UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN,
Plaintiff,

v.

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, AARON PAYMENT, CHAIRMAN in his official capacity, LANA CAUSELY, VICE CHAIRWOMAN, in her official capacity, CATHY ABRAMSON, SECRETARY in her official capacity, KEITH MASSAWAY, TREASURER in his official capacity, DENNIS MCKELVIE, DIRECTOR in his official capacity, JENNIFER MCLEOD, DIRECTOR, in her official capacity, DEBRA ANN PINE, DIRECTOR, in her official capacity, D.J. MALLOY, DIRECTOR, in her official capacity, CATHERINE HOLLOWELL, DIRECTOR, in her official capacity, DARCY MORROW, DIRECTOR, in her official capacity, DENISE CHASE, DIRECTOR, in her official capacity, BRIDGETT SORENSON, DIRECTOR, in her official capacity and JOAN ANDERSON, DIRECTOR, in her official capacity,
Defendants.

NO. 1:12-CV-962

HON.

MAG.

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BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

(ORAL ARGUMENT REQUESTED)

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INTRODUCTION

The Sault Ste. Marie Tribe of Chippewa Indians (Sault Tribe or Tribe) has its reservation and offices in Chippewa County in the Upper Peninsula. In 1993, the Tribe entered into a compact with the State of Michigan (State) to operate casinos in the Upper Peninsula. In § 9 of the Compact, the Tribe agreed that "An application to take [off-reservation] land in trust for gaming purposes . . . shall not be submitted to the Secretary of the Interior" until the Sault Tribe had reached agreement with the State's other tribes "to share in the revenue" of that casino. To the best of the State's knowledge, no such revenue sharing agreement exists, yet the Sault Tribe has recently been quoted in numerous media reports and has stated on its web page that it has entered into an agreement with the City of Lansing to buy from the City property located in Lansing for the purpose of building and operating a casino on that property. This agreement is on the City and the Tribe's web page. The Tribe has also made it clear that it will apply to the United States Department of the Interior (Interior) to have that land taken into trust for the purpose of casino gaming. There is no question that a casino in Lansing would be "off-reservation."

Based on these indisputable facts, it is clear that the Tribe is about to breach its compact with the State. Federal law gives this Court jurisdiction to enter an injunction to enjoin a tribe from violating such a compact where casino gaming is involved. For these reasons, as discussed in detail below, the State is respectfully asking that just such an injunction be entered prohibiting Defendants from applying in violation of the compact to have the property in Lansing taken into trust, at least until the Tribe complies with the compact requirement that it obtain

an agreement from the other tribes to share the revenues from any casino built on such property.

STATEMENT OF FACTS

On or about August 20, 1993, the State and the Tribe entered into a tribal-state gaming compact ("the Compact"). The Compact generally establishes the rights and responsibilities of the parties concerning the operation of Class III gaming[1] by the Tribe in the State of Michigan. A true and correct copy of the Compact is attached as Exhibit A. Pursuant to the Compact, the Tribe has conducted Class III gaming in one or more casinos it operates on Indian lands in the Upper Peninsula of Michigan, where the Tribe's headquarters and reservation are located.

Section 9 of the Compact states:

> **Off-Reservation Gaming.**
>
> An application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application.

On or about January 24, 2012, the Sault Tribe Board of Directors approved Resolution 2012-11 which stated that the Tribe intended to open a casino in the City of Lansing (City) on land that is not part of the Tribe's reservation. Exhibit B. To that end, the Tribe and the City executed a Comprehensive Development Agreement (CDA) in which they agreed that the City and/or the Lansing Economic Development Commission (LEDC) will sell and the Tribe will buy certain parcels of property in the City on which the Tribe will build and operate two casinos (Casino

[1] Class III gaming is essentially casino-style gambling. See 25 U.S.C. § 2703(8).

property), citing the Tribe's alleged authority to do so under federal law. Copy of CDA, dated January 23, 2012, attached as Exhibit C. Nowhere in the CDA does it indicate that the Tribe intends to share revenues from the Lansing casino with any other federally recognized Indian tribe, as required by § 9 of the Compact. In fact, a web page maintained by the Tribe strongly suggests that the Tribe does not intend to share revenues with any other tribes.[2]

It appears that no Casino property has yet been purchased by the Sault Tribe, but the CDA indicates that the first such purchase will occur no later than August 1, 2012, Exhibit C, § 2.2, a date that was recently extended by 90 days.[3] Once the Casino property is purchased, the Sault Tribe will seek to have title to the Casino property taken into trust by the United States for the benefit of the Tribe. The Tribe has clearly announced this intention on its web page:

