UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN, Plaintiff, vs. THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, et al., Defendants.	Case No. 1:12-cv-00962-RJJ Hon. Robert J. Jonker ORAL ARGUMENT REQUESTED **DEFENDANTS' OPPOSITION TO THE STATE OF MICHIGAN'S MOTION FOR A PRELIMINARY INJUNCTION**

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Defendants the Sault Ste. Marie Tribe of Chippewa Indians, Aaron Payment, Keith Massaway, Denis McKelvie, Jennifer McLeod, Debra Ann Pine, D.J. Malloy, Catherine Hallowell, Darcy Morrow, Denise Chase, Bridget Sorenson, and Joan Anderson respectfully submit this brief in opposition to the State of Michigan's Motion for a Preliminary Injunction.

INTRODUCTION

The State of Michigan seeks a preliminary injunction barring the Sault Ste. Marie Tribe of Chippewa Indians (the Tribe) from filing an application with the Secretary of the Interior to have certain land taken into trust. The State's request should be denied because the State has failed to satisfy any of the traditional equitable factors governing such extraordinary relief.

The State argues at the threshold that it need not satisfy those traditional factors because its request is brought under a provision of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(7)(A)(ii), that displaces traditional equitable analysis. That is incorrect. Section 2710(d)(7)(A)(ii) applies to a "cause of action … to enjoin … class III gaming activity located on Indian lands." The State's motion does not seek to enjoin "class III gaming activity located on Indian lands." The motion seeks "an injunction … prohibiting Defendants from applying … to have the property in Lansing taken into trust for gaming purposes." Mot. for Prelim. Inj. ("PI Mot.") 3. Because the provision does not apply by it terms, it cannot relieve the State of its burden to satisfy the traditional equitable standards for obtaining a preliminary injunction. In any event, the Supreme Court has held that if Congress intends to displace traditional equitable standards it must speak clearly, and nothing in the text of Section 2710(d)(7)(A)(ii) suggests any such intent.

Under the traditional standards, the State falls well short of the showings it would have to make to justify preliminary relief. First, for the reasons set forth fully in the brief in support of defendants' motion to dismiss filed contemporaneously with this opposition, the State is unlikely

to succeed on the merits. Each of the State's claims is barred by the Tribe's sovereign immunity. Counts 4-6 suffer from the additional jurisdictional defect that they are premature and thus unripe. And counts 1-3 fail to state a claim upon which relief may be granted. Second, the State has not attempted to and cannot carry its burden of showing irreparable harm. Any potential injury from gaming activity that might occur on the land is remote and speculative for the same reasons that counts 4-6 are not ripe. And an alleged breach of contract, without more, does not give rise to an irreparable injury.

Third, the balance of equities weighs against an injunction. Although the State would suffer no irreparable injury absent preliminary relief, an injunction barring the Tribe from exercising its statutory right to file a trust application would irreparably hinder the Tribe's ability to comply with the terms of its agreement with the City of Lansing and interfere with the Tribe's governmental actions. Finally, the public interest would be disserved, not advanced, by a preliminary injunction, as courts have recognized in similar circumstances.

BACKGROUND

The factual and legal background of this matter is set forth more fully in the brief in support of defendants' motion to dismiss filed contemporaneously with this response. Here, defendants merely summarize a few points particularly relevant to the State's motion for preliminary relief.

On September 7, 2012, the State filed suit against the Tribe and all members of its Board of Directors, in their official capacities. *See* Compl. The State's complaint contains six counts for relief. Counts 1-3 allege, in effect, that the Tribe may not ask the Secretary of the Interior to hold title to the Tribe's new Lansing property in trust for the Tribe—as the Tribe believes the Secretary is required to do by the Michigan Indian Land Claims Settlement Act (MILCSA), Pub.

L. No. 105-143, § 108(f), 111 Stat. 2661 (1997)—without violating Section 9 of the Tribe's gaming Compact with the State. *See* Compl. ¶¶ 33-59; *id.*, Ex. A at 9.

The complaint also contains three counts the State acknowledges (Compl. at 12) "may not yet be ripe for adjudication." Count 4 alleges a potential future violation of Section 20 of IGRA, 25 U.S.C. § 2719, which prohibits Class III gaming on Indian lands taken into trust for a tribe after October 17, 1988, unless the lands come within certain stated exceptions. Compl. ¶¶ 61-63. Count 5 alleges a potential future violation of the Michigan Gaming Control and Revenue Act, based on gross receipts the Tribe "intend[s] to derive" from a casino. *Id.* ¶ 67. Count 6 alleges that any future operation of a casino on the Lansing property would be unlawful and "would therefore be a public nuisance." *Id.* ¶ 72.

