CASE 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
Defendant – Appellant

On Appeal from the United States District Court
Western District of Michigan

BRIEF OF PLAINTIFF/APPELLEE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS'

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DISCLOSURE OF CORPORATE AFFILIATION AND FINANCIAL INTEREST

Plaintiff/Appellee Little Traverse Bay Bands of Odawa Indians is a federally-recognized Indian tribe.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

Plaintiff-Appellee, the Little Traverse Bay Bands of Odawa Indians ("LTBB"), is a federally-recognized Indian tribe located in Emmet and Charlevoix Counties, Michigan. Defendant-Appellant Bay Mills Indian Community ("BMIC") is a federally-recognized Indian tribe located in Chippewa County, Michigan. Pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721 (2011), LTBB owns and operates a class III gaming facility (the "Odawa Casino Resort") in Petoskey, Michigan, and BMIC legally owns and operates two class III gaming facilities in Brimley, Michigan.

For well over a decade, BMIC has unsuccessfully sought to establish an off-reservation casino in Michigan's Lower Peninsula.[1] After its off-reservation casino efforts had been repeatedly rejected by Congress and the courts, BMIC, on November 3, 2010, unilaterally opened a casino (the "Vanderbilt Casino") on off-reservation lands it acquired in fee simple and in the village of Vanderbilt. (RE 4, LTBB Br. Supp. Mot. for Prelim. Inj. at Ex. 3.) BMIC began operating its casino without the approval of (and in the face of known opposition from) the United States Department of the Interior and the State of Michigan (the "State"). (RE 4,

[1] *See Bay Mills Indian Community v. State*, 626 N.W.2d 169 (Mich.App. 2001); *Bay Mills Indian Community v. Western United Life*, No. 99-1036 (6th Cir. Mar. 8, 2000); H.R. 3412, 106th Cong. (1999); H.R. 1634, 107th Cong. (2001); S. 2986, 107th Congress (2002); H.R. 5459, 107th Cong. (2002); H.R. 831, 108th Cong. (2003); and H.R. 2176, 110th Cong. (2007).

LTBB Br. Supp. Mot. for Prelim. Inj. at Ex. 6.) The Vanderbilt Casino site (the "Vanderbilt Tract") is located more than 125 miles driving distance from the BMIC reservation and a mere thirty-seven (37) miles driving distance from the Odawa Casino Resort. (RE 4, LTBB Br. Supp. Mot. for Prelim. Inj. at Ex. 5.) The Vanderbilt Casino is located along Interstate 75, a major thoroughfare on which many patrons travel to get to the Odawa Casino Resort. (RE 4, LTBB Br. Supp. Mot. for Prelim. Inj. at Ex. 4.)

On December 21 and December 22, 2010 respectively, the State and LTBB filed separate suits to enjoin BMIC from operating its Vanderbilt Casino; these suits were consolidated on December 23, 2010. (RE 2, Ntc. Cases Consolidated.) Both suits allege that the Vanderbilt Casino is not located on Indian lands, as that term is defined in IGRA and BMIC's tribal-state gaming compact with the State of Michigan, and further allege, in the alternative, that even if the Vanderbilt Casino is located on Indian lands, it nonetheless is prohibited by IGRA, Section 2719. (RE 74, State of Michigan First Am. Compl.; RE 52, LTBB First Am. Compl.) LTBB also filed a motion seeking to preliminarily enjoin BMIC from operating its casino. (RE 4, LTBB Br. Supp. Mot. for Prelim. Inj.) After a hearing on the Motion on March 23, 2011, the district court entered an order preliminarily enjoining BMIC from operating its Vanderbilt Casino. (RE 33, Order Granting Prelim. Inj.) BMIC filed notice of appeal of the ruling to this Court on March 30,

2011. (RE 39, Ntc. of Interlocutory Appeal.) BMIC sought and was denied a stay of the preliminary injunction from the district court. (RE 45, Order Den. Stay.) BMIC then sought and was denied a stay from this Court. (Order Den. Stay p.2.)

II. STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellee Little Traverse Bay Bands of Odawa Indians respectfully requests that it be granted oral argument. Plaintiff-Appellee State of Michigan and Defendant-Appellant Bay Mills Indian Community have both requested oral argument in this matter; thus all parties are aware of the importance of participating in oral argument for this case.

This case involves several important and complex legal issues that may require clarification from the parties that may not be fully addressed in the briefs. These issues involve such important matters as jurisdiction, tribal sovereign immunity, and statutory interpretation. Oral argument will provide the parties with the opportunity to discuss these important issues as well as to provide Plaintiff-Appellee Little Traverse Bay Bands of Odawa Indians with the opportunity to respond to any additional arguments made by Defendant-Appellant Bay Mills Indian Community at oral argument or in any reply brief it files.

III. SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in granting a preliminary injunction enjoining BMIC from operating its casino. BMIC attacks the district

court on the basis of jurisdiction and its determination of LTBB's likelihood of success on the merits. However, despite BMIC's assertions, there is no basis for this Court to reverse the district court's decision.

