reposed in the federal government. 18 U.S.C. § 1166(d). IGRA confers no right of enforcement on Plaintiff Tribes.[3]

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[3] Plaintiff Tribes assert that they have a cause of action pursuant to 25 U.S.C. § 2710(7)(A)(ii) which provides that an Indian Tribe may initiate suit to enjoin Class III gaming activity located on Indian lands in violation of a Tribal-State compact. (Complaint, Count III). Although Count III of the complaint is not directed at the NIGC, it is difficult to determine how that cause of action applies in this case where Plaintiffs are alleging that the gaming is not taking place on Indian lands. In addition, this cause of action cannot be read so broadly as to nullify

(continued...)

Just as in Ragsdale, where exclusive jurisdiction for enforcement was reposed in a state attorney general, another entity or person cannot compel enforcement indirectly.

> Illinois has given its attorney general the exclusive responsibility to enforce the abortion statute. It has not parceled out that responsibility between him and a host of self-appointed private attorneys general. It is his decision to make whether and how vigorously to enforce the abortion statute, cf. Heckler v. Chaney, 470 U.S. 821, 831 (1985), and part of this decisional responsibility is deciding how vigorously to defend the statute in suits challenging its constitutionality. "The concerns for state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are made." Diamond v. Charles, supra, 476 U.S. at 65, 106 S.Ct. at 1705. We may not use Rule 24(a)(2) to subvert the state's separation of powers by preventing the Attorney General of Illinois from exercising the responsibilities that the state has assigned to him, and to him alone.

Ragsdale v. Turnock, 941 F.2d at 509. Here, IGRA reposes complete civil and regulatory jurisdiction over violations in the federal government. The NIGC has been given broad and exclusive jurisdiction for enforcement actions pursuant to their regulations.

Where exclusive authority to enforce the law resides in government officials, Plaintiff Tribes cannot meet Article III standing requirements. They fail to satisfy the three "irreducible" elements required to establish standing as defined by the Supreme Court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). To establish standing a plaintiff must suffer "injury in fact," there must be a causal connection between the injury and the conduct complained of, and it must be likely that the injury will be redressed by a favorable decision. Id.

Plaintiffs have not suffered an "injury in fact." An "injury in fact" is an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not

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[5](...continued)
Article III standing requirements. Plaintiff Tribes cannot and have not attempted to show cognizable injury.

conjectural or hypothetical. Lujan, 504 U.S. at 560. With respect to the "abdication of enforcement" claim, Plaintiff Tribes make no allegation of a particularized injury in their complaint, but simply make the generalized claim that by denying their request the IGRA statutory scheme will be compromised and that the effect on competition among gaming establishments will be difficult to assess. (Pltfs' Motion at 8.) Such harm is neither a "distinct nor palpable" injury to the Plaintiffs, but rather is a claim of injury to the general citizenry. Warth v. Seldin, 422 U.S. 490, 502 (1975). Nor have Plaintiffs alleged any harm other than the vague and ambiguous impact on competition among gaming facilities in the future. Such claims lack the necessary specificity and tangibility required to meet the first prong of the standing test.[4]

Plaintiff Tribes have also not alleged any facts or evidence that would establish a causal connection between the alleged injuries and the federal defendant NIGC's alleged failure to act, the second prong of the standing test. In determining if a causal connection exists, the Supreme Court utilizes a "but for" test. In Warth v. Seldin, 422 U.S. at 504 (1975), in deciding that low-income and minority residents of a city did not have standing to challenge restrictive zoning practices of a city suburb, the Court held that "[p]etitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in [the suburb] . . . ." Plaintiffs here cannot meet the "but for" test, given that an impact on competition for a premature opening of LTBB's casino by approximately three months is impossible to quantify. Plaintiffs do not even allege that "but for" the premature opening of this casino, they would have obtained

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[4] Moreover, to the extent that Plaintiff Tribes directly or indirectly allege harm based upon the Victories Tract impact on competition, such harm, by its nature, is not irreparable. See Argument II.

some benefit to which they were entitled. Even they concede that any injury is difficult to assess.[5]

Moreover, Plaintiff Tribes completely fail to satisfy the redressability prong of the standing test. "Redressability is closely related to the requirement of a causal link between the threatened injury and the conduct to be modified by the relief claimed. Redressability, however requires the court to examine whether 'the court has the power to right or to prevent the claimed injury'." Railway Labor Executives Association v. Dole, 760 F.2d 1021 (9th Cir. 1985)(citing Gonzales v. Gorsuch, 688 F.2d 1263, 1267 (9th Cir. 1982)(Plaintiff's alleged harm not redressed by an injunction sending more inspectors to monitor enforcement of the railroad safety statutes, because a particular enforcement scheme given its resources, will not result necessarily in better overall compliance). As in Railway, Plaintiff Tribes seek to involve this Court in fashioning an enforcement strategy "for an executive branch agency that was presumably commissioned by Congress to devise its own enforcement strategy." Id. at 1023.

The enforcement decisions made by federal authorities must take into account multiple factors a district court is not in a position to decide or monitor. An injunction compelling issuance of an NIGC decision and closure order against the LTBB would be impinging upon the authority of NIGC, and would force the agency to devote its scarce resources to prosecuting the LTBB for a short period of non-compliance, to the detriment of other enforcement undertakings. To the extent the LTBB's illegal gaming is alleged to cause generalized harm to the integrity of IGRA's statutory scheme, such harm would not necessarily by redressed by issuance of Plaintiff

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[5] Plaintiff Tribes cannot have it both ways. Either their economic injury is determinable, in which case their harm is not irreparable, or the economic injury is undeterminable in which case the "but for" test for standing cannot be met. In either event, their request for a preliminary injunction must fail.

Tribes' desired mandate. To the contrary, the NIGC is best placed to determine what action will best further the integrity of IGRA.

B. Defendant NIGC's Decision In Declining To Institute An Enforcement Action Against Little Traverse Bay Bands Is Not Subject To Judicial Review.

