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

STATE OF MICHIGAN,

Plaintiff, **Case No. 1:10-cv-01273-PLM**

v. **HONORABLE PAUL L. MALONEY**

BAY MILLS INDIAN COMMUNITY, et al.,

Defendant.

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Plaintiff, **Case No. 1:10-cv-01278-PLM**

v.

BAY MILLS INDIAN COMMUNITY

Defendant.

BRIEF IN SUPPORT OF DEFENDANT BAY MILLS INDIAN COMMUNITY'S MOTION TO DISMISS STATE OF MICHIGAN'S AMENDED COMPLAINT

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Defendant Bay Mills Indian Community ("Bay Mills") seeks dismissal of this case under Fed.R.Civ.P. 12(b)(1), as Bay Mills possesses sovereign immunity from suit, which has not been waived by Bay Mills nor abrogated by act of Congress. Bay Mills also seeks judgment on the pleadings of this case pursuant to Fed.R.Civ.P. 12(c), as plaintiff State of Michigan (" the State") has failed to state a claim against Bay Mills upon which relief can be granted under the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §2701, *et seq.* ("IGRA").

STANDARD OF REVIEW

This Motion is brought pursuant to Fed.R.Civ.P. 12(b)(1), 12(c), 12(h)(2)(B) and 12(h)(3). Rules 12(b)(1) and 12(h)(3) provide for dismissal for lack of subject matter jurisdiction. To survive such a motion, a plaintiff has the burden of proving jurisdiction. *Giesse v. HHS*, 522 F.3d 697, 702 (6th Cir. 2008). A Rule 12(b)(1) motion must be granted when, "taking as true all facts alleged by the plaintiff, the court is without subject matter jurisdiction to hear the claim." *Martinez v. Dep't of Homeland Sec.*, 502 F. Supp. 2d 631, 634 (E.D. Mich. 2007) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Where jurisdiction is lacking, the Court must do no more than announce that fact and dismiss the action. Fed R.Civ.P. 12(h)(3); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

The standard for assessment of a Rule 12(c) motion for judgment on the pleadings is the same as enunciated for a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Lindsay v. Yates*, 498 F.3d 434, 438 (6th Cir. 2007). *EEOC v. J.H. Routh Packing Co.*, 246 F.3d 850, 851 (6th Cir. 2001). Each turns on legal issues, rather than on an assessment of the evidence, *Technology Recycling Corp. v. City of Taylor*, 186 F. App'x 624, 640 n.5 (6th Cir. 2006) and tests the merits and legal sufficiency of the plaintiff's complaint. *Muslim Community Ass. of Ann Arbor, v. Ashcroft*, 459 F. Supp. 2d 592 596 (E.D. Mich. 2006). In considering a motion for

judgment on the pleadings under Rule 12(c), a plaintiff's factual allegations are accepted as true by the court, and the complaint is construed in the most favorable light to the plaintiff. *Technology Recycling, supra,* citing *Penny/Ohlman/Nieman, Inc. v. Miami Valley Pension Corp*., 399 F.3d 692, 697 (6th Cir. 2005). However, the factual allegations must be enough to raise a right to relief above the speculative level; the claim must be plausible and not merely conceivable. *NicSand, Inc. v. 3M Co.,* 507 F.3d 442, 455 (6th Cir. 2007*); Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 296 n.1 (6th Cir. 2008).

STATEMENT OF FACTS

The Bay Mills Indian Community is an Indian tribe located in the northern region of the State of Michigan. It has been continuously acknowledged since European contact and formally recognized in its modern governmental form since November 4, 1936. ECF No. 14, *Defendant's Brief in Opposition to Little Traverse Bay Bands of Odawa Indians' Motion for Preliminary Injunction,* Ex. Q, *Constitution of the Bay Mills Indian Community*. In order to promote the economic welfare of its community, Bay Mills entered into a Class III Compact for gaming with the State of Michigan on August 20, 1993, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §2701, *et seq.* ("IGRA"). ECF No. 74, *Amended Complaint,* Ex. A, *Compact Between the Bay Mills Indian Community and the State of Michigan Providing for the Conduct of Tribal Class III Gaming by the Bay Mills Indian Community, August 23, 1993.* Soon thereafter, the National Indian Gaming Commission ("NIGC") approved Bay Mills' gaming ordinance. ECF No. 7*4 supra*, Ex. C, *Bay Mills Gaming Ordinance, as amended.*

On December 15, 1997, Congress enacted the Michigan Indian Land Claims Settlement Act, P.L. 105-143 ("MILCSA") for the benefit of Bay Mills and other tribes. ECF No. 14, *supra*, Ex. I, *MILCSA, as enacted.* MILCSA allocated funds awarded to the tribes due to

inadequate compensation for land ceded by the Treaties of March 28, 1836, 7 Stat. 491, and August 2, 1855, 11 Stat. 631, by the Indian Claims Commission pursuant to the Indian Claims Commission Act of 1946, 25 U.S.C. §70, *et seq.* MILCSA §102. Congress established and funded a Land Trust for the benefit of Bay Mills. MILCSA §107(a)("Land Trust"). Congress directed that lands purchased by Bay Mills with Land Trust funds are to be "held as Indian lands are held." MILCSA §107(a)(3).

