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.

Interlocutory Appeal from the United States District Court
for the Western District of Michigan
Southern Division

REPLY BRIEF

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STANDARD OF REVIEW

I. Whether There is Jurisdiction is Reviewed *De Novo.*

Appellees Little Traverse Bay Bands of Odawa Indians ("LTBB") and State of Michigan acknowledge that although this Court applies an abuse of discretion standard when reviewing a preliminary injunction grant, *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007)[1], whether the district court had jurisdiction is a question of law reviewed *de novo*. *Rodriguez v. Tennessee Laborers Health and Welfare Fund*, 463 F.3d 473, 475 (6th Cir. 2006); *see also Greenpeace, Inc. v. Waste Technologies Industries*, 9 F.3d 1174, 1178 (6th Cir. 1993) (whether federal law confers jurisdiction upon the district court is a matter of statutory interpretation and a question of law reviewed *de novo*). This Court has a "special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" *Greater Detroit Resource Recovery Authority v. U.S. E.P.A.*, 916 F.2d 317, 319 (6th Cir. 1990) (quoting *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986)). Thus, this Court must first consider whether subject matter jurisdiction

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[1] The abuse of discretion standard is met when the district court "relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard." *Id.* (quoting *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 577–78 (6th Cir. 2006)) (emphasis added).

exists and analyze the district court's exercise of subject matter jurisdiction through a *de novo* review before reviewing the grant of injunctive relief. Importantly, sovereign immunity issues are fundamentally jurisdictional. *See, Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1240 fn.4 (11th Cir. 1999) (citing cases so holding from the 1st, 7th, 8th, 9th, and 10th Circuits, and also relying upon the Supreme Court's analysis in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-62 (1978)).

II. Appellees Improperly Rely Upon Pleadings Filed After The Decisions At Issue.

Bay Mills has filed a motion to strike portions of the Appellees' Briefs that rely on the Appellees' respective Amended Complaints. At the time the district court considered LTBB's Motion for Preliminary Injunction (R. 4, *LTBB Brief in Support of Motion for Preliminary Injunction)*, and BMIC's Motion for Stay (R. 40, *Motion for Stay*), neither LTBB nor the State had filed Amended Complaints. The district court issued its Order granting the injunction on March 29, 2011 and denied the Motion for Stay on April 14, 2011. LTBB did not file its Amended Complaint until May 20, 2011. (R. 52, *LTBB Amended Complaint*.) The State did not file its Amended Complaint until August 9, 2011. (R. 74, *State Amended Complaint*.)

It is well settled that this Court may not consider materials that were not considered by the district court when making the ruling(s) that are on appeal. *See, e.g., Howard v Bouchard*, 405 F.3d. 459, 468 (6th Cir. 2005). Nor will this Court consider arguments raised for the first time on appeal. *See, e.g., United States v. Turnley*, 627 F.3d 1032, 1038 (6th Cir. 2010). Obviously, the district court, in granting the injunction and denying the stay, could not have considered materials and arguments that were not filed or made until after it rendered those decisions, thus this Court may not consider them either. In this Brief, Bay Mills notes which arguments are impermissibly derived from later filed pleadings and which should therefore be ignored.

ARGUMENT

I. Bay Mills Has Not Waived Its Sovereign Immunity.

A. *Tribal Sovereign Immunity Is Not Waived Simply by Engaging in Gaming under IGRA.*

Both the State (*State Brief on Appeal* at pp. 35-37), and LTBB (*LTBB Brief on Appeal* at pp. 14-15) continue to mistakenly hold out *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385-86 (10th Cir. 1997), as a correct application of the rules governing tribal sovereign immunity in a gaming-related controversy. But they ignore the essential fact that *Mescalero* is premised on the challenge of

the State of New Mexico[2] to the existence of a valid Class III gaming compact—the very agreement which §2710(d)(7)(A)(ii) requires be allegedly violated in order for suit to proceed against an Indian tribe. The *Mescalero* court, faced with the *absence* of a valid compact, based jurisdiction on cases holding that tribal immunity is waived[3] where compliance with IGRA's provisions are at issue and in which only declaratory or injunctive relief is sought.

Two years later, when the State of Florida sued the Seminole Tribe, invoking §2710(d)(7)(A)(ii) to enjoin the Tribe from gaming without a compact with the State, it relied on *Mescalero* for its assertion of federal subject matter jurisdiction and abrogation of tribal sovereign immunity even in the *absence* of a valid compact. The Eleventh Circuit rejected the *Mescalero* reasoning, terming it "muddled" and difficult to credit." S*tate of Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999). Specifically, the Eleventh Circuit noted that

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[2] Separate litigation resulted in a Tenth Circuit decision that the Governor of the State of New Mexico had no authority to enter into a tribal-state gaming compact without ratification by the Legislature. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997), *cert. denied*, 522 U.S. 807 (1997).

[3] "Waiver" is the term utilized to describe the Tribe's voluntary relinquishment of its immunity from suit, while "abrogation" is the term utilized to describe a congressional deprivation of tribal sovereign immunity. *Accord, State of Florida v. Seminole Tribe of Florida,* 181 F.3d 1237, 1241 n.5 (11th Cir. 1999).

so broadly reading §2710(d)(7)(A)(ii) as abrogating tribal sovereign immunity from suit directly contradicts:

> . . . two well-established principles of statutory construction: that Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear, and that ambiguities in federal laws implicating Indian rights must be resolved in the Indians' favor. [citations and footnotes omitted]

Id.

The Court also rejected the *Mescalero* rationale that a tribe voluntarily waives its sovereign immunity simply by engaging in gaming under IGRA, concluding, "[t]he Supreme Court has made it plain that waivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed. The State's argument that the Tribe's gaming activities constitute a waiver of sovereign immunity is patently inconsistent with this rule". *Seminole Tribe* at 1243.

