No. 11-1413

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF MICHIGAN and LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

Plaintiffs-Appellees,

v.

BAY MILLS INDIAN COMMUNITY,

Defendants-Appellant.

STATE OF MICHIGAN'S RESPONSE IN OPPOSITION TO MOTION TO STAY INJUNCTION PENDING APPEAL

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INTRODUCTION

Plaintiff-Appellee State of Michigan (State) opposes the Motion by Defendant-Appellant Bay Mills Indian Community (Bay Mills) for a stay of the lower court's Order granting Plaintiff Little Traverse Bay Bands of Odawa Indians' (LTBB) Motion for a Preliminary Injunction (Dkt # 33, Case No. 1:10-cv-01273-PLM, hereinafter "Order")[1] The preliminary injunction that closed the casino operated by Bay Mills in Vanderbilt, Michigan (Vanderbilt casino), which is the subject of this consolidated action. LTBB's motion for the preliminary injunction was expressly supported by the State. Bay Mills sought a stay of the injunction from the trial court, which denied the motion in an Opinion and Order dated April 14, 2011. There is no reason to grant Bay Mills' renewed motion for a stay nearly eight weeks after it was first denied by the trial court.

Bay Mills asserts in this motion that it will suffer irreparable injury if the casino stays closed because it will lose the value of its investment. The lower court rejected the assertion that Bay Mills would suffer irreparable injury from the closure of its casino. Under any notion of fairness – and under Sixth Circuit precedent – Bay Mills proceeded with the opening of this casino completely at its own risk. The State has every reason to believe that Bay Mills was given multiple warnings from the agencies that are in charge of administering Indian lands and Indian gaming that its novel theory that the Vanderbilt casino would be on "Indian

lands" even though it was more than 100 miles from the Bay Mills Reservation, was unsupportable.

Bay Mills now seeks equity from this Court, yet it is clear that Bay Mills was the author of the injury it will suffer, if any. Bay Mills does not come to this Court with clean hands, and as a matter of both common sense and the law, it should not expect the Court to grant the stay it requests.

ARGUMENT

I. STANDARD OF REVIEW

Bay Mills, as the moving party, has the burden of demonstrating that a stay is warranted. This Court has set out the factors for determining such a motion in *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*[2]: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." In balancing these factors, "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay."[3]

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[1] All references to the Docket will be in Case No. 1:10-cv-01273-PLM.
[2] *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentro,* 945 F.2d 150, 153 (6th Cir. 1991).
[3] *Michigan Coalition,* 945 F.2d at 153.

To establish a likelihood of success in its interlocutory appeal, Bay Mills will have to show that that the lower court abused its discretion when it granted the preliminary injunction:

> This court reviews the grant of a preliminary injunction for an abuse of discretion. . . . a trial court's decision to grant a preliminary injunction is accorded great deference, . . '
>
> * * *
>
> 'The district court's weighing and balancing of the equities is overruled only in the rarest of cases.' . . . [4]

Bay Mills cannot satisfy any of these factors, and its motion should therefore be denied.

II. ANALYSIS

A. Where Bay Mills was warned that the casino in Vanderbilt was illegal, it cannot claim it will suffer irreparable harm if a stay is not entered.

Bay Mills was told in no uncertain terms by the State that it should cease operating its casino in Vanderbilt because it was not on Indian lands and was an illegal casino. (Dkt. #1, Ex. B) It can also reasonably be inferred that long before Bay Mills opened the Vanderbilt casino, it was told at least three times by the Department of the Interior (Interior) and/or the National Indian Gaming Commission (NIGC) that its novel theory for operating a casino in Vanderbilt, over

[4] *U.S. v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004) (citations omitted).

100 miles from its reservation, would be rejected by these federal agencies.[5] In the lower court, the State described these interactions between Bay Mills and Interior/NIGC both in its earlier brief (Dkt. # 13, p. 3) and in oral argument, and Bay Mills never denied that these agencies told it that opening a casino in Vanderbilt would violate federal law. Bay Mills still does not deny that these events occurred, but takes the position in this motion that the "record" does not prove that Bay Mills was warned that its legal theory was faulty. However, it is reasonable to infer from the record that Bay Mills was warned.

Bay Mills has the burden of proving this motion. Given the reasonable inferences raised from the undisputed fact of Bay Mills' submission to Interior/NIGC of three separate requests for approvals that would essentially authorize gaming at the Vanderbilt site, and then Bay Mills' subsequent withdrawals of those requests each time before a decision could be made, Bay Mills has the burden of coming forward with evidence that it was *not* told by these agencies that its opening of a casino in Vanderbilt would be illegal. The inference that Bay Mills was told its theory was unpersuasive is borne out by the undisputed fact that shortly after Bay Mills did open its casino, Interior and NIGC formally

[5] Dkt. # 7-1, generally and at n. 1; see also Exhibit A attached to this brief (letter from Tracie L. Stevens, NIGC Chairwoman, viewable at: http://www.nigc.gov/LinkClick.aspx?fileticket=rFTma-fVw7k%3d&tabid=909 (accessed June 13, 2011).

told Bay Mills in writing that its operation was illegal. (Dkt. #7-1; Dkt. #7-2.) The lower court found that Bay Mills has been told its theory was weak.

This Court has made it clear that where a party claiming irreparable injury was warned by the government that its conduct was illegal, it cannot assert irreparable harm from proceeding with its project:

> Indeed, especially when a party knew of the risk that it undertook when it undertook the enjoined activity, monetary losses from the [sic] complying with the injunction will seldom be irreparable.[6]

In *Edward Rose,* the federal government had told defendant that the apartment designs it wanted to build violated the Fair Housing Act[7] and that it shouldn't proceed with the construction. The defendant ignored this warning and the government obtained an injunction in federal court halting the construction and occupancy of the buildings. Defendant appealed the entry of that injunction.

This Court denied the appeal. It specifically found that, because the defendant had been warned by the government that its apartment designs violated federal law, the defendant had voluntarily incurred any harm from the preliminary injunction requiring it to stop construction and renting of the apartment buildings, even if those damages exceeded $150,000 per month.[8]

As discussed above, Bay Mills was advised by the State, NIGC and Interior that opening its Vanderbilt casino would be contrary to State and federal law and

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[6] *Edward Rose,* 384 F.3d at 264.
[7] Fair Housing Act , 42 U.S.C. § 3601 *et seq.*

thus illegal. Just as the defendant in *Edward Rose,* Bay Mills voluntarily incurred any harm that may result from the trial court's Order granting a preliminary injunction. Therefore, it has not and will not suffer any cognizable irreparable harm for purposes of analyzing whether a stay of the injunction is warranted. For this reason alone, the motion for a stay should be denied.

B. Bay Mills cannot show that the lower court abused its discretion when it granted the preliminary injunction, and it is therefore unlikely to succeed on the merits of its interlocutory appeal.

1. This Court has jurisdiction

Given Bay Mills' lack of *any* significant irreparable harm, to be successful in this motion, it bears a very high burden of showing a likelihood of success on the merits of its appeal where it must convince the Court that the lower court abused its discretion when granting the preliminary injunction.[9] Bay Mills has not come close to meeting this burden.

The primary argument made by Bay Mills regarding the merits of the Plaintiffs' case is that the Plaintiffs will likely not succeed because the case will be dismissed for want of subject matter jurisdiction. This argument fails for several reasons.

a. The Court has jurisdiction under IGRA

The trial court properly held that it had jurisdiction of this action under IGRA. Pursuant to IGRA, the State and Bay Mills entered into a Tribal-State

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[8] *Edward Rose* at 264.

compact that authorized Bay Mills to conduct Class III gaming under certain circumstances. (Dkt #1, Exhibit A). Specifically, the Bay Mills compact provides that: (1) "The Tribe shall license, operate, and regulate all Class III gaming activities pursuant to this Compact, tribal law, *IGRA, and all other applicable federal law*;" and (2) "[t]he Tribe shall not conduct any Class III gaming outside of Indian lands." Bay Mills compact §§ 4(C), 4(H) (emphasis added). Both the State and LTBB have alleged that Bay Mills has violated the compact by operating the Vanderbilt casino not on Indian lands and in violation of state and federal laws, including IGRA. (Docket #1, Case No. 1:10-cv-01273-PLM, Paragraphs 19-38; Docket # 1, Case No. 1:10-cv-01278-PLM, Paragraphs 13-24).

IGRA expressly provides the federal courts with jurisdiction in 25 U.S.C. § 2710 (d)(7)(A)(ii) when a Tribe or a State is seeking to enjoin Class III gaming activity in violation of an existing Tribal-State compact, as in the case at hand. As numerous courts have held, in addition to conferring federal jurisdiction, that section also serves as a Congressional abrogation of tribal sovereign immunity.[10]

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[9] *See, Michigan Coalition* at 153.