In August 2010, Bay Mills purchased land with funds from the Land Trust in the Village of Vanderbilt in Otsego County, Michigan ("Vanderbilt Parcel"). ECF No. 52, *LTBB First Amended Complaint*, Ex. B, *Warranty Deed*; see also ECF No. 14, *supra*, Ex. L, *Land Claims Acquisition Trust Fund Agreed-Upon Procedures Report by Rehmann, August 31, 2010*. On October 29, 2010, the Bay Mills Gaming Commission, pursuant to Bay Mills' Gaming Ordinance, licensed a small gaming facility on the Vanderbilt Parcel. ECF No. 14, *supra*, Ex. K, *Bay Mills Gaming Commission Class III Facility Gaming License for Property in Vanderbilt, Michigan*. On November 3, 2010, Bay Mills commenced gaming operations on the Vanderbilt Parcel with 38 electronic games of chance, later expanding the facility to 84 electronic gaming devices (ECF No. 8, *Motion for Extension of Time to File Response by Bay Mills*, Ex. A, *Declaration of Terry E. Carrick.*

STATEMENT OF PROCEDURAL HISTORY

The State filed suit on December 21, 2010, arguing that Bay Mills could not conduct gaming on the Vanderbilt Parcel because it was not "Indian Lands" under IGRA. ECF No. 1, *Complaint*, ¶¶22, 42. The State also claimed that the Vanderbilt Parcel was ineligible for gaming under §2719 of IGRA. ECF No. 1, *supra*, ¶44. The State supported the preliminary injunction sought by Little Traverse Bay Bands of Odawa Indians (LTBB) to end gaming operations on the Vanderbilt Parcel. ECF No. 4, *LTBB Motion for Preliminary Injunction and Brief;* ECF No. 13,

State of Michigan's Response in Support of Motion for Preliminary Injunction in Case No. 1:10-cv-1278. A preliminary injunction was issued by this Court on March 29, 2011, which ordered Bay Mills to cease its operations at the facility. ECF No. 33, *Opinion and Order Granting Plaintiff Little Traverse Bay Bands of Odawa Indians' Motion for Preliminary Injunction.* Bay Mills filed an interlocutory appeal of the preliminary injunction on March 30, 2011, ECF No. 39, *Notice of Interlocutory Appeal*, which is pending in the appellate court. This court denied Bay Mills motion for stay of the preliminary injunction by written order on April 14, 2011. ECF No. 45, *Orde*r. On July 15, 2011, the State sought leave to amend its Complaint. ECF No. 67, *State of Michigan's Motion to Amend Complaint and to Join Additional Parties*. Bay Mills opposed the State's motion, ECF No. 71, *Response Regarding Motion to Amend Complaint and Join Additional Parties*, and a hearing was held before Magistrate Judge Scoville on the matter on August 9, 2011. ECF No. 72, *Minutes*. The motion was granted from the bench as to all additional parties and a written order was entered on the same day. ECF No. 73, *Order*. The Amended Complaint was also docketed on August 9, 2011, which listed the members of Bay Mills Executive Council in their official capacity as additional defendants. ECF No. 74, *Amended Complaint.* Answers to the Amended Complaint have been filed by Bay Mills, ECF No. 95; by members of the Bay Mills Executive Council, ECF No 96; and by the Bay Mills Indian Community Gaming Commission and its members, ECF No. 97. Bay Mills seeks dismissal of the Amended Complaint for the reasons set forth below.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO HEAR THIS CASE.

A. Bay Mills Has Sovereign Immunity.

As a federally recognized Indian tribe, Bay Mills has the same common law immunity from suit enjoyed by all sovereign governments. The status of Indian tribes as sovereign

governments is a basic tenet of federal Indian law. It was first enunciated by Chief Justice John Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) in which he describes Indian tribes as "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. As sovereign nations, Indian tribes are exempt from suit absent their consent (a waiver) or that of Congress (abrogation). *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1939); *Turner v. United States*, 248 U.S. 354 (1919). This principle continues to be applied by the Supreme Court, regardless of the nature of the claim against a tribe, or the locus of the tribal activity. Justice Kennedy recently restated the underlying principle: "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998).

This tenet continues to be a fundamental element of Indian law jurisprudence in the United States and has been cited favorably by the United States Supreme Court as recently as *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). In that case, the Supreme Court reiterated the principle that a tribe's waiver of its sovereign immunity must be clear and will not be implied. The Supreme Court's decision in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991), further demonstrates the Court's adherence to this fundamental principle of sovereignty (holding that a counterclaim by a tribe in a suit filed by a state is not a waiver of tribal immunity).

Similarly, abrogation of tribal sovereign immunity by Congress must be unequivocal, and cannot be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. Testan*, 424 U.S. 392, 399 (1976); *Turner v. United States*, *supra* at 399. The Supreme Court further insists that ambiguities in the statutory abrogation by Congress of tribal sovereign

immunity must be resolved in favor of the tribe. *South Dakota v. Bourland,* 508 U.S. 679, 687 (1993). Application of these principles to the State's Amended Complaint result in the unavoidable conclusion that Bay Mills' sovereign immunity has been neither waived nor abrogated and dismissal of this case is required.