Nor is the Eleventh Circuit alone in its rejection of *Mescalero*. The Ninth Circuit similarly concluded that there is no right to sue an Indian tribe on the mere basis that it engages in gaming under IGRA. *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000) (the existence of explicit provisions in IGRA authorizing suit compels the conclusion that complaints not fitting within those explicit provisions cannot be maintained); *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1059-60 (9th Cir.

1997) (state's suit to enjoin class III gaming not prohibited by the tribal-state compact cannot be brought under §2710(d)(7)(A)(ii)).

Similarly, the Seventh Circuit rejected a broad interpretation of the scope of claims that can be brought under 25 U.S.C. §2710(d)(7)(A)(ii). In *State of Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655 (7th Cir. 2006) *(Ho-Chunk I)*, the court dismissed a suit against the Tribe for stopping revenue sharing payments, as the State's claims against the Tribe were based on failure to arbitrate the dispute under the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* It was only when the State amended its complaint, alleging that the Tribe's stoppage of payments violated its Compact in contravention of §2710(d)(7)(A)(ii), that jurisdiction to adjudicate the matter was found to exist. *State of Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (7th Cir. 2008) *(Ho-Chunk II)*.[4]

The clear result of these cases is that 25 U.S.C. §2710(d)(7)(A)(ii) does not abrogate tribal sovereign immunity or confer federal jurisdiction simply because it is cited in a complaint; tribal sovereign immunity is abrogated only when the plaintiff asserts claims containing all of the necessary elements expressly within the terms of 25 U.S.C. §2710(d)(7)(A)(ii). Any conclusion to the contrary -- that

[4] The jurisdictional provision of §2710(d)(7)(A)(ii) is narrowly construed *in Ho-Chunk II*, limiting actionable violations of the tribal-state compact only to those compact elements delineated in 25 U.S.C. §2710(d)(3)(C). *Id* at 933.

any alleged violation of IGRA by a Tribe is adequate grounds for the district court's exercise of jurisdiction – misstates the law.

B. *The Bay Mills Gaming Ordinance Is Not A Waiver of Bay Mills' Sovereign Immunity*[5]

The State's argument that sovereign immunity is voluntarily waived in the Bay Mills Gaming Ordinance (the "Ordinance") is factually baseless and legally incorrect. Indeed, Section §4.8 of the Ordinance clearly states that the Tribe does not waive its sovereign immunity by engaging in activities covered by the Ordinance:

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

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[5] For the reasons stated in its accompanying Motion to Strike, the State's argument should not be considered. Bay Mills provides this response only in the event that this Court allows this argument.

(R. 14, Ex. J.) (emphasis added).

II. Congress Has Not Abrogated Bay Mills' Sovereign Immunity.

A. *Challenging the Existence of Indian Land in the Complaint Prevents §2710(d)(7)(A)(ii) from Abrogating Bay Mills Immunity.*

Bay Mills has correctly stated the limited circumstances in which tribal sovereign immunity is abrogated by §2710(d)(7)(A)(ii). The district court's ruling in *Arizona v. Tohono O'odham Nation*, Case No. CV11-0296-PHX-DGC, 2001 W.L. 2357833 (D. Ariz.), supports this interpretation. Contrary to LTBB's assertions that this decision supports its claim to §2710(d)(7)(A)(ii) jurisdiction, all plaintiffs in the *Tohono* case argued that the property in dispute was "Indian land" under IGRA (as the Department of the Interior had determined to accept trust title). The defendant Tribe argued that the property was not Indian land—or at least not yet—since the property was not in trust for the Tribe when the case was filed, and the Department of Interior's decision to accept trust title was the subject of a separate case before the Ninth Circuit. The dispute was over ripeness, rather than sovereign immunity, and the court noted that Congress did not provide a temporal limitation on when the land at issue must become Indian lands. *Tohono* at p.3.

The position of the parties in *Tohono* is exactly the opposite of the parties in this case. While in *Tohono*, plaintiffs argued that the property would be, if it

wasn't already, "Indian land," the claims of the plaintiffs here are that the Vanderbilt Parcel is not, and never can be, "Indian land."

B. *Federal Question Jurisdiction under 28 U.S.C. §1331 Does Not Abrogate Tribal Sovereign Immunity.*

The State's arguments that 28 U.S.C. §1331 independently abrogates tribal sovereign immunity and vests the court with federal question jurisdiction were made to, and properly rejected by, the district court. Nonetheless, the State reasserts the claims, this time cloaking the arguments in terms of an action arising under "federal common law." (*State Brief on Appeal*, .p. 41.) Whatever term the State may utilize, and whatever argument it propounds in support of its untenable reading of *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), that case simply requires a non-Indian defendant in tribal court to exhaust that court's remedies prior to initiating a challenge to its jurisdiction as *ultra vires* in federal court. *National Farmers Union*, *supra* at 857.

As set forth fully in Bay Mills' Appeal Brief (p.9), the district court initially relied on 28 U.S.C. §1331 as a basis for jurisdiction, but later disavowed that holding. (R. 45 at 4.) Citing *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007), it held: "where another statute provides a waiver of tribal sovereign immunity, or when the tribe has waived its immunity, §1331 may

confer subject matter jurisdiction over an action involving a federal question." (*Id.)* (emphasis added).

In *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 920 (6th Cir. 2009),this Court directly rejected any inference that 28 U.S.C. §1331 affords an opportunity for an adverse party to proceed on a federal question against a claim of tribal sovereign immunity. Also citing *Miner,* this Court noted, "if an entity enjoys tribal sovereign immunity, federal jurisdiction is otherwise irrelevant and dismissal of the suit is proper." *Id.* Thus it is clear that the law in this Circuit precludes any assertion by the State that a federal common law cause of action can be filed against Bay Mills under 28 U.S.C. §1331 independent of an explicit abrogation or waiver of tribal sovereign immunity. Thus, any contention by the State that federal common law claims against an Indian tribe can be adjudicated under 28 U.S.C. §1331 based on *National Farmers Union* must fail.