1. Enforcement Decisions are Committed to Agency Discretion.

There is no waiver of sovereign immunity within the APA, 5 U.S.C. § 701 et seq., permitting Plaintiff Tribes' challenge to NIGC's discretion and decision to take no action against the LTBB, and thus no jurisdiction over this portion of Plaintiffs' complaint. (Complaint, Count IV). The APA specifies that judicial review is not provided where agency action is committed to agency discretion by law. 5 U.S.C. § 701(a)(2). As contrasted with most forms of agency action, "a refusal to take enforcement action by an administrative agency is presumptively not reviewable by the courts." Arnow v. United States Nuclear Regulatory Comm., 868 F.2d 223 (7th Cir. 1989); cert. denied, 493 U.S. 813 (1989); see also United Liberty Life Insurance v. Ryan, 985 F.2d 1320, 1326 (6th Cir. 1993); Diebold v. United States, 947 F.2d 787, 790 (6th Cir. 1992); Gillis v. U.S. Dept of Health and Human Services, 759 F.2d 565, 576 (6th Cir. 1985).[6]

"In both civil and criminal cases, courts have long acknowledged that the Attorney General's authority to control the course of the federal government's litigation is presumptively immune from judicial review." Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1480 (D.C. Cir. 1995). Indeed, the Supreme Court "has recognized on several occasions over many years that [the] decision not to prosecute or enforce, whether through civil or criminal process, is a decision

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[6] In addition, an agency action to be reviewable under the APA, must be a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The agency's refusal to initiate an enforcement action at the present time does not constitute a final agency action. See Gillis v. HHS, 759 F.2d at 575.

generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985). "This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of . . . decisions to refuse enforcement." Id.

> The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.

Id.

The presumption that prosecutorial discretion is not subject to judicial review can be rebutted only if Congress "has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion . . . ." Chaney, 470 U.S. at 834-835. That is, there must be a "law to apply." Id. However, Congress has not expressed an intent to circumscribe the discretion of the NIGC to decide when or whether to pursue enforcement actions for violations of IGRA, nor has Congress provided any standard by which this Court could review the exercise of discretion.

2. An Allegation That NIGC Has Abdicated Enforcing IGRA Is Insufficient to Come Within the APA Waiver Of Sovereign Immunity.

Plaintiff Tribes have made no showing that NIGC, or the federal and state prosecutorial authorities, have abdicated their responsibility to enforce IGRA by acting or failing to act within

matters that are solely committed to agency discretion. NIGC and the United States Attorney's Office are enforcing IGRA consistent with both available resources and existing circumstances. It is plainly insufficient to allege abdication of prosecutorial discretion on the grounds that responsible authorities have failed to bring the specific enforcement actions sought by the Plaintiff Tribes. Such an allegation ignores the essence of discretion -- to choose -- and is facially insufficient to obtain judicial review.

IGRA established a small governmental agency with a budget limited by Congress. 25 U.S.C. § 2718. As a result, the NIGC must carefully prioritize its actions. The NIGC seeks compliance with IGRA in a variety of ways, not all of which culminate in the filing of a lawsuit or an administrative action. It issues bulletins and letters notifying tribes and other gaming entities of their responsibilities under IGRA, such as the requirement to provide the NIGC with audits, and the requirement that certain gaming can be played only under a tribal-state compact. It provides advisory opinions on whether games fall within the Class II or III category. It also issues letters to parties if contracts submitted to the NIGC include prohibited gaming activities. All of these approaches encourage voluntary compliance as well as assist tribal gaming commissions in their compliance efforts.

In addition to these voluntary compliance efforts, the NIGC brings formal enforcement actions to force compliance with IGRA. In 1998, the Chairman of the NIGC issued ten orders of temporary closure and nine civil fine assessments for violations of IGRA. In 1999, there have been seven orders of temporary closure and three civil fine assessments. (Exhibit G, Declaration of Richard Schiff). The Office of the United States Attorney also has enforcement responsibilities, and can bring both civil and criminal actions. Like the NIGC, the United States

Attorney's Office for the Western District of Michigan has also actively investigated and sought the closure of gaming facilities that do not comply with IGRA. Past enforcement efforts show that neither agency has abdicated its responsibility under IGRA. It is squarely within the prosecutorial discretion of these federal agencies, however, to decide whether and when to institute an enforcement action against the LTBB for gaming at the Victories Tract or anywhere else.

The NIGC and the federal prosecutor's office have acted reasonably in declining to initiate an enforcement action at this time. In view of the mandatory nature of the acquisition of the Victories Tract into trust, the short time period pending completion of the application process, the ministerial nature of the acts remaining, and the LTBB's good faith attempts to resolve this matter by negotiating with state and federal officials, those officials chose not to expend their limited resources in pursuing an administrative, criminal or civil action against the LTBB. That determination is committed to agency discretion and therefore not subject to judicial review.[7]

C. The Qui Tam Provision, 25 U.S.C. § 201, Cannot be Applied to IGRA.

Plaintiffs also cannot establish likelihood of success on the merits because the statute upon which they rely for a *qui tam* recovery , 25 U.S.C. § 201, is not applicable to IGRA. The *qui tam* language of that statute refers to "penalties which accrued under this Title" which at the time of enactment in 1834, referred to Title XVIII of the Revised Statutes. Many of these statutes were

[7] If the subject parcel cannot be properly characterized as "Indian land" pursuant to IGRA, the land is subject to the jurisdiction of state and local law enforcement authorities. Plaintiff Tribes cannot show that the State has abdicated its enforcement role. In June 1999, the State of Michigan cautioned LTBB that it would consider taking action. After the execution of the letter of understanding signed by the tribal chairman and the governor, the State declined to take action when it received assurance that it was "substantially certain" LTBB's land would be taken into trust in compliance with IGRA in the near future. Exhibits D-F.

repealed, the statutes were recodified, and none applied to IGRA. IGRA, a complex and detailed statutory scheme enacted in 1988, 155 years after the enactment of Section 201, makes no reference to a *qui tam* recovery. In re United States ex. rel. Hall et al., 825 F. Supp. 1422, 1428 (D. Minn. 1993), aff'd, 27 F.3d 572 (8th Cir. 1994), cert. denied, 513 U.S. 1155 (1995). There is no evidence in the legislative history of IGRA that Congress intended to confer on private citizens the right to stand in place of the United States to enforce its provisions. As the Hall court noted, "[t]o suggest that in 1834 Congress foresaw the IGRA and the development of Indian gaming in its modern form would strain credulity." Id. The court also noted that "[p]laintiffs' bare reliance on the language of an antiquated statute [25 U.S.C. § 201] enacted to address different concerns is grossly inadequate to support [its] extraordinary and tenuous standing argument." Id.

Section 201 also refers to recovery of "accruing penalties," even though accruing penalties are not provided for in the IGRA penalty provision, 25 U.S.C. § 2713(a), cited by Plaintiff Tribes as justification for a recovery. Section 2713(a) confers exclusive discretionary authority on the Chairman of the NIGC to "levy and collect appropriate" civil fines not to exceed $25,000 per violation. At his discretion, the Chairman may impose a fine of *any amount* up to the cap, but penalties do not accrue, they are based upon what the Chairman deems appropriate. Exclusive authority to levy a penalty resides in the Chairman alone, unlike other *qui tam* statutes. See 31 U.S.C. § 3729 (False Claims Act, including *qui tam* provisions, provide for treble damages and civil penalties of $5,000-$10,000 per claim). Accordingly, IGRA's statutory scheme does not contemplate a *qui tam* recovery in the manner Plaintiff Tribes allege and they therefore have little likelihood of prevailing on that part of their claim.