At the same time it filed a complaint, the State moved for a preliminary injunction "prohibiting Defendants from applying in violation of the compact to have the [Lansing property] taken into trust for gaming purposes, 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." PI Mot. 3. That "preliminary" relief is effectively the same relief to which the State would be entitled if it were to prevail on the merits of counts 1-3 of its complaint.

ARGUMENT

In seeking a preliminary injunction, the State argues that a provision of IGRA—25 U.S.C. § 2710(d)(7)(A)(ii)—relieves it from the burden of satisfying the traditional standards for such relief. That is not correct. The normal standards for equitable relief apply here, and the State cannot meet them.

I. THE STATE'S MOTION IS GOVERNED BY THE TRADITIONAL EQUITABLE FACTORS

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Under well-established equitable principles, the State carries the heavy burden to establish that (1) it is "likely to succeed on the merits," (2) "[it] is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [the State's] favor," and (4) "an injunction is in the public interest." *Id.* at 20. Courts in the Sixth Circuit have long applied those factors to requests for preliminary injunctive relief. *See, e.g.*, *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir. 2001); *Mason County Med. Ass'n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977); *see Hudson v. Caruso*, 748 F. Supp. 2d 721, 725 (W.D. Mich. 2010).[1]

The State argues that the traditional factors do not apply here because IGRA "expressly provides for an injunction remedy." Br. in Support of Mot. for Prelim. Inj. ("PI Br.") 6-7. It relies on 25 U.S.C. § 2710(d)(7)(A)(ii), which gives federal district courts jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact."[2] That position is doubly flawed.

First, Section 2710(d)(7)(A)(ii) does not apply here. The State's motion does not seek to enjoin "class III gaming activity located on Indian lands." It seeks "an injunction … prohibiting

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[1] Before the Supreme Court's decision in *Winter*, the Sixth Circuit instructed courts to "balance" these factors to determine whether to issue a preliminary injunction. *See, e.g.*, *Michigan Bell Tel.*, 257 F.3d at 592; *Hudson*, 748 F. Supp. 2d at 725. The court appears to have adhered to that approach after *Winter*. *See, e.g.*, *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012). Any dispute about the correctness of that approach would make no difference to the outcome here, which is the same however the factors are applied.

[2] The State's brief (at 6-7) actually cites Section 2710(d)(7)(B)(ii), but it reproduces the text of Section 2710(d)(7)(A)(ii), and clause (B)(ii) applies only to actions by tribes. *See also* Compl. ¶ 1 (citing clause (A)(ii) as a basis for jurisdiction).

Defendants from applying … to have the property in Lansing taken into trust for gaming purposes." PI Mot. 3. That is all the State *can* seek at this juncture, because the Lansing property has not yet been taken into trust and thus is not yet "Indian land," *see* 25 U.S.C. § 2703(4), and there is no "class III gaming" occurring on the property. (Nor is either a trust acquisition or the initiation of gaming remotely imminent. *See* Br. in Support of Mot. to Dismiss ("MTD Br.") 14.) The State's action, and its requested preliminary relief, thus fall well outside the limited scope of the provision on which it seeks to rely.

The Sixth Circuit's recent decision in *Michigan v. Bay Mills Indian Community*, 695 F.3d 406 (6th Cir. 2012), compels the same result. *Bay Mills* explains that Section 2710(d)(7)(A)(ii) applies "only where all of the following are true: (1) the plaintiff is a State or an Indian tribe; (2) the cause of action seeks to enjoin a class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect." *Id.* at 412. The court held that the third condition was not satisfied in that case because the complaints "allege[d] that the … casino" at issue was "*not* located on Indian lands." *Id.* at 412-413.

Here, similarly, the State's allegations and motion for relief make clear that (1) the Lansing property is not yet "Indian land" and (2) the State seeks to enjoin the filing of a trust application with the Secretary of the Interior—not "a class III gaming activity." *See, e.g.*, Compl. ¶ 31 (Tribe has not yet filed trust application); PI Mot. 3 (proposed injunction). Because, as *Bay Mills* confirms, Section 2710(d)(7)(A)(ii) has no application to such a case, it certainly cannot relieve the State of its burden to satisfy the equitable standards that normally govern the availability of the relief it seeks.

