UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF MICHIGAN, *et al*.

Plaintiff/Appellee,

v.

BAY MILLS INDIAN COMMUNITY,

Defendant/Appellant,

Case No. 11-1413

(Dist. Ct. Case Nos. 1:10-cv-01273-PLM; 1:10-cv-1278-PLM)

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

This case is comprised of substantive issues of law arising from the unique nature and status of Indian Tribes in the American system of jurisprudence. It is seldom that a State in its sovereign capacity bring suit against a sovereign Indian Tribe, and it is even more rare that one Indian Tribe files suit against another. Each sovereign comes before this Court asserting its sovereign governmental rights under the laws of the United States. Not surprisingly, those assertions contradict each other.

Although framed within the context of an interlocutory appeal of the district court's issuance of a preliminary injunction, the underlying facts and the law applicable to them require the application of federal Indian law principles to this Court's *de novo* review.

Oral argument will permit the parties to discuss the issues in the necessary context of the established framework of federal Indian law jurisprudence and thereby provide the additional clarification of the issues presented in this case.

DISCLOSURE OF CORPORATE AFFILIATION AND FINANCIAL INTEREST

Defendant/Appellant is a federally recognized Indian tribe.

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INTRODUCTION

This interlocutory appeal as of right is made by Defendant Bay Mills Indian Community (Bay Mills) under 28 U.S.C. §1292(a)(1), appealing the issuance of a preliminary injunction on March 29, 2011, which closed Defendant's casino gaming facility operating on its land in Vanderbilt, Michigan. Record Entry (RE) No. 33, *Opinion and Order Granting Preliminary Injunction.*

The preliminary injunction was sought by Little Traverse Bay Bands of Odawa Indians (LTBB) in its suit against Bay Mills in which LTBB alleges that the Vanderbilt location is not "Indian lands" and therefore gaming cannot be conducted there. Case No. 1:10-cv-1278-PLM (W.D. Mich.) The State of Michigan filed a similar complaint against Bay Mills in Case No. 1-10-cv-1273-PLM (W.D. Mich.) and the cases were consolidated, with the State's case being the lead case. RE No. 2, *Notice of Consolidation*. The State supported LTBB's motion for issuance of a preliminary injunction, RE No. 13, *Response in Support*, but did not join it. RE No. 61, *Transcript, Hearing on Motion for Preliminary Injunction,* pp. 30-31.

The status of the Vanderbilt property is the essential issue in this case. Bay Mills' position is premised on the authorization for Bay Mills to acquire "Indian land" contained in the Michigan Indian Land Claims Settlement Act, P.L. 105-143 (MILCSA) which thereby permits the conduct of gaming. RE No. 14, *Brief in*

Opposition to Preliminary Injunction Motion. The factual record is currently limited to the parties' submission in support, or in opposition, to the preliminary injunction motion. RE Nos. 4, *Brief in Support of Motion for Preliminary Injunction*, 13, and 14. No evidentiary hearing was held before the district court's issuance of the preliminary injunction. RE No. 61, *supra*.

Bay Mills sought a stay of the preliminary injunction from the district court, RE No. 40, *Motion for Stay;* RE No. 41, *Brief in Support of Motion to Stay Injunction*, which was denied by the court below. RE No. 45, *Order Denying Motion for Stay*. Bay Mills sought a stay in this Court, which was opposed by the State and LTBB in separate filings. Stay was denied on June 29, 2011.

ARGUMENT

This court reviews a district court's decision regarding a preliminary injunction for an abuse of discretion. *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 98 (6th Cir.1982). The district court considers and balances four factors in making its decision: (1) whether the moving party has established a substantial likelihood or probability of success on the merits; (2) whether the moving party will suffer an irreparable injury if the court does not grant a preliminary injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief. *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644,

649 (6th Cir. 2007); see *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 374 (2008). Under this standard, the court reviews the district court's legal conclusions *de novo* and its factual findings for clear error. *Babler v. Futhey*, 618 F.3d 514, 519-20 (6th Cir. 2010). The district court's determination regarding the plaintiffs' likelihood of success on the merits is a question of law and is reviewed *de novo*. *Id*. However, the district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denial of an injunction is reviewed for abuse of discretion. *Id*.

