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.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Paul L. Maloney

BRIEF FOR PLAINTIFF-APPELLEE STATE OF MICHIGAN

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INTRODUCTION

The trial court found that both the National Indian Gaming Commission (NIGC) and the U.S. Department of Interior (Interior) forewarned Defendant-Appellant Bay Mills Indian Community (Bay Mills) that the legal theory underpinning its decision to open a casino more than 100 miles from its reservation was ill-conceived. Bay Mills ignored this advice and opened a casino in Vanderbilt, Michigan, which operated unlawfully until it was shut down by the trial court, despite Bay Mills' protestations that it would lose the value of its investment if the casino lay idle. Relying on clear Sixth Circuit precedent (*U.S. v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004)), the trial court refused to stay its injunction (as did this Court), pointing out that just as in *Edward Rose,* Bay Mills was the author of any injury it may have suffered, given its decision to open the casino even though the primary federal agencies charged with determining whether a piece of property is "Indian lands" for purposes of federal tribal gaming laws had told Bay Mills that the Vanderbilt site would not qualify.

Bay Mills now asks this Court to rule that the trial court's determination was an abuse of discretion, based in part on Bay Mills'

assertion that no federal court has jurisdiction of an action to grant injunctive relief brought by a state asserting that tribal gaming is unlawful when it occurs outside Indian lands. In other words, if Bay Mills' argument is adopted, federal courts will be powerless to enjoin tribal gaming that does not occur on Indian lands. This cannot be the outcome intended when Congress adopted its comprehensive federal law governing tribal gaming, the Indian Gaming Regulatory Act. This Court should find that the trial court did not abuse its discretion when it enjoined operation of the Vanderbilt casino because it was not located on Indian lands, and because Bay Mills would not suffer any legally cognizable injury from entry of the injunction.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellee State of Michigan (State) respectfully requests that it be granted oral argument. Bay Mills has requested oral argument, and the State would like the opportunity to respond both to positions taken by Bay Mills in oral argument and in its reply brief should one be filed.

While the factual issues in this case are limited, the legal issues are significant and complex and could very well prompt questions from

the Court which may not be fully answered in the briefs. This is particularly true concerning the issues of jurisdiction and sovereign immunity raised by Bay Mills in opposition to the motion for preliminary injunction. Bay Mills is asserting that the district court does not have jurisdiction of a cause of action seeking an injunction that asserts that a tribal casino is not on Indian lands as required by the Indian Gaming Regulatory Act. This is a very serious claim with wide-ranging implications for the sovereignty of every state. Furthermore, if Bay Mills' position that the casino it opened in 2010 in Vanderbilt (Vanderbilt casino) is on Indian lands is adopted by the Court, it will open the door to virtually unlimited opportunities for that Tribe, and possibly other tribes across the nation, to open casinos wherever they find a person willing to sell them a piece of property. This will seriously upset the balance struck by Congress when it adopted the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. (IGRA).

As this Court has already noted, the statutory and regulatory issues presented in this appeal have not been widely addressed by the courts. (Order denying motion to stay injunction, dated 6/29/2011, p. 2.)

Given the significant and complicated nature of the issues presented by this appeal, the State believes oral argument is appropriate.

JURISDICTIONAL STATEMENT

The Court has subject matter jurisdiction of this action pursuant to:

a) 28 U.S.C. § 1331, as the Complaint alleges violations of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.*, and federal common law;
b) 25 U.S.C. § 2710(d)(7)(A)(ii), as the State seeks to enjoin gaming activity conducted in violation of a tribal-state compact;
c) 28 U.S.C. § 1367 as the Complaint alleges violations of State anti-gambling and other laws; and
d) 28 U.S.C. § 2201, as this Complaint also seeks a declaratory judgment.

This Court has jurisdiction of this interlocutory appeal pursuant to 28 U.S.C. § 1292.

STATEMENT OF ISSUES

Did the district court abuse its discretion when it weighed the following preliminary injunction factors and determined that an injunction should enter in favor of Plaintiff-Appellees?

I. When the district court found that Defendant-Appellant Tribe had been warned by federal officials that its casino in Vanderbilt, Michigan would not be on Indian lands and

would therefore be illegal, did the district court properly determine that the balance of harms favored Plaintiffs-Appellees because Defendant-Appellant Tribe could not legally claim it had suffered injury?

II. Where Defendant-Appellant Tribe would claim sovereign immunity from any suit for damages brought by Plaintiffs-Appellees based on lost profits caused by unlawful competition from the Vanderbilt casino, did the trial court properly determine that Plaintiffs-Appellees would suffer irreparable injury if the preliminary injunction was not entered?

III. When the casino in Vanderbilt would violate state and federal anti-gambling laws, and would effectively entice patrons to also violate those laws when gambling at the casino, did the district court properly determine that the public interest would be harmed if the preliminary injunction was not entered?

IV. Did the district court correctly determine that Plaintiff-Appellees would likely succeed on the merits of their case

where it determined that the court had jurisdiction of the action, sovereign immunity did not bar the action and that the Michigan Indian Land Claims Settlement Act did not authorize purchase of the land in Vanderbilt on which the casino was located and that it was therefore not built on Indian lands?

Statement of the Case

This is an interlocutory appeal from the trial court's order enjoining operation of the Vanderbilt casino by Bay Mills. (RE 33, Order granting motion for preliminary injunction). The underlying action also seeks a declaration that the Vanderbilt casino operated illegally, a permanent injunction of any further operation, and through its Amended Complaint (RE 74), the State also seeks an accounting and forfeiture of all gambling proceeds and equipment from the operation of the casino. (*Id.*)

Shortly after the State's action was filed, the Little Traverse Bay Bands of Odawa Indians (LTBB), another federally-recognized Indian tribe that operates its own casino in Emmett County, Michigan, less than 40 miles from the Vanderbilt property, filed its own lawsuit

(1:10-cv-01278-PLM**)** against Bay Mills seeking an injunction against further operation of the Vanderbilt casino. The two lawsuits were consolidated by the trial court. (RE 2, Notice of consolidation). Within hours of the filing of these lawsuits, Interior and the NIGC issued determinations formally advising Bay Mills that the Vanderbilt casino was not located on Indian lands as defined in IGRA. (RE 7-1, Letter from Interior; RE 7-2, Memo from NIGC).

At the same time that LTBB filed its complaint, it also filed a motion for a preliminary injunction that asked the trial court to enjoin any further operation of the Vanderbilt casino (RE 4, Brief in Support of Motion for Preliminary Injunction). The State supported the preliminary injunction motion (RE 13, Response in Support of Motion for Preliminary Injunction) which was granted by the court on March 29, 2011 (RE 33, Order granting motion for preliminary injunction). Bay Mills sought a stay of the injunction from the trial court (RE 40, Motion to Stay Injunction), which was denied (RE 45, Order denying motion to stay). It then sought a stay from this Court which was also denied. In its opinion, this Court found, among other things, that Bay

Mills was unlikely to succeed on the merits of its appeal. (Order denying motion to stay injunction, dated 6/29/2011, p. 2.)

STATEMENT OF FACTS

Bay Mills' arguments in opposition to the entry of the preliminary injunction from which it appeals are primarily of a legal nature, i.e., Bay Mills asserts first that this Court does not have jurisdiction of Plaintiffs' actions and second, that based on its interpretations of the Michigan Indian Land Claims Settlement Act of 1997, 105 Pub.L. 143; 111 Stat. 2652 (MILCSA) (RE 13-1, copy of the MILCSA) and IGRA, it is entitled to operate a casino in Vanderbilt, Michigan, which is more than 100 miles from its reservation. Thus, the facts relevant to this appeal are primarily those alleged in the State of Michigan's Complaint. (RE 1, Complaint) and Amended Complaint (RE 74, Amended Complaint). The following facts are essentially from that Complaint and from the Amended Complaint unless otherwise attributed.

Bay Mills is a federally recognized Indian tribe with a reservation in Michigan's Upper Peninsula in Chippewa County near the town of Brimley. The Tribe's offices are located on the reservation.