[10] *See*, *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 935 (" . . . Congress abrogated [tribal] sovereign immunity . . . pursuant to 25 U.S.C. § 2710 (d)(7)(A)(ii) to enjoin the [Indian tribe's] class III gaming . . ."); *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999) (With respect to 25 U.S.C. § 2710(d)(7)(A)(ii), it is "clear that Congress abrogated tribal immunity only in the narrow circumstance in which a tribe conducts class III gaming in violation of an existing Tribal-State compact."); *New York v. Oneida Indian Nation of New York*, 78 F. Supp. 2d 49, 54 (N.D. N.Y. 1999) ("this Court has jurisdiction because the IGRA abrogated the Nation's sovereign immunity where, as here, the

The abrogation of Bay Mills' sovereign immunity by Congress in IGRA, coupled with the express jurisdiction set forth in IGRA and 28 U.S.C. §§ 1331 and 1362, clearly establish this Court's jurisdiction.[11]

Indeed, jurisdiction was found in earlier litigation in which Bay Mills asserted that the federal court should enjoin operation of a casino owned *by LTBB* under the precise circumstances now before the Court, i.e., Bay Mills claimed that LTBB's casino was illegal because it was not located on Indian lands. In *Bay Mills Indian Community v Little Traverse Bay Bands of Odawa Indians*,[12] the trial court specifically held that 25 U.S.C. § 2710 (d)(7)(A)(ii) confers subject matter jurisdiction over a suit by an Indian tribe against another Indian tribe alleging a compact violation on the ground that the gaming activity is not occurring on Indian lands under IGRA, rejecting the identical argument that Bay Mills makes here. In the earlier case, the lower court characterized the argument then made by LTBB and now made by Bay Mills, as "jurisdictional gamesmanship."[13] Given this ruling in *Bay Mills I*, now that the tables were turned, Bay Mills is on shaky ground when

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State is seeking declaratory or injunctive relief resulting from an alleged violation of an existing Tribal-State compact authorizing Class III gaming"); *see also Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) ("[Congress] has restricted tribal immunity from suit in limited circumstances.") (citing 25 U.S.C. § 2710(d)(7)(A)(ii)).

[11] *Miner Electric, Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007.

[12] *Bay Mills Indian Community v Little Traverse Bay Bands of Odawa Indians*, 1999 U.S. Dist. LEXIS 20314, 5:99-CV-88 (W.D. Mich. August 30, 1999) ("*Bay Mills I*") (copy attached as Exhibit B).

its asserts to this Court that the trial judged abused his discretion in granting the preliminary injunction closing Bay Mills' illegal Vanderbilt casino.

In fact, Bay Mills does not now disagree with the *Bay Mills I* decision. Rather, its argument to this Court is only that the earlier decision is distinguishable from the facts in the case at hand. This argument is unpersuasive.

Bay Mills asserted in Bay Mills I that because the land in question had not been taken into trust by the United States on behalf of LTBB, it was not Indian lands.[14] The trial court agreed, and dismissed LTBB's assertion that this argument deprived the court of jurisdiction:

> This is clearly an action initiated by an Indian tribe to enjoin a class III gaming activity. Nevertheless, Defendant LTBB contends that Plaintiffs have not stated a cause of action under this provision [25 U.S.C. § 2710 (d)(7)(A)(ii)] because this provision only applies to gaming activity located on "Indian lands" and Plaintiffs' entire complaint is premised upon the allegation that the casino is not located on "Indian lands."
>
> Defendant LTBB's jurisdictional challenge is not convincing. Defendant LTBB has consistently asserted that the Victories Casino land is squarely within the boundaries of the Tribe's reservation under historic treaties, and that because no treaties or statutes have disestablished that reservation, the land is "Indian land" under IGRA, 25 U.S.C. § 2703(4). Given LTBB's assertion that the land is Indian land, and given LTBB's failure to assert any other authority for operating the casino, LTBB's assertion that this Court does not have jurisdiction under 25 U.S.C. § 2710(d)(7)(A)(ii) has the ring of jurisdictional gamesmanship.[15]

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[13] *Bay Mills I*, 1999 U.S. Dist. LEXIS 20314 at *9.
[14] *Bay Mills I*, 1999 U.S. Dist. LEXIS 20314 at *5-6.
[15] *Bay Mills I*, 1999 U.S. Dist. LEXIS 20314, *8-9.

Bay Mills now argues that its attorney in *Bay Mills I* acknowledged that the land on which the LTBB casino sat was in fact "Indian lands" under IGRA, but was not within the definition of "Indian lands" in the LTBB compact. This is significant, according to Bay Mills, because compliance with IGRA's definition of Indian lands was all that was necessary to vest federal court jurisdiction in that case. It references statements from a brief it submitted in *Bay Mills I* to support its claim.

These references, however, do not support the assertion that Bay Mills' prior attorney "acknowledged that LTBB's parcel could be considered 'Indian lands' under IGRA." (Bay Mills' Brief, p. 6.) Throughout the briefs submitted in *Bay Mills I* by Bay Mills, it took the position that the LTBB parcel was *not* Indian lands under IGRA. (See, e.g., Ex. C to Bay Mills brief to this Court, pp. 2-4.) It is clear that when Bay Mills said in its brief that the LTBB lands "could be considered" Indian lands under IGRA, it meant that *for purposes of argument* they could be considered Indian lands, but that it was Bay Mills' position that they were not.[16] The LTBB parcel was thus not "acknowledged 'Indian lands'" as Bay Mills now asserts. But even if Bay Mills had conceded that the LTBB parcel was Indian

[16] This is clear from the statements in the Bay Mills I brief that it was "assuming" for purposes of argument only that the lands were Indian lands under IGRA and that this is what "Defendant asserts." Bay Mills Brief, Ex. C, pp. 2-3. It is certainly what the trial court believed was Bay Mills' position. *Bay Mills I*, 1999 U.S. Dist. LEXIS 20314 at *5-6 ("Bay Mills and the Sault Tribe . . . contend that

lands under IGRA, this would be legally meaningless if the actual decision of the *Bay Mills I* Court did not rely on the concession.

And in fact, the trial court in *Bay Mills I* did not base its jurisdictional ruling on this extremely nuanced point. The judge there said "Given LTBB's assertion that the land is Indian land, and given LTBB's failure to assert any other authority for operating the casino, LTBB's assertion that this Court does not have jurisdiction under 25 U.S.C. § 2710 (d)(7)(A)(ii) has the ring of jurisdictional gamesmanship."[17] In other words, LTBB could not hide behind an overly strict reading of IGRA to avoid having the court determine whether IGRA authorized operation of the Tribe's casino. That the court in *Bay Mills I* did not rely on the notion that the LTBB lands were Indian lands for IGRA purposes when deciding it had jurisdiction, is further confirmed by its statement that "If the land is not 'Indian land' *within the meaning of IGRA*, then Defendant LTBB is operating its casino in violation of IGRA."[18] This statement dispels any claim that the court assumed the lands in question were Indian lands when it entered the injunction shutting down LTBB's casino. It entered the injunction because it believed the lands were not "Indian lands" under IGRA.

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the LTBB's operation of the Victories Casino is illegal because . . . the land is not "Indian land" as defined in IGRA because it has not yet been taken into trust.")

[17] *Bay Mills I*, 1999 U.S. Dist. LEXIS *9.

[18] *Bay Mills I*, 1999 U.S. Dist. LEXIS *10 (emphasis added).

This approach to IGRA jurisdiction is mirrored in the case of *Mescalero Apache Tribe v. New Mexico*.[19] In that case, the state brought a counterclaim under

25 U.S.C. § 2710 (d)(7)(a)(ii) alleging that the tribal-state compact that had been executed by the tribe and the governor of New Mexico was invalid because the governor did not have authority to sign it. The tribe argued, just as Bay Mills argues here, that the federal court did not have jurisdiction and that the counterclaim was barred by the tribe's sovereign immunity. The Court of Appeals disagreed, expressly finding that it had jurisdiction under IGRA to entertain the state's counterclaim.

The legal posture of the *Mescalero Apache* case exactly parallels the argument made by Bay Mills in the case at hand. Bay Mills asserts here that because the State alleges that its casino is not on Indian lands, there is no federal court jurisdiction because 25 U.S.C. § 2710 (d)(7)(a)(ii) only authorizes actions for violations of tribal state compacts that arise *on Indian lands*. If the violation occurs somewhere else, even if a Tribal defendants asserts the relevant activity is on Indian lands (as Bay Mills does here), there is no IGRA jurisdiction.

The same argument would pertain to a situation as in *New Mexico* where the counter-plaintiff alleged that the compact was invalid, because

25 U.S.C. § 2710 (d)(7)(a)(ii) also says the federal court has jurisdiction where the

[19] *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379 (7th Cir. 1999).

gaming in question is "conducted in violation of any Tribal-State compact . . . that is in effect . . ." Where New Mexico alleged that the compact was *not in effect*, any gaming that was or would be conducted would not be pursuant to that compact. The result is legally identical to the position now taken by Bay Mills that there is no jurisdiction because the State is alleging that the gaming in question is not taking place on Indian lands. In both cases, Bay Mills would argue, a jurisdictional prerequisite is missing.