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

A. Bay Mills is immune from unconsented suit.

1. Bay Mills has sovereign immunity.

As a federally recognized Indian Tribe, Bay Mills is accorded by the common law immunity from suit as is enjoyed by all sovereign governments in our system of jurisprudence. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). A basic element of sovereignty is immunity from unconsented suit. That doctrine applies to Indian Tribes. "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 Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). Abrogation of tribal sovereign immunity by Congress must be clear and unequivocal, and cannot be implied. *Santa Clara Pueblo v.*

Martinez, 436 U.S. 49, 58 (1978); *Turner v. United States*, 248 U.S. 354, 358 (1919). Similarly, a Tribe's waiver of its sovereign immunity must be clear. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). The district court acknowledged these principles, and concluded that Congress had abrogated Bay Mills' sovereign immunity through the enactment of several federal statutes. Those conclusions are erroneous.

2. Sovereign immunity is not abrogated by federal question jurisdiction.

The district court's erroneous holding that sovereign immunity of an Indian Tribe is abrogated by general federal question jurisdiction in 28 U.S.C. §1331 and Indian federal question jurisdiction in 28 U.S.C. §1362 is pronounced without explanation or discussion in its preliminary injunction order. RE No. 33, *supra*, p.6.[1]

It is settled law in this Circuit that an Indian tribe's sovereign immunity is not abrogated by 28 U.S.C. §1331. In *Memphis Biofuels, L.L.C. v. Chickasaw*

[1] Although the district court disavows this holding in its subsequent opinion and order denying Defendant's Motion for Stay of Injunction, RE No. 45, *supra*, p.4, its reliance on these federal statutes for its exercise of jurisdiction remains in its Opinion and Order Granting Preliminary Injunction, and that order is the subject and basis of this interlocutory appeal. This holding thus constitutes an alternative basis for the district court's finding of subject matter jurisdiction.

The district court also cites §107(a)(3) of MILCSA as its basis for federal question jurisdiction under 28 U.S.C. §1331. RE No. 33, supra, p.6. Its citation does not provide the conclusion, much less any discussion, that the MILCSA language contains the express and clear abrogation of tribal sovereign immunity required for a case to proceed against an Indian Tribe. The district court's reliance on MILCSA for abrogation constitutes an improper application of governing law. *Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005).

Nation Industries, Inc., 585 F.3d 917 (6th Cir. 2009), this Court held that the terms of §1331 do not constitute the clear, unequivocal intent of Congress to abrogate tribal sovereign immunity which is required. *Memphis Biofuels* also demands that any litigant seeking to invoke federal court jurisdiction using §1331must rely on another statute to provide a waiver of tribal sovereign immunity. *Id*. at 920-921, citing *Miner Electric, Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007).

It is also settled law in this Circuit that an Indian Tribe's sovereign immunity is not abrogated by 28 U.S.C. §1362, even though the plaintiff is also an Indian tribe. *Keweenaw Bay Indian Community v. State of Michigan*, 11 F.3d 134, 1347 (6th Cir. 1993). The district court's holding to the contrary, RE No. 33, *supra*, p.6, is not only incorrect, but also uses an erroneous legal standard.

These arguments were made to the district court in support of Bay Mills' motion for stay. RE No. 41, *supra*, pp. 2-6. Even though the district court conceded that abrogation of tribal sovereign immunity was not effectuated by 28 U.S.C. §§1331 and 1362, and therefore implicitly acknowledged its lack of jurisdiction to proceed in this case, the district court chose to continue asserting its jurisdiction, instead relying on provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §2701, *et seq.*, as authorizing this action. RE No. 45, *supra*, p.4.