C. *18 U.S.C. § 1166 Does Not Abrogate BMIC's Sovereign Immunity for Suit by LTBB or the State, Nor Does It Supply A Jurisdictional Basis.*

For the first time the State now argues that 18 U.S.C. §1166 (§23 of IGRA) provides both federal court jurisdiction and an abrogation of BMIC's sovereign immunity and permits the State to file suit to enforce its provisions.[6]

[6] This argument subject to this Court's decision to consider new materials

The State's contention that it may bring suit under §1166 is not supported by any court that has considered this matter.[7] For example, in *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170 (10th Cir. 1991), the court directly addressed the effect of §1166 on a state's attempts to seek injunctive relief for tribal gaming conducted in violation of state law, and held:

> "§1166(a) makes "all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to the criminal sanctions applicable thereto" enforceable in Indian country. *Where IGRA most differs from the ACA, however, is that the power to enforce these newly incorporated laws rests solely with the United States. . . Nowhere does the statute indicate that the State may, on its own or on behalf of the federal government, seek to impose criminal or other sanctions against an allegedly unlawful tribal bingo game*."

Id. at 1177 (emphasis added). Other federal courts have also concluded that the sole authority to enforce IGRA's provisions lies with the federal government. *See, e.g., Dewberry v. Kulongoski*, 406 F. Supp.2d 1136, 1142 (D.C. Or. 2005) ("outside the express provisions of a compact, the enforcement of IGRA's prohibitions on Class III gaming remains the exclusive province of the federal government"); *United States v. E.C. Investments*, 77 F.3d 327, 330-31 (9th Cir.

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and arguments, asserted in Bay Mills' accompanying Motion to Strike.

[7] The State only cites to *United States v. Santee Sioux Tribe*, 135 F.3d 558 (8th Cir. 1998) for the proposition that a similar Nebraska state anti-gambling law authorizing injunctive relief was held to be assimilated via §1166. Yet a review of *Santee Sioux* reveals that only the *United States* was the plaintiff in that case, and the court relied on the parallel Nebraska law to allow the *federal* government to bring a civil action. *Santee Sioux*, 135 F.3d at 565.

1996) (holding that §1166 grants the federal government exclusive jurisdiction and states lack jurisdiction to prosecute a violation of assimilated state law); *Gaming Corporation of America v. Dorsey & Whitney*, 88 F.3d 536, 545 (8th Cir. 1996) (holding that with respect to §1166, "Congress did not intend to transfer any jurisdictional or regulatory power to the states" unless a tribe consented thereto in a compact).

In addition to federal cases holding that §1166 does not authorize state enforcement actions, the State of Michigan successfully litigated a similar proposition before the Michigan Supreme Court in *Taxpayers of Michigan Against Casinos (TOMAC) v. State*, 471 Mich. 306; 685 N.W.2d 221 (2004). In *TOMAC*, Michigan's highest court ruled that "States may not enforce the terms of IGRA; rather, the only enforcement provided for in the IGRA is through the federal government." *Id.* at 320. The Court further ruled that "Congress . . . left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact." *Id*. Most relevant, the Court held that "contrary to plaintiffs' contentions, 18 U.S.C. §1166 does not change this analysis." *Id*. at 321. Analyzing §1166 in close detail, the Court concluded that §1166's "'federalization' of state law regulating gambling does not give a state

enforcement power over violations of state gambling laws because 'the power to enforce the incorporated laws rests solely with the United States.'" *Id.* at 323. (quoting *United Keetoowah Band, supra*).

III. The State Cannot Circumvent Jurisdictional Limitations By Adding Tribal Officials.[8]

The State contends that jurisdiction exists in this case under the *Ex parte Young* doctrine because the State filed an amended complaint—after the issuance of the injunction—adding tribal officials as defendants. *Ex parte Young*, 209 U.S. 123 (1908). The State purports to sue tribal officials in their official capacity merely as an "end run" around the Bay Mills' sovereign immunity. This attempted "end run" does not save the State's lawsuit. *Ex parte Young* allows a plaintiff, in limited circumstances, to obtain relief against a governmental official—notwithstanding sovereign immunity—if the official is committing an ongoing violation of federal law and the plaintiff is seeking only prospective relief for the violation. *Verizon Maryland Inc. v. Publ. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002). The "legal fiction" of *Ex parte Young* permits suits against officials in limited circumstances, but it does not eliminate sovereign immunity.

[8] The State attempts to have upheld a District Court order on the basis of an amended complaint filed after that order by a different plaintiff against different defendants. This should be summarily rejected. See accompanying Motion to Strike.

Idaho v. Couer d'Alene Tribe, 521 U.S. 261, 269-70, 281-82 (1997). Courts must apply the rule cautiously, and routinely dismiss putative *Ex parte Young*-based claims for failure to plead them correctly.[9]

Among *Ex parte Young's* limitations, the doctrine applies only to officials carrying out the allegedly unlawful act, *Verizon Maryland*, at 645; does not apply when a claim would intrude on special sovereignty interests of a government, *Idaho v. Couer d'Alene Tribe* at 281-82, and does not apply if another remedial scheme could address the alleged wrong without further intrusion on the sovereign, *Seminole Tribe at* 74 (1996). Bay Mills contends that the State's allegations fail these tests, and will so demonstrate to the district court in due course. The need for new analysis of this issue, however, illustrates the impropriety of the State asserting entirely new arguments and theories to this Court without the benefit of development below. The State's *Ex parte Young* arguments should be disregarded at this stage.