Bay Mills entered into a tribal-state compact with the State pursuant to IGRA in 1993, and thereafter opened and has continuously operated a casino on its reservation in Chippewa County.

In 2009, Bay Mills submitted a request for an Indian lands determination to the U.S. Department of Interior (RE 7-1, Letter from Interior, n. 1), seeking a determination that land in the town of Vanderbilt, Michigan was "Indian lands" for purposes of IGRA such that the Tribe could open and operate a new casino in that town which is in the Lower Peninsula of Michigan more than 100 miles from Bay Mills' reservation. Bay Mills submitted a lengthy memorandum to Interior in support of its application for the Indian lands determination that asserted that the Vanderbilt property would be Indian lands if it was purchased with funds that Bay Mills had obtained as a result of a payment pursuant to the MILCSA.[1] Before Interior could give a formal

[1] The MILCSA was passed by Congress for the purpose of making actual payment of funds that had been awarded to various Michigan tribes several decades earlier to compensate them for the value of land ceded to the federal government and for which the tribes received less than fair value. Representatives from the tribes worked with Congressional committees to draft language that was acceptable to the tribes concerning the use and distribution of the funds.

determination, however, Bay Mills withdrew its request. (RE 7-1, Letter from Interior, n. 1).

In February, 2010, Bay Mills submitted a request for approval of amendments to its Tribal Gaming Ordinance to the NIGC[2] that were intended to identify this same property in Vanderbilt as Indian lands on which a casino could be operated. (RE 7-1, Letter from Interior, n. 1). Before Bay Mills obtained an answer to its request for approval of the amendments to the Gaming Ordinance, it once again withdrew its request from the federal agency. (*Id.*)

In May, 2010, Bay Mills again submitted a request to NIGC (*id.*) that sought essentially the same approval of amendments to its Gaming Ordinance that would have established the Vanderbilt property as Indian lands for casino gaming purposes. For a third time, Bay Mills withdrew its request before the federal agency could act on it. (*Id.*) Finally, Bay Mills submitted a request for approval of amendments to its Gaming Ordinance that did not specifically identify the Vanderbilt property as Indian lands, but rather contained a generic description of

[2] IGRA requires any tribe that wishes to operate a casino to adopt a gaming ordinance that must be approved by the NIGC. 25 U.S.C. § 2710(d)(1)(A).

what would be considered Indian lands under the Ordinance. These amendments were approved by NIGC, ostensibly because they did not require NIGC to determine that off-reservation lands were eligible for gaming. (RE 67-4, Letter from NIGC approving Gaming Ordinance Amendments and excerpts from Gaming Ordinance).

The Gaming Ordinance created a Tribal Gaming Commission that was charged with regulating all casinos owned by the Tribe, and with issuing licenses to those casinos. (*Id.*, Gaming Ordinance §§ 4.1, 4.18(A) and (Q)). The Gaming Ordinance also included a "sue or be sued" provision that allowed the Gaming Commission to file lawsuits and also be sued by third parties in some circumstances. (*Id.*, Gaming Ordinance Excerpts § 4.18(Y)). The Gaming Ordinance prohibited the Tribe from operating a casino outside of Indian lands. (*Id.*, Gaming Ordinance Excerpts § 5.5).

Nevertheless, and even though it had not obtained approval from either Interior or the NIGC of the Vanderbilt property as Indian lands that would be eligible for the location of a casino, on November 3, 2010, Bay Mills opened a new casino on that property. (Appellant's Brief on Appeal (corrected), p. 3). On October 29, 2010, the Tribal Gaming

Commission issued a license to the Tribe for this casino. (Appellant's Brief on Appeal (corrected), pp. 2-3).

On December 16, 2010, the Michigan Attorney General sent a letter to Bay Mills ordering it to immediately close the casino because it violated state gaming laws. Bay Mills refused to shut down the Vanderbilt casino and the State filed the instant lawsuit on December 21, 2010 seeking to enjoin any further operation of the casino.

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion when it entered a preliminary injunction shutting down the Vanderbilt casino which was located more than 100 miles from the Bay Mills reservation. The trial court correctly weighed and balanced the four injunction factors.

Irreparable injury factor. Bay Mills was warned by two federal agencies that the land in Vanderbilt was not Indian lands as defined in IGRA and was therefore not authorized by federal law. Under clear Sixth Circuit precedent, when a party has been told by the government that its proposed activity is unauthorized, it cannot claim injury when that activity is enjoined. The State and LTBB have shown irreparable injury from the unlawful competition posed by the Vanderbilt casino,

which in the case of the State will impact percentage based economic incentive payments from LTBB. Because Bay Mills would assert and may enjoy sovereign immunity from an action for damages, LTBB's losses are irreparable. The injury of the State and LTTB from vacating the injunction clearly outweighs any injury Bay Mills may legally claim.

Likelihood of success on the merits factor. Given the absence of irreparable injury, the showing on the likelihood of success factor need not be as strong as when injury is established by the enjoined party. Here, Bay Mills primary argument is that the Court does not have jurisdiction because of the allegation that the casino is not on Indian lands. This same argument was rejected by the district court in a nearly identical case decided in 1999, but where Bay Mills was seeking to enjoin operation of a casino by LTBB not on Indian lands. The federal court does have jurisdiction of this action because a prerequisite for Indian gaming under IGRA is that it be located on Indian lands. Moreover, IGRA grants jurisdiction to the federal courts to enforce state anti-gambling laws in Indian country if the gaming is not authorized by IGRA. Michigan has multiple laws outlawing unlicensed casino gaming, including a nuisance law that makes it illegal to own a building

where gaming is conducted, and that makes it unlawful for a person to permit someone else to operate an unlicensed casino. While the Vanderbilt casino itself is not located in Indian country, the unlawful conduct of *owning* that casino and *permitting* it occurred on the Bay Mills reservation in Indian country.

The Tribe does not have immunity from suit for prospective injunctive relief. IGRA abrogated that immunity for actions brought based on violations of tribal-state compacts. IGRA also abrogated tribal sovereign immunity for actions based on gaming activity in Indian country that is not authorized by IGRA and that violates state law. Furthermore, Bay Mills expressly waived its sovereign immunity for actions that do not involve land within its reservation when it adopted a "sue or be sued" provision in its Tribal Gaming Ordinance. Finally, even if the Tribe has sovereign immunity, the Amended Complaint seeks prospective injunctive relief against individual Tribal officials who have the authority to close the Vanderbilt casino. This Court therefore has jurisdiction of the State's action.

The trial court did not abuse its discretion when it determined that the Vanderbilt casino was not on Indian lands. Bay Mills'

assertion that land purchased with MILCSA funds automatically becomes Indian lands is wrong. The MILCSA only allows the purchase of lands that would "consolidate and enhance" tribal landholdings. The Vanderbilt parcel is not eligible for purchase with these funds as it is over 100 miles from Bay Mills' reservation. Even if the Vanderbilt property could be lawfully purchased with MILCSA funds, it does not automatically become eligible for gaming. IGRA prohibits gaming on land acquired after 1988 unless it fits within certain limited exceptions, none of which are applicable here. Even if Bay Mills' argument that the IGRA after-acquired property prohibition only applies to land taken into trust by the United States, property purchased with MILCSA funds does not automatically become non-trust Indian lands eligible for gaming because the MILCSA says only that such lands shall be held "as Indian lands are held." Indian lands are held in several ways, including and primarily by the United States in trust for a tribe, and there is nothing in the MILCSA that even suggests lands purchased with MILCSA funds can *only* be lands restricted against alienation, which according to Bay Mills (the State disagrees), would make them eligible for gaming under IGRA. Furthermore, both Interior and the NIGC

made determinations that the lands in question would not qualify as Indian lands within the meaning of IGRA and would not therefore be eligible for tribal gaming.

Harm to others factor. The trial court did not abuse its discretion when it found that LTBB would be harmed from the competition created by the unlawful operation of the Vanderbilt casino by Bay Mills. It also found that the State would be harmed because it has a tribal-state compact with LTBB that entitles the State to economic incentive payments that are a percentage of the net win dollars earned by the LTBB casino in Petoskey. If the net win decreases as a result of competition from the Vanderbilt casino, the State will suffer.