D. 18 U.S.C. § 1955 Does Not Provide For A Qui Tam Recovery.

Similarly, Plaintiffs cannot obtain a *qui tam* recovery under 18 U.S.C. § 1955. That section does not expressly provide for a *qui tam* recovery. This deficiency is fatal to Plaintiff Tribes' claim. "No common law right to maintain *qui tam* actions exists and the authority to maintain such actions must be found in legislation." United States ex. rel. Burnette v. Driving Hawk, 587 F.2d 23, 24 (8th Cir. 1978); United States ex rel. Yankton Sioux Tribe v. Gambler's Supply, Inc., 925 F. Supp. 658, 667 (D.S.D. 1996). "Whether a penalty may be enforced by a civil action brought by a private citizen or only by a criminal suit prosecuted by the government is a matter of legislative discretion, direction, and intent, and if a statute contemplates recovery only by a criminal proceeding, a civil remedy cannot be adopted." Burnette, 587 F.2d at 24. Sanctions for violation of a criminal statute are beyond the scope of *qui tam* proceedings. Id. at 25 (citing Gerbing v. I.T.T. Rayonier, Inc., 332 F. Supp. 309, 310 (M.D. Fla 1971)). Nothing in the language of 18 U.S.C. § 1955 creates a cause of action for private parties to share in the proceeds of a forfeiture. Thus, Plaintiff Tribes have no standing to bring suit under this provision.

Instead, section 1955 was enacted as part of the Organized Crime Control Act of 1970 ("OCCA"), an act intended to blunt the threat of organized crime to society at large. Indeed, the legislative history of the Act, embodied in House Report No. 91-1549, adopts as part of that history the Attorney General's view that Title VIII (the gambling provisions relevant here) "relates in its entirety to the control of illegal syndicated gambling" and is "directed solely to the objective of providing for more effective Federal prosecution of illegal gambling--the lifeblood of organized crime." Committee on the Judiciary, Organized Crime Control Act of 1970, H.R.Rep. 1549, 91st Cong., (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4050, 4064. The criminal portion of

Section 1955 is clearly intended to apprehend and punish persons engaging in relatively large-scale gambling enterprises, or, in other words, persons engaging in organized crime. 18 U.S.C. § 1955(b)(1)(i)-(iii). The authority to prosecute these violations resides with the federal government.

In the seminal case of California v. Cabazon Band of Mission Indians, 480 U.S. 202, 212 (1987), the Supreme Court recognized that 18 U.S.C. § 1955 makes certain violations of state and local gambling laws violations of federal law. It also expressly stated that enforcement of criminal statutes, including OCCA, on Indian lands is within the exclusive province of the federal government:

> That enactment is indeed a federal law that, among other things, defines certain federal crimes over which the district courts have exclusive jurisdiction. There is nothing in OCCA [Organized Crime Control Act] indicating that the States are to have any part in enforcing federal criminal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not effect. We are not informed of any federal efforts to employ OCCA to prosecute the playing of bingo on Indian reservations, although there are more than 100 such enterprises currently in operation, many of which have been in existence for several years, for the most part with the encouragement of the Federal Government. Whether or not, then, the Sixth Circuit is right and the Ninth Circuit wrong about the coverage of OCCA, a matter that we do not decide, there is no warrant for California to make arrests on reservations and thus, through OCCA, enforce its gambling laws against Indian tribes.

480 U.S. at 213-14 (footnotes omitted).

The forfeiture provisions of OCCA are but one component in the task of fighting organized crime. They are clearly intended to redress the public harm and the remedy clearly redresses the general wrongs to the public which arise from gambling as an enterprise of organized crime. As one court has noted, these wrongs include "draining resources from the economy, subverting the democratic process, and undermining the general welfare." Summers v.

FDIC, 592 F. Supp. 1240, 1242 (W.D.Okla. 1984).

Accordingly, recovery under 18 U.S.C. § 1955 runs solely to the public rather than to the harmed individual. An action is commenced by the government for recovery of monies to the government. That the government alone may bring suit is not without significance under the common law. See Hales v. Winn-Dixie Stores, Inc., 500 F.2d 836, 840 (4th Cir.1974) ("the importance of who sues and who collects and retains any judgment is stressed."); Rivera v. Anava, 726 F.2d 564, 568 n. 3 (9th Cir.1984); Brady v. Daly, 175 U.S. 148, 154 (1899) ("The whole recovery is given to the proprietor, and the statute does not provide for a recovery by any other person in case the proprietor himself neglects to sue. It has nothing in the nature of a *qui tam* action about it, and we think it provides for the recovery of neither a penalty nor a forfeiture."). This aspect of Plaintiff Tribes' claim therefore provides no prospect of success.

E. Mandamus is an Improper Remedy Where No Legal Duty Is Owed to Plaintiffs.

Plaintiffs allege that this Court has jurisdiction under 28 U.S.C. § 1361 to compel the NIGC Chairman to perform his legal duty to the Plaintiffs and issue an order closing the LTBB Victories Tract casino and levying a civil penalty against LTBB for illegal gaming. (Complaint, Count V). For purposes of this preliminary injunction proceeding, these allegations also promise little likelihood of success.

Section 1361 of Title 28 of the United States Code provides that district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer of the United States to perform a duty owed to the plaintiffs. As set forth, however, Plaintiffs lack standing to assert this claim because they have not alleged and cannot show that NIGC's action has caused them to suffer a redressable injury, apart from that which is shared by the public at large. They

thus cannot demonstrate that any duty was owed to them that the Chairman of the NIGC did not perform.

Moreover, a writ of mandamus cannot issue unless the official was required to perform a ministerial nondiscretionary act. Nothing alleged or sought by Plaintiff Tribes even remotely qualifies as the type of clear, unequivocal, ministerial and non-discretionary act necessary to allow the Court to entertain a mandamus action. See Lovallo v. Froehlke, 468 F.2d 340, 343 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973); Smith v. Grimm, 534 F.2d 1346, 1351 (9th Cir.), cert. denied, 429 U.S. 980 (1976). Mandamus may properly issue "only where the duty to be performed is ministerial and the obligation to act peremptory, and clearly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and undisputable." Littlewolf v. Hodel, 681 F. Supp. 929, 949 (D.D.C. 1988), aff'd, 877 F.2d 1058 (D.C. Cir. 1989), cert. denied, 493 U.S. 1043 (1990) (quoting 13th Regional Corp. v. United States Dept. of Interior, 654 F.2d 758, 760 (D.C. Cir. 1980) (quoting United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 420, 51 S. Ct. 502, 504 (1931)). For a duty to be classified as ministerial, it must be "so plainly prescribed as to be free from doubt and equivalent to a positive command." Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218-19, 50 S.Ct. 320 (1930); see also Jarrett v. Resor, 426 F.2d 213, 216-17 (9th Cir. 1970); Smith v. Grimm, supra, 534 F.2d at 1352 (9th Cir. 1976). Mandamus is an extraordinary remedy that is to be used in only the most urgent cases. Strait v. Laird, 445 F.2d 843, 844 (9th Cir. 1971), rev'd on other grounds, 406 U.S. 341, 92 S. Ct. 1693 (1972); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 53 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972).