3. Sovereign immunity is not abrogated by the Indian Gaming Regulatory Act.

The district court misinterpreted and misconstrued the abrogation of tribal sovereign immunity contained in IGRA.[2] RE No. 45, *supra*, p.4. The section in question—25 U.S.C. §2710(d)(7)(A)(ii)—delineates the conditions under which suit may be brought against an Indian tribe in specific gaming-related disputes.[3] This provision establishes two critical elements necessary for abrogation of sovereign immunity to apply: (1) the challenged conduct is in violation of the Tribal-State compact, and (2) it involves gaming on "Indian lands, as that term is defined in IGRA at 25 U.S.C. §2703(4).[4]

As the jurisdiction of the district court must be ascertained on the face of the complaint, any plaintiff seeking to invoke 25 U.S.C. §2710(d)(7)(A)(ii) as the jurisdictional basis for suit against an Indian tribe must claim that the defendant is

[2] Also cited by the district court in its opinion denying a stay is 25 U.S.C.§2719 of IGRA. RE No. 45, *supra*, p.4. . It is not clear if such citation is due to the district court's conclusion that §2719 is a separate basis for jurisdiction. If that is in fact the court's purpose, the conclusion is an improper application of governing law, as the section does not contain an express intent by Congress to abrogate tribal sovereign immunity as required to be given that effect. *Santa Clara Pueblo v. Martinez, supra.*

[3] It reads in relevant part, that "[t]he United States district courts shall have jurisdiction over...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 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."

an Indian tribe conducting Class III gaming and that the gaming is on Indian land and that gaming violates an existing Class III gaming compact with the State. Neither complaint in these consolidated cases alleges all of these elements; instead, both complaints assert that the property upon which Bay Mills is conducting Class III gaming is not "Indian land." RE No. 1, *Complaint filed by State of Michigan*, *passim*; RE No. 1 (Case 1:10-cv-1278-PLM), *Complaint filed by Little Traverse Band*, *passim*.

Strict adherence to the jurisdictional prerequisites of 25 U.S.C. §2710(d)(7)(A) is not solely a requirement of its subsection abrogating tribal sovereign immunity [§2710(d)(7)(A)(ii)]. It is also demanded of an Indian tribe seeking to sue a State under the subsection authorizing suit against a State for failing to negotiate a Class III gaming compact in good faith. [§2710(d)(7)(A)(i)]

This Court's decision in *Match-e-be-nash-she-wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616 (6th Cir. 2002)[5] illustrates the point that litigation under IGRA's abrogations of governmental sovereign immunity must comply with each legal and factual IGRA prerequisite in order for the district court to exercise jurisdiction. In that case, then-Governor Engler challenged the district court's jurisdiction on the grounds that an Indian tribe cannot sue under this provision if it

[5] The case was relied upon by Bay Mills at the hearing on LTBB's motion for preliminary injunction as supporting its careful construction of IGRA's limited abrogations of governmental sovereign immunity. RE No.61, *supra*, p.56-57.

has no "Indian lands." This Court agreed with the Governor's contention, 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, citing 25 U.S.C. §2710(d)(3)(A).[6]

The district court did not address this point in its opinions granting the requested preliminary injunction against Bay Mills. Instead, the district court relied for its interpretation of the jurisdictional parameters of 25 U.S.C. §2710(d)(7)(A)(ii) on an opinion issued in 1999 [RE No. 4, *supra*, Ex. 7] in a case the district court termed a "remarkably similar situation involving these same two parties" and concluded that *Bay Mills Indian Community, et al. v. Little Traverse Bay Bands of Odawa Indians*, et al., No. 5:99-cv-88 (W.D. Mich. 1999) (*Bay Mills I*) confirms "jurisdiction over a suit where the allegation is that the gaming operation is not on Indian land." RE No. 45, *supra*, p.4.

The cases share superficial similarity, but the facts relevant to a determination of jurisdiction and the resulting legal conclusions under §2710(d)(7)(A)(ii) differ significantly. *Bay Mills I* involved litigation in which Bay Mills was the plaintiff and LTBB was the defendant , arising from the opening

[6] "Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities..."

of a Class III gaming facility on land owned in fee by LTBB in Petoskey, Michigan, which LTBB claimed were "Indian lands" as defined by IGRA in 25 US.C. §2703(4). LTBB's assertion failed to take into account that its Class III gaming compact with the State required that it limit gaming activities to "eligible Indian lands", a category much narrower than the IGRA definition, as it is defined in that compact as trust and reservation lands acquired under 25 U.S.C. §1300k-4(a) within Emmett or Charlevoix Counties. This compact requirement meant that only land taken into trust by the Secretary of the Interior for the benefit of LTBB could be used for gaming. RE No. 4, *supra*, Ex. 7, p.3. Conversely, operation of a casino on land which is not in trust violated the compact. *Id*. at 7. Therefore, since the land on which gaming was being conducted by LTBB was not in trust, there was no dispute that the tribal-state compact was violated. *Id*.