IV. 25 U.S.C. §2719 Is Inapplicable.

The State and LTBB continue to proffer 25 U.S.C. §2719 of IGRA as alternate grounds for subject matter jurisdiction by alleging that even if the parcel constitutes "Indian land", the conduct of gaming thereon is proscribed by a

[9] *See, e.g., Gean v. Hattaway*, 330 F.3d 758 (6th Cir. 2003) (dismissing claim for failure to plead continuing conduct).

separate section of IGRA -- 25 U.S.C. §2719. (R. 52, *LTBB First Amended Complaint*, ¶31; R. 74, *State First Amended Complaint*, ¶53; *State's Brief on Appeal*, p. 55; and *LTBB's Brief on Appeal*, p. 15 (arguing Bay Mills' compact with the State of Michigan requires IGRA compliance, thus placing this claim within the congressional abrogation of tribal sovereign immunity set forth in 25 U.S.C. §2710(d)(7)(A)(ii) as a violation of the compact)). R. 52, ¶¶27, 32; R. 74, ¶56. Their reliance on 25 U.S.C. §2719 to salvage jurisdiction is misplaced and must fail, even if this Court permits this argument in the face of Bay Mills' motion to strike.[10]

Section 2719 of IGRA is clear that gaming "shall not be conducted on lands *acquired by the Secretary in trust* for the benefit of an Indian tribe after October 17, 1988" unless specific exceptions apply.[11] 25 U.S.C. §2719(a)(emphasis added). The Department of the Interior has concluded that IGRA's prohibition against gaming on lands acquired after October 17, 1988, means what it says,

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[10] These allegations too arise in amended complaints filed after the District court's order; they were not before that court and therefore, as explained in Bay Mills' motion to strike, cannot supply a basis to affirm that order.

[11] "When the words of a statute are unambiguous, then [the] 'judicial inquiry is complete.'" *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462 (2002).

applying only to trust land (which all parties agree the Vanderbilt Casino is not).[12] So has the NIGC.[13]

The State's argument that *Citizens Against Casino Gambling in Erie County v. Hogen*, 2008 WL 2746566 (W.D.N.Y. 2008) (*CACGEC*), "disagrees" with Bay Mills' position carries little weight. Certainly, restricted fee lands acquired as intended by Congress are "Indian Lands" as Bay Mills has consistently contended. *CACGEC* at 63. However, the State ignores the Department's subsequent rulemaking and Opinions on this point.

In *CACGEC*, the Department and NIGC's rule-making and position concerning the application of §2719 on lands not in trust were not considered by that court, as the rule-changes were viewed as untimely for its proper consideration. This holding creates a situation in which the NIGC may possibly be placed by the court's determination in violation of the Department's new rule. *Id*

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[12] This conclusion is articulated through rulemaking that implements IGRA's Section 2719, published as 73 Fed. Reg. 29354-293380 (May 20, 2008) and codified as 25 C.F.R. Part 292. In the preamble to the regulations the Department explained that "[t]he omission of restricted fee from section 2719(a) is considered purposeful, because Congress referred to restricted fee lands elsewhere in IGRA, including section 2719(a)(2)(A)(ii) and 2703(4)(B)." 73 Fed. Reg. 29355.

[13] See, R. 4, Ex. 16, *Letter to Hon. Barry Snyder, President, Seneca Nation of Indians, from Philip N. Hogen, Chairman, National Indian Gaming Commission*, dated January 20, 2009.

at 12. These circumstances obviously do not exist here. The rule-making process has fully run, with notice to the public and comments fully considered. Accordingly, the Department's decision falls within the rule of statutory construction articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that the Department's interpretation is controlling. Finally, a subsequent memorandum opinion explaining the Department's interpretation of §2719 in the Part 292 regulations issued by then-Solicitor David Bernhardt following the issuance of the regulations further supports the Department's current position on non-trust land acquired after October 17, 1988. (R. 4, Ex. 9, *Solicitor M-Opinion M-037023, dated January 18, 2009*)[14]

V. No Deference Is Due the Department of Interior on the Meaning of the Michigan Indian Land Claims Settlement Act (MILCSA).

Contrary to the deference that the Department should be afforded in its interpretation of §2719, the Department's interpretation of MILCSA deserves no attention, much less deference under the *Chevron* analysis. The State's contention (*State's Brief on Appeal*, pp. 56-61) that an opinion of the Interior Department

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[14] M-Opinions are "binding on all Departmental offices...and may only be modified or overruled by the Solicitor, Under Secretary or Secretary." *See* M-Opinion M-37003, dated January 18, 2001and attachments thereto.

Solicitor (R. 7, Att. A., *Letter from Interior*) regarding the provisions of MILSCA must be accorded so-called "*Chevron*" deference, is not correct. No deference is due under the circumstances of this case.[15] Under *Chevron,* considerable weight is accorded to an executive department's construction of a statutory scheme it is entrusted to administer when the statute is silent or ambiguous as to the issue. Absolute deference to an executive branch department's reasonable interpretation of a statute is only required under *Chevron* when such interpretation is the result of formal rule-making procedures. Outside formal adjudicatory proceedings, the weight to be given the agency determination is based on the circumstances, including the need for uniformity in interpretation, the agency's expertise and its thoroughness. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218 (2001); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 198 F.Supp.2d 920 (W.D. Mich. 2002) ("*Grand Traverse II*"); G*rand Traverse Band of Ottawa and Chippewa*

[15] *Chevron* deference to the administrative agency's interpretation is given by a court in determining the meaning of ambiguous statutory terms. When no ambiguity is found, no deference is accorded. But by arguing that Chevron deference should be accorded, the State must also concede that another statutory construction rule for ambiguous language is also relevant: that statutes enacted for the benefit of Indians are to be liberally construed in favor of Indians, with ambiguous provisions interpreted for their benefit. *Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 258, 268-269 (1992); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

Indians v. United States Attorney, 46 F.Supp.2d 689 (W.D. Mich. 1999) ("*Grand Traverse I*"). *Chevron* deference does not apply here.