The question of whether a nondiscretionary duty exists rests largely on Congressional

intent: "If Congress had an intent with respect to the question at issue and if that intent was to create a mandatory, nondiscretionary duty on the part of the official(s) charged with administering the [duty], then mandamus is appropriate (if no other remedy is adequate)." American Cetacean Society v. Baldrige, 768 F.2d 426, 434 (D.C. Cir.1985), rev'd on other grounds sub nom. Japan Whaling Association v. American Cetacean Sys., 478 U.S. 221 (1986).

Neither a specific ministerial duty nor a Congressional intent to create such a duty exists in these circumstances. Rather, Plaintiffs seek to compel Defendant NIGC to exercise its discretion to bring an enforcement action in a particular manner, and they want to dictate the result of the Chairman's decision -- closure of the Victories Tract casino. See, e.g., Panama Canal Co. v. Grace Line, 356 U.S. 309, 317-18 (1958). In contrast, Congress gave the Chairman the discretion to close a casino and/or levy a penalty for violations of IGRA at a dollar amount that he believes appropriate. Because these actions are clearly discretionary and not ministerial, a writ of mandamus is an inappropriate remedy.

II. PLAINTIFFS HAVE FAILED TO SATISFY ANY OF THE OTHER REQUIREMENTS FOR INJUNCTIVE RELIEF

Even apart from failing to demonstrate any likelihood of success on the merits, Plaintiff Tribes have failed to satisfy the other requirements for injunctive relief. Before an injunction may issue, they must show irreparable injury. Plaintiffs argue that irreparable injury occurs in two respects. First, the statutory scheme of IGRA will be compromised by failure to complete the land-in-trust application process. Second, there will be some impact on competition between the casinos in Northern Michigan which will be "difficult to assess." (Pltfs' Mot. at 8).

Irreparable harm must be more than mere speculation; there must be more than simply

unfounded fear on the part of the applicant. A preliminary injunction should not issue simply to prevent the possibility of some remote future injury. A present and actual threat must be shown. 11A Charles A. Wright & Arthur Miller, Federal Practice and Procedure 2d § 2948.1 (1995). Injuries which are deemed sufficiently irreparable to justify the extraordinary remedy of preliminary injunctive relief are only of the most severe variety: loss of income, adverse changes in the manner of doing business, loss of government subsidy and loss of customers do not rise to the level of "irreparable harm." A&B Wiper Supply v. Consumer Product Safety Comm., 514 F. Supp. 1145, 1148 (E.D. Pa. 1981); Morgan v. Fletcher, 518 F.2d 236 (5th Cir. 1975). Economic loss, in and of itself, does not constitute irreparable harm. Southern Ohio Coal v. Office of Surface Mining, 831 F. Supp. 1324 (S.D. Ohio 1993)(citing Ohio v. Nuclear Regulatory Commission, 812 F.2d 288, 290-91 (6th Cir. 1987), rev'd on other grounds, 20 F.3d 1418 (6th Cir. 1994).

Plaintiffs rely on Basicomputer Corporation v. Scott, 973 F.2d 507 (6th Cir. 1992), for the proposition that loss of customer goodwill often amounts to irreparable injury because the damages are difficult to ascertain. However, in that case the plaintiff corporation suffered a direct injury as a result of a group of employees who violated a non-compete clause in their employment contracts and made use of confidential customer information to lure customers away from plaintiff. Id. at 512. The injury to a customer base in Basicomputer was evident and direct.

In contrast, Plaintiff Tribes merely allege here that two or three months of gaming by the LTBB will "wreak havoc on the balance" and "set a dangerous precedent" for gaming in the future. (Pltf's Mot. at 8). Plaintiffs do not identify how a minimal period of gaming at the Victories Tract without it being in trust impacts them, or sets any dangerous precedent for the

operation of their gaming facilities. There is no precedent to be set. There is no endorsement by federal authorities of illegal gaming in Michigan. NIGC assessed the LTBB's specific situation and decided not to initiate an administrative action at present. This was not an endorsement by NIGC, or by the United States Attorney's Office, of illegal gaming and does not compromise the integrity of IGRA. As with any prosecutorial decision, an evaluation must be made on a case-by-case basis. Plaintiff Tribes cannot allege that two to three months of gaming by the LTBB in technical noncompliance with the land-in-trust provisions of IGRA causes them any significant injury.

Plaintiffs also cannot establish that the public interest would be served by the issuance of a preliminary injunction. NIGC and state and federal authorities have made an independent determination not to proceed against the LTBB because the trust application process is nearly complete. There is no purpose served in bypassing these prosecutorial determinations and issuing an injunction directing the closure of LTBB's casino. Indeed, prosecutorial authorities must be given flexibility to monitor compliance of IGRA and act as circumstances change. To allow private litigants to usurp the role of an enforcement authority and compromise that flexibility would contravene the public interest because prosecutorial decision-making would be relegated to competing gambling facilities. That result is surely not intended by IGRA.

Finally, the harm to third parties prong weighs in favor of Defendant LTBB. On this point we defer to the brief of the LTBB opposing Plaintiffs' request. However, this Defendant does note that the LTBB has opened its casino only after pursuing the expeditious completion of the trust application process, and it has received authorization from the State of Michigan to proceed. The LTBB has undoubtedly expended significant monies, hired employees, and is now

operating an ongoing business. Without question, the LTBB's members and its employees will be significantly adversely affected by closure of the casino, and Plaintiff Tribes have not explained why the extraordinary measure of closing the casino is necessary to rectify the only kind of injury they would have standing to complain of -- specific individualized injury -- when the land upon which the LTBB operates will be in trust in a matter of weeks. See Argument IA infra. Plaintiff Tribes have, in all respects, failed to articulate an adequate basis for injunctive relief.

CONCLUSION

WHEREFORE, because Plaintiffs, Bay Mills Indian Community and Sault Saint Marie Tribe of Chippewa Indians cannot meet the requirements for preliminary injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure, Defendant National Indian Gaming Commission respectfully requests that Plaintiffs' motion for a preliminary injunction be denied.