Bay Mills initially claimed in that case that LTBB's gaming activity was not located on "Indian lands", which caused the National Indian Gaming Commission (named as an additional defendant) to observe, "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' Motion for Stay Pending Appeal*, 11-1413 (6th Cir.), Ex. B, p.9, f.3. However, the dispute in *Bay Mills I* evolved from determining whether the land in question was "Indian land" as defined by IGRA, to whether it was land on which the LTBB compact permitted gaming, and Bay

Mills zealously asserted that the land was ineligible for gaming under that standard in its subsequent filings, but acknowledged that it could be considered "Indian lands" under IGRA. See, *Bay Mills Motion for Stay Pending Appeal*, 11-1413 (6th Cir.), Ex. C, pp. 4-5; *Bay Mills Motion for Stay Pending Appeal*, 11-1413 (6th Cir.) Ex. D, pp. 3-5.

The opinion in *Bay Mills I* therefore characterized the dispute as whether gaming could validly take place on non-trust land, and concluded:

> Because compliance with the terms of a compact is 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.

RE No. 4, *supra*, Ex. 7, p. 7. The charge of "jurisdictional gamesmanship" made by the court, *Id*. at 8, is not leveled at Bay Mills, but at LTTB for asserting that it could engage in gaming on its property because it was "Indian land" under IGRA, even though its compact required that the land be taken into trust in order to be eligible for gaming activities. Under the circumstances of *Bay Mills I*, all the prerequisites for jurisdiction and abrogation of LTBB's sovereign immunity from suit under 25 U.S.C. §2710(d)(7)(A)(ii) were clearly met: the property, although "Indian land" under IGRA, could not be used by the Tribe for the conduct of gaming because the activity on land not in trust violated the Tribe's compact.

Here, the district court did not recognize that the LTBB compact's clear distinction between "Indian land" under IGRA and "eligible Indian land" for its valid gaming is the basis of the holding in *Bay Mills I* that jurisdiction exists under §2710(d)(7)(A)(ii) of IGRA. In contrast, the Bay Mills compact defines "Indian land" almost word for word with the definition in IGRA at 25 U.S.C. §2703(4). RE No. 1, *supra*, Ex. A, p.3. Unlike *Bay Mills I*, there exists no definition gap within which the district court can assert jurisdiction to adjudicate the existence of a compact violation, without acknowledgement by plaintiffs that the Vanderbilt parcel is "Indian land" under IGRA. Lacking such acknowledgement, the district court's conclusion that it has jurisdiction to adjudicate this controversy improperly applies governing law.

4. Bay Mills has not waived its sovereign immunity by engaging in gaming activity.

The district court further misconstrued §2710(d)(7)(A) by concluding that tribal sovereign immunity is abrogated by this provision "in the narrow category of cases where compliance with IGRA's provisions [sic] at issue and where only declaratory or injunctive relief is sought." RE No. 45, *supra*, pp. 4-5, citing *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379 , 1385-86 (10th Cir. 1997) In that case, Tenth Circuit permitted the State's counterclaim that a tribal-state compact was invalid under New Mexico law to proceed in a suit initiated by the Tribe against the State under §2710(d)(7)(A)(i) of IGRA. The *Mescalero* holding

has been expressly rejected by other federal courts of appeals, and it is not relied upon in subsequent decisions of the Tenth Circuit. The Eleventh Circuit termed the decision "muddled" and "difficult to credit" in *State of Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1241, 1242 (11th Cir. 1999), and went on to note that the cases cited by the *Mescalero* panel in support of its holding—and upon which the district court also expressly relies—addressed an entirely different issue, being whether a tribe voluntarily waives its own sovereign immunity by engaging in gaming under IGRA; the Eleventh Circuit expressly rejected that conclusion, stating that no waiver can be implied from such conduct, *Id*., and therefore refused to allow Florida to sue the Seminole Tribe under §2710(d)(7)(A)(ii) for conducting gaming without of a gaming compact. Accord, *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000)); *State of Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655 (7th Cir. 2006); *State of Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (7th Cir. 2008). Each case rejects jurisdiction to sue an Indian tribe under §2710(d)(7)(A)(ii) of IGRA when the sole basis for the complaint is that gaming is occurring; it is necessary for jurisdictional purposes that a tribal-state compact is being violated, as well.