A. *The Interior Position Is Not the Result of Formal Rule-Making.*

The genesis of the DOI opinion is expressed clearly in the first paragraph of the document; it was requested by an attorney with NIGC by letter dated November 9, 2010 (R. 7, p.1). No notice was given to BMIC that such a request had been made, and no effort was made by the Interior Department or NIGC to solicit the Tribe's views. However, a legal analysis contained in a letter dated December 14, 2010, from, among others, the Plaintiff in this case, is expressly mentioned by the Department as being considered. (*Id.* at p.3, f.2) Under such circumstances, which stand in marked contrast to the open deliberations for formal rule-making, to accord absolute deference to the Interior Department and NIGC[16] opinions regarding the MILCSA Land Trust and its effect on the "Indian lands" definition in IGRA violates the fundamental meaning of due process.

[16] BMIC notes that the NIGC opinion defers to the Interior Department regarding the meaning and intent of MILCSA and makes no independent analysis of that statute's provisions. (R. 7, Ex. B pp.2-3).

B. *The Department of Interior Does Not Administer Section 107(a) of MILCSA.*

The Department of Interior has no role of any kind relating to the oversight of the Plan for Use and Distribution of the Bay Mills Indian Community Funds, enacted as §107 of MILCSA. In particular, any Interior Department responsibility for the creation, administration, management, and implementation of the Land Trust established by §107(a) is expressly disavowed in subsec. (a)(6):

> Notwithstanding any other provision of law, the approval of the Secretary for any payment from the Land Trust shall not be required and the Secretary shall have no trust responsibility for the investment, supervision, administration or expenditure of funds from the Land Trust.

C. *The Department of the Interior Did Not Draft Section 107(a) of MILCSA and the State's Recital of the Statute's Legislative History is Incomplete.*

The State argues that the Interior Department's analysis must be given "considerable weight" not only because the Department is generally charged by Congress with the administration of Indian Affairs, 25 U.S.C. §§ 2, 9, but also because the Department is the primary author of the legislation which ultimately was enacted as MILSCA and therefore knows better than anyone what its terms mean. The latter contention is wrong.

Enactment of judgment distribution legislation was the result of Bay Mills filing suit in 1996 in order to force the Department to carry out its obligations to

prepare distribution plans under the Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. §1401, *et seq.* (R. 14, *Bay Mills Response to Preliminary Injunction Motion*, Ex. A). The draft legislation developed by the Department and submitted to both houses of Congress on March 14, 1997 (R. 14, Ex. B), differs so significantly and substantially from the provisions of MILCSA—both as introduced as H.R. 1604 (R. 14, Ex. D) and as finally enacted (R. 14, Ex. I)—the only element that they have in common is the *purpose* of distributing the judgment funds to the intended tribal and individual beneficiaries. The basic elements of the Bay Mills Indian Community Plan were not drafted by the Interior Department, but instead by the Tribe in consultation with the bill's primary sponsor, the Hon. Dale Kildee. (R. 14, Ex. E; R. 16, *Bay Mills Exhibits to Response*, Ex. N)

The role of the Interior Department in crafting the legislation was at most that of commentator, by suggesting so-called "technical amendments" to the text. See, R. 4, *LTBB Brief in support of Preliminary Injunction*, Exs. 11, 12; R. 15 *Bay Mills Exhibits in Response*, Ex. H. The State's assertion that Interior's role in submitting the language that became §107 of MILCSA gives its interpretation "special—and arguably controlling weight" is based on a misunderstanding of the

law[17] and facts regarding the enactment of this provision. Given the facts underlying MILCSA, the State's contention that "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," (*State Brief on Appeal*, p. 59-60) is plainly wrong.

VI. The Federal Courts' Lack Of Jurisdiction To Hear Plaintiffs' Claims Does Not Reflect An "Absurd Result" But Is A Natural Result Of The Long Held Doctrine Of Sovereign Immunity.

Both LTBB and the State argue that to credit BMIC's explanation of the inherent limitations of IGRA's abrogation of tribal sovereign immunity would work an absurd result and leave BMIC free to violate the law "with impunity" as federal courts would be "powerless" to act. These are baseless fears, more accurately characterized as a reflection of the State's displeasure that, as the Michigan Supreme Court itself has recognized, *see TOMAC, supra,* the State must give way to the federal government here. Similar arguments were advanced to the Eleventh Circuit when the State of Florida protested that the effect of being held to

[17] Although cited by the State in support of its *Chevron a*rgument, (State's Response, p. 57) 25 U.S.C. §1402 is instead the basis of the Bay Mills lawsuit against the Department of the Interior, as the Department failed to carry out is obligations to develop a distribution plan as provided in the Indian Tribal Judgment Distribution Act, 25 U.S.C. §1401, et seq. See R. 14, supra, Ex. A and B. Equally inapposite is the citation to §105(b) of MILCSA, for §105(b) of that section expressly excludes the Bay Mills judgment distribution plan--§107—from the Secretary's tribal plan development tasks.

both of the jurisdictional predicates of 25 U.S.C. §2710(d)(7)(A)(ii) would leave intact the Seminole Tribe's sovereign immunity, leaving the State "no forum in which it can prevent the Tribe from violating IGRA with impunity." *Seminole Tribe* at 1243. The Eleventh Circuit found this concern unavailing, citing numerous cases recognizing that the doctrine of sovereign immunity can leave parties without a forum in which to pursue claims, concluding that this is no reason to suppose that immunity must give way in such circumstances. *See, Seminole Tribe* at 1243-44. *See also, Gaming Corp. of America*, 88 F.3d at 547 ("Although courts may be reluctant to conclude that Congress intended plaintiffs to be left without recourse . . . IGRA has a carefully balanced jurisdictional scheme, through which Congress gave the courts the right to negotiate tribal-state compacts but declined to give them broader authority without tribal consent.") Finally, it bears noting that the question of whether BMIC is gaming without complying with IGRA is certainly capable of being heard by a federal court—just as in *Santee Sioux*, the federal government could bring a civil claim to test the matter. *See, Santee Sioux* at 562-65. The two plaintiffs' claims that by accepting BMIC's arguments, the court would be allowing BMIC to act with impunity do not ring true. Rather, by finding that IGRA does not provide jurisdiction for these suits to

be maintained by the State or LTBB, the court would be preserving the structural balance of IGRA.