Respectfully submitted,

MICHAEL H. DETTMER
United States Attorney

Dated: August 24, 1999

JOAN E. MEYER
CHARLES GROSS
Assistant United States Attorneys
PO Box 208, Grand Rapids, Michigan 49501-0208
616/456-2404

EDWARD PASSARELLI
United States Department of Justice
Environmental and Natural Resources
General Litigation Section
PO Box 663, Washington, D.C. 20044-0663

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

The BAY MILLS INDIAN COMMUNITY and The SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS; UNITED STATES OF AMERICA *ex rel.* The BAY MILLS INDIAN COMMUNITY and The SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

Plaintiffs,

v.

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS; and NATIONAL INDIAN GAMING COMMISSION;

Defendants.

Case No. 5:99-CV-88

Hon. Robert Holmes Bell

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, the Bay Mills Indian Community ("Bay Mills") and the Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe") (referred to collectively as the "Plaintiffs") brought this action seeking to enjoin Defendant Little Traverse Bay Bands of Odawa Indians ("Little Traverse Band") from operating a casino in Petoskey, Michigan (the "Petoskey Casino") in blatant violation of federal and state law. Plaintiffs also filed their motion for preliminary injunction and a hearing was held on August 26, 1999 at 4:00 p.m. before this Court. The Court permitted the parties to submit supplemental briefs to be filed before 9:00 a.m. on August 30, 1999.

EXHIBIT -C-

ARGUMENT

I. The Compact Requires That The Land Be Taken Into Trust.

Plaintiffs disagree with the Little Traverse Band's assertion that the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA") permits gaming on the land in question (which was formerly a bowling alley purchased just this year by the tribe) even though it has not been taken into trust. However, even assuming for purposes of argument that this is accurate, the tribe cannot game on this land because the *compact* requires that the land first be taken into trust. Specifically, as noted in the letter from Governor John Engler dated June 29, 1999 (attached to the James Rider Declaration as Exhibit 1), gaming under the compact can only be conducted on "*Eligible* Indian lands" (emphasis added) which are defined by the compact as "trust ***and reservation*** lands acquired under 25 U.S.C. § 1300k-4." (emphasis added). As noted by Governor Engler in that same letter:

> Consequently, before lands become "Eligible Indian lands" pursuant to the terms of the compact, *they must be acquired by the Secretary for LTB's benefit.* (emphasis added)

Thus, the Little Traverse Band's assertion now that the compact does not mean that the land must be taken into trust conflicts both with the unambiguous language of the compact and with the interpretation of that language by one of the parties to the compact – the State of Michigan. Defendant's assertion that the "Eligible Indian Lands" reference must mean the same as "Indian Lands" under IGRA is merely wishful thinking and ignores the critical modifier "eligible". The fact that the parties to the compact agreed to an additional requirement for Indian gaming above that which might be required by IGRA, even assuming Defendant's construction of IGRA is accurate (which Plaintiffs believe is inaccurate and is belied by the

BIA's guidelines requiring a "conclusive factual and legal finding" that the lands are reservation or restored lands, Exhibit B to Plaintiffs' Combined Reply Brief, p. 6) is not prohibited by IGRA in any way.[1] It is therefore clear that operation of the casino while the land is admittedly not in trust violates the compact. This violation entitles Plaintiffs to an injunction under 25 U.S.C. § 2710(d)(7)(A)(ii).

II. IGRA Requires That The Land Be Taken Into Trust Before Gaming Can Occur.

As noted above, IGRA requires that land be taken into trust before gaming can occur, even if that land is reservation land. A review of 25 U.S.C. § 2719(a) makes this apparent. This section begins with the admonition that gaming will *not* be permitted on land taken into trust after October 17, 1988, unless – and then it lists two exceptions pertinent to Michigan. The first allows gaming if the land is in the tribe's reservation as it existed on October 17, 1988. The second allows gaming if it is in the tribe's "last recognized reservation". Presumably, the first exception covers the situation as the Little Traverse Band sees it (the second exception applies to reservations which have been extinguished which is in fact the case here). Assuming Defendant is correct and the bowling alley is located in a reservation which existed on October 17, 1988, this section of IGRA *still* requires that it be taken into trust *before gaming can be conducted on it*. Thus, even though this land might be considered "Indian lands" under IGRA (as Defendant asserts), it still cannot be used for gaming without violating the restrictions of § 2719.

Clearly, this casino is illegal.

[1] As will be shown below, it is clear that IGRA does not permit gaming to be conducted on land which was not a reservation at the time of IGRA's enactment, particularly where the tribe in question was not even recognized by the United States until several years later.

III. The Casino Is Not Located On Reservation Land.

The land on which the Petoskey casino is located was a bowling alley which was not owned by an Indian tribe until it was purchased on land contract by Defendant earlier this year. Defendant cannot with a straight face contend that IGRA intended to allow gaming on land which was taken by the U.S. Government pursuant to the 1855 treaty (on which Defendant has relied in support of its claim to this land) and then sold to non-Indians. Under these circumstances, it is clear that the intention of Congress was to break up the reservation so that Indian people would be forced to assimilate with the rest of the population. Whether this was right or wrong, it occurred and the former reservation land was conveyed to parties other than an Indian tribe, and in the case of the land in question, became a bowling center in the city of Petoskey. Even if a reservation had existed there 100 years ago, it surely has not been evident since.

Even if it is true that a finding that the land is restored would allow gaming without the land's being taken into trust[2], that is not the point. The determination has not been made. Defendant introduced the August 11, 1999 memo from the BIA, not the Plaintiffs, and it clearly represents the latest statement of the Federal Government that IGRA issues are pending. Thus, in addition to the requirements of the compact, which are clear, Defendant has jumped the gun.

IV. The Required Government Approvals Are Months Away.

Defendants either did not understand the process required before gaming is permitted at the Petoskey casino, or they intentionally ignored that there are *two* determinations that have to

[2] IGRA would not permit this, 25 U.S.C. § 2719 (b)(1)(B)(iii).

be made by the Department of Interior ("Interior") before such gaming can commence. And, most importantly, one of those determinations is not merely "ministerial" as has been the assertion to the state of Michigan and to this Court. As established by the August 11, 1999 memorandum (NIGC's Exhibit G) from Interior, and confirmed by Interior's Checklist For Gaming Acquisitions (Plaintiffs' Combined Reply, Exhibit B)[3], a separate legal determination must be made that the land in question fits within one of the exceptions set forth in § 2719 of IGRA before gaming can commence, even if taking the land in trust is a ministerial function. Now, the Little Traverse Band asserts that they have talked to people at Interior and have been told that this second decision has been made in their favor. This would not appear to be the case from the recent August 11 memo, and one can reasonably question if such representations mean very much. Regardless, it is clear that a "conclusive factual and legal finding" that one of IGRA's exceptions applies is far from a ministerial act.[4] Thus the entire basis on which the State of Michigan apparently acquiesced to the premature operation of the casino – that the land would be taken into trust as a matter of course – appears to have resulted from a misunderstanding of how the gaming approval process really works.