> The project will be built on City of Lansing-owned land to be purchased by the Sault Tribe. The Tribe *will file an application with the U.S. Department of the Interior to take the land into trust* as tribal lands under a specific provision of the federal Land Claims Act that gives only the Sault Tribe the legal right to the process. The Tribe's intent is to open the casino after receiving federal approval. Exhibit E, p.2
>
> * * *
>
> Said Sault Tribe Chairperson Aaron Payment: "My job is to protect the best interests of my tribal membership, which in the case of this project means making sure all necessary project details are settled before *we file our trust land application*. We knew the initial deadline we set of Aug. 1 was aggressive given all the work that must be done to file a solid and comprehensive *application* with the federal government *to take this land into trust*. (emphasis added) Exhibit E, p.1.

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[2] *See*, http://lansingkewadin.wordpress.com/ (accessed 9/04/2012, printout attached as Exhibit E).

[3] See Exhibit E, p. 1.

The CDA allows the Tribe five years after it begins "the application process" to make this happen. Exhibit C, §4.8(b)(i) and (iii).

Representatives of the State first learned of the proposed Lansing casino through media reports. After gathering as much information as it could, the State sent a letter on February 7, 2012 to the Tribe warning it that the operation of Class III gaming at a casino in Lansing would be unlawful. A true and correct copy of this letter is attached as Exhibit D.

Despite this warning, Defendants are continuing with their plans for the Sault Tribe to purchase land in the City on which to operate a casino, and to have that land taken into trust by the United States for the benefit of the Tribe. Given the contractual requirement in the CDA to purchase the Casino property, or a part of it, by no later than November 1, 2012, the State believes that the Tribe will submit an application to have the purchased land taken into trust in the very near future.

ARGUMENT

I. To maintain the status quo, the Court should enter a preliminary injunction prohibiting the Tribe from applying to have the Casino property taken into trust in violation of § 9 of the Compact.

A. The Court should not apply the traditional injunction factors where, as here, a statute expressly provides for an injunction remedy.

Where a statute expressly contemplates the remedy of injunction, if the statutory prerequisites to entry have been established, some courts, including the U.S. Court of Appeals for the Sixth Circuit, have held that there is no need for the court to conduct a traditional four-factor preliminary injunction analysis before entering the injunction. See, *CSX Transp., Inc. v. Tennessee State Bd. of Equalization*, 964 F.2d 548, 551 (6th Cir. 1992) ("However, since Congress has expressly authorized the granting of injunctive relief to halt or prevent a violation of § 11503, traditional equitable criteria do not govern the issuance of preliminary injunctions under § 11503."); *United States v. Estate Preservation Servs.*, 202 F.3d 1093, 1098 (9th Cir. 2000) ("The traditional requirements for equitable relief need not be satisfied since Section 7408 expressly authorizes the issuance of an injunction.") Because the federal statute at issue in this case provides for injunctive relief, the equitable factors should not be analyzed before entry of the injunction.

1. IGRA expressly provides for an injunction remedy for gaming activity that violates a compact

Just as with the statutes enforced in *CSX Transp.* and *Estate Preservation Servs.*, 25 U.S.C. § 2710(d)(7)(b)(ii) authorizes the Court to enter an injunction when

certain prerequisites have been met. Under its express terms, an injunction will enter pursuant to IGRA where there is or will be 1) Class III gaming activity on Indian lands that is 2) conducted in violation of a compact. Specifically, 25 U.S.C. § 2710(d)(7)(b)(ii) states:

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

There is no suggestion in this statute that the court need balance equities to determine if an injunction is warranted, which makes sense since there is no traditional damages remedy available under IGRA. This is not a case where the court must determine whether entry of a damages award later is a sufficient remedy, such that there is no need to employ the equitable remedy. If a tribe is violating its compact on Indian lands, IGRA provides that an *injunction* should enter to remedy the violation.

If, despite IGRA's express injunction remedy, a court *could* weigh the equities and decide that an injunction was an inappropriate remedy, even where a breach has occurred, the state party to a compact will arguably be without any remedy whatsoever, and will be denied the benefit of the bargain struck in its compact, since IGRA does not allow money damages. And, because gaming in violation of a compact also violates IGRA, a state will also be without a remedy for these statutory violations. Under such an outcome, a tribe will have every incentive to

violate a compact and/or IGRA, and simply take its chances that a court will determine that there is no penalty for the violation based on the equitable factors.[4] If this is the law, few states will be inclined to negotiate compacts that they may not be able to enforce. This cannot have been the intention of Congress when it made the tribal-state compacts the "centerpiece"[5] of IGRA's regulatory scheme.