The district court did not abuse its discretion in finding that it has subject matter jurisdiction over this proceeding pursuant to IGRA 28 U.S.C. § 1331 and § 1362. While § 1331 and § 1362 generally address federal subject matter jurisdiction, Section 2710(d)(7)(A)(ii) of IGRA not only specifically grants jurisdiction, but abrogates BMIC's sovereign immunity with respect to this action. The district court did not abuse its discretion in finding that LTBB meets the Article III standing requirements of the U.S. Constitution because LTBB demonstrated both threatened injury and actual harm from BMIC's opening of the Vanderbilt Casino.

Nor did the district court abuse its discretion in finding that LTBB was likely to succeed on the merits of its claims. LTBB's claims are based on the status of the land where the Vanderbilt Casino is situated, and the district court did not abuse its discretion when it found that BMIC's acquisition of this land did not meet the statutory requirements of Section 107(a)(3) of the Michigan Indian Land Claims Settlement Act. The district court properly rejected BMIC's claim of super sovereign power to bestow Indian land status on any parcel of land it purchases, anywhere in the country, for the purpose of unilaterally establishing and operating

a casino, without the consent of state and local governments. The district court properly weighed the balance of harms and did not abuse its discretion in doing so. Finally, the district court did not abuse its discretion in finding that the public interest favors the preliminary injunction because the public interest was clearly established.

IV. STANDARD OF REVIEW

The granting or denial of a preliminary injunction is within the discretion of the district court and based on four factors: (1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable injury in the absence of an injunction; (3) whether an injunction will cause substantial harm to others; and (4) whether an injunction would serve the public interest. *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994); *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney*, 46 F.Supp.2d 689, 694 (W.D. Mich. 1999) ("the degree of likelihood of success required [to support a grant of a preliminary injunction] may depend on the strength of the other factors [considered]."). The moving party seeking an injunction need not satisfy all four preliminary injunction factors. *See In re: DeLorean Motor Co.,* 755 F.2d 1223, 1229 (6th Cir. 1985). Instead, the four factors are to be balanced, with each carefully considered. On appeal, the court review of these factors is limited to whether the district court abused its discretion in granting the preliminary

injunction. *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 98 (6th Cir. 1982). Great deference is accorded to the district court's decision to grant a preliminary injunction, and it "will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n*, 110 F.3d 318, 322 (6th Cir. 1997).

V. ARGUMENT

A. This Court has Subject Matter Jurisdiction.

In its First Amended Complaint, LTBB alleged the bases for subject matter jurisdiction as: 1) The Indian Gaming Regulatory Act ("IGRA"), Section 2710 (d)(7)(A)(ii), for actions "initiated by a[n] . . . Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact"; 2) federal question jurisdiction pursuant to 28 U.S.C. § 1331 for questions arising under federal law, and 3) jurisdiction under 28 U.S.C. § 1362 for civil actions "brought by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the controversy arises" under federal law. (RE 52, LTBB First Am. Compl.) LTBB's First Amended Complaint requires a determination of whether land purchased with earnings derived from BMIC's Land Trust constitutes "Indian lands" for the purposes of IGRA. That determination, in turn, required the Court to interpret federal laws, namely Section

107(a)(3) of the Michigan Indian Land Claims Settlement Act, Pub. L. 105-143, 111 Stat. 2652 (1997) ("MILCSA"), and IGRA, 25 U.S.C. § 2703(4). Clearly these are issues that "arise under" federal law, and there is no question that LTBB is an Indian tribe. Further, IGRA Section 2710(d)(7)(A)(ii) stands as a separate and independent basis for subject matter jurisdiction, providing that "United States district courts shall have jurisdiction over . . . any cause of action initiated by a[n] . . . Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . that is in effect." This provision independently confers subject matter jurisdiction on this Court to hear the present action *and* expressly abrogates BMIC's sovereign immunity to this suit.

Nevertheless, BMIC argues that the District Court lacks subject matter jurisdiction to entertain this case. (Appellant's Br. 8-17.) BMIC asserts that the district court erroneously held that the sovereign immunity of an Indian tribe is abrogated by § 1331 and § 1362. (Appellant's Br. 9.) This misconstrues the district court's holding. The district court did not address the issue of sovereign immunity, nor did BMIC seek to dismiss LTBB's motion for a preliminary injunction on the basis of sovereign immunity. (RE 33, Order Granting Prelim. Inj. at p. 6.) Although BMIC made this argument—for the first time—at the hearing on the Motion for Preliminary Injunction, the district court agreed that, standing alone, neither § 1331 nor § 1362 abrogated a tribe's sovereign immunity. (RE 45,

Order Den. Mot. to Stay at p. 4.) However, that is not the situation at hand. These jurisdictional statutes were not invoked in isolation, but were invoked in combination with IGRA, 25 U.S.C. § 2710(d)(7)(A)(ii), which expressly abrogates BMIC's sovereign immunity to this suit; therefore, the district court has subject matter jurisdiction, and the district court correctly held that, "[w]here another statute provides a waiver of tribal sovereign immunity, or when the tribe has waived its immunity, § 1331 may confer subject matter jurisdiction over an action involving a federal question." (RE 45, Order Den. Stay at p. 4.)