As a result, it is clear that this process, which has already taken over five weeks without any evidence of reaching a conclusion, could take many more months. This is particularly true

[3] "A tribe's contention that gaming on newly acquired lands is not prohibited because one or more exceptions apply *will require a conclusive factual and legal finding that the particular exception does apply* to the trust acquisition." Plaintiffs' Combined Reply, Exhibit B, p. 6. (emphasis added).

"Pending resolution of the IGRA issues..." NIGC's Exhibit G, p 3.

[4] The assertion that only ministerial acts are necessary apparently arises from the belief that the Little Traverse Band's Reaffirmation Act, 25 U.S.C. § 1300k mandates that the land in question be taken into trust. Even if this is true, there is nothing in this Act which says that the tribe has a right to open a casino or that land taken into trust satisfies one of the § 2719 exceptions of IGRA.

as the "conclusive factual and legal finding" made by Interior could be challenged in court as a final agency decision, in which case, the determination that this is "restored" lands might never become reality. The issue then becomes whether under these circumstances, and in the meantime, gaming should be permitted in Petoskey.[5]

V. Plaintiffs May Seek An Injunction Under IGRA.

The Court asked Plaintiffs whether it was truly the intent of Congress to permit a tribe to obtain an injunction enjoining another tribe from gaming in violation of its compact. Of course, the first place to look when attempting to divine the mind of Congress is the language of the statute. Here, the language clearly authorizes an action for an injunction in just such a case as the case at hand. What else could it mean?

Moreover, whether Plaintiffs or another tribe would be authorized to seek an injunction against a tribe in Arizona will be governed by principles of standing. There may be a case where the facts are such that an injunction against an Arizona tribe is warranted. What is important here is that the language of the statute clearly authorizes an injunction, and under the facts of the case at hand, Plaintiffs have standing. Not only will they be injured by the loss of business from the illegal competition[6], they also have a vested interest in assuring that all Indian gaming is conducted on a level playing field and in accordance with the law. This is particularly

[5] Plaintiffs note that there is still a legitimate question as to whether all the title defects have been removed from the property. The purported mortgage discharge attached to Defendant's Supplemental Brief clearly states that it was "Executed but not delivered." Without delivery, this discharge has no legal effect.

[6] Illegal competition is a recognized basis for standing. For example, under the Lanham Trademark Act, section 43(a), 15 U.S.C. § 1125(a), which establishes a cause of action for anyone injured by false and misleading advertising, it has been specifically recognized that competitors may bring an action based on the violation of statute. Monkelis v. Scientific Systems Services, 653 F. Supp. 680, 684 (W.D. Pa. 1987)("[T]he traditional plaintiff in section 43(a) cases is an injured competitor...").

true where illegal gaming is being conducted in their own back yard. The proximity of the Petoskey casino to casinos operated by Plaintiffs means that all the casinos have the same customer base. If these customers perceive that tribes do not have respect for the law (as established by the compact and IGRA), then all tribal gaming in this area could be affected. This is particularly true as non-tribal casinos in Canada and the U.S. offer alternatives to tribal gaming. Thus, in light of the recognition by Congress that violation of a compact by one tribe could injure another, and the obvious injury which could result from illegal gaming in Petoskey, it is clear that this Court has jurisdiction over Plaintiffs action for an injunction.[7]

CONCLUSION

For these reasons, and the reasons set forth in Plaintiffs' motion and brief, and at oral argument, Plaintiffs respectfully request that the Court enter an order enjoining the operation of the Petoskey casino until trial can be conducted on this action for a permanent injunction.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
Kevin J. Moody (P34900)
Louis B. Reinwasser (P37757)

Dated: August 29, 1999

By: _____
Louis B. Reinwasser
Attorneys for Plaintiff
One Michigan Avenue, Suite 900
Lansing, MI 48933-1609
(517) 487-2070

[7] Allowing a tribe to enforce IGRA makes sense in light of NIGC's repeated claim that it is a small agency with a small enforcement budget, such that it has to prioritize the use of its resources. This does not sound like the agency is not enforcing the law because it used its discretion to decide not to, but rather that it is not enforcing the law where it otherwise might choose to if it had enough money. It is thus perfectly understandable, knowing the limitations of the agency, that Congress would have allowed tribes – which are governments in their own right – to enforce the requirements of IGRA.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

The BAY MILLS INDIAN COMMUNITY and The SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS; UNITED STATES OF AMERICA *ex rel.* The BAY MILLS INDIAN COMMUNITY and The SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS Plaintiffs/Appellees, v. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS; and NATIONAL INDIAN GAMING COMMISSION; Defendants/Appellants.	Court of Appeals No. 99-1962 District Court Case No. 5:99-CV-88 Hon. Robert Holmes Bell

PLAINTIFFS/APPELLEES' REPLY TO EMERGENCY APPLICATION FOR STAY OF PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs/Appellees, the Bay Mills Indian Community ("Bay Mills") and the Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe") (referred to collectively as the "Plaintiffs") brought this action seeking to enjoin Appellant Little Traverse Bay Bands of Odawa Indians ("Little Traverse Band") from operating a casino in Petoskey, Michigan (the "Petoskey Casino") in blatant violation of federal and state law. Plaintiff Tribes also filed their motion for preliminary injunction and a hearing was set for August 26, 1999 at 4:00 p.m. before the Honorable Robert Holmes Bell. After considering the oral arguments of all parties, Judge Bell took the matter under advisement and gave all sides until 9:00 a.m. Monday, August 30, 1999 to

EXHIBIT -D-

file supplemental briefs, which all sides did. Judge Bell issued his opinion later that day, granting Plaintiff Tribe's request for an injunction. At 11:09 a.m. this morning, August 31, 1999, attorneys for Plaintiff Tribe's received a faxed copy of Appellant's emergency application. Plaintiff's attorneys were informed at about 2:00 p.m. that they had until 3:30 p.m. to provide a written response. This is that response.

I. The Basis for Not Going To the Trial Court First Is Not Persuasive.

Appellant neglected to follow the requirement in the court rule that it go first to the trial court when seeking a stay. It however, provided no legitimate basis circumventing this rule. The trial court could have acted just as expeditiously as this Court had it been given the opportunity.