The Seventh Circuit, nevertheless, had no trouble upholding its jurisdiction.[20] Because it expressly found that it had jurisdiction under 25 U.S.C. § 2710 (d)(7)(a)(ii), it also found that Congress had abrogated the tribe's sovereign immunity.[21]

The courts in *Bay Mills I* and *Mescalero* recognized that a tribe's authority to conduct what would otherwise be illegal gaming arises solely from IGRA.

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[20] *Mescalero Apache*, 131 F.3d 1386. The U.S. Court of Appeals for the Tenth Circuit has also upheld an injunction of gaming on non-Indian lands pursuant to IGRA in *Kansas v. Norton*, 249 F.3d 1213 (10th Cir. 2001). In that case the Appeals Court upheld entry of an injunction by the trial court which had determined that the tribe there was unlikely to succeed in convincing the court that the determination of the NIGC that a tract of land owned by the tribe was "Indian lands" should not be reversed. It enjoined all defendants, including the tribe, from taking any action that would further gaming on the land in question. *Id.* at 1221. While this was an administrative appeal, there is no reason to distinguish it from the case at hand. In *Kansas*, the court enjoined the tribe from operating a casino on non-Indian lands. Under Bay Mills' theory in the case at hand, the court would not have had jurisdiction to do that. The Tenth Circuit disagrees with Bay Mills on this point.

[21] *Mescalero Apache*, 131 F.3d at 1386-1386.

Congress clearly did not enact IGRA – with its extensive regulatory scheme concerning what is required for lawful Indian gaming, and its heavy involvement of the States in determining what Indian gaming will be permitted (*see, e.g.*, 25 U.S.C. §§ 2710 (d) and 2719), and injunctive enforcement by States and Tribes where Indian Tribes violate the Tribal-State compacts entered into to permit lawful Indian Class III gaming – only to permit a Tribe to avoid all of IGRA's regulatory intent and requirements by simply opening an illegal casino a hundred miles away from its Indian reservation.[22] If Bay Mills' argument is validated, it will effectively give Bay Mills – or any tribe – a green light to open a casino anywhere, even on indisputably non-Indian lands, and barring action by the U.S. Department of Justice, every federal court will be powerless to enjoin it.[23]

b. The Court has jurisdiction under federal common law

Federal courts can exercise jurisdiction under 28 U.S.C § 1331 when a cause of action arises under the "laws" of the "United States." *Id.* This includes federal common law as well as federal statutes such as IGRA. *National Farmers Union*

[22] The *Kansas* Court stated: "We are loathe to conclude that in enacting IGRA, Congress intended a State to have no say whatsoever in the largely dispositive question for Indian gaming purposes of whether a tract of land inside the State's borders constitutes 'Indian lands,' within the meaning of IGRA." *Kansas* at 249 F.3d 1223. While this statement was made in the context of determining standing for the State of Kansas, it is applicable here where the same question has arisen under IGRA – can a state challenge a tribe's casino operation conducted outside Indian lands in federal court?

Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850 (1985). In *National Farmers*, a tribal court had entered a judgment against a non-tribal school. The school sought an injunction from the federal court which was granted by the trial court, and reversed by the Court of Appeals which held that the federal court did not have jurisdiction of the action.

The Supreme Court disagreed. It noted that federal courts were frequently called upon to determine issues concerning a tribe's authority. (*Id at 851-852.)* These and other federal court decisions comprise the body of federal Indian common law.

A similar issue arises in the case at hand. Can a tribe open a casino on non-Indian lands with no concern as to whether a state can seek an injunction from a federal court to curtail the unlawful exercise of tribal authority within the state's sovereign territory? This is very similar to the question addressed by the Court in *National Farmers* concerning the authority of the tribal court over non-Indians. [24]

The State believes, based on the cases discussed above, that there is a federal common law claim based on Bay Mills' operation of a casino on non-Indian lands. The State has until July 15, 2011 to bring a motion seeking to amend its complaint. It will file such a motion adding a cause of action under federal common law that

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[23] The Department of Justice was informed by the NIGC that Bay Mills' casino was not in Indian lands, but it has failed to bring any kind of action to address the illegal gaming.

[24] See also, *Cardin v. De La Cruz*, 671 F.2d 363, 365 (9th Cir. 1982).

asserts that the Tribe has exceeded its authority to open such a casino. This would be an additional basis for federal court jurisdiction.

c. Bay Mills waived sovereign immunity for actions brought in respect of unlawful gaming on lands outside its reservation

In addition to the waiver of sovereign immunity found in IGRA that is discussed above, Bay Mills has expressly waived its immunity, at least in the limited circumstance where an action arises in respect to lands falling outside the exterior boundaries of its Reservation. This waiver is included in the gaming ordinance Bay Mills adopted for the regulation of its gaming enterprises. Which was approved by NIGC as required by IGRA (25 U.S.C. § 2710 (d)(1)(A)).

Section 4 of this ordinance creates a separate Tribal Gaming Commission. The Commission is delegated extensive authority[25] over the operation of tribal gaming enterprises, including the authority "to sue or be sued in courts of competent jurisdiction within the United States and Canada..." (Ex. A, Section 4.18(Y)). This authority is "subject to the provisions of this Ordinance and other tribal laws relating to sovereign immunity." *Id.* The waiver of sovereign immunity in the gaming ordinance does reference the "sue and be sued" provision, noting:

[25] As set forth in Section 4.18(A-KK), and in other sections of the gaming ordinance. Ex. A.

> Neither the power to sue and be sued provided in Subsection 4.18(Z),[26] nor any express waiver of sovereign immunity by resolution of the Tribal Commission shall be deemed . . . a consent to suit in respect of any land within the exterior boundaries of the Reservation . . ."

For the "sue and be sued" provision to have any meaning, it must contemplate that the Commission will be subject to suit in federal court for some purposes. Similar provisions have been interpreted to act as a waiver of sovereign immunity.[27] It appears that this is still an undecided issue in this Court.[28] However, there is no reason to distinguish the situation where a tribe adopts a "sue and be sued" ordinance from the adoption of such a provision by the federal government. In *Dolan v. United States Postal Serv.*,[29] the Supreme Court held that the federal government had waived its immunity from suit when it enacted the Postal Reorganization Act[30] which included a "sue and be sued" clause. It is well established that the federal government does not waive its immunity except by a clear and express waiver, just as in the case of Indian tribes.[31] If a "sue and be sued" clause in a federal statute can operate as a waiver for the Postal Service,

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[26] This probably should refer to Subsection 4.18(Y).
[27] *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009) ("Some courts have held that a broad sue-and-be-sued clause does waive tribal-sovereign immunity. See Validity and Construction of Indian Reorganization Act, 28 A.L.R. Fed. 2d 563 at § 27 (citing cases). . .")
[28] *Id.* at 922 ("Thus, even if we were to conclude that a broad sue-and-be-sued clause waives tribal-sovereign immunity, this clause is insufficient to do the job.")
[29] *Dolan v. United States Postal Serv.*, 546 U.S. 481, 484 (2006).
[30] 39 U.S.C. § 401 (1).
[31] *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 33 (1992)

there is no good reason that it should not operate as a waiver of a tribe's sovereign immunity.

This is especially true where the waiver can be narrowly applied. The State acknowledges that Bay Mills' gaming ordinance requires an express waiver of sovereign immunity before the Tribe or the Commission can be sued, and that such waivers are very narrow, but the "sue and be sued" provision is express and it is very narrow – it cannot pertain to land within the exterior boundaries of the Reservation. These restrictions make sense as the Tribe did not want to subject its land in Indian country and its assets on that land to suit in any court.

As indicated above, the State will be filing a motion to amend its Complaint. It will add the Tribal Gaming Commission as a defendant in the Amended Complaint, and will plead the waiver of sovereign immunity from the Tribal Gaming Ordinance. This will provide an additional source of jurisdiction for the federal court.

2. The trial court did not abuse its discretion when it determined that it was unlikely that Bay Mills could establish that its casino was on Indian lands

With regard to Bay Mills' assertion that the lower court incorrectly determined that the lands in question were not properly purchased with funds obtained by Bay Mills under the Michigan Indian Land Claims Settlement Act of

1997,[32] Bay Mills' arguments likewise fail to meet the abuse of discretion standard that will apply to these assertions in its appeal. The lower court reasonably determined that the lands in question did not "consolidate and enhance" Bay Mills' landholdings as required by § 107 of the MILCSA. It was also reasonable to reject Bay Mills' assertion that the MILCSA automatically converted lands purchased with its funds into "restricted fee" lands, particularly where Bay Mills admitted on the record that it had taken a contrary position concerning the meaning of § 107 in 2002 when it claimed, not that land bought with MILCSA funds was automatically restricted fee lands, but that Interior had a mandatory obligation to take land purchased with such funds *into trust* for the benefit of the Tribe. (See letter from Interior, Dkt. # 4-10).