1. 25 U.S.C. 2710(d)(7)(A)(ii) Confers Subject Matter Jurisdiction and Abrogates BMIC's Sovereign Immunity to this Suit.

IGRA Section 2710(d)(7)(A)(ii) (hereinafter "(A)(ii)") stands as a separate and independent basis for subject matter jurisdiction, providing that "United States district courts shall have jurisdiction over . . . any cause of action initiated by a[n] . . . Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . that is in effect." This provision independently confers subject matter jurisdiction on this Court to hear the present action *and* expressly abrogates BMIC's sovereign immunity to this suit.

As an initial matter, federal courts have unanimously concluded that Section (A)(ii) abrogates tribal sovereign immunity to suit for injunctive relief. *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 935 (7th Cir. 2008), *rehearing and rehearing*

en banc denied, 564 F.Supp.2d 856 (W.D. Wisc. 2008), *cert dismissed* 129 S.Ct. 28 (2008), ("Congress abrogated sovereign immunity . . . pursuant to [Section (A)(ii)] to enjoin the [tribe's] class III gaming"); *Florida v. Seminole Tribe of Florida,* 181 F.3d 1237, 1242 (11th Cir. 1999) (With respect to Section (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."); *see also Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.,* 523 U.S. 751, 758 (1998) ("[Congress] has restricted tribal immunity from suit in limited circumstances." (citing Section (A)(ii))).

BMIC argues that because LTBB asserts that the Vanderbilt Tract is not located on Indian lands,[2] Section (A)(ii) does not confer subject matter jurisdiction (and does not abrogate BMIC's sovereign immunity). This argument fails for several reasons.

a. The District Court has previously found subject matter jurisdiction exists where the alleged compact violation is that gaming is occurring on non-Indian land.

First, the district court has previously determined that Section (A)(ii) confers subject matter jurisdiction over a suit by an Indian tribe against another Indian tribe

[2] BMIC fails to note that only two of the three claims for relief in the Complaint allege that the Vanderbilt Casino is not located on Indian lands. The third claim for relief does not; to the contrary, the third claim for relief is premised on a determination that the Vanderbilt Casino *is* located on Indian lands, but that it is nonetheless prohibited by another section of IGRA, 25 U.S.C. § 2719.

alleging a compact violation on the ground that the gaming activity is not occurring on Indian lands under IGRA. *Bay Mills Indian Community v. Little Traverse Bay Bands of Odawa Indians*, No. 5:99-CV-88 (W.D. Mich. Aug. 30, 1999). (RE 4, LTBB Br. Supp. Prelim. Inj. at Ex. 7.) Indeed, in the 1999 litigation, the court below rejected the very same argument made by BMIC in an effort to enjoin LTBB from operating a casino. In fact, the Court characterized such argument as "jurisdictional gamesmanship." (*Id.* slip op. at 8.) BMIC now attempts to rewrite *Bay Mills,* claiming that the decision focused on whether the lands were eligible Indian lands under the LTBB compact, not IGRA. (Appellant's Br. 13-15.) BMIC even asserts that the property at issue in *Bay Mills was* Indian land under IGRA at the time.[3] That is not the position that BMIC asserted in that case, nor was that the decision of the court below in that case. In fact the court specifically did *not* address whether the lands were, in fact, Indian lands as defined in IGRA. (*Id.* at 9.) Instead, the court found jurisdiction based on: (1) defendant's (LTBB's) assertion that the land was "Indian land," and (2) the defendant's failure to assert any other authority for operating the casino. (*Id.* at 8.) Similarly, BMIC asserts in this matter that the Vanderbilt Casino is on Indian lands as defined by IGRA and BMIC's tribal-state compact.

[3] BMIC also attempts to confuse the Court by stating that the charge of "jurisdictional gamesmanship" was "not leveled at Bay Mills" without admitting that, although the parties are the same, their roles are reversed. (Appellant's Br. 15.)

b. BMIC's interpretation would lead to illogical results.

Second, BMIC's interpretation, if carried to its logical conclusion, would lead to preposterous and unintended results. If BMIC's interpretation holds true, then any time an Indian tribe found it beneficial to violate any provision of its tribal state gaming compact, it could do so with impunity simply by locating its casino on non-Indian lands, because doing so would deprive surrounding tribes and the State of the ability to invoke federal court jurisdiction (or the jurisdiction of any other court)[4] to remedy the violation. This is reinforced by BMIC's assertion that Section (A)(ii) is the *only* available abrogation of its sovereign immunity. Thus, according to BMIC's theory, States and Indian tribes have a remedy for compact violations that occur at otherwise legal casinos which are located on Indian lands, but have *no remedy at all* for compact violations that occur at *illegal* casinos located on *non-Indian lands*. Surely Congress did not intend such an absurd result.

c. Section (A)(ii) Confers Subject Matter Jurisdiction where the land at issue has not been designated as Indian Lands Under IGRA.