The district court misapplied the governing law in its inquiry as to the existence of jurisdiction over Bay Mills in the absence of abrogation by Congress or waiver by the Tribe of its sovereign immunity from suit.

B. Plaintiff lacks standing.

The district court erred when it concluded that LTBB had suffered an injury in fact, proving standing based upon LTBB's allegations of future, potential damages. 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).[7]

In this case, the district court clearly erred when it relied on LTBB's expert report from Alea Advisors, LLC ("Alea") to determine that LTBB had suffered an

[7] In *Sault Sainte Marie Tribe*, "Sault Tribe" sought to challenge trust acquisition for another tribe which would allow that tribe to conduct casino gaming approximately 40 miles away from the Sault Tribe's existing gaming facility. The Sault Tribe alleged only that the proximity of an additional gaming facility would necessarily affect its market share and requested that the court "in effect" take judicial notice of that fact. *Id.* at 915. In rejecting the Sault Tribe's evidence as insufficient proof of its injury, this Court noted: "If the operation of the Petoskey casino had in fact been draining trade from St. Ignace, it should not have been beyond the Sault Tribe's capability to present facts and figures demonstrating and quantifying the diversion of business. Perhaps the Sault Tribe failed to make such a presentation because the evidence simply was not there[.]" *Id*.

injury in fact as a result of Bay Mills' operations for purposes of standing, despite LTBB's inability to demonstrate a diversion of its business by Bay Mills' operations as evidence of its injury. RE No. 33, *supra*, p. 17.[8] 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, RE No. 6, *Amended Exhibit 17 to RE 4, supra*, ("Alea Report") (analyzing the impact on Odawa Casino Resort a "potential new competitor located in Vanderbilt, Michigan.") [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 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*; 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). The district court's best information as to the likelihood of actual harm is that the Odawa Resort may lose money. RE No. 33, *supra*, p. 14 (citing

[8] But see, RE No. 45, at 8. (indicating that such damages may not be present damages, but may be instead threatened future damages, and basing its determination on the court's own unsupported assumption that such losses "will" happen based on market competition, in clear contravention of the rule set forth by this Court in *Sault Sainte Marie Tribe*, *supra*).

Declaration of Odawa Casino General Manager David Wolf, pp. 8-11, Ex. A to RE No. 27, *LTBB Reply to Response to Motion for Preliminary Injunction.*)

The district court's reliance on Bay Mills' expert testimony to buttress its allegations of injury is misplaced. RE No. 33, *supra*, p. 14, citing RE No. 14, Ex. R, *Declaration of Jake Miklojcik.* ("Bay Mills Report"); RE No. 45, *supra*, p. 7. The Bay Mills Report refutes the wildly exaggerated allegations made by Alea regarding their assumptions and methodology. Bay Mills Report, p. 2, paragraph 4. In doing so, the Bay Mills Report relies on the information in the Alea Report and on general models, with no reliance on data quantifying any actual injury to LTBB. Bay Mills Report, pp. 2-3. However, the district court relies on the Bay Mills Report's rebuttal to LTBB's assertions as fact. RE 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.* LTBB has failed to make the basic showing of injury by its expert report; Bay Mills' expert's rebuttal of its analysis does not cure that failure.

The district court erred further when it distinguished this Court's holding in *Sault Sainte Marie Tribe* based on its procedural posture, thereby compounding its erroneous conclusion that LTBB has demonstrated its injury for purposes of standing. RE No. 45, *supra*, p. 7. Because the district court has enjoined the operation of the Vanderbilt Facility, further discovery will be fruitless. Without an

ongoing gaming activity, no court will or could 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 clearly established already but also impermissibly turns the burdens of proof and persuasion on their heads.[9]

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

A. LTBB cannot demonstrate that it is likely to succeed on the merits when serious questions have been raised about the district 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,* 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 to be addressed before consideration of the merits. *Id. at 919.* 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, 461 2001 WL 549409 (6th Cir. 2001)

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

("[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. RE No. 33, *supra*, p. 5.