II. Judge Bell Did Not Abuse His Discretion When Granting the Injunction

For this Court to stay operation of the injunction, it would have to find that Judge Bell abused his discretion when granting the injunction. Blue Cross & Blue Shield Mut. Of Ohio v. Blue Cross and Blue Shield Ass'n, 110 F.3d 318 (6th Cir. 1997)("This court reviews a challenge to the grant or denial of a preliminary injunction under an abuse of discretion standard and *accords great deference to the decision of the district court.*"). This is a very strict standard of review which Appellants have not even come close to satisfying. Judge Bell's decision is very well thought out, addressing all the factors necessary to a determination that an injunction is warranted. The overriding determination was perhaps that the Appellants are unquestionably operating a casino in violation of both state and federal law because the land on which the

casino is situated has admittedly not been taken into trust by the federal government as required by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA"). [1]

III. The Trial Court Has Jurisdiction

The Little Traverse Band asserts that the trial court did not have jurisdiction over Plaintiffs' action arising out of IGRA, specifically out of § 2710(d)(7)(A)(ii) of IGRA, which expressly gives jurisdiction to federal courts over actions brought by states or *Indian tribes seeking to enjoin Class III gaming* being conducted on Indian lands in violation of a tribal-state compact. The Little Traverse Band asserts that Plaintiffs cannot argue jurisdiction under this provision in that Plaintiffs are claiming that operation of the Petoskey casino is illegal because it is not being conducted on Indian lands, and therefore the jurisdictional section does not apply. However, Appellant is faced with the same quandry – if these are Indian lands for purposes of IGRA, as Appellant unequivocally asserts here, then its argument that the trial court does not have jurisdiction must fail as 25 U.S.C. § 2710(d)(7)(A)(ii) vests jurisdiction of an action to enjoin violations of compacts in the district courts. Judge Bell specifically found that the Appellant's assertions in this regard had "the ring of jurisdictional gamesmanship." Opinion p. 8. This is a unique problem for Defendant as, under its theory that these are Indian lands, it is still in violation of IGRA because the gaming is being conducted *in violation of its compact* even if it is assumed that the land on which the casino sits is Indian lands. This is because the

[1] Appellant's plea to this Court that it "enjoin" the injunction requires that the Appellants have clean hands. Operation of a casino illegally does not permit such a determination.

compact requires that *all* land on which gaming is conducted must be taken into trust, whether it is "Indian lands" for purposes of IGRA or not.

Specifically, as noted in the letter from State of Michigan Governor John Engler dated June 29, 1999 (attached to the James Rider Declaration as Exhibit 1 which was submitted to the trial court by Appellants), gaming under the compact can only be conducted on "Eligible Indian lands" which are defined by the compact as "trust ***and reservation lands*** acquired under 25 U.S.C. § 1300k-4." As noted by Governor Engler in that same letter:

> "Consequently, before lands become 'Eligible Indian lands' pursuant to the terms of the compact, *they must be acquired by the Secretary for LTB's benefit.*" (emphasis added)

Thus, the Little Traverse Band's assertion now that the compact does not mean that the land must be taken into trust conflicts both with the unambiguous language of the compact and with the interpretation of that language by one of the parties to the compact – the State of Michigan. Defendant's assertion that the "Eligible Indian Lands" reference must mean the same as "Indian Lands" under IGRA is merely wishful thinking and ignores the critical modifier "eligible". The fact that the parties to the compact agreed to an additional requirement for Indian gaming above that which might be required by IGRA, even assuming Defendant's construction of IGRA is accurate (which Plaintiffs believe is inaccurate and is belied by the BIA's guidelines requiring a "conclusive factual and legal finding" that the lands are "reservation" or "restored" lands before gaming can occur) is not prohibited by IGRA in any way. Clearly, then, gaming on such land violates the compact. Judge Bell specifically found this. Since it violates the compact, it is a violation of 25 U.S.C. § 2710(d)(7)(A)(ii) which entitles an Indian tribe to sue in federal court to enjoin gaming conducted "in violation of any Tribal-State

compact entered into" pursuant to IGRA. Thus, even under Defendant's analysis, the trial court has jurisdiction of this cause of action.

Moreover, Plaintiffs believe that 25 U.S.C. § 2710(d)(7)(A)(ii) was intended to protect their interests in just this sort of case, where a competitor is "breaking the rules." Defendant attempts to explain what Congress intended when it adopted this jurisdictional provision, but Defendant's assertion that 25 U.S.C. § 2710(d)(7)(A)(ii) is intended to vest district courts with jurisdiction only over an action by a Tribe with jurisdiction over the Indian lands on which Class III gaming is being conducted in violation of a compact to which that Tribe is a party makes no sense. It is difficult to imagine a situation where someone would be gaming in violation of a compact to which the tribe is a party, other than the tribe itself. Congress certainly did not waste its time creating a cause of action to deal with such circumstances and expressed this intention by allowing actions by a tribe to enjoin gaming "conducted in violation of *any* Tribal-State compact". Had Congress intended to circumscribe the actions as Defendants contend, it would have employed a much less broad expression than "any compact", *e.g.*, it would only have permitted actions to enjoin activity in violation of *the* or *its* compact. Judge Bell found that the language of IGRA was clear and that it means what is says.

Nor can Appellant excuse its conduct by asserting that it is only a matter of time before the land is acquired by the Secretary, so everyone should just turn a blind eye to this illegal gaming. Federal law does not permit such an approach to casino gaming, nor has Defendant cited any authority in support of such a claim. The law has certain requirements that must be met and merely promising that they will be is insufficient to satisfy those requirements.

It is also a distinct possibility that those requirements will never be met, or at least not for some time. There is a requirement that before land is taken into trust, a notice be published allowing 30 days for objections to be lodged. Since the notice has not been published and there is no way of predicting what sorts of objections might be submitted when it is, or what sorts of defects might be uncovered, it is somewhat optimistic to assert that taking the property in trust is a done deal.

Finally, it appears that Interior has just determined (as of last Friday) that the land qualifies as "restored" lands for purposes of IGRA, and that gaming can occur on that land. Judge Bell was made aware of this determination before he made his ruling. This is an issue entirely separate and distinct from the issue of whether the land will be taken into trust so that even if it is taken into trust, the tribe could still be precluded from gaming on the land. This is a legal determination to be made before the Little Traverse Band will be allowed to legally game in Petoskey, and, more importantly, it is one that can be challenged in an administrative appeal as it is final agency action. Thus, it is possible that before the 30-day period has expired that someone will challenge the determination that this is restored lands for IGRA gaming purposes. If that challenge is successful, as it might well be as there is a strong argument that Appellants are a tribe that was never extinguished and is therefore not "restored", the land may never be approved for gaming. Under these circumstances, it would be unfortunate if the casino were allowed to operate during the pendacy of the proceeding, only to be shut down later. The status quo here is really a situation where the casino is not operating, as this was the situation on July 15, 1999, the day before the casino was opened illegally. Appellants cannot legitimately argue that the status quo is now as this would permit tribes to open an illegal casino, and as long as

they got it up and operating for a few days, then claim, in the face of any challenge, that they should be allowed to continue because they would be harmed if it is shut down. This is a bad precedent to set.