[4] Absent the waiver of sovereign immunity in Section (A)(ii) or a voluntary waiver of sovereign immunity, no court would have jurisdiction to order the cessation of unlawful gaming by an Indian tribe on non-Indian lands. *See Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999) ("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.")

The issue of whether Section (A)(ii) confers subject matter jurisdiction where the plaintiff alleges that the proposed gaming is not currently located on Indian lands was recently addressed in *Arizona v. Tohono O'odham Nation*, No. 2:11-CV-0296, 2011 WL 2357833[5] (D. Ariz. June 15, 2011). In *Tohono O'odham Nation,* plaintiffs invoked Section (A)(ii) to enjoin future gaming by the defendant Indian tribe, which had not yet completed the process of designating the lands at issue "Indian lands" under IGRA. *Tohono O'odham Nation*, 2011 WL 2357833, at *3.

In *Tohono O'odham Nation*, the court held that, even where the land at issue was not currently designated as "Indian lands" under IGRA, the Court nonetheless had subject matter jurisdiction to entertain an action to enjoin future gaming on the land because the defendant Indian tribe intended to conduct gaming on the land at issue when it completed the process of designating the lands as "Indian lands" under IGRA:

> Section 2710(d)(7)(A)(ii) grants district courts 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 ... that is in effect." (emphasis added). Congress did include one temporal limitation on this abrogation of tribal sovereign immunity—it required that the suit concern a compact "that is in effect." *But Congress did not include a similar temporal limitation on when the land at issue in the suit must become Indian lands.* Instead, it focused on the nature of the claim: "to enjoin a class III gaming activity located on Indian lands." That is precisely

[5] Westlaw misspells the defendant as "Tohono O'odhom Nation."

> what this lawsuit seeks to do. Congress extended the abrogation to "any" lawsuits "initiated" by a State or Indian tribe to enjoin gaming activity on Indian lands, but without specifying when the lawsuit must be "initiated." Plaintiffs have initiated this lawsuit to enjoin class III gaming on Indian lands owned by the Nation in the Phoenix metropolitan area—precisely the kind of lawsuit for which Congress abrogated sovereign immunity in § 2710(d)(7)(A)(ii).... It is true that Parcel 2 had not been taken into trust when this lawsuit was filed and therefore did not then qualify as "Indian lands." But this does not alter the nature of the claim asserted by Plaintiffs—to enjoin gaming on Indian lands. Moreover, DOI has decided that Parcel 2 will be taken into trust and this Court has upheld that decision. *Gila River,* Doc. 133. *The Nation has declared its intention to game on the land. The fact that Parcel 2 is not yet in trust is an issue of ripeness, not a question of sovereign immunity*.

Tohono O'odham Nation, 2011 WL 2357833, at *3.

The reasoning of the court in *Tohono O'odham Nation* applies even more forcefully to the present case, where the defendant Indian tribe did not simply intend to operate a casino when it satisfied the federal requirements for designating the land as "Indian land" under IGRA *in the future*, but *actually began operating the casino* prior to satisfying the federal requirements for designating the land as Indian lands under IGRA. As in *Tohono O'odham Nation*, LTBB and the State brought an action to enjoin an Indian tribe from the prospective operation of casino gaming on lands that had not yet been designated as "Indian lands" under IGRA.

It would defy logic and congressional intent to permit BMIC to unilaterally defeat jurisdiction by actually engaging in the illegal act that Plaintiffs seek to enjoin.[6]

d. The District Court's citation to *Mescalero* is appropriate.

BMIC's attempt to discredit the district court's citation to *Mescalero Apache Tribe v. New Mexico,* 131 F.3d 1379 (10th Cir. 1997), through reliance on *Florida v. Seminole Tribe of Florida* , 181 F.3d 1237 (11th Cir. 1999), should not be given weight. Whatever the limitations of the *Mescalero* opinion, and the Eleventh Circuit's reservations about the opinion, the controlling fact in the *Seminole Tribe* opinion was that a compact did not exist, therefore there could not be a violation of Section (A)(ii). Here LTBB alleges that a compact violation exists because BMIC's casino is not located on Indian lands. *Seminole Tribe* held the following:

> When section 2710(d)(7)(A)(ii) of IGRA is read in light of these principles, it becomes 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. *Cf. Cabazon Band of Mission Indians v. Wilson,* 124 F.3d 1050, 1059-60 (9th Cir. 1997) (concluding that section 2710(d)(7)(A)(ii) did not authorize state's suit to enjoin tribal class III gaming that existing Tribal-State compact did not prohibit). Because the State and the Tribe have not entered into a compact in this case, we hold that Congress has not abrogated the Tribe's immunity from the State's suit.