Second, although Congress may expand or limit federal courts' equitable discretion in granting injunctions, the Supreme Court has made clear that courts should not "lightly assume that Congress has intended to depart from established principles." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) ("As this Court has long recognized, a major departure from the long tradition of equity practice should not be lightly implied.") (internal quotation marks omitted). Even if Section 2710(d)(7)(A)(ii) applied here, nothing in that provision suggests any congressional intent to displace the traditional standards for granting equitable relief.

The State relies principally (PI Br. 6) on *CSX Transportation, Inc. v. Tennessee State Board of Equalization*, 964 F.2d 548, 551 (6th Cir. 1992). But *CSX* is part of a line of so-called "statutory injunction" cases in which courts have held that congressional intent to displace traditional standards for the issuance of injunctive relief may be inferred *where Congress has supplied an alternative standard*. *See, e.g.*, *CSX*, 964 F.2d at 551 (statute expressly authorized granting preliminary injunction based on showing of "reasonable cause" to believe state tax was discriminatory); *United States v. Szoka*, 260 F.3d 516, 523 (6th Cir. 2001) (statute required issuance of injunction based on findings that an "order was regularly made and duly served" and defendant "is in disobedience of the same"); *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1098 (9th Cir. 2000) (statute specified five elements government must prove to obtain injunction). The logic of these cases is that where Congress specifies "statutory requirements for the issuance of an injunction" it has "replaced the traditional equitable factors with a different inquiry," and in that way "effectively limit[ed] the discretion of the district court." *Szoka*, 260 F.3d at 523-524. That rationale has no application here, because Section 2710(d)(7)(A)(ii) supplies no alternative standard to govern the issuance of injunctions, and there is no other

"necessary and inescapable" indication that Congress intended to restrict or expand "the court's jurisdiction in equity." *Weinberger*, 456 U.S. at 313; *see Wisconsin v. Stockbridge-Munsee Cmty.*, 67 F. Supp. 2d 990, 996 (E.D. Wis. 1999) (holding there is no evidence that "Congress intended to provide for injunctive relief [under Section 2710(d)(7)(A)(ii)] without requiring a showing of irreparable injury").[3]

The State objects (PI Br. 7) that, if the usual equitable analysis applies, a court might find a compact violation but then balance the equities and conclude that no injunction should issue, leaving the State "without any remedy." This argument falters for two reasons. First, the State's concern suggests, at most, that a court should be hesitant to decline to issue a *permanent* injunction upon a final determination that a compact has been violated. It says nothing about the proper standards for deciding whether to issue a *preliminary* injunction, which by definition must be done before the court has fully heard a case and made any final determination of a compact breach. The potential need for effective *permanent* relief is a distinctly different question. In any event, the argument that an injunction is necessary to grant effective relief is simply one that should be taken into account as part of a court's normal equitable analysis—not a justification for concluding that Congress has directed the courts to depart from longstanding equitable standards. *See eBay*, 547 U.S. at 394-396 (Roberts, C.J., concurring) (historical practice of regularly granting injunctions in patent cases suggested equitable balance would often favor such relief after a final determination of infringement—but Patent Act did not, by authorizing courts to issue injunctions, displace traditional standards governing when it is appropriate to do so).

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[3] Each of the cases the State cites (PI Br. 6) was decided before the Supreme Court's decision in *eBay*, which emphatically reaffirmed the principle that Congress must speak clearly to displace the traditional principles governing a federal court's exercise of its equitable powers. *See, e.g.*, *eBay*, 547 U.S. at 391-392. Because the decisions are inapposite even on their own terms, the Court need not consider their continuing vitality in light of *eBay*.

II. THE STATE CANNOT SATISFY THE TRADITIONAL STANDARDS FOR PRELIMINARY INJUNCTIVE RELIEF

Under the traditional standards for equitable relief, the State cannot make the "clear showing" necessary to support its request for a preliminary injunction. *Winter*, 555 U.S. at 22. As the Supreme Court has explained, "injunctive relief [is] as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.*; *see Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) ("the preliminary injunction is an extraordinary remedy … , which is to be applied only in the limited circumstances which clearly demand it") (internal quotation marks and alterations omitted). The State scarcely even attempts to make such a showing, addressing the issue only in a footnote. PI Br. 16 n.8. Its arguments are manifestly insufficient to sustain the State's "burden of proving that the circumstances clearly demand" an injunction. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). On the contrary, each of the four standard equitable factors weighs decidedly against the issuance of preliminary relief.

A. The State Is Not Likely To Succeed On The Merits

Although "no one factor is controlling" in a preliminary injunction analysis, "a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. National Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000); *see Hudson*, 748 F. Supp. 2d at 724 (same). For the reasons explained in the brief in support of defendants' motion to dismiss (which defendants incorporate here), such a finding is appropriate here—and the State certainly cannot carry its converse burden of showing a "strong" likelihood of success. *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc).