VII. Bay Mills Did Not Assume an Avoidable Risk, But Continues To Suffer Concrete Harm, Whereas the State's Harm Is Unsubstantiated and Self-Inflicted.

Contrary to the State's continued and baseless accusations (*State's Brief on Appeal,* pp. 20-23), Bay Mills was not forewarned of the State or Federal government's opposition to the Vanderbilt facility. Instead of asserting any actual facts to contradict Bay Mills' assertions, the State merely suggests that there is an "inference" that Bay Mills was forewarned its activities in Vanderbilt would be objectionable because on December 22, 2010, seven weeks after it opened its facility on November 3rd 2010, the Department and NIGC informed Bay Mills its operations were illegal. In addition the State itself can only demonstrate that its position was made clear to Bay Mills by letter dated December 16, 2010, six weeks after the facility has been opened. (*Id.* at 12.)

The State, in an effort to cast doubt on an otherwise clear record, asserts that Bay Mills has been evasive by relying on the factual record as the basis for its assertion that neither federal nor state officials forewarned Bay Mills that they would object to its Vanderbilt operations. (*Id*, p. 21.) In fact, the record shows that Bay Mills has denied and continues to deny such assertions.

Inexplicably, the State now suggests that Bay Mills must carry the burden to prove what it has already demonstrated—that it was not told by these agencies that its casino in Vanderbilt was illegal. This rebuttal is unnecessary and absurd. Such proof has already been provided; Interior has said so itself, "[t]he Tribe withdrew each of these . . . requests before receiving responses from the NIGC or the Department." (R. 45, p. 6, citing R. 36, p. 3 n. 1.) With no record to support such a conclusion, the district court clearly has no evidence upon which to make a "reasonable inference," thus it erred in concluding Bay Mills was warned by both the State and federal agencies, or either of them, of their objection to its Vanderbilt Facility. The State would have this court forget that there is a heavy burden placed on a plaintiff seeking a preliminary injunction. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). Here, a plaintiff makes a claim without evidence, then asserts the burden is on the defendant to prove the negative. This Court should reject this attempt to turn the burden of proof on its head.

In contrast to the unfounded allegations made by the State, the State has plainly caused its own economic harm by allowing other casino-style gaming to occur within its borders, thus the State's allegations of injury should not be a factor in this Court's decision to grant relief. *State Brief on Appeal*, p. 24-5. Like many

of the other tribal casinos in Michigan, Bay Mills was required to make economic incentive payments to the State.[18] However, Bay Mills' obligations to make such payments were vitiated when the State authorized additional casino-style gaming within the State thus alleviating Bay Mills and other tribes of their obligation to make their economic incentive payments.[19] *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 271 F.3d 235 (6th Cir. 2001).

The State's loss of revenues from Bay Mills' gaming operations is thus based solely and plainly on its own actions, and was clearly a factor of which the State was aware and considered in calculating its decision to expand casino-style gaming throughout Michigan. It cannot now claim that such losses of revenues are a harm from which it may seek this Court's protection.[20] *U.S. v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004).

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[18] *Sault Sainte Marie Tribe of Chippewa Indians et al. v. Engler*, Case No. 1:90-cv-611, (W.D. Mich. 1993), R. 100, *Stipulation* (¶7) *and Consent Judgment* (¶4), "[E]ach tribal party to the Stipulation shall make semi-annual payments to the Michigan Strategic Fund of the State of Michigan in an amount equal to eight percent (8%) of the net win at each casino derived from all class III electronic games of chance, as those games are defined in each class III compact."

[19] Paragraph 7 of the *Stipulation* provided Bay Mills, as well as the other party tribes, the exclusive right to conduct such gaming in the state in return for these incentive payments.

[20] Similarly, neither does such loss of revenues by its own making harm the public interest. (*LTBB Brief on Appeal*, p. 17.)

CONCLUSION

Plaintiffs have failed to meet their burden to establish the Court's jurisdiction over this cause of action. They have instead alleged facts that are inapposite to its assertion of jurisdiction and fatal to its claim. In the absence of subject matter jurisdiction, this action must be dismissed and the District Court's order granting injunctive relief reversed.

Respectfully submitted,

BAY MILLS INDIAN COMMUNITY

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(s) Kathryn L Tierney attorney for

Bay Mills Indian Community Dated: 10/17/11

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2011, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS; GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS; KEWEENAW BAY INDIAN COMMUNITY; HANNAHVILLE INDIAN COMMUNITY; BAY MILLS INDIAN COMMUNITY; AND LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,	Civil No. 1:90 CV 611
Plaintiffs,	Hon. Benjamin F. Gibson
v.	
JOHN M. ENGLER, Governor of the State of Michigan,	
Defendant.	

STIPULATION FOR ENTRY OF CONSENT JUDGMENT

Plaintiffs Sault Ste. Marie Tribe of Chippewa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Keweenaw Bay Indian Community, Hannahville Indian Community, Bay Mills Indian Community and Lac Vieux Desert Band of Lake Superior Chippewa Indians (hereinafter "the tribes"), by and through their undersigned counsel, intervenor Saginaw Chippewa Tribe of Michigan (hereinafter "the Saginaw Tribe"), by and through its undersigned counsel, and defendant John M. Engler, Governor of the State of Michigan (hereinafter "the Governor"), by and through his undersigned counsel, hereby stipulate and agree as set forth below.