Thus, there is no need to balance the equitable injunction factors when a party seeks an injunction based on violations of a tribal-state compact as in the case at hand.

a. The State has established the prerequisites for entry of an injunction in this case.

i. The State seeks to enjoin Class III gaming activity.

There is little doubt that the Tribe will apply to Interior to have the Casino property taken into trust so it can conduct Class III gaming on the site. The Tribe has legally bound itself in the CDA to submit such an application forthwith. For example, in § 5.1.3 of the CDA, the parties agreed that "The City's obligation to close on the Tribe's acquisition of the Showcase Casino Parcel is contingent on satisfaction of the following: (a) The Tribe successfully transferring the Corner Parcel into trust and establishing its right to conduct gaming activities on both properties." See Exhibit C. Earlier in the CDA, the parties agreed that the Tribe

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[4] The worst case scenario for a tribe would be that it is enjoined from the illegal conduct.

[5] *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1031 (2d Cir. 1990); *N. Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1311-1312 (10th Cir. 2004)

had five years after "beginning the application process" to have the land taken into trust. Exhibit C, § 4.8(b)(i). The Tribe's web page also makes it clear that it intends to apply to Interior to have the Casino property taken into trust. "The Tribe will file an application with the U.S. Department of the Interior to take the land into trust . . ." Exhibit E, p. 2.

There can also be no dispute that the sole purpose for applying to Interior to have land in Lansing taken into trust is so that the Tribe can conduct Class III gaming at a casino there it intends to build, own and operate on Indian lands. The CDA makes this clear:

> Upon acquiring title to the real property owned by the City and the LEDC, the Tribe intends to take the necessary steps to establish its right to conduct tribal gaming on both parcels pursuant to Indian Gaming Regulatory Act, being 25 U.S.C., Section 2701 *et seq.* (Exhibit C, preamble ¶ G)
>
> * * *
>
> Once the Tribe establishes its right to conduct Indian gaming, the Tribe intends to construct a separate temporary Indian gaming casino on the Corner Parcel currently owned by the LEDC. Following commencement of Indian gaming operations in the temporary casino, the Tribe shall begin construction of a permanent casino (the "Showcase Casino Facility" as defined in Article 1 below) north of the Lansing Center on property currently owned by the City. (Exhibit C, preamble ¶ H).
>
> * * *
>
> The City's obligation to close on the Tribe's acquisition of the Showcase Casino Parcel is contingent on satisfaction of the following: (a) The Tribe successfully transferring the Corner Parcel into trust and establishing its right to conduct gaming activities on both properties. (Exhibit C, ¶ 5.1.3(a)).

Applying to have the Casino property placed in trust is an activity that is statutorily required before the Tribe can conduct Class III games on this site which

is not on its reservation. See, 25 U.S.C. § 2703(4). It is thus activity that can be enjoined pursuant to 25 U.S.C. § 2710(d)(7)(b)(ii).

ii. The Sault Tribe will breach the Compact when it applies to have the Casino property taken into trust

The prohibition in § 9 is crystal clear: the Tribe agreed not to 1) submit an application to take land into trust for gaming purposes pursuant to 25 U.S.C. § 2719 ("§ 20") unless it had first 2) agreed to share revenues from that gaming with the other federally recognized tribes in Michigan. As discussed above, the Tribe is committed to file an application with Interior to have the Casino property taken into trust.

The trust application will necessarily be "pursuant to" § 20 of IGRA. Since this land in Lansing would be taken into trust, if at all, after October 17, 1988,[6] § 20 prohibits Class III gaming on it unless the Tribe can come within one of the exceptions listed in subsection (b). So when the Tribe promised in the CDA that it will "establish it's right to conduct Tribal gaming on both parcels pursuant to [the] Indian Gaming Regulatory Act," it is referring to the § 20 prohibition and exceptions. For the Tribe to lawfully conduct Class III gaming at a casino in Lansing, it will have to establish that its project meets one of the exceptions in § 20. Thus, this application to take land into trust will clearly fall within the ambit of § 9 because it will be made "pursuant to § 20 of IGRA." Unless the Tribe has agreed to

[6] The State does not agree that the land is eligible to be taken into trust for gaming.

share the revenues from any casino on this property, the application will be a patent violation of the Compact.

iii. The State believes, based on the Tribe's public statements, that it does not intend to share revenues from the Lansing casino with other tribes as required by § 9.