First, each of the State's claims is barred by the Tribe's sovereign immunity. *See* MTD Br. 7-9. It is well-established that "an Indian tribe is subject to suit only where Congress has

authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998). As also discussed above, the State is wrong that its suit falls within the narrow congressional abrogation of immunity in 25 U.S.C. § 2710(d)(7)(A)(ii). Counts 1-3 seek to enjoin the Tribe's application to the Secretary of the Interior to have the Lansing property taken into trust, and thus do not seek "to enjoin class III gaming activity located on Indian lands." 25 U.S.C. § 2710(d)(7)(A)(ii). Similarly, Section 2710(d)(7)(A)(ii) does not apply to count 4, arising under 25 U.S.C. § 2719, because the Lansing property is not yet "Indian land." *See Bay Mills*, 695 F.3d at 412-413 (Section 2710(d)(7)(A)(ii) does not apply to Section 2719 claim where complaint makes clear the land is not held in trust). Finally, the IGRA provision clearly has no application to the state-law violations alleged in counts 5-6, and the State has identified no congressional abrogation of immunity that could apply to those claims.

The State's attempt to sidestep the Tribe's immunity by suing members of the Tribe's Board of Directors in their official capacities is equally unavailing, as defendants explain in their brief in support of the motion to dismiss. *See* MTD Br. 10-13. Even if the Sixth Circuit were to recognize some analog to the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), in the context of tribal sovereign immunity (which to date it has not), the principle would not apply here because the Supreme Court has made clear that *Ex parte Young* may not be used (1) to compel specific performance of a sovereign's contract, *see Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1639 (2011); (2) to enforce duties governed by IGRA's remedial scheme, *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996); or (3) to remedy violations of state law, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

Second, the State is unlikely to prevail on counts 4-6 because those claims are unripe. *See* MTD Br. 13-15. Courts should be particularly reluctant to grant injunctive relief "unless [the case] arise[s] in the context of a controversy 'ripe' for judicial resolution." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). The State's acknowledgement in its complaint (at 12) that counts 4-6 "may not yet be ripe for adjudication" is correct. These claims are unripe because no gaming is occurring—or can occur—on the Lansing property now, and because any future gaming is far down the road and "contingent on a number of factors." *Texas v. United States*, 523 U.S. 296, 300 (1998). The State will not suffer any "hardship" from deferred resolution of the issues raised in counts 4-6. *See Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533, 544 (6th Cir. 2010).

Third, the State is unlikely to prevail on the merits of counts 1-3 because those counts fail to state a claim. *See* MTD Br. 15-18. Section 9 of the Compact applies to traditional *discretionary* trust applications to the Secretary of the Interior filed under Section 20 of IGRA, not to the type of *mandatory* trust application that became available to the Tribe, years after the Compact was signed, under Section 108(f) of MILCSA. That conclusion follows both from the text of Section 9 and from the fact that a discretionary application is the only kind that would have been available to the Tribe at the time the State and the Tribe entered into the Compact.

B. The State Will Suffer No Irreparable Injury From The Tribe's Filing Of A Trust Application

The State also has not "demonstrate[d] that failure to issue the injunction is likely to result in irreparable harm." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1068 (6th Cir. 1998). A moving party must "demonstrate that irreparable injury is *likely* in the absence of an injunction," not just that it is "a possibility." *Winter*, 555 U.S. at 22. And the injury must be

"actual and imminent," not "speculative or unsubstantiated." *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006).

It is the State's "burden [to] prov[e]" it will suffer irreparable harm. *Overstreet*, 305 F.3d at 573. Here, the State simply asserts (PI Br. 16 n.8) that it "probably does not have … an adequate remedy at law and will be irreparably harmed if the Tribe can violate § 9 with impunity." That conclusory assertion, set forth in a footnote and unsupported by any evidence, is insufficient to justify extraordinary relief. *See, e.g.*, *Leary*, 228 F.3d at 739 ("the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion").

Nor could the State possibly meet its burden here. Any potential injury to the State that might flow from gaming on the Lansing property at some point in the indefinite future cannot satisfy the requirement that an injury be "actual and imminent." Thus, the State can rely only on a theory that its interest in enforcement of Section 9 would be irreparably harmed by allowing the Tribe even to file an initial trust application. But that theory fails for at least two reasons.