Public interest factor. The trial court did not abuse its discretion when it determined that the public interest would be harmed by operation of the Vanderbilt casino. That casino violates state law which in itself harms the public interest. Also, as found by the trial court, any person who gambles at the Vanderbilt casino is also breaking state anti-gambling laws, effectively creating a public nuisance which is decidedly not in the public interest.

Thus, the trial court did not abuse its discretion when it found it had jurisdiction of this action, and that on balance, the four injunction factors weighed in favor of closing the Vanderbilt casino.

STANDARD OF REVIEW

This Court generally reviews a district court's grant of a request for a preliminary injunction for abuse of discretion. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 540 (6th Cir. 2007). Under this standard, the district court's legal conclusions are reviewed de novo and its factual findings for clear error. *Id.* at 541. The district court's determination of whether the movant is likely to succeed on the merits is a question of law and is accordingly 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 denying preliminary injunctive relief is reviewed for abuse of discretion. *Id.* This standard of review is "highly deferential" to the district court's decision, *id.*, and the district court's weighing and balancing of the equities is overruled only in the "rarest of cases." *U.S. v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004).

Bay Mills has not even approached a showing that this is one of the "rarest of cases" that would warrant a finding that the trial court abused its discretion, and its appeal should therefore be denied.

ARGUMENT

The district court did not abuse its discretion when it weighed the four preliminary injunction factors and determined that an injunction should enter in favor of Plaintiff-Appellees.

This Court has established four factors that must be balanced by a district court when considering a motion for preliminary injunction. Those four factors are:

(1) whether the movant has a strong likelihood of success on the merits;

(2) whether the movant would suffer irreparable injury without the injunction;

(3) whether issuance of the injunction would cause substantial harm to others; and

(4) whether the public interest would be served by the issuance of the injunction. *Certified Restoration,* 511 F.3d at 542.

These four considerations are "factors to be balanced, not prerequisites that must be met." *Id.* The district court judge "is not required to make specific findings concerning each of the four factors used in determining a motion for preliminary injunction if fewer factors are dispositive of the issue." *Id.*

The trial court correctly weighed and balanced these factors, and at the very least, its determination in this regard was not an abuse of discretion.

I. Where Bay Mills was warned that the casino in Vanderbilt was illegal, it cannot claim it will suffer irreparable injury if the injunction is not vacated.

Bay Mills was told in no uncertain terms by the State that it should cease operating its casino in Vanderbilt because it was not on Indian lands and was an illegal casino. (RE 1, Complaint, Ex. B) It was also reasonable for the trial court to find that long before Bay Mills opened the Vanderbilt casino, it was told by Interior and NIGC that its novel theory for operating a casino in Vanderbilt, over 100 miles from its reservation, would be rejected by these federal agencies. In the lower court, the State described these interactions between Bay Mills and Interior/NIGC both in its earlier brief (RE 13, Response in support of motion for preliminary injunction, p. 3) and in oral argument, and Bay Mills never denied that these agencies told it that opening a casino in Vanderbilt would violate federal law. Nor did Bay Mills submit an affidavit or other evidence during the preliminary injunction hearing that asserted that it had not been told by these agencies that if Bay Mills proceeded with the administrative determination, it would be formally determined that the lands in question were not Indian lands eligible for tribal gaming. Even now, Bay Mills does not deny that it

was advised by these agencies that the Vanderbilt property was not Indian lands, but takes the position in this appeal that the "record" does not "support" that Bay Mills was warned that its legal theory was faulty. (Appellant's Brief (corrected), p. 32). However, it was not clear error for the trial court to find that in fact Bay Mills was warned that it could not legally open a casino in Vanderbilt. This is particularly true given the lower standard of proof that is permissible when a court is making findings of fact in a preliminary injunction hearing:

> "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.*, [*Univ. of Tex. v. Camenisch*, 451 U.S. 390] at 395. "A party thus is not required to prove his case in full at a preliminary-injunction hearing . . ., and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. . . ." *Id.*, at 395; accord *In re DeLorean Motor Co.*, 755 F.2d 1223, 1230 (6th Cir. 1985).

Wilcox v. United States, 888 F.2d 1111, 1113-1114 (6th Cir. 1989).

Bay Mills has the burden of proving in this appeal that the trial court abused its discretion when it entered the preliminary injunction. Given the reasonable inferences raised by the undisputed facts of Bay Mills' submission to Interior/NIGC of three separate requests for

approvals that would essentially authorize gaming at the Vanderbilt site, and then Bay Mills' subsequent withdrawals of those requests each time before a decision could be made, Bay Mills has the burden at a minimum of coming forward with evidence that it was *not* told by these agencies that its opening of a casino in Vanderbilt would be illegal. Bay Mills has not done so and cannot now complain that the trial court found that it was warned that "its legal position, that the Vanderbilt property was Indian land, was tenuous" (RE 45, Order denying motion to stay, p. 6) and that it assumed the risk of moving forward with the development of the casino. This finding was not an abuse of discretion.

The inference that Bay Mills was told its theory was unpersuasive is borne out by the undisputed fact that shortly after Bay Mills did open its casino, Interior and NIGC formally told Bay Mills in writing that its operation was illegal. (RE 7-1 Letter from Interior; RE 7-2, Memo from NIGC.)

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

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

Edward Rose, 384 F.3d at 264. In *Edward Rose*, the federal government had told the defendant that the apartment designs it wanted to build violated the Fair Housing Act and that it shouldn't proceed with the construction. The defendant ignored this warning and the government obtained an injunction in federal court halting the construction and occupancy of the buildings. The defendant appealed the entry of that injunction.

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

As discussed above, the trial court found that Bay Mills was advised by the State, NIGC and Interior that opening its Vanderbilt casino would be contrary to State and federal law and thus illegal. Just as the defendant in *Edward Rose*, Bay Mills voluntarily incurred any

harm that may result from the trial court's Order granting a preliminary injunction. Therefore, it has not and will not suffer any cognizable irreparable harm that could be weighed against the harm suffered by the State and LTBB if the injunction is vacated.[3]

II. LTBB and the State will suffer irreparable injury if the injunction is vacated.

The lower court found that LTBB will suffer irreparable harm if the illegal Vanderbilt casino is allowed to continue in operation. (RE 33, Order granting motion for preliminary injunction, p. 14). LTBB presented compelling evidence to the trial court (RE 4, Brief in support of motion for preliminary injunction, with attachments, and RE 27, Reply in support of motion for preliminary injunction with attachments) of the harm it will suffer if the Vanderbilt casino remains in operation, including a loss of revenues and goodwill arising from the unlawful competition from that casino. The lower court also found that LTBB could be barred by Bay Mills' sovereign immunity from obtaining a

[3] This Court has made it clear that the irreparable harm factor requires a balancing of the harm incurred by the moving party if the injunction is not entered, against any "potential harm to the defendant if an injunction is issued." *In re DeLorean Motor Co.,* 755 F.2d 1223, 1229 (6th Cir. 1985).

money judgment from Bay Mills to compensate LTBB for its losses, and that this inability to sue for money damages constituted irreparable injury. (RE 33, Order granting motion for preliminary injunction, pp. 14-15). Bay Mills has not shown that these findings are clear error.

Likewise, the State has compacts with tribes other than Bay Mills that require that economic incentive payments be made to the State based on revenues generated by tribal casinos, including such an agreement with LTBB. To the extent the Vanderbilt casino draws casino customers from these other tribal casinos, the State will lose money. (*Id.* p. 16). This along with the injury to the sovereignty of the State when its laws are broken, constitute irreparable injury.

Given that Bay Mills cannot establish any legally cognizable irreparable injury, the balance of such injury decidedly shifts in favor of LTBB and the State.