While the Tribe has not expressly stated that it does not intend to obtain the necessary § 9 revenue sharing agreement, it is also true, based on the public record that the State has seen, that the Tribe has nowhere noted its intention to comply with § 9. Moreover, it is apparent from the CDA and the Tribe's web page, that it intends to keep all the profit from the casino, with the exception of a percentage it will share with its investor/developer Lansing Futures, LLC. For example, when the Tribe held a referendum on whether to approve the casino, it informed its members that "the Tribe will be 100 percent owners and managers" of the casino, that "15% of the annual income" has been "earmarked" for special Sault Tribe programs but the "rest of the annual income we receive will be used to reinstate membership service. . . ." Exhibit E, p. 13. According to the Tribe, "all Lansing casino revenues will go to tribal member programs and services, and to pay down debt." *Id.* p. 6. While the Tribe explained that it would be paying its developer "a fee equal to 14% of operating profits (after payment of expenses) for the first seven years. . ." and "up to $10 million to cover the initial legal and start-up costs," *Id.* p. 17, it nowhere mentioned any payments to other tribes. As for the City of Lansing, it would receive "limited revenue sharing payments" in exchange for its

support of the project. *Id.* p. 3. In distinguishing the Lansing casino from the failed Greektown casino previously owned by the Tribe, it told its members that it would "pay 2.5 percent to the City of Lansing, versus paying nearly 30 percent in taxes and fees to the state, city of Detroit, and Gaming Control Board." *Id.* p. 13.

Had the Sault Tribe intended to execute an agreement and share revenues with the other 11 Michigan tribes, it seems likely it would have informed its members of that intention when releasing information pertinent to the referendum vote. The State has seen nothing of the sort. Also, given that the Tribal Council passed a resolution authorizing the execution of the various agreements with the developer and the City (see Exhibit B), it would have made sense to include in that resolution, or in a separate resolution, authority to enter into revenue sharing agreements with the other tribes. No such resolution has been made public. The obvious conclusion to be drawn from these facts is that the Tribe does not intend to comply with § 9's requirement of entering into a revenue sharing agreement with the other tribes before filing an application with the federal government to have land taken into trust for gaming purposes.

Section 9 is a simple, straightforward prohibition. There is no room for nuance or excuses. The contractually required course the Tribe has set itself upon – to apply to Interior to have the Casino property taken into trust for gaming when it has not reached agreement with the other tribes to share revenues – will violate § 9

of the Compact.[7] The State has therefore established the prerequisites to entry of an injunction as required by 25 U.S.C. § 2710(d)(7)(A)(ii).

2. Sovereign immunity does not bar this claim

The Tribe may assert sovereign immunity as a bar to the State's claim. However, the law is clear that IGRA, specifically 25 U.S.C. § 2710(d)(7)(A)(ii), at a minimum abrogates a tribe's sovereign immunity for actions that seek injunctive relief for violations of a compact that is in effect. *See, Florida v. Seminole Tribe*, 181 F.3d 1237, 1242 (11th Cir. 1999) ("When section 2710(d)(7)(A)(ii) of IGRA is read in light of these principles, it becomes clear that Congress abrogated tribal immunity only in the narrow circumstance in which a tribe conducts class III gaming in violation of an existing Tribal-State compact."); *New York v. Oneida Indian Nation of New York*, 78 F. Supp. 2d 49, 54 (N.D. N.Y. 1999) ("this Court has jurisdiction because the IGRA abrogated the Nation's sovereign immunity where, as here, the State is seeking declaratory or injunctive relief resulting from an alleged violation of an existing Tribal-State compact authorizing Class III gaming"); *Arizona v. Tohono O'odham Nation*, 2011 U.S. Dist. LEXIS 64041 (D. Ariz. June 15, 2011)("The amended complaint alleges in Claim 7 that the Nation has breached the Compact through anticipatory repudiation and seeks a judicial declaration that the Compact is voidable. Doc. 26 ¶¶ 126, 127. The wrong alleged — breach of the Compact — clearly is covered by IGRA's abrogation of sovereign immunity."); *see*

[7] It will also violate IGRA which prohibits gaming activities that aren't conducted in conformance with a gaming compact. 25 U.S.C. § 2710(d)(1)(C).

also Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 758 (1998) ("[Congress] has restricted tribal immunity from suit in limited circumstances.") (citing 25 U.S.C. § 2710(d)(7)(A)(ii)); *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385 (10th Cir. 1997) ("While there is sparse case law on the issue, it appears the majority supports the view that IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought.").