B. Bay Mills Has Not Waived Its Sovereign Immunity by Tribal Ordinance or by Agreement; Allegations to the Contrary Relying on Tribal Law Should Be Considered by the Tribal Court in the First Instance.

1. The Gaming Ordinance Does Not Waive Sovereign Immunity.

The Bay Mills Indian Community's Gaming Ordinance does not waive Bay Mills' sovereign immunity.[1] Instead, the Gaming Ordinance expressly preserves tribal sovereign immunity. Section 4.8 could not be more clear on this subject:

> **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. [emphasis added]

ECF No. 74, Ex. C, p.13. This provision not only preserves the Tribe's sovereign immunity, but also clearly controverts the State's contention [¶34 of Amended Complaint] that any alleged waiver of the sovereign immunity of the Bay Mills Gaming Commission ("the Commission") extends to the Tribe. As is noted in Section 4.8 above, "[n]othing in this

[1] As is discussed in Section I(B)(3) of this Brief, this Court should defer on the grounds of comity to the Bay Mills Indian Community Tribal Court for a determination as to the meaning of the Gaming Ordinance.

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..."[emphasis added]

2. The Tribal-State Compact Does Not Waive Tribal Sovereign Immunity.

The Tribal-State Compact between the State and Bay Mills does not contain any provision which can be plausibly interpreted as a waiver of tribal sovereign immunity. Instead, the Compact clearly preserves the sovereign immunity of both parties; it provides in relevant part: "Nothing in this Compact shall be deemed a waiver of the Tribe's sovereign immunity. Nothing in this Compact shall be deemed a waiver of the State's sovereign immunity." ECF No. 74, Ex. A, §7(B).

3. This Claim Should be Dismissed under the "Tribal Exhaustion Rule."

Despite the plain language of the Gaming Ordinance, the State now claims that Bay Mills has waived its sovereign immunity through enactment of its Gaming Ordinance. ECF No. 74, *supra*, Ex. C. In addition to being plainly wrong, the State has taken this argument to the wrong court. This claim by the State is founded solely on the construction and interpretation of the Gaming Ordinance, enacted by the sovereign authority of the Bay Mills Indian Community, and is thereby subject to the "tribal exhaustion rule" established in *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987). This binding precedent requires federal and state courts to abstain from hearing claims that Indian tribes have exceeded their civil regulatory or adjudicatory authority until the plaintiff has first exhausted such claims in tribal court. Abstention is required whether or not a proceeding is pending in the tribal court concerning the same subject matter. See, *e.g.*, *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994); *Crawford v. Genuine Parts Co.*, 947 F.2d 1405 (9th Cir. 1991); *Ninigret Dev. Corp. v.*

Narragansett Indian Wetuomuck Housing Authority, 207 F.2d 21 (1st Cir. 2000*); Smith v. Moffett*, 947 F.2d 442 (10th Cir. 1991).

The tribal exhaustion doctrine is a principle of comity, which requires federal courts to dismiss, or abstain from deciding, cases in which a party asserts that a tribal forum possesses concurrent jurisdiction. Deference is required, because "[a]djudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." *Iowa Mutual Ins. Co. v. LaPlante, supra* at 16.

As a result, federal courts defer to tribal courts' interpretation of tribal law, and review its factual findings under a clearly erroneous standard. See, *e.g., Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004) (tribal court's holding that no benefit plans created requires deference); *Stock West Corp. v. Taylor (Stock West II)*, 964 F.2d 912 (9th Cir. 1992) (tribal law establishing immunity from suit for officers and employees in performance of official duties must be first interpreted by the tribal courts); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994) (tribal court holding that it had personal jurisdiction over non-Indians under tribal constitution given deference).

Most significantly for this case, federal court deference is accorded to a tribal court determination as to the existence of a waiver of sovereign immunity by the Tribe pursuant to tribal law. *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 992 (8th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000*); Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994).

For these reasons, the State's claims concerning the meaning of the Gaming Ordinance provisions, including the purported waiver of tribal sovereign immunity, should be dismissed on comity grounds for failure to exhaust remedies in Tribal Court.

C. Bay Mills' Sovereign Immunity Is Not Waived Simply By Engaging In Gaming Under IGRA.

The State cites IGRA as providing both an abrogation of Bay Mills' sovereign immunity and the "federal question" basis for this Court's jurisdiction under 28 U.S.C. §1331.[2] Under the circumstances recited in the State's Amended Complaint, IGRA does not provide a basis for this Court's jurisdiction.

Due to the procedural history in this case, the analysis of the existence and scope of governmental immunity and federal court jurisdiction must begin with this Court's initial review of jurisdiction. In the context of evaluating Bay Mills' motion for stay (ECF No. 40), this Court turned to the Tenth Circuit's decision in *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385-86 (10th Cir. 1997) and suggested that Bay Mills has waived its immunity simply by engaging in gaming. ECF No. 45, *supra*, at 4-5. Any assertion that tribal sovereign immunity is allegedly waived[3] by the Tribe's engagement in gaming under IGRA, however, must satisfy the strict and long-standing standards for waiver of tribal immunity discussed above–any such waiver must be express and unequivocal. *Mescalero* ignored those standards and mistakenly held that where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought, tribal sovereign immunity is waived. Such a pronouncement misstates