III. The public interest factor weighs heavily in favor of denying the appeal.

In addition to the State's loss of money should the illegal Vanderbilt casino be permitted to resume operations, vacating the injunction would permit Bay Mills to resume operations of a tribal

casino that is not authorized by IGRA because it is not located on Indian lands (see Section IV.C, *infra*) and therefore violates State and federal anti-gambling laws. (RE 1, Complaint, Counts I and II.) These laws also make it illegal for anyone to patronize an unlawful casino. It is certainly not in the public interest to allow the operation of a casino that would essentially entice the public to violate the law and effectively create a public nuisance. This factor also weighs heavily in favor of leaving the injunction in place and was properly weighed by the trial court in its deliberations.

IV. The State is likely to succeed on the merits of its case in the court below.

A. The trial court has jurisdiction of this action which asserts violations of federal statutory and common law.

Given Bay Mills' lack of any legally cognizable harm, and the obvious harm to LTBB, the State and the public, to be successful in this motion, Bay Mills bears a very high burden of showing that the lower court abused its discretion when it weighed these factors against the likelihood of success factor and determined that an injunction was warranted. Bay Mills has not come close to meeting this burden.

Bay Mills essentially makes two arguments concerning the merits of the Plaintiffs' case: (1) that the trial court lacked subject matter jurisdiction because Plaintiffs alleged that the Vanderbilt casino is not on Indian lands, a jurisdictional prerequisite (according to Bay Mills) under IGRA,[4] and that (2) the Vanderbilt casino is built on "Indian

[4] Bay Mills asserts that the question of jurisdiction should not be considered as part of the likelihood of success factor, but should be addressed first as a threshold question. It cites to no case where a court has made such a ruling in the context of a preliminary injunction. *Memphis Biofuels, L.L.C. v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009), relied on by Bay Mills, did not even involve entry of a preliminary injunction, but was a decision on a motion to dismiss pursuant to F.R.Civ.P. Rule 12(b)(6). Here, Bay Mills elected not to file a Rule 12(b)(6) motion challenging the court's jurisdiction. All that was before the trial court, was the preliminary injunction motion, and in that context the question of whether the court has jurisdiction or not is just another argument that was made regarding the likelihood of success factor, which in turn is weighed and balanced against the other factors. Contrary to Bay Mills' assertion, another case it cites on this issue clearly held that the four factors are "weighed" in considering a motion for a preliminary injunction, *United States Ass'n of Imps. of Textiles & Apparel v. United States*, 413 F.3d 1344, 1346 (Fed. Cir. 2005), despite the fact that one of the arguments made there against the injunction was that the court did not have jurisdiction. Nothing in that case supports the claim that jurisdictional arguments somehow trump the other injunction factors. This Court has made it clear that at the preliminary injunction stage, an injunction may enter if a plaintiff "shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *In re DeLorean Motor Co.,* 755 F.2d 1223, 1229 (6th Cir. 1985). That is not to say that where it is clear that a court does not have jurisdiction, a party seeking a preliminary injunction may

lands" and is therefore authorized under federal law. These arguments fail for several reasons.

1. The Court has jurisdiction under IGRA

The trial court properly held that it had jurisdiction of this action under IGRA. One basis for IGRA jurisdiction is the express provision of such jurisdiction in 25 U.S.C. § 2710 (d)(7)(A)(ii) when a tribe or a state is seeking to enjoin Class III gaming activity in violation of an existing tribal-state compact, as in the case at hand:

> (7) (A) The United States district courts shall have jurisdiction over . . . (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect . . .

The State and Bay Mills did enter into a tribal-state compact that authorized Bay Mills to conduct Class III gaming under certain circumstances. (RE 1, Complaint, Exhibit A). Specifically, the Bay Mills compact provides that: (1) "The Tribe shall license, operate, and

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not be able to show "serious questions going to the merits." But there are numerous reasons, as set forth in this brief, why Bay Mills' jurisdictional argument fails, and at a minimum, the State has shown "serious questions going to the merits" of that argument. That, together with the fact that Bay Mills can show no legally cognizable harm, clearly supports the trial court's determination that an injunction was warranted.

regulate all Class III gaming activities pursuant to this Compact, tribal law, IGRA, and all other applicable federal law;" and (2) "[t]he Tribe shall not conduct any Class III gaming outside of Indian lands." (RE 1, Complaint, Exhibit A, (Bay Mills compact §§ 4(C), 4(H)))(emphasis added). Both the State and LTBB have alleged that Bay Mills has violated the compact by operating the Vanderbilt casino outside of Indian lands and in violation of a variety of state and federal laws, including IGRA. (RE 1, Complaint, Paragraphs 19-38; RE 1, Complaint, Case No. 1:10-cv-01278-PLM, Paragraphs 13-24). Because of these compact violations, the trial court had jurisdiction under this provision of IGRA to enjoin the illegal gaming.

Bay Mills argues, however, that because the State and LTBB assert that the illegal gaming did not occur on Indian lands, the court did not have jurisdiction, even though Bay Mills itself steadfastly claims that the lands in question are Indian lands. The trial court disagreed and entered the injunction.

The trial court relied on a 1999 decision where jurisdiction was found in litigation in which *Bay Mills,* as plaintiff, asserted that the federal court should enjoin operation of a casino owned *by LTBB*

(defendant there) under the precise circumstances now before the Court, i.e., a plaintiff tribe claims that a defendant tribe's casino is illegal because it is not located on Indian lands. In that prior case, *Bay Mills Indian Community v. Little Traverse Bay Bands of Odawa Indians*, 1999 U.S. Dist. LEXIS 20314, 5:99-CV-88 (W.D. Mich. August 30, 1999) ("*Bay Mills I*") (RE 4-7, copy of *Bay Mills I*), the court specifically held that 25 U.S.C. § 2710 (d)(7)(A)(ii) conferred subject matter jurisdiction over a suit by an Indian tribe against another Indian tribe alleging a compact violation on the ground that the gaming activity is not occurring on Indian lands under IGRA, rejecting the identical argument that Bay Mills makes here that jurisdiction is lacking. In the earlier case, the lower court characterized the argument then made by LTBB and now made by Bay Mills, as "jurisdictional gamesmanship." *Bay Mills I,* 1999 U.S. Dist. LEXIS 20314 at *9. Given this ruling in *Bay Mills I*, now that the tables are turned, Bay Mills is on shaky ground when it asserts to this Court that the trial judge abused his discretion in granting the preliminary injunction closing Bay Mills' illegal Vanderbilt casino.

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

Bay Mills asserted in *Bay Mills I* that because the land in question had not been taken into trust by the United States on behalf of LTBB, it was not Indian lands. *Bay Mills I,* 1999 U.S. Dist. LEXIS 20314 at *5-6. In that case, the trial court agreed, and dismissed LTBB's assertion that this argument deprived the court of jurisdiction:

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

Bay Mills I, 1999 U.S. Dist. LEXIS 20314 at *8-9. Bay Mills now argues that its attorney in *Bay Mills I* acknowledged that the land on which the LTBB casino sat was in fact "Indian lands" under IGRA, but was not within the definition of "Indian lands" in the LTBB compact. This is significant, according to Bay Mills, because compliance with IGRA's definition of Indian lands was all that was necessary to vest federal court jurisdiction in that case. It references statements from briefs it submitted in *Bay Mills I* to support its claim.

These references, however, do not support the assertion that Bay Mills' prior attorney "acknowledged that [LTBB's parcel] could be considered 'Indian lands' under IGRA." (Appellant's Brief (corrected), p. 14.) Throughout the briefs submitted by Bay Mills in *Bay Mills I*, it took the position that the LTBB parcel was not Indian lands *under IGRA*. (See, Bay Mills brief in support of motion for stay filed in this Court, Exhibit C, pp. 2-4.) It is clear that when Bay Mills said in its brief in the prior case that the LTBB lands "could be considered" Indian lands under IGRA, it meant that for purposes of argument they could be considered Indian lands, but that it was Bay Mills' position that they were not. The LTBB parcel was thus not "acknowledged 'Indian lands'"

as Bay Mills now asserts. More importantly, even if Bay Mills had conceded that the LTBB parcel was Indian lands under IGRA, *this would be legally meaningless* if the actual decision of the *Bay Mills I* Court did not rely on that concession.