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[6] BMIC's citation to *Match-E-Be-Nash-She-Wish Potawatomi v. Engler*, 304 F.3d 616 (6th Cir. 2002), is not contrary to this reasoning. In that case, the issue was whether the State had a duty to negotiate a gaming compact before the Tribe had acquired Indian lands. By contrast, BMIC has executed a gaming compact with the State of Michigan, and the issue is whether BMIC should be enjoined from gaming on non-Indian lands, in violation of its compact.

Florida v. Seminole Tribe of Florida 181 F.3d 1237, 1242 (11th Cir. 1999).

LTBB seeks to enjoin BMIC from violating its gaming Compact by operating a casino on lands prior to satisfying the essential requirement of designating the lands as "Indian lands" as defined in IGRA. This is precisely the type of claim recognized and authorized by Section (A)(ii). Indeed, *Tohono O'odham Nation* is directly parallel to the circumstances here, because in both cases, the alleged compact violation is that the defendant Tribe intends to operate a casino on lands prior to satisfying the "Indian lands" requirement of IGRA. Thus, the district court's reliance on *Mescalero* was entirely appropriate since the central issue in this case is whether there is a compact violation by BMIC.

2. Alternate Bases for Jurisdiction.

LTBB does not rely exclusively on the assertion that the Vanderbilt Casino is located on non-Indian lands as the basis for its compact challenge. In its First Amended Complaint, LTBB asserts a cause of action in the alternative, asserting that, even assuming that the Vanderbilt Casino *is* located on Indian lands, the casino nonetheless violates IGRA and BMIC's tribal-state compact because gaming is barred on lands acquired by an Indian tribe after IGRA's enactment (with a few inapplicable exceptions). (RE 52, LTBB First Am. Compl. at pp. 6-7.)

B. LTBB Meets Article III Standing Requirements.

LTBB has met the standing requirements for this action because it demonstrated both threatened injury and actual harm since BMIC's opening of its Vanderbilt Casino. (RE 4, LTBB Br. Supp. Mot. for Prelim. Inj. at pp. 23-28.) BMIC argues that LTBB lacks standing because LTBB's expert report addressed "potential" impacts. (Appellant's Br. 19.) BMIC's argument fails for two reasons. First, LTBB demonstrated actual harm resulting from BMIC's operation of its illegal casino, in particular through loss of customer goodwill (RE 6, LTBB Am. Ex. 17; RE 27, LTBB Reply to Resp. to Mot. for Prelim. Inj. at Ex. 1), and the district court agreed. ("Little Traverse Bay has established that is has and will suffer irreparable harm." RE 33, Order Granting Prelim. Inj. at p. 14.) Second, LTBB was not required to wait until it suffered the threatened harm to establish standing. Courts have long recognized "that threatened rather than actual injury can satisfy Article III standing," and that threatened injury is "by itself injury in fact." *E.g.*, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,* 204 F.3d 149, 160 (4th Cir. 2000).[7]

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[7] Citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc*., 454 U.S. 464, 472 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). "[O]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). *See also Covington v. Jefferson County*, 358 F.3d 626, 638 (9th Cir. 2004). "The injury alleged has not yet occurred; it is threatened.

Thus, BMIC's claim that the district court erred in finding that LTBB has standing is misplaced. The district court considered the evidence presented at the preliminary injunction hearing and held: "Little Traverse Bay has established that it ***has and will*** suffer irreparable harm." (RE 33, Order Granting Prelim. Inj. at p. 14.) That holding is fully supported by the evidentiary record. (RE 4, LTBB Br. Supp. Mot. for Prelim. Inj. at Exs. 5, 6, 18, 19, and 20; RE 6, LTBB Am. Ex. 17; RE 17, BMIC Resp. to Mot. for Prelim. Inj. at Ex. R; RE 27, LTBB Reply to Resp. to Mot. for Prelim. Inj. at Ex. 1.) BMIC focuses its arguments on the expert reports presented by both LTBB and BMIC, but ignores the substantial additional support LTBB provided through affidavits. (Appellant's Br. 18-20. *See* RE 4, LTBB Br. Supp. Mot. for Prelim. Inj. at Exs. 5, 6, 18, 19, and 20; RE 6, LTBB Am. Ex.17; RE 17, BMIC Resp. to Mot. for Prelim. Inj. at Ex. R; RE 27, LTBB Reply to Resp. to Mot. for Prelim. Inj. at Ex. 1.) BMIC further ignores evidence that it offered *from its own expert* that concluded that LTBB was sustaining substantial injury from the operation of the Vanderbilt Casino. (Appellant's Br. 19-20.) Indeed, BMIC's expert concluded that $1.5 million would annually be "shifted from spending otherwise flowing to the Odawa casino." (RE 17, BMIC Resp. to Mot. for Prelim. Inj. at Ex. R, ¶ 23.)