[2] This Court has correctly acknowledged that 28 U.S.C. §1331 alone does not constitute abrogation of tribal sovereign immunity from unconsented suit. ECF No. 45, *Order*, pp. 3-4. See *e.g. Keweenaw Bay Indian Community v. State of Michigan*, 11 F.3d 1341 (6th Cir. 1993) (dismissal affirmed of case brought by an Indian tribe under 28 U.S.C. §1362 for failure to join two other tribes under Fed. R. Civ. P. 19(b) as 28 U.S.C. §1362 did not waive their sovereign immunity); *Memphis Biofuels, L.L.C. v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 922 (6th Cir. 2009) (holding that the potential existence of federal question jurisdiction under 28 U.S.C. §1331 alone does not abrogate a tribe's immunity), citing *Miner Electric, Inc. v. Muscogee (Creek) Nation*, 404 F.3d 1007, 1011 (10th Cir. 2007).

[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).

well-established law and precedent of the Supreme Court on this issue, and for this reason, has been rejected by other circuits. This Court should reject it as well.

Mescalero discusses three separate grounds for asserting jurisdiction over an Indian tribe. First, *Mescalero* found that Congress broadly abrogated tribal sovereign immunity from suits that seek declaratory or injunctive relief for alleged tribal violations of IGRA. Second, *Mescalero* found that a tribe, by electing to engage in gaming under IGRA, waived its immunity from a suit to require compliance with IGRA's provisions. Third, *Mescalero* found that tribal sovereign immunity does not extend to actions seeking prospective equitable relief. None of these grounds presents a tenable argument under the tribal sovereign immunity rules established by the U.S Supreme Court.

The Eleventh Circuit addressed all three of *Mescalero's* theories in a suit brought against an Indian tribe by the State of Florida for engaging in Class III gaming without first entering into a Class III Compact as IGRA requires. *Seminole Tribe* at 1241, 1242. The court in *Seminole Tribe* reviewed closely, then rejected *Mescalero*'s first rationale, observing that IGRA's abrogation contains specific elements and is limited to claims to enjoin a Class III gaming activity located on Indian lands and conducted in violation of a tribal-state gaming compact, holding that absent a compact with the Tribe, IGRA is not an abrogation of the Tribe's immunity from the State's suit. *Seminole Tribe* at 1242. The Eleventh Circuit carefully considered, and then rejected, the State's argument that *Mescalero* should be followed, observing that the holding in *Mescalero* was "difficult to credit". Specifically, the Eleventh Circuit noted that 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 Eleventh Circuit then considered the second premise of *Mescalero,* that a tribe voluntarily waives its own sovereign immunity simply by engaging in gaming under IGRA. The Eleventh Circuit correctly concluded that "[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. The court in *Seminole Tribe* went on to hold that the tribe did not expressly and unequivocally waive its immunity by electing to engage in gaming under IGRA.

Finally, the Eleventh Circuit closely examined and then rejected the third premise of the *Mescalero* decision that sovereign immunity does not apply when prospective equitable relief is the only remedy. The court succinctly and correctly concluded that "it is not the law." *Seminole Tribe, supra* at 1244. See, e.g., *Santa Clara Pueblo v. Martinez, supra,* (upholding tribal sovereign immunity from suit under the Indian Civil Rights Act, 25 U.S.C. §1301, *et seq.*, in which plaintiff sought only declaratory and injunctive relief).

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 allegations regarding violations of IGRA provisions regarding gaming revenue use by a tribe cannot be remedied by direct action). *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 IGRA claims which 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 its 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 lesson taught by these cases is that 25 U.S.C. §2710(d)(7)(A)(ii) does not automatically abrogate tribal sovereign immunity or confer jurisdiction on a federal court simply because a complaint cites that particular statutory provision; tribal sovereign immunity is abrogated only when the plaintiff actually asserts claims containing all of the necessary elements which are expressly within the terms of 25 U.S.C. §2710(d)(7)(A)(ii). Any suggestion to the contrary – that any alleged violation of IGRA by an Indian tribe is adequate grounds for the district court's exercise of jurisdiction – misstates well established Supreme Court precedent and should be rejected by this Court.

II. THE ALLEGATIONS SET FORTH IN THE STATE'S AMENDED COMPLAINT DO NOT PROVIDE THIS COURT WITH A BASIS FOR JURISDICTION UNDER IGRA.

[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.

The only section of IGRA that arguably contains an express abrogation of tribal sovereign immunity and provides this Court with jurisdiction is 25 U.S.C. §2710(d)(7)(A)(ii), which reads in pertinent part:

> [T]he 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 . . .(emphasis added).

This provision delineates the specific conditions under which suit may be brought under IGRA against an Indian tribe in specific gaming-related disputes, all of which must be met for a federal court to have jurisdiction and there to be some possibility of an abrogation of sovereign immunity: (1) the claim for relief must be founded on the conduct of gaming by an Indian tribe on its "Indian lands" (a term defined in IGRA at 25 U.S.C. §2703(4)),[5] and (2) the gaming activity at issue is conducted in violation of a tribal-state compact. As a Court's jurisdiction must be ascertained on the face of the complaint, any plaintiff seeking to bring suit against an Indian Tribe under 25 U.S.C. §2710(d)(7)(A)(ii) must therefore claim that the defendant tribe is conducting Class III gaming and that the gaming is on Indian land and that such gaming violates an existing Class III gaming compact with the State. See, *Match-e-be-nash-she-wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616 (6th Cir. 2002) (holding that claims invoking IGRA's abrogation of governmental sovereign immunity are limited to, and dependent on, the

[5] "The term "Indian lands" means—

(A) all lands within the limits of any Indian reservation; and

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

existence of each legal and factual IGRA prerequisite, and particularly the existence of Indian Lands).