And in fact, the trial court in *Bay Mills I* did not base its jurisdictional ruling on the notion that LTBB's casino was in fact on Indian lands as defined in IGRA. The judge there said "Defendant LTBB has consistently asserted that the Victories Casino land . . . is 'Indian land' under IGRA, 25 U.S.C. § 2703(4). Given LTBB's assertion that the land is Indian land, and given LTBB's failure to assert any other authority for operating the casino, LTBB's assertion that this Court does not have jurisdiction under 25 U.S.C. § 2710 (d)(7)(A)(ii) has the ring of jurisdictional gamesmanship." *Bay Mills I*, 1999 U.S. Dist. LEXIS *9. In other words, the court didn't base its jurisdiction on a finding that the casino was on Indian lands as defined in IGRA; it held it had jurisdiction because LTBB *asserted* the lands were Indian lands under IGRA, just as Bay Mills now asserts that the Vanderbilt casino is on Indian lands as defined in IGRA.

That the court in *Bay Mills I* did not rely on some finding that the LTBB lands were Indian lands for IGRA purposes when deciding it had jurisdiction, is further confirmed by its statement that "If the land is not 'Indian land' within the meaning of IGRA, then Defendant LTBB is operating its casino in violation of IGRA." *Bay Mills I*, 1999 U.S. Dist. LEXIS *10 (emphasis added). This statement dispels any claim that the court assumed the lands in question were Indian lands under IGRA, but not under the compact, when it entered the injunction shutting down LTBB's casino. If the Court believed it had jurisdiction only because the lands in question were Indian lands under the IGRA definition, it would not have relied on the possibility that they were *not* Indian lands under IGRA as the basis for finding a violation of IGRA. The court however clearly believed it had jurisdiction, even if the violation of IGRA was gaming conducted not on Indian lands within the meaning of IGRA. Bay Mills' claim now that the *Bay Mills I* Court found it had jurisdiction *only* because it believed the lands in question

were Indian lands within the meaning of IGRA is merely wishful thinking.[5]

The *Bay Mills I* Court's approach to IGRA jurisdiction is mirrored in the case of *Mescalero Apache Tribe v. New Mexico,* 131 F.3d 1379 (10th Cir. 1999). In that case the state brought a counterclaim under 25 U.S.C. § 2710 (d)(7)(a)(ii) alleging that the tribal-state compact that had been executed by the tribe and the governor of New Mexico was invalid because the governor did not have authority to sign it. The tribe argued, just as Bay Mills argues here, that the federal court did not have jurisdiction and that the counterclaim was barred by the tribe's

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[5] Bay Mills cites to *Match-e-be-nash-she-wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616 (6th Cir. 2002) to support its claim that this Court does not have jurisdiction where the plaintiff asserts that casino gambling is not occurring on Indian lands. In *Engler*, the tribe there sued the State alleging that the State was not negotiating in good faith concerning the tribe's request to enter into a tribal-state compact. This Court affirmed dismissal of the tribe's case because it did not have standing to bring a lawsuit to force the State to negotiate with it where the tribe did not even have lands taken into trust on which it could operate a casino pursuant to IGRA. *Id.* at 304 F.3d 618. While the Court referred to this want of standing as a jurisdictional issue, it was clearly the status of the plaintiff in that case that led the Court to dismiss, 15-101 *Moore's Federal Practice* - Civil § 101.20 ("Standing addresses *who* may bring the suit."), not the subject matter of the lawsuit over which the Court would otherwise have jurisdiction. In the case at hand, there is no dispute that the State has standing to bring this action.

sovereign immunity. *Mescalero Apache*, 131 F.3d at 1381. The Court of Appeals disagreed, expressly finding that it had jurisdiction under IGRA to entertain the state's counterclaim. *Id.* at 1386.

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

The same argument would pertain to a situation as in New Mexico where the counter-plaintiff alleged that the compact was invalid, because 25 U.S.C. § 2710 (d)(7)(A)(ii) also says the federal court has jurisdiction where the gaming in question is "conducted in violation of any Tribal-State compact . . . that is in effect . . ." Where New Mexico alleged that the compact was not in effect, even if the gaming violated

the compact, a federal court would not have jurisdiction under Bay Mills' theory because there was no compact "in effect."

The result is legally identical to the position now taken by Bay Mills that there is no jurisdiction because the State is alleging that the gaming in question is not taking place on Indian lands. In both cases, Bay Mills would argue, a jurisdictional prerequisite is missing — in one case, the absence of an effective compact, and in the other, the absence of Indian lands.

The Tenth Circuit, nevertheless, had no trouble upholding federal court jurisdiction. *Mescalero Apache*, 131 F.3d 1386. Because it expressly found that it had jurisdiction under 25 U.S.C. § 2710(d)(7)(A)(ii), it also found that Congress had abrogated the tribe's sovereign immunity.

There is a further basis for IGRA jurisdiction here. IGRA also includes a provision, Section 23, now codified at 18 U.S.C. § 1166 ("§ 1166)" that assimilates state anti-gambling laws into federal law if the violations of those anti-gambling laws occur in Indian country and do not involve gambling that is authorized under a tribal-state compact, which in the case at hand would include Class III gaming such as

occurred at the Vanderbilt casino. The assimilative language in § 1166 is very broad:

> (a) Subject to subsection (c), for purposes of Federal law, *all State laws pertaining to the licensing, regulation, or prohibition of gambling*, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.
>
> (b) Whoever in Indian country is guilty of *any act or omission involving gambling*, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to alike punishment. (emphasis added)

This statute has been interpreted to assimilate state statutory and common law. *United States v. Santee Sioux Tribe*, 135 F.3d 558, 565 (8th Cir. 1998)("According to the government, 'all State laws' necessarily includes Nebraska civil case law authorizing injunctive relief to effectuate the closure of gambling establishments determined under State law to be public nuisances. We agree.")

In Michigan, there are several laws that are relevant to the licensing, regulation and prohibition of gaming at the Vanderbilt casino. For example, Michigan Compiled Laws 600.3801 governs nuisance

actions in Michigan, and among other things, makes it unlawful to *own a building* where gambling takes place. It authorizes the State Attorney General to bring an action for an injunction to abate such a nuisance. M.C.L. 600.3805. This Court has jurisdiction of such an action pursuant to §1166 because the Class III gaming at the Vanderbilt casino was not authorized by a tribal-state compact because it did not occur on Indian lands, as discussed above. However, the *ownership* of the building in which the casino operated occurred *in Indian country*, since it was owned by Bay Mills[6] which has its tribal offices on the Bay Mills reservation.[7] Thus, §1166 authorizes an action for abatement of a nuisance under state law, but in federal court.

Similarly, M.C.L. 432.218 makes it a misdemeanor for anyone who is: "(d) Conducting or *permitting a person* who is not licensed pursuant to this act to conduct activities required to be licensed under the casino, occupational, and suppliers licensee provisions in this act or

[6] RE 4-3, Deed for the Vanderbilt property. This deed shows Bay Mills as owner at its address in Brimley, Michigan.
[7] "Indian country" is defined in 18 U.S.C. § 1151 to include a tribe's reservation lands.

in rules promulgated by the board." (emphasis added).[8] M.C.L. 432.219 and 432.220 both provide for forfeiture of any money or assets used or obtained in the operation of such illegal gambling activities. Here, as alleged in the Amended Complaint, and admitted by Bay Mills in its Brief on Appeal (pp. 2-3), Bay Mills, through its Gaming Commission, issued a permit for the operation of the Vanderbilt casino. The Gaming Commission's offices are also located on the Bay Mills reservation in Indian country. The gambling activities which were permitted by Bay Mills definitely would have to be licensed under state law (M.C.L. 432.218) to be legal since they did not occur on Indian lands, but rather in the sovereign territory of the State of Michigan. IGRA, through §1166, thus grants jurisdiction to federal courts to consider actions based on these violations of Michigan laws.