Bay Mills cannot show that it is likely to succeed on the merits of its appeal. Bay Mills' motion for a stay should be denied.

III. LTBB, the State and the Public will be harmed if this Court grants a stay.

The lower court found that LTBB will suffer irreparable harm if the illegal Vanderbilt casino is allowed to continue in operation. In weighing the "harm to others factor," this Court should now consider the harm to the State and the public as well. The Vanderbilt casino is clearly illegal, and was operated contrary to IGRA, other applicable federal law, State law, and the BMIC Compact. LTBB

[32] Michigan Indian Land Claims Settlement Act of 1997, P.L. 105-143

presented compelling evidence to the trial court (Dkt. ## 4 and 27) of the harm it will suffer if a stay is entered, including a loss of revenues and goodwill arising from the unlawful competition from the Vanderbilt casino.

Likewise, the State has compacts with tribes other than Bay Mills that require that economic incentive payments be made to the State based on revenues generated by tribal casinos, including such an agreement with LTBB. To the extent the Vanderbilt casino draws casino customers from these other tribal casinos, the State will lose money. As with all of the other factors, this weighs in favor of denying Bay Mills' request for a stay.

IV. The public interest factor weighs heavily in favor denying a stay.

In addition to the State's loss of money should the illegal Vanderbilt casino be permitted to resume operations, granting a stay would permit Bay Mills to resume operations of a tribal casino that is not authorized by IGRA and violates State and federal anti-gambling laws. (*See* State Complaint (Dkt #1), Counts I and II.) These State laws also make it illegal for anyone to patronize an unlawful casino. It is certainly not in the public interest to allow the operation of a casino that would essentially entice the public to violate the law and effectively create a public nuisance.

("MILCSA").

CONCLUSION

The State respectfully asks that the motion for stay pending appeal be denied.

Respectfully submitted,

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Dated: June 16, 2011
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PROOF OF SERVICE

I certify that on June 16, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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Exhibit A

September 15, 2010

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Bay Mills Indian Community
12140 West Lakeshore Dr.
Brimley, MI 49715

Re: Bay Mills Indian Community gaming ordinance amendment

Dear Ms. Tierney:

This letter responds to your request to review and approve an amendment to the Community's gaming ordinance. The amendment was adopted by the Executive Council Resolution No. 10-7-30 on July 30, 2010, and submitted to NIGC on August 2, 2010. The amendment rescinds two previous amendments enacted earlier this year, Resolution Nos. 10-2-9 and 10-5-20. The amendment removes site-specific language in the ordinance in favor of a general definition of Indian lands that is comparable to the provisions in the IGRA.

The ordinance amendment satisfies the requirements of IGRA and NIGC regulations, and this letter constitutes my approval of it. It is important to note that approval is granted only for gaming on Indian lands as defined by IGRA over which the Community has jurisdiction. Thank you for your submission. The NIGC staff and I look forward to working with you on future gaming issues. If you have questions, please do not hesitate to contact Dawn Sturdevant Baum, Staff Attorney, at 202-632-7003.

Sincerely,

Tracie L. Stevens
Chairwoman

Bay Mills Indian Community
12140 West Lakeshore Drive
Brimley, Michigan 49715
(906) 248-3241 Fax-(906) 248-3283

AUG - 2 2010

RESOLUTION

Resolution No. 10-7-30
Amendment to Gaming Ordinance

WHEREAS: The Bay Mills Indian Community is a federally recognized Indian tribe with a Constitution enacted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. sec. 461, *et seq.*, and

WHEREAS: The Tribe regulates gaming on its tribal lands under a compact with the State of Michigan and under its Gaming Ordinance, and

WHEREAS: The Executive Council has determined that it is in the best interest of the Bay Mills Indian Community to describe the lands upon which gaming may be conducted pursuant to this Ordinance and in conformance with the Indian Gaming Regulatory Act, 25 U.S.C. sec. 2701, *et seq.*

NOW, THEREFORE BE IT RESOLVED, that the Executive Council of the Bay Mills Indian Community hereby amends the Gaming Ordinance by revising Sections 2.30, and 5.5(A), and deleting Section 2.45, and renumbering Sections 2.31 through 2.45, with additions underlined and deletions struck out:

2.30 "**Indian lands**" means:

(A) All lands within the limits of the Reservation of the Bay Mills Indian Community; and

(B) Any lands title to which is either held in trust by the United States for the benefit of the Bay Mills Indian Community or held by the Bay Mills Indian Community subject to restriction by United States against alienation and over which the Tribe exercises governmental power.

2.31 "**IRS**" means....

2.32 "**Key employee**" means...

2.33 "**License**" means...

2.34 "**Manager**" means...

laws, or parts thereof, inconsistent with the provisions of this Ordinance are hereby repealed.

Repeal of this Ordinance or any portion thereof shall not have the effect of reviving any prior Law, Ordinance, or Resolution theretofore repealed or suspended.

3.3 **Classes of Gaming**. This Ordinance shall divide gaming into the following three Classes: Class I, Class II and Class III.

3.4 **Construction**. In construing the provisions of this Ordinance, unless the context otherwise requires, the following shall apply:

(A) This Ordinance shall be liberally construed to effect its purpose and to promote substantial justice.

(B) Words in the present tense include the future and past tenses.

(C) Words in the singular number include the plural, and words in the plural number include the singular.

(D) Words of the masculine gender or neuter include masculine and feminine genders and the neuter.

3.5 **Savings Clause**. If any section of this Ordinance is invalidated by a court of competent jurisdiction, the remaining sections shall not be affected thereby.

Section 4. Tribal Gaming Commission.

4.1 **Establishment**. The Council hereby charters, creates and establishes the Gaming Commission as a governmental subdivision of the Tribe. The Commission shall be referred to throughout this Ordinance as the Tribal Commission.

4.2 **Location and Place of Business**. The Tribal Commission shall be a resident of and maintain its headquarters, principal place of business and office on the Bay Mills Reservation, Michigan. The Tribal Commission may, however, establish other places of business in such other locations as the Tribal Commission may from time to time determine to be in the best interest of the Tribe.

4.3 **Duration**. The Tribal Commission shall have perpetual existence and succession in its own name, unless dissolved by the Tribal Council pursuant to Tribal law.

4.4 **Attributes**. As a governmental subdivision of the Tribe, the Tribal Commission has been delegated the right

to exercise one or more of the substantial governmental functions of the Tribe. In creating the Tribal Commission, it is the purpose and intent of the Tribal Council that the operations of the Tribal Commission be conducted on behalf of the Tribe for the sole benefit and interests of the Tribe, its members and the residents of the Reservation. In carrying out its purposes under this Ordinance, the Tribal Commission shall function as an arm of the Tribe. Notwithstanding any authority delegated to the Tribal Commission under this Ordinance, the Tribe reserves to itself the right to bring suit against any person or entity in its own right, on behalf of the Tribe or on behalf of the Tribal Commission, whenever the Tribe deems it necessary to protect the sovereignty, rights and interests of the Tribe or the Tribal Commission.

4.5 **Recognition as a Political Subdivision of the Tribe.** The Tribe, on behalf of the Tribal Commission, shall take all necessary steps to acquire recognition of the Tribal Commission as a political subdivision of the Tribe, recognized by all branches of the United States Government as having been delegated the right to exercise one or more substantial governmental functions of the Tribe.

4.6 **Sovereign Immunity of the Tribal Commission.** The Tribal Commission is clothed by federal and tribal law with all the privileges and immunities of the Tribe, except as specifically limited by this Ordinance, including sovereign immunity from suit in any state, federal or tribal court. Nothing in this Ordinance shall be deemed or construed to be a waiver of sovereign immunity of the Tribal Commission from suit, which shall only be waived pursuant to subsection 4.7. Nothing in this Ordinance shall be deemed or construed to be a consent of the Tribal Commission to the jurisdiction of the United States or of any state or of any other tribe with regard to the business or affairs of the Tribal Commission.

4.7 **Waiver of Sovereign Immunity of the Tribal Commission.** Sovereign immunity of the Tribal Commission may be waived only by express resolutions of both the Tribal Commission and the Tribal Council after consultation with its attorneys. All waivers of sovereign immunity must be preserved with the resolutions of the Tribal Commission and the Tribal Council of continuing force and effect. Waivers of sovereign immunity are disfavored and shall be granted only when necessary to secure a substantial advantage or benefit to the Tribal Commission. Waivers of sovereign immunity shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds, if any, of the Tribal Commission subject thereto, and shall specify the court having jurisdiction pursuant thereto and the applicable law. Neither the power to sue and be sued

provided in Subsection 4.18(Z), nor any express waiver of sovereign immunity by resolution of the Tribal Commission shall be deemed a consent to the levy of any judgment, lien or attachment upon property of the Tribal Commission other than property specifically pledged or assigned, or a consent to suit in respect of any land within the exterior boundaries of the Reservation or a consent to the alienation, attachment or encumbrance of any such land.