Nevertheless, the possibility of future injury may be sufficient to confer standing on plaintiff; threatened injury constitutes 'injury in fact.'" *Central Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

Although BMIC's brief ignores this point, the district court also found that, absent an injunction, LTBB will suffer irreparable injury as a matter of law, because IGRA only authorizes suit against BMIC for injunctive relief, not damages, and that the "[i]mposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." (RE 33, Order Granting Prelim. Inj. at p. 15 (citing *Chamber of Commerce of United States v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010); and *QEP Field Servs. Co. v. Ute Indian Tribe of Uintah and Ouray Reservation*, 740 F.Supp.2d 1274, 1283-84 (D. Utah 2010).) Here, the only waiver of BMIC's sovereign immunity to suit from LTBB is for injunctive relief, pursuant to Section (A)(ii). Absent an injunction, LTBB has no ability to obtain any relief, and thus the harm to LTBB that would result from the denial of injunctive relief is irreparable. The district court correctly found that LTBB has standing.

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

The basis for BMIC's claim that Vanderbilt Tract constitutes "Indian land" under IGRA is that it was acquired pursuant to Section 107(a)(3) of MILSCA, which 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.

Michigan Indian Land Claims Settlement Act, Pub. L. 105-143, § 107, 111 Stat. 2652 (1997). The district court correctly held that BMIC's acquisition of the Vanderbilt Tract did not comply with Section 107(a)(3) because the Vanderbilt Tract, which is located more than 125 miles from BMIC's existing land holdings, does not "consolidate and enhance" BMIC's existing land holdings. In reaching this conclusion, the district court employed a plain meaning analysis, finding that the acquisition of the Vanderbilt Tract must *both* "consolidate and enhance" BMIC's existing land holdings in order to comply with Section 107(a)(3). The district court correctly found that BMIC's acquisition of the Vanderbilt Tract did not meet the criteria of consolidation:

> In the context of this provision, the statutory language has a plain and obvious meaning. The word "consolidate" means "to bring together or unify." The word "enhance" means "to improve or make greater" or "to augment." Obviously, the purchase of the Vanderbilt Tract is an enhancement of tribal landholdings, as the additional land augmented, or made greater, the total land possessed by Bay Mills. However, the statute does not authorize every enhancement. The statute uses the conjunction "and" between the word "consolidation" and the word "enhancement." The use of the word "and" cannot be ignored. *See Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("It is, however, a cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.'") (citations omitted). In 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. Under § 107(a)(3), Bay Mills may use the earnings from the land trust to acquire additional land next to, or at least near, its existing tribal landholdings. The

> statute does not allow Bay Mills to create a patchwork of tribal landholdings across Michigan.

(RE 33, Order Granting Prelim. Inj. at p. 10 (citations omitted).) The district court's decision mirrors the conclusion reached by the Solicitor of the United States Department of the Interior and the National Indian Gaming Commission, the two federal agencies charged with administering tribal affairs and Indian gaming, respectively. (RE 7, Mot. to File Supp. Auth. at Exs. 1-2; RE 13, State of Michigan Resp. in Supp. Of Prelim. Inj.) In contrast to the well-reasoned decision of the district court, the Department of the Interior and the NIGC, BMIC advocates for an interpretation of the terms "consolidate and enhance" that leads to utterly ridiculous results. BMIC would have this Court interpret the word "and" to mean "or,"[8] with the result being to magically bestow upon BMIC the super-sovereign power to choose any parcel of land, located anywhere in the United States (no matter how far removed from BMIC's existing land holdings), and, without providing notice to any federal, state or local unit of government, unilaterally remove such parcel of land from state and local jurisdiction and immediately begin the operation of a full-scale Las Vegas-style casino.[9] This argument not only

[8] BMIC's anecdote about Gene Kelly's ability to independently sing and dance is not analogous to the situation at hand. Had Congress enacted a law mandating that Gene Kelly "sing and dance" on the floor off the capitol rotunda, he would be required to do both in order to comply with such law.

[9] At the hearing on the preliminary injunction, BMIC's legal counsel confirmed that its interpretation would pose no geographical limitations to where it could

renders the term "consolidate" surplusage, but is the very antithesis of it, as is demonstrated by the facts of this case

The district court did not abuse its discretion in employing its plain meaning analysis to the terms, "consolidate and enhance," and BMIC thus is not likely succeed on the merits of its claim to the contrary.

D. The District Court did not Abuse its Discretion in Weighing the Balance of Harm.

The district court weighed the evidence presented by the parties in evaluating the relative harm from the preliminary injunction, and BMIC has presented this Court with no basis for finding that the district court abused its discretion in doing so. Indeed, this Court has set a particularly high bar in the review of preliminary injunctions, reversing the "district court's weighing and balancing of the equities only in the rarest of circumstances." *Moltan Company v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1175 (6th Cir. 1995). Here, in granting the preliminary injunction, the district weighed the evidence and the equities, and found that the balance of harms tipped in favor of entering the injunction:

> Gamblers will spend their money at either of the two casinos. If an injunction is not granted, gamblers will continue to patronize the Vanderbilt Casino and Bay Mills and the Vanderbilt community will enjoy the resulting economic benefits, while the Petoskey Casino and

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exercise such super-sovereign powers. (RE 61, Tr., Mot. for Prelim. Inj. at p. 93.) Moreover, BMIC continues to advocate for such unprecedented power—it argues against the district court's interpretation of the term "consolidate" to include a geographic component. (Appellant's Br. 27.)