-EXHIBIT A-

1. The tribes initiated this litigation pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, (hereinafter "IGRA"). In their original complaint, filed July 10, 1990, the tribes named the State of Michigan as the sole defendant. Jurisdiction in this Court is based upon 25 U.S.C. § 2710(d)(7)(A)(i), and 28 U.S.C. § 1362.

2. On March 26, 1992, the Court granted the state's motion to dismiss the tribes' complaint on the grounds that the Eleventh Amendment to the U.S. Constitution barred the litigation in federal court,[1] but allowed the tribes to amend the complaint by naming state governmental officials as defendants. Subsequent to the Court's dismissal order, on May 5, 1992, the Court granted the tribes' motion for leave to file its first amended complaint naming the Governor as the sole defendant.

3. On February 9, 1993, the Court granted the tribes' motion confirming jurisdiction in the Court over all matters raised by the first amended complaint, save for the issues subsumed within the appeal to the Sixth Circuit. Subsequent to that Order, the parties filed dispositive cross motions for dismissal and/or summary judgment, together with supporting affidavits and/or memorandum briefs. Oral argument on the cross motions was scheduled for July 23, 1993; however, the parties, with the Court's concurrence, took the motions off calendar because they anticipated filing this Stipulation for Entry of

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[1]/The tribes appealed the Court's decision to the U.S. Court of Appeals for the Sixth Circuit, No. 91-2698. The matter has been fully briefed and oral argument was heard on June 18, 1993.

Consent Judgment, which obviated the need for the Court to rule on the pending motions.

4. The tribes and the Governor have agreed to resolve their differences and thereafter to dismiss this litigation with prejudice. However, this Stipulation and the Court's subsequent entry of Consent Judgment shall become effective and shall bind and obligate all parties hereto only on the express condition that each tribal party and the Governor execute a class III gaming compact, which is concurred in by resolution of the Michigan Legislature, and that those compacts are thereafter approved by the United States Secretary of the Interior and notice of said approvals published in the Federal Register, pursuant to 25 U.S.C. § 2710(d)(8). In the event that any condition described herein does not occur with respect to one or all of the tribes, the dispositive cross motions for dismissal and/or summary judgment referred to in paragraph 3 shall be immediately placed on the Court's calendar for disposition, and thereafter the case shall proceed to judgment.

5. The Saginaw Chippewa Indian Tribe of Michigan (hereinafter "Saginaw Tribe") is a federally recognized Indian tribe with lands in the State of Michigan held in trust by the United States for its benefit. Its legal and political status is substantially identical to the original six plaintiff tribes, which are party to this litigation. The Saginaw Tribe seeks to intervene herein as a party plaintiff and agrees to be bound by the terms of this Stipulation for Entry of Consent Judgment in the same manner and to the same extent as the six originally

named plaintiff Indian tribes. The Saginaw Tribe independently could bring the identical cause of action against the Governor brought by the tribes in the instant proceedings, pursuant to 25 U.S.C. § 2710(d)(7)(A)(i). However, the Governor and the Saginaw Tribe seek to avoid relitigation of substantially identical issues, as well as avoid the risk of any inconsistent judgments. Therefore, through this Stipulation for Entry of Consent Judgment, the Governor and the tribes hereby consent to the intervention of the Saginaw Tribe for the express and limited purpose of entry and enforcement of this Stipulation for Entry of Consent Judgment and the accompanying Consent Judgment.

6. The parties hereto agree that from and after the date or dates the condition in paragraph 4 has been accomplished, each tribal party to this stipulation shall make semi-annual payments to the Michigan Strategic Fund of the State of Michigan in an amount equal to eight percent (8%) of the net win at each casino derived from all class III electronic games of chance, as those games are defined in each class III compact. As used herein, "net win" is defined as the total amount wagered on each electronic game of chance, minus the total amount paid to players for winning wagers at said machines. For purposes of these payments, all calculations of amounts due shall be based upon a fiscal year beginning October 1 and ending September 30 of the following calendar year, unless the parties agree on a different fiscal year, and all payments due the state pursuant to the terms of this stipulation shall be paid no later than sixty (60) days after October 1 and March 31 of each year. Any payments due and

owing from the tribes in the year the compacts are approved, or the final year the compacts are in force, shall reflect the actual net win but only for the portion of the year the compacts are in effect.

7. The tribes' obligation to make the payments provided for in paragraph 6 above shall apply and continue only so long as there is a binding class III compact in effect between each tribe and the State of Michigan which provides for the play of electronic games of chance, and then only so long as the tribes collectively enjoy the exclusive right to operate electronic games of chance in the State of Michigan, as they are defined in said compacts. The operation of electronic games of chance by persons or entities other than the tribal parties to this stipulation shall not violate the tribes' exclusive right to operate said machines so long as said machines: a) reward a player only with the right to replay the device at no additional cost; b) do not permit the accumulation of more than fifteen (15) free replays at any one time; c) allow the accumulated free replays to be discharged only by activating the device for one additional play for each accumulated free replay; and d) make no permanent record, directly or indirectly, of the free replays awarded.

8. The parties hereto agree that from and after the date or dates the condition in paragraph 4 has been accomplished, each tribal party to this stipulation shall make semi-annual payments to any local units of state government in the immediate vicinity of each tribal casino in the aggregate amount equal to two

percent (2%) of the net win at each casino derived from all class III electronic games of chance, as those games are defined in each class III compact. As used herein, "net win" is defined as the total amount wagered on each electronic game of chance, minus the total amount paid to players for winning wagers at said machines. Each tribe shall determine which local unit or units of government shall receive payments and the amounts thereof; provided however, the guidelines governing the tribes in making said determinations shall be based upon compensating said local units of government for governmental services provided to the tribes and for impacts associated with the existence and location of the tribal casino in its vicinity; and provided further, however, that out of said aggregate payment, each local unit of government shall receive no less than an amount equivalent to its share of ad valorem property taxes that would otherwise be attributed to the class III gaming facility if that site were subject to such taxation. For purposes of these payments, all calculations of amounts due shall be based upon a fiscal year beginning October 1 and ending September 30 of the following calendar year, unless a tribe determines to use a different fiscal year, and all payments due any local unit or units of government pursuant to the terms of this stipulation shall be paid no later than sixty (60) days after October 1 and March 31 of each year. Any payments due and owing from the tribes in the year the compacts are approved, or the final year the compacts are in force, shall reflect the actual net win but only for the portion of the year the compacts are in effect.