4.8 **Sovereign Immunity of the Tribe.** All inherent sovereign rights of the Tribe as a federally-recognized Indian tribe with respect to the existence and activities of the Tribal Commission are hereby expressly reserved, including sovereign immunity from suit in any state, federal or tribal court. Nothing in this Ordinance, nor any action of the Tribal Commission, shall be deemed or construed to be a waiver of sovereign immunity from suit of the Tribe; or to be a consent of the Tribe to the jurisdiction of the United States or of any state or any other tribe with regard to the business or affairs of the Tribal Commission or the Tribe; or to be a consent of the Tribe to any cause of action, case or controversy, or to the levy of any judgment, lien or attachment upon any property of the Tribe; or to be a consent to suit with respect to any land within the exterior boundaries of the Reservation, or to be a consent to the alienation, attachment or encumbrance of any such land.

4.9 **Credit of the Tribe.** Nothing in this Ordinance nor any activity of the Tribal Commission shall implicate or any way involve the credit of the Tribe.

4.10 **Assets of the Tribal Commission.** The Tribal Commission shall have only those assets specifically assigned to it by the Council or acquired in its name by the Tribe or by it on its own behalf. No activity of the Tribal Commission nor any indebtedness incurred by it shall implicate or in any way involve any assets of tribal members or the Tribe not assigned in writing to the Tribal Commission.

4.11 **Membership.**

(A) Number of Commissioners. The Tribal Commission shall be comprised of five (5) Tribal Gaming Commissioners consisting of persons appointed by the Executive Council.

(B) Qualification of Commissioners. Each Commissioner must be a member of the Tribe, and, as of the date of appointment, shall not be:

(1) An employee of a gaming enterprise of the Tribe; or

(2) A member of the Gaming Commission staff.

(C) Background Check. Prior to the time that any Tribal Commission member takes office on the Tribal Commission, the Tribe shall perform or arrange to have performed a comprehensive background check on each prospective member, the results of which shall be transmitted to the Executive Council. No person shall serve as a Commissioner if:

(1) His prior activities, criminal record, if any, or reputation, habits or associations:

(a) Pose a threat to the public interest; or
(b) Threaten the effective regulation and control of gaming; or

(c) Enhance the dangers of unsuitable, unfair, or illegal practices, methods, or activities in the conduct of gaming; or

(2) S/he has been convicted of or entered a plea of nolo contendere to a felony or any gaming offense in any jurisdiction or to a misdemeanor within five (5) years of consideration for appointment involving a matter which would be a crime under the provisions of the Michigan Penal Code or the controlled substance provisions of the Michigan Public Health Code; or

(3) S/he has a present interest in the conduct of any gaming enterprise or in any business which is licensed as a vendor to a gaming enterprise of the Tribe; or

(4) S/he has a member of his immediate family employed as a primary management official by any tribal gaming establishment.

4.12 **Term of Office.** Each Commissioner shall serve a term of four years, commencing on January 1st, or until a successor Commissioner is appointed. On January 1, 1998, two Commissioners shall be appointed for a term of two years, and three Commissioners shall be appointed for a term of four years. Thereafter, all Commissioners shall serve four-year terms. The Council's appointment of any Commissioner who is not a member of the Executive Council shall be by resolution.

4.13 **Ex Officio Members.** At the direction of the Tribal Council, any member of the Tribal Council, any Tribal or Bureau of Indian Affairs employee or any other person may

be designated to participate, without vote, in Tribal Commission meetings.

4.14 **Meetings.**

(A) Regular Meetings. The Tribal Commission shall hold at least two regular monthly meetings, which shall take place on the first and third Tuesdays of each month. If the meeting date falls on a holiday, it may be rescheduled to another date not in conflict with the regular meetings of the Executive Council on the second and fourth Mondays of each month.

(B) Special Meetings. Special meetings may be called at the request of the Tribal Council, the Chairman of the Tribal Commission or three (3) or more members of the Tribal Commission.

(C) Compensation of Commissioners. An honorarium set by the Executive Council may be paid to Commissioners as compensation.

(D) Quorum. A quorum for all meetings shall consist of four (4) members.

(E) Voting. All questions arising in connection with the action of the Tribal Commission shall be decided by majority vote. The Chairman of the Tribal Commission shall only be entitled to vote to break a tie.

4.15 **Organization.** The Tribal Commission shall develop its own operating procedures and shall elect from within itself a Chairman to direct meetings, a reporter to be responsible for keeping Tribal Commission minutes and transmitting to the Tribal Council a copy of those minutes, handling correspondence and reporting Tribal Commission decisions and such other officers as it deems advisable.

4.16 **Removal of Members or Vacancies.**

(A) Removal.

(1) A Commissioner shall be immediately removed by the Executive Council for any action which bars eligibility for serving in that capacity under subsections 4.11(C)(2), (3), or (4) of this Ordinance.

(2) A Commissioner may be removed by the Council for the following reasons: serious inefficiency, neglect of duty, malfeasance, misfeasance, nonfeasance, misconduct in office, or for any

conduct which threatens the honesty and integrity of the Tribal Commission or otherwise violates the letter or intent of this Ordinance. Except as provided below, no Commissioner may be removed without notice and an opportunity for a hearing before the Council, and then only after the Commissioner has been given written notice of the specific charges at least ten days prior to such hearing. At any such hearing, the Commissioner shall have the opportunity to be heard in person or by counsel and to present witnesses on his behalf. If the Council determines that immediate removal of a Commissioner is necessary to protect the interests of the Tribe, the Council may immediately remove the Commissioner temporarily, and the question of permanent removal shall be determined thereafter pursuant to Tribal Commission hearing procedures. A written record of all removal proceedings together with the charges and findings thereon shall be kept by the Tribal Secretary. The decision of the Council upon the removal of a Commissioner shall be final.

(B) Vacancies. If any Commissioner shall die, resign, be removed or for any reason be unable to serve as a Commissioner, the Council shall declare his position vacant and shall appoint another person to fill the position. The terms of office of each person appointed to replace an initial Commissioner shall be for the balance of any unexpired term for such position, provided, however, that any prospective appointee must meet the qualifications established by this Ordinance.

4.17 **Conflict of Interest.** No person shall serve as a Commissioner if s/he or any member of his immediate family is a primary management official of, or has a financial interest in, any management contract or gaming supply business, or if s/he has any other personal or legal relationship which places him in a conflict of interest.

4.18 **Powers of the Tribal Commission.** In furtherance, but not in limitation, of the Tribal Commission's purposes and responsibilities, and subject to any restrictions contained in this Ordinance or other applicable law, the Tribal Commission shall have and is authorized to exercise by majority vote, the following powers in addition to all powers already conferred by this Ordinance:

(A) To regulate all day-to-day gaming activity within the jurisdiction of the Tribe including tele-bingo and other unusual games.

(B) To promote the full and proper enforcement of all tribal civil and criminal gaming laws and policies.

(C) To enact and enforce such rules and regulations regarding its activities and governing its internal affairs as the Tribal Commission may deem necessary and proper to effectuate the powers granted by this Ordinance and the powers granted and duties imposed by applicable law.

(D) To publish and distribute copies of this Ordinance, Tribal Commission rules, and any Council, Tribal Commission or Tribal Court decisions regarding gaming matters.

(E) To prepare and submit for Council approval proposals, including budget and monetary proposals, which could enable the Tribe to better carry forth the policies and intent of this Ordinance.

(F) To work with the staff of any tribal department, program, project, or operation and to cooperate with the Council or any Council Committee in regard to gaming issues.

(G) Where it is in the best interest of the Tribe, to develop a cooperative working relationship with federal and state agencies and officials.

(H) To arrange for and direct such inspections and investigations as it deems necessary to ensure compliance with this Ordinance and implementing regulations. In undertaking such investigations, the Tribal Commission may request the assistance of tribal gaming staff, federal, state and tribal law enforcement officials, legal counsel and other third parties.

(I) To maintain and keep current a record of new developments in the area of Indian gaming.

(J) To request the assistance of the Tribal Court or Tribal Appellate Court in conducting gaming hearings, defining terms used in this Ordinance or other tribal laws, or in any other matter in which the Tribal Commission deems such assistance to be necessary or proper.

(K) To consider any gaming matter brought before it by any person, organization or business, and all matters referred to it by the Tribal Council.

(L) To obtain and publish a summary of federal revenue laws relating to gaming and to insure compliance with the same.