Similar to the requirements of 25 U.S.C. §2710(d)(7)(A)(ii), the court in *Match-e-be-nash-she-wish Band of Pottawatomi Indians v. Engler, supra,* addressed the related abrogation provisions under 25 U.S.C. §2710(d)(7)(A)(i), permitting a tribe to sue a state for failing to negotiate a Class III gaming compact in good faith. In that case, then-Governor Engler claimed that the plaintiff tribe could not abrogate the State's immunity and bring suit to compel good faith negotiation of a compact, since it had no "Indian land" in the State. The Sixth Circuit agreed, holding that suit cannot be initiated by an Indian tribe under 25 U.S.C. §2710(d)(7)(A)(i) unless the tribe has "Indian lands" as defined in IGRA and on which it operates or contemplates operating a gaming facility and that the existence of Indian Lands is a condition precedent to federal jurisdiction. *Match-e-be-nash-she-wish Band, supra* at 618, citing 25 U.S.C. §2710(d)(3)(A)[6].

In contrast, the State in this case claims that the property here at issue is not "Indian land", ECF No. 74, *passim,* thereby expressly disavowing the existence of the very element necessary to invoke the tribal sovereign immunity abrogation. By its own pleadings, the State has failed to properly plead a cause of action under the requisite provisions of IGRA, 25 U.S.C. §2710(d)(7)(A)(ii). For this reason, the State cannot rely upon that section of IGRA to abrogate Bay Mills' sovereign immunity. The State's invocation of the section is flatly contradicted by

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

the contents of the State's own pleadings. It is the legal version of "having your cake and eating it, too."

Instead of adhering to the rule in *Match-e-be-nash-she-wish*, the Court in this case has opted to rely upon an opinion issued in *Bay Mills Indian Community, et al. v. Little Traverse Bay Bands of Odawa Indians*, No. 5:99-cv-88-RHB (W.D. Mich. 1999) (*Bay Mills I*) calling it a "remarkably similar situation involving these same two parties" and finding that the resulting opinion confirms "jurisdiction over a suit where the allegation is that the gaming operation is not on Indian land." ECF No. 45, *supra*, p. 4. While *Bay Mills I* and this case are superficially similar, the facts relevant to the determination of subject matter jurisdiction and the application of §2710(d)(7)(A)(ii) in these cases are materially different.

Bay Mills I involved litigation resulting from the opening by LTBB of a Class III gaming facility on land it owned in fee simple in Petoskey, Michigan. The Sault Sainte Marie Tribe of Chippewa Indians and Bay Mills were the plaintiffs in that action and LTBB was the defendant. In defending its casino, LTBB asserted that the land was "Indian land" as defined in 25 U.S.C. §2703(4) of IGRA, because of the land's location on LTBB's historic reservation. However, LTBB failed to take into account that gaming on the property violated its Class III Compact because the Compact required that its gaming be limited to a much narrower category than "Indian land"; it had to occur on "eligible Indian lands" (defined as trust and reservation lands acquired under 25 U.S.C. §1300k-4(a)). This narrower definition of land eligible for gaming under its compact meant that LTBB was only permitted to game on its trust land. ECF No. 4, *Brief in Support of Motion for Preliminary Injunction*, Ex. 7, *Opinion [Bay Mills I]*, p. 3.

Unlike the case at bar, in *Bay Mills I* the dispute was not whether the LTBB property met the IGRA definition, but whether the property was eligible for gaming under the LTBB

compact.[7] In *Bay Mills I*, subject matter jurisdiction therefore existed under 25 U.S.C. §2710(d)(7)(A)(ii) to determine whether the gaming on that particular parcel violated the Tribal-State compact because the parcel was acknowledged "Indian land." ECF No. 4, *supra*, Ex. 7, at 8. In contrast to the LTTB compact in *Bay Mills I*, the Compact between Bay Mills and the State in this case contains a definition of "Indian lands" virtually identical to that contained in IGRA, 25 U.S.C. §2703(4). ECF No. 52, *First Amended Complaint*, Ex. A, at 3. Because there is no difference between the IGRA definition of "Indian lands" and that contained in the Bay Mills compact, the State's assertion in this case that the Vanderbilt Parcel is not "Indian lands" directly conflicts with the requirement of §2710(d)(7)(A)(ii) that the claim for relief must be founded on the conduct of gaming by an Indian tribe on its "Indian lands." Denial of "Indian land" status forecloses the State from relying on this provision as a basis for abrogating tribal sovereign immunity.