While §1166(d) does vest exclusive jurisdiction in the United States to prosecute criminal violations of state laws, neither an action to abate a nuisance, nor an action for forfeiture of assets is necessarily considered a criminal action under state law. M.C.L. 600.3805

[8] M.C.L. 600.3805 also authorizes an action for nuisance based on a person *permitting* another to use a building for gaming or other unlawful purposes.

("The attorney general . . . may maintain an action for equitable relief . . . to abate said nuisance . . ."); see also, *People v. Monaco*, 262 Mich. App. 596, 602 (Mich. Ct. App. 2004) ("Even M.C.L. 600.5809(2) [a statutory limitations period], which applies in the criminal context, applies only to civil forfeiture actions based on a penal statute.") Since these state laws become federal law by operation of §1166, this Court would have jurisdiction under 28 U.S.C. § 1331.[9]

2. The Court has jurisdiction under federal common law

Federal courts can exercise jurisdiction under 28 U.S.C § 1331 when a cause of action arises under the "laws" of the "United States." *Id.* This includes federal common law as well as federal statutes such as IGRA. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). In *National Farmers*, a tribal court had entered a judgment against a non-tribal school. The school sought an injunction from the federal court which was granted by the trial court,

[9] The State amended its complaint to include an action for abatement of a nuisance, for forfeiture under the Michigan Gaming Control and Revenue Act, M.C.L. 432.101 *et seq*. and based on federal common law. (RE 74, Amended Complaint).

and reversed by the Court of Appeals which held that the federal court did not have jurisdiction of the action.

The Supreme Court disagreed. It noted that federal courts were frequently called upon to determine issues concerning a tribe's authority. (*Id.* at 851-852.) These and other federal court decisions comprise the body of federal Indian common law. See also, *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011) ("[W]e hold that the alleged unlawful exercise of tribal court jurisdiction in violation of federal common law is an ongoing violation of 'federal law' sufficient to sustain the application of the *Ex parte Young* doctrine.")

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

The State amended its complaint, pursuant to leave granted by the trial court, to add, among other things, a cause of action under federal common law that asserts that the Tribe has exceeded its

authority to open a casino when it is not located on Indian lands within the meaning of IGRA. This provides an additional basis for federal court jurisdiction.

B. Sovereign Immunity is not a bar to this action.

1. IGRA provides an express abrogation of tribal sovereign immunity

As noted above, the federal courts have found an express abrogation of tribal sovereign immunity in IGRA, specifically 25 U.S.C. § 2710(d)(7)(A)(ii). *See, Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 935 (7th Cir. 2008) (" . . . Congress abrogated [tribal] sovereign immunity . . . pursuant to 25 U.S.C. § 2710 (d)(7)(A)(ii) to enjoin the [Indian tribe's] class III gaming . . ."); *New York v. Oneida Indian Nation of New York*, 78 F. Supp. 2d 49, 54 (N.D. N.Y. 1999) ("this Court has jurisdiction because the IGRA abrogated the Nation's sovereign immunity where, as here, the State is seeking declaratory or injunctive relief resulting from an alleged violation of an existing Tribal-State compact authorizing Class III gaming"); *see also Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 758 (1998) ("[Congress] has restricted tribal immunity from suit in limited circumstances.") (citing 25 U.S.C. § 2710(d)(7)(A)(ii)). Some courts have found the abrogation extends to any litigation alleging a breach of a tribal-state compact, while others have read the abrogation

language more narrowly.[10] The State believes that the better interpretation of this section of IGRA is that Congress intended states to have the ability to seek prospective injunctive relief in court, whenever a violation of IGRA is alleged. (*Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385 (10th Cir. 1997)("While there is sparse case law on the issue, it appears the majority supports the view that IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought.").

This is confirmed by the second abrogation of tribal sovereign immunity found in IGRA in Section 23, 18 U.S.C. § 1166. As discussed above, this provision assimilates all state laws pertaining to gambling even when it occurs in Indian country, if the gambling is not authorized by a tribal-state compact. Subsection (b) of this statute specifically provides that "whoever" is guilty of a violation of state law "involving gambling, whether or not conducted or sanctioned by an Indian tribe . . ." is guilty and subject to punishment under that law. The fact that this

[10] In its brief to this Court, Bay Mills acknowledged that numerous courts have held that IGRA abrogated tribes' sovereign immunity where "a tribal-state compact is being violated…" (Bay Mills brief, p.12).

section addresses violations of state law for gambling "conducted or sanctioned by an Indian tribe" makes it clear that Congress intended that a tribe would be subject to the jurisdiction of the federal courts for violating state anti-gambling laws where the gambling is not condoned by a tribal-state compact.

Thus, where Bay Mills has owned a building that is a public nuisance under state law because illegal gaming is conducted there, and where it has issued a permit from Indian country for illegal casino gaming not on Indian lands and in violation of state law, Congress has abrogated the immunity from suit of the Tribe.

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

The law is clear that Indian Tribes can waive their sovereign immunity from suit. *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). In addition to the waiver/abrogation of sovereign immunity found in IGRA that is alleged in the original Complaint, Bay Mills has expressly waived its immunity, at least in the limited circumstance where an action arises in respect to lands falling outside the exterior boundaries of its Reservation. This

waiver is included in the gaming ordinance Bay Mills adopted for the regulation of its gaming enterprises (RE 74-3, Excerpts from Gaming Ordinance), which was approved by the NIGC as required by IGRA (25 U.S.C. § 2710(d)(1)(A)).

Section 4 of this ordinance creates a Tribal Gaming Commission. The Commission is delegated extensive authority[11] over the operation of tribal gaming enterprises, including the authority "to sue or be sued in courts of competent jurisdiction within the United States and Canada. . . ." (RE 74-3, Gaming Ordinance, Section 4.18(Y)). This authority is "subject to the provisions of this Ordinance and other tribal laws relating to sovereign immunity." *Id.* The waiver of sovereign immunity in the Gaming Ordinance references the "sue or be sued" provision, noting:

> Neither the power to sue and be sued provided in Subsection 4.18(Z),[12] nor any express waiver of sovereign immunity by resolution of the Tribal Commission shall be deemed . . . a consent to suit *in respect of any land within the exterior boundaries of the Reservation* . . . ." [13]

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[11] As set forth in Section 4.18(A-KK), and in other sections of the Gaming Ordinance.

[12] This probably should refer to Subsection 4.18(Y).

[13] RE 74-3, Excerpts from Gaming Ordinance § 4.7 (emphasis added).

The language of the waiver of sovereign immunity itself clearly suggests that the "sue or be sued" clause is a waiver of sovereign immunity as it is paired with an actual *express* waiver by the Tribe in the sentence quoted above "Neither the power to sue and be sued provided in Subsection 4.18(Z), nor any express waiver of sovereign immunity by resolution of the Tribal Commission shall be deemed . . . a consent to suit. . . ." This sentence treats both the "sue or be sued" clause and the express waiver *as actual waivers*, but limits their application to lands outside the Reservation. There would be no reason to include the "sue or be sued" clause in this sentence if it wasn't a waiver at all since if that were the case, it *already* could not act as a waiver with respect to lands either inside or outside the Reservation.

For the "sue or be sued" provision to have any meaning, it must contemplate that the Gaming Commission will be subject to suit in federal court for some purposes. Similar provisions have been interpreted to act as a waiver of sovereign immunity by a tribe.[14] It

[14] *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009) ("Some courts have held that a broad sue-and-be-sued clause does waive tribal-sovereign immunity. See *Validity and Construction of Indian Reorganization Act*, 28 A.L.R. Fed. 2d 563 at § 27 (citing cases). . . .").

appears that this is still an undecided issue in the Sixth Circuit.[15] However, there is no reason to distinguish the situation where a tribe adopts a "sue or be sued" ordinance from the adoption of such a provision by the federal government. In *Dolan v. United States Postal Serv.*, 546 U.S. 481, 484 (2006), the Supreme Court held that the federal government had waived its immunity from suit when it enacted the Postal Reorganization Act (39 U.S.C. § 401 (1)) which included a "sue or be sued" clause. It is well established that the federal government does not waive its immunity except by a clear and express waiver, just as in the case of Indian tribes. *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 33 (1992). If a "sue or be sued" clause in a federal statute can operate as a waiver for the Postal Service, there is no good reason that it should not operate as a waiver of a tribe's sovereign immunity.