(M) To arrange for training of Tribal Commission members, tribal employees and others in areas relating to the regulation or operation of gaming.

(N) With the approval of the Council, to employ such advisors as it may deem necessary. Advisors may include, but are not limited to, lawyers, accountants, law enforcement specialists and gaming professionals.

(O) To make recommendations to the Council on the hiring of all supervisory gaming employees.

(P) To promulgate rules and regulations to implement and further the provisions of this Ordinance.

(Q) To approve or disapprove any application for a tribal gaming license.

(R) To consult with and make recommendations to the Council regarding changes in tribal gaming laws and policies.

(S) To administer oaths, conduct hearings, and by subpoena compel the attendance of witnesses and the production of any books, records and papers relating to the enforcement of tribal gaming laws, regulations and policies.

(T) To make, or cause to be made by its agents or employees, an examination or investigation of the place of business, equipment, facilities, tangible personal property, and the books, records, papers, vouchers, accounts, documents and financial statements of any gaming or enterprise operating, or suspected to be operating, within the jurisdiction of the Tribe.

(U) When necessary or appropriate, to request the assistance and utilize the services of the courts, law enforcement and government officials and agencies, and private parties, in exercising its powers and carrying out its responsibilities.

(V) To examine under oath, either orally or in writing, any person or agent, officer, or employee of any person, with respect to any matters related to this Ordinance.

(W) To delegate to an individual member of the Commission, or to an individual member of the Tribal Council, or to the Tribal Commission or tribal staff, such of its functions as may be necessary to administer these ordinances efficiently; provided, that the Tribal Commission may not re-delegate its power to exercise any of the substantial governmental

functions of the Tribe delegated to the Tribal Commission by the Tribe; and provided further, that the Tribal Commission may not delegate its power to promulgate rules and regulations. It may also not delegate to anybody except the Tribal Council or Tribal Court the power to revoke a tribal gaming license permanently. The Tribal Commission may, however, delegate the power to suspend a gaming license temporarily and to close a licensed gaming enterprise for no more than 30 days when its continued operation threatens the public health, welfare or safety.

(X) To close permanently, after notice and a hearing, any game or games which are operating in violation of tribal law.

(Y) To sue or be sued in courts of competent jurisdiction within the United States and Canada, subject to the provisions of this Ordinance and other tribal laws relating to sovereign immunity; provided, that no suit shall be brought by the Tribal Commission without the prior explicit written approval of the Tribal Council.

(Z) To purchase, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve and use property and assets of every description, real and personal, tangible or intangible, including money, securities, or any interests therein, rights and services of any kind and description or any interest therein; provided that the Tribal Commission shall have authority to purchase any interest in real property, whether located on or off the Reservation, only with the express, prior written consent of the Tribal Council as to each such action, and title to such real property and property which is to become a fixture or permanent improvement or part of the real property shall be taken in the name of the Tribe or in the name of the United States in trust for the Tribe, and title to all trust and restricted real property shall remain in trust or restricted status.

(AA) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its personal property and assets.

(BB) With the prior permission of the Tribal Council, to borrow money and to make, accept, endorse, execute and issue bonds, debentures, promissory notes, guarantees and other obligations of the Tribal Commission for moneys borrowed, or in payment for property acquired or for any of the purposes of the Tribal Commission and to secure payment of any

obligations by secured interest, mortgage, pledge, deed, indenture, agreement or other instrument of trust or by other lien upon, assignment of or agreement in regard to all or any part of the property, rights or privileges of the Tribal Commission.

(CC) To arbitrate, compromise, negotiate or settle any dispute to which it is a party relating to the Tribal Commission's authorized activities.

(DD) To enter into, make, perform and carry out any agreement, partnership, joint venture contract or other undertaking with any federal, state or local governmental agency, tribe, person, partnership, corporation or other association or entity for any lawful purpose pertaining to the business of the Tribal Commission or which is necessary or incidental to the accomplishment of the purposes of the Tribal Commission.

(EE) To invest and reinvest its funds in such mortgages, bonds, notes, debentures, share of preferred and common stock, and any other securities of any kind whatsoever, and property, real, personal or mixed, tangible or intangible, as the Tribal Commission shall deem advisable and as may be permitted under applicable law, provided that the Tribal Commission shall have authority to invest or reinvest in real property, whether located on or off the Reservation, subject to the restrictions set forth in Subsection 4.18(DD) above.

(FF) To exercise the tribal power to tax authorized by the Tribal Constitution, and, in accordance with other applicable law, by establishing and collecting gaming fees from gaming enterprises.

(GG) To purchase insurance from any stock or mutual company for any property, or against any risk or hazard.

(HH) To establish and maintain such bank accounts as may be necessary or convenient.

(II) To engage in any and all activities which directly or indirectly carry out the purposes of the Tribe as set forth in this Ordinance.

(JJ) With prior approval of the Tribal Council, to make application and accept grants and other awards from private and governmental sources in carrying out or furthering the purposes of the Tribal Commission or the Tribe.

(KK) To exercise all authority delegated to it or conferred upon it by law and to take all action which shall be reasonably necessary and proper for carrying into execution the foregoing powers and all of the powers vested in this Ordinance as permitted by the purposes and powers herein stated and which are deemed to be in the best interests of the Tribe, exercising prudent management and good business judgment, all in compliance with applicable law.

4.19 **Annual Budget**. The Tribal Commission shall prepare an annual o0erating budget for all Tribal Commission activities and present it to the Council by November 15th of each year.

4.20 **Tribal Commission Regulations**.

(A) Tribal Commission regulations necessary to carry out the orderly performance of its duties and powers shall include, but shall not be limited to the following:

(1) Internal operational procedures of the Tribal Commission and its staff;

(2) Interpretation and application of this Ordinance as may be necessary to carry out the Tribal Commission's duties and exercise its powers;

(3) A regulatory system for all gaming activity, including accounting, contracting, management and supervision;

(4) The findings of any reports or other information required by or necessary to implement this Ordinance; and

(5) The conduct of inspections, investigations, hearings, enforcement actions and other powers of the Tribal Commission authorized by this Ordinance.

(B) No regulation of the Tribal Commission shall be of any force or effect unless it is adopted by the Tribal Commission by written resolution and subsequently approved by a resolution of the Tribal Council and both filed for record in the office of the Tribal Secretary.

(C) The Tribal Court and any other court of competent jurisdiction shall take judicial notice of all Tribal Commission regulations adopted pursuant to this Ordinance.

4.21 **Right of Entrance; Monthly Inspection.** The Tribal Commission and duly authorized officers and employees of the Tribal Commission, during regular business hours, may enter upon any premises of any operator or gaming establishment for the purpose of making inspections and examining the accounts, books, papers, and documents, of any such operator or gaming establishment. Such operator shall facilitate such inspection or examinations by giving every reasonable aid to the Tribal Commission and to any properly authorized officer or employee.

A Commissioner or a member of the Tribal Commission's staff shall visit each tribally-owned or tribally-operated gaming establishment during normal business hours for the purpose of monitoring its operation. Such visits shall be unannounced.

4.22 **Investigations.** The Tribal Commission, upon complaint or upon its own initiative or whenever it may deem it necessary in the performance of its duties or the exercise of its powers, may investigate and examine the operation and premises of any person who is subject to the provisions of this Ordinance. In conducting such investigation, the Tribal Commission may proceed either with or without a hearing as it may deem best, but it shall make no order without affording any affected party notice and an opportunity for a hearing pursuant to Tribal Commission regulations.

4.23 **Hearings; Examiner.** Pursuant to regulations, the Tribal Commission may hold any hearing it deems to be reasonably required in administration of its powers and duties under this Ordinance. Whenever it shall appear to the satisfaction of the Tribal Commission that all of the interested parties involved in any proposed hearing have agreed concerning the matter at hand, the Tribal Commission may issue its order without a hearing.

The Tribal Commission may designate one of its members to act as examiner for the purpose of holding any such hearing or the Tribal Commission may appoint another person to act as examiner under subsection 4.24 below. The Tribal Commission shall provide reasonable notice and the right to present oral or written testimony to all people interested therein as determined by the Tribal Commission.

4.24 **Appointment of Examiner; Power of Examiner.** The Tribal Commission may appoint any person qualified in the law or possessing knowledge or expertise in the subject matter of the hearing to act as examiner for the purpose of holding any hearing which the Tribal Commission, or any member thereof, has power or authority to hold. Any such appointment shall constitute a delegation to such examiner

of all powers of a Commissioner under this Ordinance with respect to any such hearing.

4.25 **Staff of Gaming Commission.** Staff of the Gaming Commission are employees of the Bay Mills Indian Community, subject to the governmental personnel policies of the Tribe and supervised by the Commission.

(A) Any staff position which includes responsibility for monitoring, reviewing and investigating the day-to-day gaming operations of a tribally-operated gaming enterprise, or supervision of such monitoring, review, and investigation, must be held by a person who meets the standards contained in subsection 4.11(C) of this Ordinance.