Had the district court given proper weight to Bay Mills' assertions concerning the lack of jurisdiction of the court, that court 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**.**

B. The district court's interpretation of the Michigan Indian Land Claim Settlement Act is erroneous.

1. The provisions of §107(a)(3) are ambiguous.

In concluding that Bay Mills' property in Vanderbilt was not "Indian lands" under IGRA, the district court reviewed MILCSA, §107(a) of which directed the governing body of Bay Mills to establish a non-expendable trust known as the

"Land Trust" with 20 per cent of the Tribe's share of certain judgment funds, identified in the Statute.[10]

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

[10] The complete text of MILCSA is found at RE No. 14, *supra*, Ex. I

[11] 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."

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".[12] 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. A provision of IGRA [§2719(d)(1)] was construed as "ambiguous" by the United States Supreme Court, defined as "capable of being understood in two or more possible senses or ways." *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001). Black's Law Dictionary is cited with approval for its definition of "ambiguous" by this Circuit in *Scottsdale Insurance Co. v. Flowers*, 513 F.3d 546, 565 (6th Cir. 2008):

> 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

[12] 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.*, RE 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. RE No. 33, *supra*, p. 12; RE No. 45, *supra*, p. 5.[13] 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." RE No. 33, *supra*, p. 11. The district court's pronouncement provides no guidance as to what the district court considers to be "near" existing tribal landholdings, other than its conclusion that the Vanderbilt parcel is not "near."

2. The district court's literal interpretation of §107(a)(3) leads to internal inconsistencies, and a result inconsistent with Congress' intent.

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

[13] 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." RE 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."

Congressional intent. By focusing on one phrase of one sentence of MILCSA, the district court makes surplusage of much of the Land Trust provision and ignores the impact that its holding will have on effectuation of the statute's purpose. 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 proper role for a reviewing court in its determination of a statute's meaning is enunciated by Judge Learned Hand in terms often cited by courts throughout the United States:

> Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that the statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2nd Cir. 1945).

The district court's insistence that the statutory language is plain, with obvious and only one possible meaning, clearly discernible by the court, flies in the face of this rule of statutory construction. As noted above, the district court's interpretation requires that any land purchase with §107(a)(3) Land Trust funds be

both a consolidation and enhancement of tribal landholdings. 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. RE 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. *Id*. 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.[14]

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.[15] 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

[14] 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.

[15] 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.

somehow determined)[16], 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 is erroneous as a matter of law and frustrates the intent of Congress and the purpose of the Act in enacting MILCSA.

III. IN LIGHT OF THE FACTS PRESENTED TO THE DISTRICT COURT, THE BALANCE OF HARMS CLEARLY DISFAVORS THE ISSUANCE OF A PRELIMINARY INJUNCTION.

A. The district court erred when it found that LTBB would suffer irreparable harm.

The district court's determination that LTBB had demonstrated it suffered, and would likely continue to suffer, a substantial, irreparable harm, was clear error. As detailed in Section I. B., above, LTBB has utterly failed to demonstrate it has suffered an economic loss of any kind as an injury in fact for the purpose of standing, *a fortiori*, it has not adequately proven harm to warrant the injunction issued by the court below as a matter of law.

LTBB's claimed loss of market share, being dependent upon these same sources, is also inadequately proven, thus the district court's reliance on this claimed loss does not cure its error in finding irreparable harm where none exists.

[16] This conclusion is particularly troubling, due to the absence in the record at this stage of the proceedings regarding the location, title status and relative proximity of Bay Mills' land holdings, other than a map proffered by LTBB purporting to accurately render these elements. RE No. 4, *supra, Ex. 4.* It is also appended to *LTBB's Brief Opposing Bay Mills' Motion for Stay*, 11-1413 (6th Cir.), Ex. 1.