This is especially true where the waiver can be narrowly applied. The State acknowledges that Bay Mills' gaming ordinance requires an express waiver of sovereign immunity before the Tribe or the Commission can be sued, and that such waivers are very narrow, but

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[15] *Id.* at 922 ("Thus, even if we were to conclude that a broad sue-and-be-sued clause waives tribal-sovereign immunity, this clause is insufficient to do the job.")

the "sue or be sued" provision is express and it is very narrow – it cannot pertain to land within the exterior boundaries of the Reservation. These restrictions make sense as the Tribe did not want to subject its land in Indian country and its assets on that land to suit in any court. Of course, in the case at hand, the issue is whether the land on which the Vanderbilt casino is located is on the Reservation as Bay Mills contends, or not, as the State contends. If the Court agrees with the State, then the waiver in the Gaming Ordinance would be an additional basis for finding that the trial court had jurisdiction to enter an injunction closing the Vanderbilt casino.

3. Even if the Tribe retains sovereign immunity, Tribal officials are subject to suit for prospective injunctive relief.

The Amended Complaint adds the individual members of the Tribal Gaming Commission and the Tribal Executive Council as parties' defendant in their official capacities. The Gaming Commission is authorized by the Gaming Ordinance to license all Tribally-owned and operated casinos, and has the authority to close them should they violate Tribal law. (RE 74-3, Excerpts from Gaming Ordinance, Section 4.18(B, X). The Executive Council is apparently the governing body for

the Tribe that made the decision to open and operate the Vanderbilt casino. (RE 71, Bay Mills' response to motion to amend, p.8)

Federal law is clear that tribal officials can be sued for prospective declaratory and injunctive relief under a doctrine which is similar to that established in the case of *Ex parte Young*, 209 U.S. 123 (1908). The extension of this principle to tribal officials was probably first noted by the Supreme Court in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505 (U.S. 1991), a case where the Court refused to allow Oklahoma to sue a tribe because of its sovereign immunity, but based its decision in part on the Court's view that the State would have other remedies, including an *Ex parte Young*-type suit. "We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. See *Ex parte Young* . . . ." *Oklahoma*, 498 U.S. 514. As noted in *Cohen's Handbook of Federal Indian Law* "When tribal officials act outside the bounds of their lawful authority, however, most courts would extend the doctrine of *Ex parte Young* (footnote omitted) to allow suits against the officials, at least for declaratory or injunctive relief." *Cohen's Handbook of Federal Indian Law* § 7.05.

Here, it is clear that if the Vanderbilt casino is not located on Indian lands, as asserted by the State, the Bay Mills' tribal officials who are named in the Amended Complaint, have acted "outside the bounds of their lawful authority." *Id.* The Gaming Ordinance only allows licensing and operation of a Tribal casino on Indian lands. (RE 67-4, Excerpts from Gaming Ordinance, Section 5.5). If the State is correct that the Vanderbilt casino is not on Indian lands, then these officials have all violated their own Tribal ordinance, which is the source of any authority they have to act on behalf of the Tribe. It could not be clearer that such actions subject these officials to an action such as this for prospective declaratory and injunctive relief.[16] The district court has jurisdiction of an action for prospective injunctive relief against these officials under federal common law and IGRA (both §1166 and 25 U.S.C. § 2710(d)(7)(A)(ii)).

[16] As noted above, the Supreme Court in *Oklahoma* suggested that such officials could also be liable for damages where they have acted in excess of their authority.

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

Having established that it had jurisdiction of this action, the trial court proceeded to consider the merits of the Plaintiffs' claim that the Vanderbilt casino was not located on Indian lands and therefore violated IGRA.[17] With regard to Bay Mills' assertion that the lower court incorrectly determined both that the lands in question were not properly purchased with funds obtained by Bay Mills under the Michigan Indian Land Claims Settlement Act of 1997, and that they were not Indian lands, Bay Mills' arguments likewise fail to meet the abuse of discretion standard that applies to these assertions in its appeal. The district court reasonably determined that the lands in question did not "consolidate and enhance" Bay Mills' landholdings as required by § 107 of the MILCSA, because the Vanderbilt property was over 100 miles from the Tribe's reservation. While Bay Mills argued that this phrase should be read "consolidate *or* enhance" the trial court

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[17] *Bay Mills I*, 1999 U.S. Dist. LEXIS *10 (If casino is not on Indian lands, it is operating "in violation" of IGRA."): see also, *Kansas v. United States,* 249 F.3d 1213, 1220 (10th Cir. 2001) ("[A] condition of Class III casino gaming under IGRA is that such gaming occur on a tribe's 'Indian lands.'")

properly rejected such an interpretation where the language, as written, was unambiguous. (RE 33, Order granting motion for preliminary injunction, p. 12).[18] Because it is clear that the purchase of the Vanderbilt property did in no way "consolidate" the Tribe's other landholdings, the lower court properly held that the purchase of this land with MILCSA funds was improper, and therefore any argument that the Vanderbilt casino is on Indian lands because MILCSA land purchases automatically become Indian lands was erroneous.

Having ruled that the Vanderbilt property was not properly purchased with MILCSA funds, the trial court saw no need to address the other argument made to support Bay Mills' claim that the Vanderbilt casino was on Indian lands, i.e., that the MILCSA automatically converted lands purchased with its funds into "restricted fee" lands – an argument that is central to Bay Mills' claim that the

[18] The district court also properly rejected application of the Indian canon of construction, which is sometimes applied to interpret language in statutes in a manner that favors the interests of a tribe that is a party to litigation. (RE 33, Order granting motion for preliminary injunction, p. 12). Since the language in question is not ambiguous, the trial court correctly determined that application of this canon was not necessary or appropriate. Also, it would not be appropriate in this case where LTBB also has significant interests in how this statute is interpreted which conflict with Bay Mills' interest, and effectively neutralize the Indian canon of construction in any event.

Vanderbilt property is not "after-acquired" land that IGRA renders ineligible for gaming.[19] Should this Court consider this second argument, it should be rejected as well, particularly where Bay Mills had taken a contrary position concerning the meaning of § 107 in 2002 when it claimed, not that land bought with MILCSA funds was automatically restricted fee lands, but that Interior had a mandatory obligation to take land purchased with such funds into trust for the benefit of the Tribe. (RE 7-1, Letter from Interior, p. 14, n. 11).

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[19] 25 U.S.C. § 2719. The State disagrees with Bay Mills' additional argument that IGRA would allow gaming on after-acquired property that has not been taken into trust by the United States, but which instead is restricted against alienation. The only case that the State could find that addresses this issue also disagrees with Bay Mills' position. *Citizens Against Casino Gambling v. Hogen*, 2008 U.S. Dist. LEXIS 52395 *171-178 (W.D.N.Y. 2008). The court there based its decision on its understanding that when IGRA was passed in 1988 there was no mechanism that would allow for land to be placed in restricted fee status after 1988, so Congress did not address it in the IGRA after-acquired property prohibition. For reasons that are unclear, it appears that Interior and NIGC have recently changed their prior interpretation of this section of IGRA which agreed with the *Hogen* Court's interpretation, and now take the position that land in restricted fee status is not subject to the after-acquired property prohibition. Since this interpretation is an abrupt about-face by these agencies, it is entitled to little if any weight. *Thornton v. Graphic Communs. Conf. of the Int'l Bhd. of Teamsters Supplemental Ret. & Disability Fund*, 566 F.3d 597, 615 (6th Cir. 2009) (Court considers "consistency" with earlier pronouncements when determining how much weight to give agency interpretations of statutes.)

This analysis is consistent with that developed by Interior in response to Bay Mills' request for an Indian lands determination, and ultimately issued in response to Bay Mills' decision to open an unlawful casino on land which Interior and NIGC determined was not Indian lands within the meaning of IGRA. (RE 7-1, Letter from Interior; RE 7-2, Memo from NIGC). The trial court did not see a need to invoke these agency determinations because it considered the MILCSA language to be unambiguous. Nonetheless, these determinations by Interior are instructive because Interior has a significant role in the interpretation and application of the MILCSA which lends considerable weight to its interpretation of that statute's provisions.