(B) All other staff positions maintained by the Gaming Commission must be held by persons who meet the standards contained in subsection 4.11(C)(1)--(3) of this Ordinance.

(C) No staff member may serve as a Commissioner of the Tribal Gaming Commission.

4.26 **Quarterly Reports.** The Tribal Commission shall file a quarterly report to the Council summarizing reports received from each of the Tribe's Primary Management Officials, and making such comments as it deems necessary to keep the Council fully informed as to the status of its various gaming operations.

Section 5. Gaming Licenses.

5.1 **Applicability.** This Ordinance applies to all people engaged in gaming within the jurisdiction of the Tribe. The application for license and the conduct of gaming within the jurisdiction of the Tribe shall be deemed to be a consent to the jurisdiction of the Tribe and the Tribal Court in all matters arising from the conduct of such gaming, and all matters arising under any of the provisions of this Ordinance or other tribal laws.

5.2 **License Required.** No person shall operate Class II or Class III gaming within the jurisdiction of the Tribe unless such gaming is licensed by the Tribe.

5.3 **Types of Licenses.** The Tribe shall issue each of the following types of gaming licenses:

(A) Tribally-Owned or Tribally-Operated Class II. This license shall be required of all tribally-owned or tribally-operated gaming enterprises operating one or more Class II gaming activities.

Exhibit B

BAY MILLS INDIAN COMMUNITY; SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS; UNITED STATES OF AMERICA ex rel. BAY MILLS INDIAN COMMUNITY and SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, Plaintiffs, v. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS; and NATIONAL INDIAN GAMING COMMISSION, Defendants.

File No. 5:99-CV-88

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

1999 U.S. Dist. LEXIS 20314

August 30, 1999, Decided
August 30, 1999, Filed

DISPOSITION: **[*1]** Plaintiffs' motion for preliminary injunction (Docket # 3) GRANTED.

COUNSEL: For BAY MILLS INDIAN COMMUNITY, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, plaintiffs: Louis B. Reinwasser, Miller, Canfield, Paddock & Stone, Lansing, MI.

For LITTLE TRAVERSE BAY BAND OF ODAWA INDIANS, defendant: James A. Bransky, Michigan Indian Legal Services, Traverse City, MI.

For LITTLE TRAVERSE BAY BAND OF ODAWA INDIANS, defendant: George Forman, Forman & Prochaska, San Rafael, CA.

For NATIONAL INDIAN GAMING COMMISSION, defendant: Joan E. Meyer, Charles R. Gross, U.S. Attorney's Office, Grand Rapids, MI.

JUDGES: ROBERT HOLMES BELL, UNITED STATES DISTRICT JUDGE.

OPINION BY: ROBERT HOLMES BELL

OPINION

Plaintiffs, the Bay Mills Indian Community ("Bay Mills") and the Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe"), have filed suit against the Little Traverse Bay Bands of Odawa Indians ("LTBB") and the National Indian Gaming Commission ("NIGC"). Plaintiffs seek a declaration that LTBB's operation of the Victories Casino in Petoskey, Emmet County, Michigan, is illegal, an injunction against operation of the casino, the imposition of penalties against LTBB, and recovery of a portion of those penalties **[*2]** assessed. This case is currently before the Court on Plaintiffs' motion for a preliminary injunction enjoining operation of the casino.

I.

Federal recognition of the LTBB was reaffirmed in 1994 through the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act ("LTBB Act"), *25 U.S.C. § 1300k*. To enable the LTBB to reestablish a land base within or near its historic reservation, Congress required the Secretary of the Interior to accept into federal trust status for the benefit of the LTBB any conveyances of land in Emmet and Charlevoix Counties, subject to clear title. [1]

1 *25 U.S.C. § 1300k-4(a)* provides:

> 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.

[*3]

Gaming on Indian lands is subject to regulation under the Indian Gaming Regulation Act ("IGRA"), *25 U.S.C. § 2701 et seq.* IGRA permits class III gaming only on "Indian lands," which are defined as:

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

25 U.S.C. § 2703 (4).

Under IGRA, class III gaming activities are lawful on Indian lands if such activities are authorized by the tribe, are located in a state that permits such gaming, and are conducted in conformance with a Tribal-State compact. *25 U.S.C. § 2710(d)(1).*

On December 3, 1998, the LTBB entered into a compact with the State of Michigan for the conduct of class III gaming on "eligible Indian lands," defined in the compact as "trust and reservation lands acquired under *25 U.S.C. § 1300k-4(a)* within Emmet or Charlevoix **[*4]** Counties, Michigan." Accordingly, before lands become "eligible Indian lands" pursuant to the terms of the compact, they must be acquired by the Secretary in trust for LTBB's benefit.

On December 14, 1998, the LTBB submitted a request to the Bureau of Indian Affairs ("BIA"), Department of the Interior, to take the Victories Casino land in Emmet County into trust. When the LTBB prepared to open the casino in early July 1999, the land had not yet been taken into trust. On July 2, 1999, the LTBB and the State of Michigan entered into a Letter of Understanding that the tribe would not conduct any gaming at the Victories Casino in Emmet County "until such time as there is substantial certainty that the land will be taken into trust by the United States for the benefit of LTBB." The Letter of Understanding merely declares the intention of the State to forbear from asserting legal challenges to LTBB's gaming at the casino. It does not purport to amend the Tribal-State compact.

In a letter dated July 14, 1999, to the State of Michigan, the BIA advised that trust acquisitions on behalf of the LTBB are mandatory rather than discretionary. All that is left to occur before the land is designated **[*5]** as trust land is the ministerial act of ensuring that there are no adverse claims against the title. Once title defects are corrected, there is a 30 day notice requirement before the property becomes trust property.

On July 16, 1999, the LTBB opened Victories Casino with the consent of the State of Michigan. The land had not yet been taken into trust.

On August 5, 1999, the Associate Solicitor for Indian Affairs issued a memorandum concluding that the Victories Casino property qualifies as restored land within the meaning of section 20 of IGRA, *25 U.S.C. § 2719*, and is therefore exempt from the general prohibition against gaming on land acquired after October 17, 1988. On August 27, 1999, the Solicitor's Office decided to accept the Victories Casino property into trust. The decision has now been submitted to the Federal Register for publication as required by *25 C.F.R. § 151.12(b)*. After notice is published, and if no interested party seeks judicial review of the Secretary's determination, the land will be transferred into trust status after the 30 day notice period has expired.

Plaintiffs, Bay Mills and the Sault Tribe, are federally recognized Indian tribes **[*6]** that own and operate casinos in northern Michigan. They contend that the LTBB's operation of the Victories Casino is illegal because it is being operated in violation of IGRA. Specifically, Plaintiffs contend that the land is not "Indian

land" as defined in IGRA because it has not yet been taken into trust.

On August 2, 1999, after learning that the National Indian Gaming Commission ("NIGC") had no present intention of taking any action against the Victories Casino, Plaintiffs filed this suit, on their own behalf and on behalf of the United States, against the LTBB and the NIGC, alleging five causes of action: 1) a *qui tam* action under *25 U.S.C. § 201* to recover penalties for violation of IGRA; 2) a *qui tam* action for declaration that the casino violates *18 U.S.C. § 1955*, and for forfeiture of revenues; 3) an injunction against violation of IGRA, *25 U.S.C. § 2710(d)(7)(A)(ii)*; 4) review of final agency action by NIGC under APA, *5 U.S.C. § 702* and *§ 704*; and 5) mandamus directing the NIGC to close, fine, or prosecute Defendants for violating IGRA.

II.

In determining whether **[*7]** to grant a preliminary injunction, this Court considers the following four factors:

> (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Connection Distributing Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998), cert. denied, 526 U.S. 1087, 143 L. Ed. 2d 650, 119 S. Ct. 1496 (1999). "None of these factors, standing alone, is a prerequisite to relief; rather, the court should balance them." *Id.*

A. Likelihood of Success on the Merits

For purposes of this motion for preliminary injunctive relief the Court will focus on Plaintiffs' likelihood of success on Count III of their complaint which seeks injunctive relief under IGRA, *25 U.S.C. § 2710(d)(7)(A)(ii)*. In the context of this motion the Court need not consider Plaintiffs' likelihood of success on their *qui tam* claims under *25 U.S.C. § 201* or *18 U.S.C. § 1955*, or their APA and mandamus claims **[*8]** against the NIGC.

There is no question that as of this date the Victories Casino land has not been taken in trust by the Secretary of the Interior. There is accordingly no dispute that the land is not "eligible Indian lands" under the terms of the compact between the LTBB and the State of Michigan.

Because compliance with the terms of a compact are a prerequisite to legal class III gaming under IGRA, there is no question that Plaintiffs are likely to succeed on the merits of their substantive claim that Defendant LTBB is operating the Victories Casino in violation of IGRA. Defendant LTBB's opposition to the motion for preliminary injunction focuses on jurisdictional barriers regarding the scope of IGRA and whether tribal immunity has been abrogated.