All of the prerequisites for jurisdiction and abrogation of tribal sovereign immunity from suit under 25 U.S.C. §2710(d)(7)(A)(ii) were met in *Bay Mills I.* The property, although "Indian land" under IGRA, could not be used by LTBB for the conduct of gaming because that activity on land not in trust violated LTBB's gaming compact with the State. By contrast, in this case there exists no definitional gap within which this Court can assert jurisdiction to adjudicate the

[7] Though the initial complaint in *Bay Mills I* asserted that the land on which LTBB has opened its casino was not Indian Lands under IGRA, the plaintiffs later acknowledged that the property could be considered "Indian lands" under IGRA, but argued that it was nonetheless ineligible for gaming under LTBB's compact due to its fee simple, not trust status. (See *Bay Mills I, Plaintiffs' Supplemental Brief in Support of Motion for Preliminary Injunction,* p. 3 [Exhibit A], and August 31, 1999, *Plaintiffs'/Appellees Reply to LTBB's Emergency Application for a Stay Preliminary Injunction* in *Bay Mills Indian Community, et al. v. Little Traverse Bay Bands of Odawa Indians, et al.*, Court of Appeals No. 99-1962 (6th Cir.) (*Bay Mills II*) [Exhibit B] at 3-5.)

existence of a compact violation, without acknowledgement by the State that the Vanderbilt Parcel in question is "Indian land" under IGRA.

However, the State adamantly controverts the status of the property in this case as "Indian land". *See* ECF No. 74 ¶¶38, 54 and 63. Accepting all allegations in the Amended Complaint as true for purposes of considering the Rule 12(b)(1) motion to dismiss, the land in question cannot be considered "Indian land." As a result, the State does not and cannot satisfy its burden of establishing the prerequisites of jurisdiction under 25 U.S.C. § 2710(d)(7)(A)(ii). This Court therefore does not have jurisdiction under this provision of IGRA and this case must be dismissed.

III. 28 U.S.C. §1367 DOES NOT ABROGATE BMIC'S SOVEREIGN IMMUNITY FROM SUIT BY THE STATE, NOR DOES IT SUPPLY A JURISDICTIONAL BASIS.

The State also argues that this Court has jurisdiction under the supplemental jurisdiction provisions of 28 U.S.C. §1367 to consider alleged violations of state gambling and nuisance law. The State is wrong. The law in this Circuit is clear; the district court must have an independent basis for jurisdiction for this case under Title 28 of the United States Code in order to be able to assert supplemental jurisdiction under §1367. *Peacock v. Thomas*, 516 U.S. 349, 354-55(1996); *Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); *Phelps v. Nationwide Ins. Co.*, 37 Fed. Appx. 752, 2002 WL 1334757, p.2 (6th Cir. 2002). As has been discussed throughout, no independent basis for jurisdiction exists, as tribal sovereign immunity precludes the exercise of jurisdiction. Moreover, even assuming for the sake of this discussion that there exists adequate and valid legal grounds for the exercise of original jurisdiction, tribal sovereign immunity precludes consideration of the state law claims that are proffered under §1367. See, *e.g.*, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma, supra*; *United States v. United States Fidelity & Guaranty Co., supra*. Section 1367 has never been construed as a waiver of sovereign

immunity, for good reason. This provision does not contain the clear and unequivocal language which can be read as an abrogation of sovereign immunity. In fact, courts which have considered the issue have unanimously concluded that §1367 is not a waiver of sovereign immunity. *San Juan Co. Utah v. United States*, 503 F.3d 1163, 1181 (10th Cir. 2007); *Dunn & Black v. United States*, 403 F.3d 1084, 1088, n.3 (9th Cir. 2007); *United States v. Certain Land Situated in the City of Detroit*, 361 F.3d 305, 307 (6th Cir. 2004); *Boritz v. United States*, 685 F. Supp.2d 113, 122, n.4 (D. D.C. 2010).

IV. ALLEGATIONS OF JURISDICTION UNDER THE DECLARATORY JUDGMENT ACT, 28 U.S.C. §2201, DO NOT CREATE AN INDEPENDENT BASIS FOR FEDERAL SUBJECT MATTER JURISDICTION.

As the plain language of the statute makes clear, §2201 is not an independent ground for jurisdiction. It merely provides a remedy in equity for causes of action properly filed in federal court. Section 2201 reads in pertinent part:

> (a) In a case of actual controversy within its jurisdiction, except...any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. [emphasis added]

Since its 1950 decision in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), the Supreme Court has consistently held that §2201 does not create an independent ground for jurisdiction. As Justice Felix Frankfurter explained:

> The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked. But the requirements of jurisdiction—the limited subject matters which alone Congress had authorized the District Courts to adjudicate—were not impliedly repealed or modified.

Skelly Oil Co., at 671-672. The Sixth Circuit has also had occasion to reach the same conclusion. See, *e.g.*, *Davis v. United States*, 499 F.3d 590, 594 (6th Cir. 2007); *Toledo v.*

Jackson, 485 F.3d 836, 839 (6th Cir. 2007*); Heydon v. Mediaone of Southeast Michigan, Inc.*, 327 F.3d 466, 470 (6th Cir. 2003); *King v. Sloane*, 545 F.2d 7, 8 (6th Cir. 1976).