The MILCSA was adopted in 1997 after many years of effort seeking actual payment of funds that had earlier been awarded by the Indian Claims Commission to certain Michigan Tribes, including Bay Mills. These funds represented compensation for lands that had been ceded by the Tribes to the federal government, but for which the Tribes had not been adequately compensated. Interior was charged with, among other things, approving plans submitted by the Tribes for the use and distribution of the judgment funds and submitting a plan for

use and distribution to Congress. MILCSA, § 105(b); 25 U.S.C § 1402 ("Within one year after appropriation . . . the Secretary of the Interior shall prepare and submit to Congress a plan for the use and distribution of the funds. Such plan shall include identification of the present-day beneficiaries, a formula for the division of the funds among two or more beneficiary entities if such is warranted, and a proposal for the use and distribution of the funds."). This is particularly significant here, because these plans ultimately became sections of the enacted statute. In the case of Bay Mills, the plan it proposed, and which Interior approved and formally submitted to Congress pursuant to 25 U.S.C. § 1402, became § 107 of the MILCSA (§ 107). Section 107 is the provision in the MILCSA on which Bay Mills has expressly relied for its claim that the Vanderbilt casino is on Indian lands.

Because of Interior's role in submitting the language that ultimately became § 107 of the MILCSA, as well as its overall responsibilities and authorities for administering federal law as it applies to Indian tribes,[20] Interior's interpretation of the language

[20] 25 U.S.C. §§ 2, 9; *Board of Comm'rs v. United States*, 139 F.2d 248, 251-252 (10th Cir. 1943) ("Historically, the Secretary of the Interior has been the delegated arm of the Federal government to act as the

in § 107 must be given considerable weight. NIGC recognized this in its decision, noting that the MILCSA is "the Department's [Interior's] to interpret." (RE 7-2, Memo from NIGC, p. 2). There is a strong argument that this interpretation is controlling here pursuant to the decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Under *Chevron*, considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. *Id.* at 844. While *Chevron* deference is generally found where the agency decision in question followed notice and public comment, the Supreme Court has not limited such deference only to these circumstances. For example, in *United States v. Mead Corp.*, 533 U.S. 218 (2001) the Court recognized that *Chevron* deference can arise in other circumstances where it is warranted. *Mead* at 230-231 ("That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative

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guardian of the Indian ward; to administer the affairs of its Indians, and to that end has been granted wide discretionary powers in the enforcement of the declared Congressional policy.")

formality was required and none was afforded, see, e.g., *NationsBank of N. C., N. A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257, 263 (1995)"). In *NationsBank* the Court deferred to an interpretation by the Comptroller of Currency which the Court referred to as the "expert administrator's statutory exposition," *id.* at 257, even though the interpretation had not arisen in the context of rulemaking or any other notice and comment setting. However, since the interpretation of the ambiguous language in the statute in question was "reasonable . . . in light of the legislature's revealed design" and the Comptroller was given broad authority under the legislation in question to regulate banking, the Comptroller's interpretation of that statute was given "controlling weight" by the Court. *Id.*

Likewise in the case at hand, Interior not only has broad authority in the administration and regulation of Indian affairs, it had a specific role in submitting the language to Congress that became § 107 of the MILCSA. This certainly gives any interpretation of the language by Interior special – and arguably controlling – weight when it is in dispute. Interior's role in developing, approving and submitting the language of the statute is similar to its role in promulgating regulations

that are submitted to Congress for review,[21] and that would unquestionably be entitled to *Chevron* type deference in a legal dispute. Furthermore, as discussed at length in Interior's Opinion, its conclusions are entirely consistent both with the design of the MILCSA and IGRA. There is no reason not to grant this interpretation of § 107 controlling weight.[22]

Even if Interior's interpretation is not as a matter of law binding on the courts, case law strongly suggests that this opinion must be given serious consideration. As recently noted by this Court:

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[21] 5 U.S.C. § 801. Even if there was no public notice and comment on § 107, the party directly affected by the statute, Bay Mills, was given significant input into the language that was ultimately adopted by Congress. See § 105(b) of the MILCSA. Thus the policy underlying *Chevron* deference that is served by notice and comment was satisfied in this instance.

[22] At least one other court has found that *Chevron* type deference to Interior's Indian lands determinations is appropriate. *United States v. Livingston*, 2010 U.S. Dist. LEXIS 97598, 38-39 (E.D. Cal. Sept. 1, 2010) ("As set forth above, Congress allows the Department [of Interior] to handle Indian affairs. 25 U.S.C. §479a. But Congress delegated its authority to recognize Indian tribes federally to the executive branch long before 1994. In 1978, Congress passed 25 U.S.C. §§ 2, 9 to allow the Bureau of Indian Affairs to manage 'all Indian affairs and...all matters arising out of Indian relations.' Thus, the Department has the authority to make these interpretations, and this Court should accord 'considerable weight' to the 'executive department's construction of a statutory scheme it is entrusted to administer.' *Chevron, U.S.A., Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).")

> We also review less formal agency authorities, lacking the "force of law" of notice and comment rule-making, which may be relevant. See *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Although *Chevron* deference does not apply to these "other" agency interpretations, they still enjoy "some deference whatever its form" due to the agency's institutional expertise and in the interests of judicial uniformity. *Id.* at 226-27, 234-35. The weight of deference accorded depends on the agency authority's inherent persuasiveness. See *id.* at 228. Specifically, we consider "the thoroughness evident in [the agency authority's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); see also *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 643 (6th Cir. 2004) (observing that *Skidmore* and its progeny "permit[] an agency to earn the weight given to it by the courts, while *Chevron* gives reasonable agency interpretations controlling weight as a matter of right").

Thornton v. Graphic Communs. Conf. of the Int'l Bhd. of Teamsters Supplemental Ret. & Disability Fund, 566 F.3d 597, 615 (6th Cir. 2009). So even if Interior's interpretation of § 107 of the MILCSA isn't controlling as a matter of law, because of its "institutional expertise" and the "thoroughness evident" in Interior's consideration, as well as the validity of its reasoning, it is certainly persuasive and should be given considerable weight by this Court.

The trial court correctly determined that the State and LTBB were likely to succeed on the merits of their claims. At the very least,

they have shown "serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *In re DeLorean Motor Co.,* 755 F.2d 1223, 1229 (6th Cir. 1985). Bay Mills' appeal should be denied.

CONCLUSION AND RELIEF REQUESTED

The State respectfully asks that the district court's order granting the preliminary injunction be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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 this brief contains no more than 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 12,679 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Century Schoolbook.

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ADDENDUM

Designation of Relevant District Court Documents

RE 1	Complaint and Exhibits
RE 1	Complaint, Case No: 1:10-cv-01278-PLM
RE 2	Notice of Consolidation
RE 4	Brief in Support of Motion for Preliminary Injunction
RE 4-3	Deed for the Vanderbilt property
RE 4-7	Copy of *Bay Mills Indian Community v. Little Traverse Bay Bands of Odawa Indians*, 1999 U.S. Dist. LEXIS 20314, 5:99-CV-88 (W.D. Mich. August 30, 1999)
RE 7-1	Letter from Interior
RE 7-2	Memo from NIGC
RE 13	Response in Support of Motion for Preliminary Injunction
RE 13-1	Copy of MILCSA
RE 27	Reply in Support of Motion for Preliminary Injunction
RE 33	Order Granting Motion for Preliminary Injunction
RE 40	Motion to Stay Injunction
RE 45	Order Denying Motion to Stay
RE 71	Bay Mills' Response to Motion to Amend
RE 74	Amended Complaint
RE 74-3	Letter from NIGC approving Gaming Ordinance; Amendments and Excerpts from Gaming Ordinance.

CERTIFICATE OF SERVICE

I certify that on September 28, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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