> the surrounding community will be deprived of those revenue streams. If the injunction is granted, gamblers will shift their patronage to the Petoskey Casino and Little Traverse Bay and the Petoskey community will enjoy the resulting economic benefits, while the Vanderbilt Casino and the surrounding community will be deprived of those same dollars.

(RE 33, Order Granting Prelim. Inj. at p. 15.) The district court concluded, however, that, because LTBB established a likelihood of success on the merits, "the Vanderbilt Casino will likely have to be shut down at some point, tilting the balance of the harm in favor of granting a preliminary injunction." (*Id*. at p. 16.)

BMIC insists that LTBB's expert report fell short of demonstrating a measureable effect on the market that corresponds with the operation of the Vanderbilt Casino. (Appellant's Br. 29.) However, BMIC has not shown that the Court abused its discretion. BMIC fails to note that the district court made the following findings without regard to LTBB's expert report (or to BMIC's rebuttal):

> Little Traverse Bay has established that it has and will suffer irreparable harm. Little Traverse Bay has established that Bay Mills' Vanderbilt Casino targets, through advertising, customers of the Petoskey Casino. Bay Mills offers "Free Play" dollars for new customers to its casino who show rewards cards from the Petoskey Casino. Mr. Wolf, a general manager at the Odawa Casino, estimates the Petoskey Casino may lose between $250,000 and $400,000 per month to the Vanderbilt Casino's 84 slot machines.

(RE 33, Order Granting Mot. for Prelim. Inj. at p. 14 (internal citations omitted).)

BMIC also argues that it demonstrated that it has sustained economic harm as result of the preliminary injunction and that it did *not* assume a risk of financial

loss by opening the Vanderbilt Casino. (Appellant's Br. 32.) In addition to the startup costs of the facility and paying its employees, BMIC claims harm from an alleged loss of "actual revenue" by the local government in Vanderbilt. (Appellant's Br. 31-32.) However, this is illogical. The revenues shared with local governments through the *Consent Judgment* in *Sault Sainte Marie Tribe of Chippewa Indians et al. v. Engler*, Case No. 1:90-cv-611 (W.D. Mich. 1990), are not "actual revenue." Rather, such payment is to be provided to local governments to compensate "for impacts associated with the existence and location of the tribal casino in its vicinity." (RE 274, Stipulation for Entry of Consent Judgment, *Sault Sainte Marie Tribe of Chippewa Indians et al*, Case No. 1:90-cv-611, p. 6) Thus, if the Vanderbilt Casino is not operating, then there is no cost associated with it that would be compensating the local government. If BMIC were so inclined, they could certainly pay the local government out of its own pocket through its own goodwill (rather than payment based on the consent agreement) just as it is paying the former Vanderbilt Casino employees. Such payment, however, cannot be accurately deemed loss of actual revenue.

BMIC alleges that the record does not show that it assumed a risk by opening the Vanderbilt Casino because the letters from the NIGC, Department of the Interior, and the State were not issued until after the Vanderbilt Casino was opened. (Appellant's Br. 32. *See* RE 4, LTBB Br. Supp. Mot. for Prelim. Inj. at

Ex. 6; RE 7, LTBB Mot. to File Supp. Auth. At Ex. 1-2.) BMIC ignores that it had previously been issued an opinion from the Department of the Interior concluding that lands purchased from MILCSA funds were not mandatory trust acquisitions. (RE 4, LTBB Br. Supp. Mot. for Prelim. Inj. at Ex. 10, p. 1.) Although NIGC and Department of the Interior only became aware of the opening of the Vanderbilt Casino after it had been opened, BMIC cannot claim that it did not know that any risk was involved or that its legal position was tenuous. As discussed by the Department of the Interior in its Opinion, BMIC had on three separate occasions sought decisions from the NIGC and/or the Department of the Interior on its restricted fee theory that could have authorized operation of the Vanderbilt Casino.[10] (RE 7, LTBB Mot. to File Supp. Auth. At Ex. 1, n. 1, p. 8.) BMIC withdrew all three of these requests before a final decision was issued by the

[10] The district court did not make a finding on restricted Indian lands. However, BMIC bases its extraordinary power for the alleged authority to unilaterally create restricted Indian lands under Section 107(a)(3) totally out of context to the history of restricted Indian lands. BMIC alleges that Congress, in enacting Section 107(a)(3), provides BMIC individual unreviewable authority to create restricted fee Indian lands anywhere in the country. BMIC asserts, based on the slim legislative history of MILCSA and the skewed reading of Section 107(a)(3), that restricted fee title is created by operation of law. Historically, restricted fee lands were created by R.S. § 2116, which was enacted as a part of the Act of June 30, 1834, c. 161, § 12, 4 Stat. 730, codified the decision of the Court in *Johnson v. M'Intosh*, 21 U.S. 543 (1823) and provided penalties for its violation, certainly not the case here in the contemporary ambiguous language of Section 107(a)(3) that BMIC relies on. However, the court need not reach these issues, because BMIC fails to meet the "consolidation and enhancement" requirements of the first sentence of Section 107(a)(3).

agencies, presumably because BMIC had reason to believe the decisions would not be favorable to its cause.