V. THE PROVISIONS OF 25 U.S.C. §2719 ARE INAPPLICABLE TO THIS CASE.

The State proffers 25 U.S.C. §2719 of IGRA as an alternate ground for subject matter jurisdiction. The State thus seeks to preserve this Court's jurisdiction over the controversy surrounding the status of the Vanderbilt Parcel by alleging that even if the parcel does constitute "Indian land", the conduct of gaming thereon is proscribed by a separate section of IGRA -- 25 U.S.C. §2719. ECF No. 74, ¶66. The State further alleges that both Bay Mills' compact with the State of Michigan and tribal law require that all gaming be conducted in compliance with IGRA, thereby placing this claim within the congressional abrogation of tribal sovereign immunity set forth in 25 U.S.C. §2710(d)(7)(A)(ii). ECF No.74, ¶¶38, 39, 55. The State's reliance on 25 U.S.C. §2719 to salvage jurisdiction is misplaced and without merit.

Section 2719 of IGRA provides 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. 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, applies only to land taken into trust by the United States after that date. 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. Following the issuance of the regulations, then-Solicitor David Bernhardt issued a memorandum opinion further explaining the Department's interpretation of §2719 in the Part

292 regulations. Solicitor M-Opinion M-037023, dated January 18, 2009. ECF No. 4, *supra*, Ex. 9.[8]

The NIGC concurred in the Department's analysis and conclusion that Section 2719 applies only to trust lands when it approved the Seneca Nation of Indians' Class III Gaming Ordinance. ECF No. 4, *supra*, 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. As the Department's rule-making decision is based on notice and opportunity for public comment, it 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.

It is undisputed in this case that the Vanderbilt Parcel is not held in trust for the benefit of Bay Mills. There does not exist, therefore, any basis upon which the State can rely on 25 U.S.C. §2719 for its assertion that the Vanderbilt parcel is ineligible for gaming under IGRA. [9]

VI. THE ENTIRE ACTION MUST BE DISMISSED UNDER RULE 19 SINCE BAY MILLS IS A NECESSARY PARTY THAT CANNOT BE JOINED BECAUSE OF ITS SOVEREIGN IMMUNITY.

Bay Mills supports the arguments contained in the motions to dismiss under Fed.R.Civ.P. 19(b) filed respectively by the individual members of the Bay Mills Indian Community Executive Council, ("Council Members") and the Bay Mills Indian Community Gaming Commission and its individual members ("Gaming Commission"). Bay Mills has

[8](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.)

[9] As all allegations contained in a complaint are accepted as true for purposes of determining a motion to dismiss under Fed.R.Civ.P. 12(c), Bay Mills does not controvert them, but limits its position solely to the Court's determination of this motion.

demonstrated that the Court should dismiss Bay Mills from this case based on its sovereign immunity. In so doing, the Court should find that dismissal of Bay Mills alone is dispositive of the entire case—no matter how many defendants the State may try to add in an effort to obscure the fact that its claims are against Bay Mills.

Continuing the case without Bay Mills poses a threat to Bay Mills' well-established legal interest in interpretation and application of its rights and obligations under the Compact and the conduct of its gaming operations. These interests are substantial, and so is the prejudice that Bay Mills will suffer if the claims are litigated in its absence—after all, the Compact is a contract between Bay Mills and the State. *Taxpayers of Michigan Against Casinos v. Michigan*, 471 Mich. 306, 324 (2004); *Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 484-85 (9th Cir.1998); *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1556 (10th Cir.1997); *Friends of Amador County v. Salazar*, No. Civ. 2:10-348 at 7 (E.D. Cal. Oct. 4, 2011) (tribes have substantial gaming-related interests that would be impaired by actions seeking to enjoin Class III gaming activity). Because Bay Mills has "an interest relating to the subject of the action" which could be impaired or impeded if the claim is decided in its absence, Bay Mills is a required party under Federal Rule of Civil Procedure 19. When an Indian tribe is a required party, and has not waived its sovereign immunity, the entire action must be dismissed—especially when the action touches on agreements that the tribe itself has entered into, as this case does. *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1348 (6th Cir. Mich. 1993) (concerning interpretation and application of a treaty); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1156-1157 (9th Cir. 2002) (concerning a claim impacting a tribe's lease rights).[10]

[10] Rule 19 was amended in 2007, and the word "necessary" was replaced by

Bay Mills obviously has a significant interest in agreements that it negotiates—especially in situations like this one where the agreement is a Compact entered for the purpose of generating revenue for strong and self-sufficient tribal government and for the general welfare of Bay Mills and its members. ECF No. 74, Ex. A, *supra*, §1(D), (E); *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542, 547 (2d. Cir. 1991). Indeed, "no procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975); see also *Fluent*, 928 F.2d at 547; *Friends of Amador County*, No. Civ. 2:10-348 at 8. An action to interpret or enforce the Compact is so prejudicial to the rights of a signatory tribe that the action must be dismissed unless the tribe can be made a party to the action. *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1156-1157 (9th Cir. Ariz. 2002) (citing *Lomayaktewa v. Hathaway*, *supra*, at 1325; *McClendon v. United States*, 885 F.2d 627, 633 (9th Cir. 1989) (a tribe that was party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation on the contract); *see also Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 552-53 (4th Cir. 2006) (when the relief sought would prejudice a tribe's economic interests and contractual relations, the entire action should be dismissed). Bay Mills is a necessary party to any litigation that would interpret or construe the terms of the Compact.