9. The parties hereby consent to the entry of the accompanying Consent Judgment, consistent with the terms and conditions of this stipulation.

Respectfully submitted,

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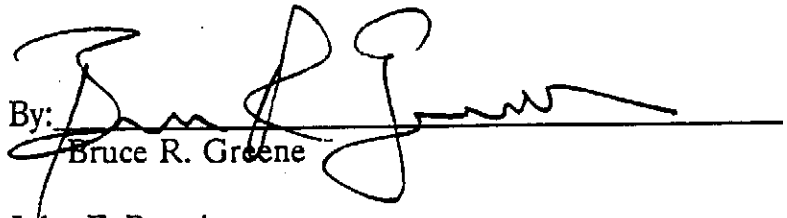
By: 
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS; GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS; KEWEENAW BAY INDIAN COMMUNITY; HANNAHVILLE INDIAN COMMUNITY; BAY MILLS INDIAN COMMUNITY; AND LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,	)	Civil No. 1:90 CV 611
Plaintiffs,	)	Hon. Benjamin F. Gibson
v.	)	
JOHN M. ENGLER, Governor of the State of Michigan,	)	
Defendant.	)	

CONSENT JUDGMENT

The parties to the above captioned litigation have entered into a Stipulation for the Entry of Consent Judgment, signed by counsel of record on August 16 through 19, 1993, and filed with the Court on August 19, 1993 (hereinafter "the Stipulation"). Pursuant to the Stipulation and for good cause shown, it is hereby ORDERED, ADJUDGED and DECREED, that:

1. The terms, provisions and conditions of the Stipulation are hereby incorporated by reference into this CONSENT JUDGMENT as if fully set out herein and thereby made an ORDER of the Court.

2. The Saginaw Chippewa Indian Tribe of Michigan is hereby made a party to these proceedings for the express and limited

purpose of entry and enforcement of the Stipulation and is hereby bound by the terms of the Stipulation and this CONSENT JUDGMENT in the same manner and on the same terms and conditions as the original parties to these proceedings.

3. This CONSENT JUDGMENT shall become effective and shall bind and obligate all parties hereto only on the express condition that each tribal party and the Governor shall execute a class III gaming compact, which shall be concurred in by resolution of the Michigan Legislature, and that those compacts are thereafter approved by the United States Secretary of the Interior and notice of said approvals published in the Federal Register, pursuant to 25 U.S.C. § 2710(d)(8). In the event that any condition described herein does not occur with respect to one or all of the tribes, the dispositive cross motions for dismissal and/or summary judgment filed by the tribes and the Governor in these proceedings shall be placed immediately on the Court's calendar for disposition, and thereafter the case shall proceed to judgment.

4. From and after the date or dates the condition in paragraph 3 of this CONSENT JUDGMENT has been accomplished, each tribal party to the Stipulation shall make semi-annual payments to the Michigan Strategic Fund of the State of Michigan in an amount equal to eight percent (8%) of the net win at each casino derived from all class III electronic games of chance, as those games are defined in each class III compact. Details relating to the time and manner of payment, together with the definition of

the term "net win," are set forth in the Stipulation and shall hereby govern the parties.

5. The tribes' obligation to make the payments provided for in paragraph 4 of this CONSENT JUDGMENT shall apply and continue only so long as there is a binding class III compact in effect between each tribe and the State of Michigan, which provides for the play of electronic games of chance, and then only so long as the tribes collectively enjoy the exclusive right to operate electronic games of chance in the State of Michigan, as they are defined in said compacts. The operation of electronic games of chance by persons or entities other than the tribal parties to this Stipulation shall not violate the tribes' exclusive right to operate said machines so long as said machines: a) reward a player only with the right to replay the device at no additional cost; b) do not permit the accumulation of more than fifteen (15) free replays at any one time; c) allow the accumulated free replays to be discharged only by activating the device for one additional play for each accumulated free replay; and d) make no permanent record, directly or indirectly, of the free replays awarded.

6. From and after the date or dates the condition in paragraph 3 of this CONSENT JUDGMENT has been accomplished, each tribal party to the Stipulation shall make semi-annual payments to any local units of state government in the immediate vicinity of each tribal casino in the aggregate amount equal to two percent (2%) of the net win at each casino derived from all class III electronic games of chance, as those games are defined in

each class III compact. Details relating to the time and manner of payment, the definition of the term "net win," the minimum payments required and the guidelines governing the tribes' determination regarding said payments are set forth in the accompanying Stipulation, and shall hereby govern the parties.

7. Upon satisfactory evidence presented to the Court that the condition set forth in paragraph 3 of this CONSENT JUDGMENT has been met, all claims by all parties to these proceedings shall be dismissed with prejudice, pursuant to the terms of the Stipulation. The Court shall enter an appropriate order of dismissal upon receiving said satisfactory evidence from the parties.

8. The Stipulation and this CONSENT JUDGMENT can be modified and rescinded only in the above captioned case, and only by the mutual written consent of all parties and with the Court's concurrence.

9. Notwithstanding said subsequent dismissal, the Court shall retain continuing jurisdiction for the purposes of enforcing the Stipulation and this CONSENT JUDGMENT according to their terms and provisions.

Dated: August 20, 1993

Benjamin F. Gibson
United States District Judge

Certified As A True Copy
C. Duke Hynek, Clerk
By _____ Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date AUG 20 1993