BMIC has not demonstrated that this is one of those "rarest of circumstances" that warrant a reversal of the district court's preliminary injunction order.

E. The District Court did not Abuse its Discretion in Finding that the Public Interest Favors the Preliminary Injunction.

The district court properly considered and rejected BMIC's claim that the public interest favors staying the injunction. The court noted that, the competition between BMIC and LTBB, even if not zero-sum, would result in reduced revenues for LTBB's casino, which results in reduced revenue for the State. (RE 45, Order Den. Mot. to Stay at p. 8.) The fact that the State will lose revenues if the Vanderbilt Casino is not enjoined results from the fact that LTBB pays a portion of its casino revenues to the State of Michigan per the terms of its gaming compact with the State, while BMIC is under no similar obligation to pay any revenues to the State from its Vanderbilt Casino. Thus, every dollar wagered at the Vanderbilt Casino that would otherwise be wagered at LTBB's nearby Odawa Casino Resort represents a real loss of revenues for the State of Michigan. The district court did not abuse its discretion in finding that the public interest favors the entry of the injunction, and weighs against a stay of that injunction pending appeal.

BMIC cites *Keweenaw Bay Indian Cmty v. United States*, No. 2:94-CV-262, 1999 WL 33978509, at 1, *3 (W.D. Mich. September 30, 1999), for the proposition that a court is not required to grant an injunction simply because a plaintiff alleged an IGRA violation. (Appellant's Br. 33.) While this is true, that is not the case at hand. *Keweenaw Bay Indian Cmty* does not stand for the proposition that an IGRA violation is not in the public interest. Rather, the very quote cited by BMIC shows that an allegation of a statute violation *is* a matter of public interest. (*Keweenaw Bay Indian Cmty,* 1999 WL 33978509, at *3.[11]) While such an allegation alone is not enough to grant an injunction, such an allegation demonstrates the public interest. The district court below properly noted that the public "has an interest in not being enticed to violate the law." (RE 33, Order Granting Mot. for Prelim. Inj. at p. 16.)

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

[11] The Court further states "[o]ther than the violation of § 2719(a), defendants have not claimed or demonstrated any *other injury* to the *public interest*." (Emphasis added.) (*Keweenaw Bay Indian Cmty*, 1999 WL 33978509, at *4.) While a mere allegation of a statute violation alone is not enough for the granting of an injunction, it certainly qualifies as implicating the public interest factor.

VI. CONCLUSION

For the foregoing reasons, Little Traverse Bay Bands of Odawa Indians respectfully requests that this Court affirm the decision of the district court granting the preliminary injunction.

Respectfully submitted this 28th day of September, 2011.

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RE 2	Notice that this case consolidated with 1:10-cv-1278
RE 4	LTBB Brief in Support of Motion for Preliminary Injunction
RE 4-3	Warranty Deed
RE 4-4	Declaration of Alan Proctor
RE 4-5	Declaration of Dexter McNamara
RE 4-6	12/16/10 Letter to BMIC from Manning
RE 4-7	*BMIC v. LTBB* Opinion
RE 4-10	9/10/02 Letter to BMIC from Larry Morrin
RE 4-18	Declaration of Sharon Sierzputowski
RE 4-19	Declaration of Cheryl Samuels
RE 4-20	Declaration of Denneen Smith
RE 6	LTBB Amended Exhibit 17 to Brief in Support of Motion for Preliminary Injunction
RE 7	LTBB Motion for Leave to File Supplemental Authority and Request for Judicial Notice
RE 7-1	BMIC Indian Lands Opinion
RE 7-2	12/21/10 NIGC Opinion
RE 13	State of Michigan Response in Support of Motion for Preliminary Injunction

RE 17 Exhibits P – T to BMIC Response to Motion for Preliminary Injunction

RE 17-R Declaration of Jacob Miklojcik

RE 27 LTBB Reply to Response to Motion for Preliminary Injunction

RE 27-1 Declaration of David Wolf

RE 33 Order Granting Motion for Preliminary Injunction

RE 39 BMIC Notice of Interlocutory Appeal

RE 45 Order Denying Motion to Stay

RE 52 LTBB First Amended Complaint

RE 74 State of Michigan Amended Complaint

RE 274 [in] *Sault Sainte Marie Tribe of Chippewa Indians et al. v. Engler*, Case No. 1:90-cv-611 (W.D. Mich. 1990), Stipulation for Entry of Consent Judgment

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2011, I filed Brief of Plaintiff/Appellee Little Traverse Bay Bands of Odawa Indians' via the Court's Electronic Case Filing System, which will service Notice of Electronically Filing to:

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