Furthermore, tribal sovereign immunity eliminates the need for further analysis under Rule 19, because it resolves the issue in favor of dismissal: "when an indispensable party is

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"required" and the word "indispensable" was removed. The changes were intended to be "stylistic only" and "the substance and operation of the Rule both pre- and post-2007 are unchanged." *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008). The cases cited from before the amendment use the "necessary and indispensable" terminology.

immune from suit" the Rule 19 analysis is effectively over because "immunity may be viewed as one of those interests compelling by themselves." *Fluent*, 928 F.2d at 548 (citing *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (quoting *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 252 U.S. App. D.C. 140, 788 F.2d 765, 777 n. 13 (D.C. Cir. 1986) (quoting 3A Moore's Federal Practice ¶19.15, at 19-266 n. 6 (1984))); *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119, 19 L. Ed. 2d 936, 88 S. Ct. 733 (1968)); *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991); *Dawavendewa*, 276 F.3d at 1162.[11] The Amended Complaint is aimed at determining the legality of Bay Mills' gaming operations and Bay Mills' rights under the Compact. That question cannot be decided unless Bay Mills is a party.[12] *Friends of Amador County*, No. Civ. 2:10-348 at 8. The fact that a tribe's status as an indispensable party may leave a plaintiff without any forum for seeking relief does not change this result: "lack of an alternative forum does not automatically prevent dismissal of a suit." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990); see also *Chehalis*, 928 F.2d at 1500 (plaintiff's suit dismissed

[11] In any event, other factors that could be considered under Rule 19(b) weigh in favor of dismissal. The State is seeking an order that would prejudice Bay Mills' rights under the Compact—that resulting prejudice would be severe, as described above, and would be unavoidable if the State gets the relief it seeks. Rule 19(b)(1); (2).

[12] The public rights exception to Rule 19 does not change the result. There are two requirements to the public rights exception: First, "the litigation must transcend the private interests of the litigants and seek to vindicate a public right." *Wilbur v. Locke*, 423 F.3d 1101, 1115 (9th Cir. 2005). Second, "although the litigation may adversely affect the absent parties' interests, the litigation must not destroy the legal entitlements of the absent parties." *Id.*, (citing *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988); *Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992) ("The public rights exception to joinder rules is an acceptable intrusion upon the rights of absent parties only insofar as the adjudication does not destroy the legal entitlements of the absent parties")). Here, the State's claims seek to destroy Bay Mills' legal entitlements to conduct gaming activity on its land. *Friends of Amador County*, No. Civ. 2:10-348 at 8 (dismissing claims under Rule 19 because tribe could not be joined and the action would injure the tribe's interests, "including its right under federal law to engage in class III gaming.")

despite lack of alternative forum for plaintiff tribe to bring action for injunctive relief against the Secretary).

The Supreme Court has recognized that dismissal is the appropriate outcome in a case involving the sovereign interests of a government in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). In *Coeur d'Alene*, the Coeur d'Alene Tribe claimed exclusive use and ownership of the bottomlands underlying Lake Coeur d'Alene in a suit against the State of Idaho, several state agencies, and numerous state officials in their official capacities; the tribe sought a declaration acknowledging its exclusive use and occupancy of the bottomlands as well as a declaration that all Idaho laws which purport to regulate, authorize use, or affect in any way the submerged lands are invalid as applied. The Supreme Court termed these claims as "close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe" if the Tribe prevailed. *Coeur d'Alene* at 282. The Court noted that the State's "special sovereignty interests" are implicated:

> This is especially troubling when coupled with the far-reaching and invasive relief the Tribe seeks, relief with consequences going well beyond the typical stakes in a real property quiet title action. The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands. [emphasis added]

Id. The Court therefore declared that these special sovereign interests of the State barred the Tribe's suit under the Eleventh Amendment and precluded application of *Ex parte Young*, 209 U.S.123 (1908) doctrine. See *Arnett v. Myers*, 281 F.3d 552, 568 (6th Cir. 2002) (quoting *Coeur*

d'Alene and refining the jurisdictional considerations affecting the application of the *Ex parte Young* doctrine); see also *Hamilton v. Myers*, 281 F.3d 520, 528 (6th Cir. 2002).

The same considerations apply to the Tribe's interests in the Vanderbilt Parcel which it acquired with interest from the Land Trust fund, "to be held as Indian lands are held", established under §107(a)(3) of MILCSA. The gravamen of the State's allegations in its Amended Complaint is that the property is not subject to the Tribe's governmental authority and is not "Indian land." Certainly these allegations directly challenge the applicability of Bay Mills' jurisdiction and regulatory authority to the Vanderbilt Parcel in the same manner as Idaho's jurisdiction was challenged in *Coeur d'Alene*. Such assertions clearly implicate much more than "the typical stakes in a real property quiet title action", but instead would bar the Tribe from the exercise of its governmental power over its land. Just as in *Coeur d'Alene*, any suggestion that Bay Mills sovereign interests are not plainly offended by the State of Michigan's requested relief, ignores reality.

CONCLUSION

For the reasons set forth above, Bay Mills requests that this case be dismissed with prejudice.

Respectfully submitted,

BAY MILLS INDIAN COMMUNITY

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 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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