Here, the Sault Tribe has announced its intention to breach its gaming compact, conduct which violates IGRA. 25 U.S.C. § 2710(d)(1)(A). Under these circumstances, the Congressional abrogation of the Tribe's immunity is effective.

Furthermore, even if the Tribe itself were determined to be immune from suit, the State's complaint seeks prospective injunctive relief against the individual Sault Tribe council members who have the authority to rescind the decision to open a casino in Lansing. Federal law is clear that tribal officials can be sued for prospective declaratory and injunctive relief under a doctrine which is similar to that established in the case of *Ex parte Young*, 209 U.S. 123 (1908). The extension of this principle to tribal officials was probably first noted by the Supreme Court in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505 (1991), a case where the Court refused to allow Oklahoma to sue a tribe because of its sovereign immunity, but based its decision in part on the Court's view that the State would have other remedies, including an *Ex parte Young*-type suit. "We have never held that individual agents or officers of a tribe are not liable for damages in

actions brought by the State. See *Ex parte Young* . . . ." *Oklahoma*, 498 U.S. 514. As noted in *Cohen's Handbook of Federal Indian Law* "When tribal officials act outside the bounds of their lawful authority, however, most courts would extend the doctrine of *Ex parte Young* (footnote omitted) to allow suits against the officials, at least for declaratory or injunctive relief." *Cohen's Handbook of Federal Indian Law* § 7.05.

Here, it is clear that if an application to take the Casino property into trust is submitted before a revenue sharing agreement is signed, the Sault Tribe Officials who are named in the Amended Complaint, have acted "outside the bounds of their lawful authority." *Id.* Section 42.713 of the Tribe's Gaming Ordinance (Exhibit F) requires all casino operators to *comply with the Sault Tribe Compact*. Since the Tribe is the only operator licensed under the Gaming Ordinance (Exhibit F, § 42.301), and since the Tribal Council governs the conduct of the Tribe, these officials have all violated their own Gaming Ordinance by violating the terms of the Compact. Since these actions were outside the bounds of the Tribe's own laws, it was unauthorized conduct. It could not be clearer that such unauthorized actions subject these officials to an action such as this for prospective declaratory and injunctive relief to keep them from violating the Compact. This Court has jurisdiction of an action for prospective injunctive relief against these officials under federal common law and IGRA (25 U.S.C. § 2710(d)(7)(A)(ii)).

Thus, whether the injunction is entered against the Tribe directly, or against the Defendant Tribal Officials pursuant to *Ex parte Young*, IGRA authorizes the injunction based on the imminent violation of § 9 of the Compact.[8]

[8] Even though the State does not believe the law requires the Court to look any further than the requirements of IGRA when deciding whether to enjoin violations of a compact, even a cursory analysis of the traditional injunction factors ((1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction. See *Blue Cross & Blue Shield Mutual of Ohio v. Blue Cross and Blue Shield Ass'n*, 110 F.3d 318, 322 (6th Cir. 1997)) provides an alternative basis for granting this motion. As discussed above, there can be little dispute that the Tribe's applying to take land into trust for off-reservation gaming will violate the Compact and IGRA; the State will therefore likely succeed on the merits of its case. Since the State probably does not have a damages remedy, it is clear that it does not have an adequate remedy at law and will be irreparably harmed if the Tribe can violate § 9 with impunity.

Nor will Defendants suffer significant harm by entry of an injunction. It is clear that the Tribe and other parties to the CDA fully anticipated that there would be one or more legal challenges that would delay or preclude completion of the casino. See, e.g., Exhibit C, §§ 4.4.3; 4.8(b)(ii) and (iv), 5.1.1, 5.1.2. The CDA gives the Tribe *five years* to have the Casino property taken into trust, Exhibit C, §§4.8(b)(i) and (iii), and makes provision for a return of the property to the City if the Tribe is unable to obtain trust status for the property. An injunction entered now that maintains the status quo will even save the Tribe the expense of performing its obligations under the CDA, which ultimately would be for naught if the Court determines that the Tribe has violated its Compact. Moreover, the Tribe has the power to remedy this violation and avoid this injunction entirely merely by complying with the requirements of § 9. It is not harmed.

Finally, the public interest will definitely be served if the status quo is maintained while the legal claims which were anticipated by the Tribe and the City are sorted out.

CONCLUSION AND RELIEF REQUESTED

For these reasons, the State respectfully requests that Defendants be enjoined from applying to Interior to have the Casino property taken into trust for gaming purposes.

Respectfully submitted,

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