IV. The Tribe's Sovereign Immunity Has Been Abrogated and/or Waived.

Appellant contends that the trial court does not have jurisdiction over it as it is a sovereign Indian tribe and that it has neither waived that sovereign immunity nor has it been abrogated by the United States. Plaintiffs fully agree that Defendant enjoys sovereign immunity, but it is clear that such immunity has been abrogated by Congress when it enacted 25 U.S.C. § 2710(d)(7)(A)(ii). Judge Bell's decision has a thorough analysis of this issue relying on recent Supreme Court decisions right on point. Opinion p. 11. It is difficult to imagine a clearer expression of intent on the part of Congress to abrogate a tribe's immunity than by expressly including a provision in a statute which vests jurisdiction in the district courts to enjoin Class III gaming activity conducted on Indian lands in violation of a compact.[2] Thus, this action for an injunction under IGRA is not prohibited by sovereign immunity.

[2] The U.S. Supreme Court found that Congress's intent to abrogate a state's sovereign immunity was "unmistakably clear" when it included provisions in 25 U.S.C. § 2710(d)(7)(A)(I) allowing a tribe to sue a state for failure to negotiate for a compact in good faith. Seminole Tribe of Florida v. Florida, 134 L.Ed. 2nd 252, 266-267 (1996). The Court there held that Congress did not have authority to abrogate such immunity under the Indian Commerce Clause, even though its intention to do so was established. There is no similar problem with Congress's power to abrogate a tribe's sovereign immunity as long as its intent to do so is made clear in a statute. See, *e.g.*, Oklahoma Tax Commission v. Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991); United States v. Wheeler, 435 U.S. 313, 323 (1978). Thus, Seminole, although reaching a different result regarding state immunity, conclusively establishes that Congress intended to abrogate a tribe's sovereign immunity when suit is brought under 25 U.S.C. § 2710(d)(7)(A)(ii). See also, Maxam v. Lower Sioux Indian Community of Minnesota, 829 F. Supp. 277, 281 (D. Minn. 1993)(By engaging in gaming governed by IGRA, tribe waives sovereign immunity for narrow purpose of determining compliance with requirements of Act); Ross v. Flandreau Santee Sioux Tribe, 809 F. Supp. 738, 745 (D.S.Dak. 1992)(same). See also Oklahoma Tax Commission, supra, p.p. 512-515.

V. The Plaintiffs Have Satisfied the Factors of Entry of a Preliminary Injunction.

The law is clear that the four injunction factors do not *all* have to be satisfied in order for the Court to enter a preliminary injunction. The four considerations are factors to be balanced, not prerequisites that must be met, and a strong showing of one factor may compensate for a weaker showing on another factor such that an injunction should still be entered. In Re DeLorean Motor Company, 755 F.2d, 1223, 1228 (6th Cir. 1985). Here, the Plaintiffs have made a strong showing that the conduct of the Little Traverse Band is illegal and that under 25 U.S.C. § 2710(d)(7)(A)(ii), it should be enjoined. There is a strong likelihood that Plaintiffs will be successful on this claim and Judge Bell so found. In fact, based on the information now before the trial court, there is no question that the Little Traverse Band is conducting class III gaming in violation of its compact because the land on which its casino is located has not been taken into trust. Just because the state has not decided to object does not mean that there is no violation of IGRA. Congress specifically gave tribes the right to obtain an injunction where a compact is being violated, and there is no mention that the state's lack of concern is a factor in such an action. The granting of such a right of action alone is recognition that other entities than just the state have an interest in seeing that the requirements of a compact are met. And the fact that Congress recognized such a right of action for an injunction, without requiring that factors other than a violation of a compact be considered, is at least a strong basis for giving the other three injunction factors less weight in this proceeding.

Nevertheless, Plaintiffs submit that the other factors weigh in favor of their case.

A. Irreparable Injury

Judge Bell's decision carefully considered this factor and Appellees rely upon the analysis contained therein in support of this factor. In all cases the balance of factors clearly weighs in Appellee's favor. DeLorean, supra.

B. Public Interest

It goes almost without saying that the public interest is decidedly injured if criminal violations of the gaming laws are allowed to continue. Even if no action is taken by federal or state prosecutors to punish such violations, the fact that the law makes such conduct a federal offense clearly establishes that its continued operation is harmful to the public interest. As noted by Judge Bell:

> The State and the NIGC's failure to act is not an indication that the public has no interest in a tribe's compliance with IGRA. As noted by the NIGC, the decision whether to prosecute a given violation may be affected by the limited resources available to the agency. The public nevertheless has an interest in not allowing violations of the gaming laws to continue.

Opinion, p. 13.

This makes complete sense, particularly in light of Congress' express determination that tribes may seek injunctions in federal court to remedy violation of compacts.[3]

[3] Allowing a tribe to enforce IGRA makes particular sense, as noted by Judge Bell, in light of NIGC's repeated claim that it is a small agency with a small enforcement budget, such that it has to prioritize the use of its resources. This does not sound like the agency is not enforcing the law because it used its discretion to decide not to, but rather that it is not enforcing the law where it otherwise might choose to if it had enough money. It is thus perfectly understandable, knowing the limitations of the agency, that Congress would have allowed tribes – which are governments in their own right – to enforce the requirements of IGRA.

C. **Balance of Harm.**

The balance of harm as between the Plaintiff and Appellants favors Plaintiffs. Appellants are flagrantly violating both civil and criminal laws of the United States. Without question, such conduct must be enjoined, particularly where both the state and federal governments have failed in their obligation to take action to end these blatant violations of federal law.[4] Although the Little Traverse Band has argued that it will be harmed by the loss of revenue its illegal operation is generating, it would be a terrible precedent to set to allow such gaming to proceed illegally merely because the operator of a casino is making money! Had the Little Traverse Band followed the law when it set about to open a casino, then no complaints would be appropriate. However, having elected to ignore the express requirements for the operation of its gambling establishment, it cannot hide behind the fact that its revenue stream will cease when an injunction is entered. ("The [*Merrill Lynch v.] Kramer* [816 F. Supp 1242 (N.D. Ohio 1992)] court further found convincing the plaintiff's argument that injunctive relief was necessary to deter employees and competitors firms from engaging in such action in the future.")

[4] Right now there is apparently no one, other than the Little Traverse Band, which is regulating the gaming on this land. The State has turned away from its obligation to enforce its laws against illegal gaming and the NIGC has apparently elected not to use its limited resources to enforce the federal. No one is minding the store here even though no one is actually saying, again other than the tribe, that gaming under these circumstances is legal.

CONCLUSION

For these reasons, and the reasons set forth in Judge Bell's Opinion, Plaintiffs respectfully request that this Court deny the application for an emergency stay.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
Kevin J. Moody (P34900)
Louis B. Reinwasser (P37757)

Dated: August 31, 1999

By: _____
Louis B. Reinwasser
Attorneys for Plaintiff
One Michigan Avenue, Suite 900
Lansing, MI 48933-1609
(517) 487-2070

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