RE No. 33, *supra*, p. 14. In, *Novartis Consumer Health, Inc. v. Johnson & Johnson - Merck Consumer Pharm. Co.*, 290 F.3d 578 (3d Cir. 2002) (upon which the district court relies to demonstrate that lost market share may be irreparable harm for these purposes) plaintiff sought relief pursuant to the Lanham Act, 15 U.S.C. §1051 *et seq*., for false advertising by defendant of a misleading "nighttime strength" product. *Id*. at 580. Plaintiff in that case argued that it was being irreparably harmed because it was losing market share based on this deceptive advertising. *Id*. The court agreed that loss of market share was an irreparable injury in this circumstance because it observed that plaintiff had demonstrated that the defendant's activities, "had already had a measurable effect on [plaintiff's] market share as reflected by a decrease in sales of [its product] that corresponds to the increased sales for [defendant's product]." [emphasis added] *Id*. at 595-6.

LTBB's assertion of fuzzy estimates of future losses suggested in its Alea Report, falls far short of the standard relied upon by the Court in *Novartis*—that a plaintiff demonstrate a 'measurable effect' on its market that 'corresponds' to the defendant's activities just as it fails the "facts and figures" test set by this Court in *Sault Sainte Marie* to show injury for standing. The district court's reliance on the amorphous numerology that has been supplied by LTBB has done nothing but effectively postpone LTTB's burden to show proof of harm until after discovery, instead of requiring proof of a measurable impact on LTBB's market

corresponding to Bay Mills' Vanderbilt operations. Such error is compounded by that fact the discovery process is assured to provide nothing new. The district court's conclusion that LTBB adequately proved this harm is clear error, and determination that the extraordinary remedy of a preliminary injunction is proper based upon such an insufficient showing of harm should be rectified by this Court. When, as here, irreparable injury to plaintiff is not proven, relief must be denied. *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 104 (6th Cir. 1982).

Finally, the district court ignores completely the fact that LTBB has already protected itself from any potential 'substantial' impacts to its market, particularly from such a facility as has been established by Bay Mills in Vanderbilt. Bay Mills' Vanderbilt casino currently houses 84 slot machines with no plans or intention to increase that capacity. RE No. 14, *supra*, Ex. E, *Declaration of Jeffrey Parker*, ¶4. This number of machines is below the threshold of what Plaintiff's own compact with the State of Michigan defines as a "commercial casino" sufficient to have an impact on Plaintiff's operations. Bay Mills Report, ¶22. With this protective measure in place and given the modest capacity of the Vanderbilt facility, LTBB cannot justify, and the court was clearly wrong to conclude, that any possible impacts on the LTBB Odawa Casino could be substantial to warrant the preliminary injunctive relief.

B. Unlike LTBB, Bay Mills demonstrated that it and others would suffer actual, substantial harm if its operations were enjoined.

In contrast to the assertions by LTBB, Bay Mills has shown that it actually has and will continue to suffer economic harm as a result of the district court's preliminary injunction. RE No. 14, *supra*, pp. 27-29. In addition, Bay Mills has demonstrated that the surrounding community is also suffering actual and significant harm due to the district court's closure of the Vanderbilt Facility. Bay Mills has demonstrated an investment of more than seven hundred fifty thousand dollars ($750,000.00) in startup costs. RE, No. 41, *supra,* Ex. A, *Declaration of Rodney Jones*, ¶6. Further it has shown that this investment has already generated significant goodwill which is steadily devaluing due to the closure of the Vanderbilt Facility and will continue to devalue should the injunction stay in place. *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.

Losses to the surrounding community are just as substantial and have also been clearly demonstrated. In addition to the seventeen local families who have lost or will lose a wage earner should the injunction remain, Bay Mills has demonstrated that the local governments and businesses are losing actual revenues by the closure of the facility, as opposed to the conjectural losses asserted by

LTBB and the State of Michigan. *See*, RE 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 (W.D. Mich. 1990) (*Sault Sainte Marie Tribe v. Engler*), RE No. 100, *Consent Judgment* ¶6); *see also* RE No. 25, *Response of Bay Mills to State of Michigan's filing in support of Motion for Preliminary Injunction by LTBB*, Exs. B and C, *Declarations of Elizabeth Haus and Ed Posgate*, respectively.

The district court's additional finding in its Opinion, RE 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 also 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. RE No. 36, *Department of Interior Opinion Letter*. The record also indicates that the State of Michigan did not object to Bay Mills' position until its letter of December 16, 2010. RE 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. RE No. 4, *supra*, Ex. 5 (selected photographs showing expansion construction and dated December 14, 2010).