IGRA gives the United States district courts 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 entered into under paragraph (3) that is in effect . . .

25 U.S.C. § 2710(d)(7)(A)(ii).

This is clearly an action initiated by an Indian tribe to enjoin **[*9]** a class III gaming activity. Nevertheless, Defendant LTBB contends that Plaintiffs have not stated a cause of action under this provision because this provision only applies to gaming activity located on "Indian lands" and Plaintiffs' entire complaint is premised upon the allegation that the casino is not located on "Indian lands."

Defendant LTBB's jurisdictional challenge is not convincing. Defendant LTBB has consistently asserted that the Victories Casino land is squarely within the boundaries of the Tribe's reservation under historic treaties, and that because no treaties or statutes have disestablished that reservation, the land is "Indian land" under IGRA, *25 U.S.C. § 2703(4)*. Given LTBB's assertion that the land is Indian land, and given LTBB's failure to assert any other authority for operating the casino, LTBB's assertion that this Court does not have jurisdiction under *25 U.S.C. § 2710(d)(7)(A)(ii)* has the ring of jurisdictional gamesmanship. This Court is satisfied that it has jurisdiction over this case pursuant to *25 U.S.C. § 2710(d)(7)(A)(ii)*.

Whether or not the Victories Casino land is within the **[*10]** boundaries of the historic reservation, and whether historic reservation status is sufficient to make the land "Indian land" as defined in IGRA, are questions of fact that have not been fully developed at this point in the litigation. Resolution of these questions, however, is not essential to a determination of whether there is a violation of IGRA that should be enjoined. If the land is not "Indian land" within the meaning of IGRA, then Defendant LTBB is operating its casino in violation of IGRA. Even if the land is "Indian land" within the meaning of IGRA, there is no question that it is not held in trust as required by the Tribe's compact with the State of Michigan. Because the land is not held in "trust," use of the land for gaming violates the compact, and thereby violates IGRA.

In the alternative, Defendant LTBB argues that *§ 2710(d)(7)(A)(ii)* does not mean what it says. LTBB claims that the statute should not be read so broadly as to authorize one tribe to sue another tribe for operation of a gaming facility in violation of its compact. LTBB contends that such an interpretation of the statute would enable tribes to roam throughout the country, without regard to state lines **[*11]** or reservation boundaries, looking for other tribes to sue for allegedly violating the terms of compacts to which the bounty-hunting tribes are not parties, and in which such tribes have no interest. Defendant LTBB contends that the statute should be read to apply only to 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.

Whatever the wisdom of Defendant LTBB's interpretation, that is not what the statute says. There is nothing in the language of *§ 2710(d)(7)(A)(ii)* that renders it ambiguous. The statute clearly confers on Indian tribes the authority to file suit in district court to enjoin a class III gaming activity located on Indian lands and conducted in violation of "any" Tribal-State compact. The statute does not limit jurisdiction to violations of the compact to which the suing tribe is a party. The statute allows suit for violation of "any" Tribal-State compact, not "its" Tribal-State compact. Whether or not this Court agrees with such a broad grant of jurisdiction is not relevant. The Court is bound to apply the laws as set forth by Congress.

The LTBB claims **[*12]** that even if IGRA applies, the LTBB is immune from suit under the doctrine of Indian sovereign immunity. Case law clearly refutes this assertion.

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978)*. "A suit against an Indian tribe is therefore barred unless the tribe clearly waived its immunity or Congress expressly abrogated that immunity by authorizing the suit." *Florida v. Seminole Tribe, 181 F.3d 1237, 1999 WL 509841* at *2 (11th Cir. July 20, 1999). As the Eleventh Circuit noted in *Florida v. Seminole Tribe*, "In IGRA, Congress abrogated tribal immunity by authorizing a state to sue a tribe in district court 'to enjoin a class III gaming activity located on Indian land and conducted in violation of any Tribal-State compact entered into under *[section 2710(d)(3)]* that is in effect.'" *Id.* at *3 (quoting *25 U.S.C. § 2710(d)(7)(A)(ii)*. IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is **[*13]** at issue and where only declaratory or injunctive relief is sought." *Mescalero Apache Tribe v. State of New Mexico, 131 F.3d 1379, 1385 (10th Cir. 1997)*.

The issue raised by this motion for preliminary injunction falls within that narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought. Congress clearly abrogated the sovereign immunity of Defendant LTBB as to this issue.

Because IGRA grants this Court jurisdiction over a request for injunctive relief for violations of tribal-state compacts, and because there is no question that Defendant LTBB is operating class III gaming on property that has not been taken in trust, there is a strong likelihood that Plaintiffs will succeed on the merits of their claim for injunctive relief.

B. Irreparable Injury

Defendants argue that Plaintiffs have not come forward with any evidence of specific injury to themselves.

Plaintiffs have alleged two kinds of irreparable injury. Injury to themselves based upon the unfair advantage LTBB gains through illegal competition, and

injury to all tribes from upsetting the balance of interests addressed **[*14]** under IGRA. These injuries allegedly caused by Defendant LTBB are non-compensable. The degree to which Plaintiffs will be injured by illegal competition is not capable of precise measurement, and there is no legal measurement of damages caused when one tribe ignores the requirements of IGRA and upsets the balance of interests between tribes, states and the U.S. government in regulating Indian gaming.

C. Balance of Harms and Public Interest

Defendants allege that if a preliminary injunction is entered suspending operation of the casino, the tribe will be harmed by the loss of revenues, the employees will be harmed by the loss of employment, and the state will be harmed because it will not earn its 8% of the net win from the casino's electronic gaming devices.

Granting an injunction will undoubtedly cause some harm to the LTBB and its employees. Nevertheless, this hardship must be seen as a calculated risk taken by the LTBB when it opened the casino. The LTBB understood that the property had not yet been taken into trust and that trust status was essential under the terms of the compact. The LTBB was on notice through clear language in IGRA that opening a casino before **[*15]** the property met the terms of the compact could result in an action for injunctive relief.

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.

After balancing all of the factors, the Court is satisfied that a preliminary injunction should issue, preliminarily enjoining the LTBB from operating class III gaming at the Victories Casino until such time as LTBB has demonstrated to the satisfaction of this Court, that LTBB has met the requirement that the Victories Casino land has been taken into trust, or until a trial can be held on the merits of this action, whichever occurs first.

At such time as the Victories Casino property has been put in trust, the LTBB may contact this Court telephonically to indicate that change in status, and may forward evidence of the trust status by facsimile. Upon receipt of sufficient evidence of the property's trust status, the Court will immediately **[*16]** dissolve the preliminary injunction.

III.

Defendant LTBB contends that if a preliminary injunction is entered, Plaintiffs should be required to post a substantial security. The tribe estimates the value of the loss to the tribe, its employees and the lost fees to the State and local governments to amount to $ 54,500 per day.

Rule 65 provides that no preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. *Fed. R. Civ. P. 65 (c)*. The amount of security given by an applicant for an injunction is a matter for the discretion of the trial court, and the court may, in the exercise of its discretion, require no security at all. *USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 100 (6th Cir. 1982)*. District courts have discretion to dispense with the security requirement of *Rule 65(c)* under limited circumstances, such as where the bond requirement might discourage the initiation of a suit to enforce important federal rights or public interests, or **[*17]** where requiring security would effectively deny access to judicial review. *California ex rel. Van De Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1325-26 (9th Cir. 1985)* (citing *Friends of the Earth v. Brinegar, 518 F.2d 322, 323 (9th Cir. 1975)*.

By its express and unambiguous terms IGRA authorizes a tribe to seek an injunction to stop gaming conducted in violation of a Tribal-State compact. Because requiring a plaintiff tribe to give security would discourage initiation of a suit to enforce important public interests relating to gaming, this Court concludes that Plaintiffs should not be required to post a security bond in this case.

An order consistent with this opinion will be entered.

Date: August 30, 1999

ROBERT HOLMES BELL

UNITED STATES DISTRICT JUDGE

ORDER GRANTING PRELIMINARY INJUNCTION

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiffs' motion for preliminary injunction (Docket # 3) is **GRANTED**.

IT IS FURTHER ORDERED that Defendant Little Traverse Bay Bands of Odawa Indians is enjoined from operating class III gaming at the Victories Casino in Petoskey, Emmet **[*18]** County, Michigan, as of 11:59 p.m., Tuesday, August 31, 1999, until such time as the LTBB has demonstrated to the satisfaction of this Court that LTBB has met the requirement that the Victories Casino land has been taken into trust.

IT IS FURTHER ORDERED that no bond shall be required, a public issue being involved.

Date: August 30, 1999

ROBERT HOLMES BELL

UNITED STATES DISTRICT JUDGE