IV. THE PUBLIC INTEREST IS NOT SERVED BY ENJOINING BAY MILLS.

A. Bay Mills' operations are not a public nuisance.

The district court erred as a matter of law in determining that the public is served by enjoining Bay Mills operations at Vanderbilt as a public nuisance. RE No. 33, *supra*, p. 16 and RE No. 45, *supra*, p. 8. A court is not required to grant an injunction simply because a plaintiff alleges a defendant violated IGRA. See *Keweenaw Bay Indian Cmty v. United States*, 1999 WL 33978509 *1, *3 (W.D. Mich.) ("Although particular regard should be given to the public interest, '[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law.['] ") (quoting *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). Casino-style gaming is prevalent throughout Michigan and regulated by State statute. M.C.L §432.201. Accordingly, the State's gaming-enforcement concerns are regulatory in nature as opposed to prohibitory.

Such considerations do not implicate the public welfare. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan and State of Michigan*, 46 F.Supp.2d 689, 705 (W.D. Mich. 1999)[17], citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209-11 (1987). Although Plaintiff's goals of enforcing State laws are laudable, it is a federal interest to promote tribal self-sufficiency and self-government. See *Grand Traverse Band*, *supra*, at 705. Bay Mills' decision to open a casino and use revenues from the Vanderbilt casino to provide for the tribe and its members serves these federal interests and should not be disregarded due to State interests in regulating gaming in the Michigan, particularly when such a determination turns on the merits of the case. *Id*.

B. The district court wrongly found that the Vanderbilt casino deprives the state of revenues.

As has been discussed above at length in Section I. B. of this Appeal, the district court wrongly determined that LTBB had demonstrated a loss of revenues. Because the district court's determination that the State's deprivation of income is based on the State's receiving lesser revenues in its revenue sharing payments from

[17] In *Grand Traverse Band*, the United States and State of Michigan sought to enjoin the gaming activities of the Grand Traverse Band at its Turtle Creek gaming facility, alleging the gaming violated IGRA and harmed the public. In finding that the assertion of illegality by the State and United States was insufficient to justify an overriding concern of harm to the public, that court noted the concomitant federal interest in promoting tribal self-sufficiency and self-government, as well as the public support the Grand Traverse Band had received from the local community. *Id*. at 705. Such is the case here. Evidence of public support is ample and unanimously favorable as demonstrated in Section III B.

LTBB, the district court compounded its error by finding that the unsubstantiated loss of LTBB is being subsequently suffered by the State.[18] RE No. 33, *supra*, at 16; RE No. 45, *supra*, at 8. Assuming that such an economic loss should even be considered in an action on the equities, the district court's determination that the public interest is thereby served by enjoining the Vanderbilt operations in order to protect the State from being "deprived" of these revenues is not borne out by the facts is an error of law.

CONCLUSION

WHEREFORE, for all the above reasons, Bay Mills respectfully requests that this Court find that the district court abused its discretion and reverse its order enjoining Bay Mills operations at Vanderbilt.

Respectfully submitted,

BAY MILLS INDIAN COMMUNITY

By /s/ *Kathryn L. Tierney*
Kathryn L. Tierney (P24837)
Chad P. DePetro (P58482)
12140 W Lakeshore
Brimley, MI 49715
Phone: (906) 248-3241
e-mail: candyt@bmic.net
e-mail: cdepetro@bmic.net

[18] The State itself offered no independent evidence of a loss of revenues related to Bay Mills Vanderbilt operations. Neither has the State or the Court demonstrated that such loss of revenue is properly considered in determining harm to the public interest.

ADDENDUM

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

X this brief contains 7846 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

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(s) Kathryn L Tierney attorney for

Bay Mills Indian Community Dated: 8/10/11

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2011, I electronically filed Defendant/Appellant's Interlocutory Appeal of Order Granting Temporary Injunction with the Clerk of the Court using the ECF system which sent notification of such filing to counsel of record. I also certify that on August 10, 2011, I electronically filed Appellant's Brief with the Clerk of the Court using the ECF system which sent notification of such filing to counsel of record.

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