First, a breach of contract, standing alone, does not create irreparable injury. *See, e.g.*, *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1263-1264 (10th Cir. 2004) (collecting authority; "courts do not automatically, nor as a matter of course," find irreparable injury based on breaches of contract); *Jerome-Duncan, Inc. v. Auto-By-Tel, LLC*, 966 F. Supp. 540, 543 (E.D. Mich. 1997) (no irreparable harm where there was "nothing unique about this case, with regard to damages, which would take it out of the ordinary breach of contract remedies context"). Instead, a party must establish a concrete injury that would flow

from an alleged contract breach. Here, the State has identified no concrete, irreparable injury that could flow from the Tribe's filing of a trust application.[4]

Second, and in all events, were the State correct that IGRA authorizes a lawsuit to enjoin the Tribe from filing a trust application (which it is not), presumably any eventual judgment in the State's favor could be implemented, if otherwise appropriate, by requiring the Tribe to withdraw any application it had filed. Any supposed injury from the initial filing would thus be fully reparable by "other corrective relief." *Johnson v. City of Memphis*, 444 F. App'x 856, 860 (6th Cir. 2011); *see* 11A Wright et al., *Federal Practice and Procedure* § 2948.1 (2d ed. 1995) ("preliminary injunction usually will be denied if it appears that the applicant has an adequate alternate remedy in the form of money damages *or other relief*") (footnote omitted; emphasis added).

C. The Balance Of Equities Does Not Favor An Injunction

The balance of equities also weighs against an injunction. Although the absence of a preliminary injunction would not harm the State, granting an injunction would substantially harm the Tribe.

First, the Tribe and the City of Lansing have entered into an agreement predicated on the Tribe's prompt filing of a trust application. An injunction, by design, would delay the filing of the application, and hinder the Tribe's ability to honor its Comprehensive Development Agreement (CDA) with the City, which imposes time restrictions on establishing the trust status of the land. *See, e.g.*, Compl., Ex. D, ¶¶ 2.2, 3.1. The administrative review process involved

[4] The State is correct (PI Br. 16 n.8) that, because of sovereign immunity, it could not recover damages flowing from a breach of Section 9. In an appropriate case, that might warrant treating a contractual breach as giving rise to irreparable harm. Here, however, the State has not identified any harm flowing from the Tribe's filing of a trust application that could give rise to a claim for damages in the first place.

before the Secretary acts on a trust application can be lengthy. *See, e.g.*, *Gila River Indian Cmty. v. United States*, 776 F. Supp. 2d 977, 982 (D. Ariz. 2011) (noting a mandatory trust acquisition was filed on January 28, 2009, but not acted upon until July 23, 2010), *aff'd*, 2012 WL 3945301 (9th Cir. Sept. 11, 2012). The administrative process, moreover, will almost certainly be followed by litigation. By barring the Tribe from even beginning this process, a preliminary injunction would threaten the Tribe's ability to secure a timely decision.

An injunction therefore would hinder the Tribe's ability to comply with the CDA, frustrate the Tribe's federal statutory right to a mandatory trust acquisition, and interfere with the Tribe's right to conduct its governmental affairs. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980) (tribes retain "fundamental attribute[s] of sovereignty … unless divested of [them] by federal law or necessary implication of their dependent status"). These harms are concrete, serious, and not subject to any practical possibility of future reparations from the State. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-1251 (10th Cir. 2001) (harm to right of tribal self-government is irreparable); *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008) ("where … the plaintiff in question cannot recover damages from the defendant due to the defendant's sovereign immunity" any economic injury suffered "is irreparable"). Such injury to the Tribe's statutory rights under MILCSA would be particularly inequitable given that MILCSA itself was a legislative response to judgments against the United States secured by the Tribe after lengthy land claims litigation.[5]

[5] The State maintains (PI Br. 16 n.8) that the Tribe "anticipated" legal challenges to the land deal and that the Tribe, under the CDA, has five years to secure trust status for the Lansing property. But in view of the likely length of the administrative process, the possible need for a separate gaming determination, and the litigation that will almost inevitably follow, an injunction barring the Tribe from even beginning the process could substantially complicate the Tribe's

Second, the balance of hardships tips further in favor of the Tribe because the preliminary relief the State seeks—barring the filing of a trust application until a revenue-sharing agreement has been reached with other tribes—is essentially the same relief it would hope to secure after a trial on the merits of counts 1-3 (which are the only counts presently ripe for review). In such circumstances, the balance of hardships weighs in favor of the Tribe, especially because the Tribe will have no effective way to recoup the time it has lost even if it prevails on the merits. *See* 11a *Federal Practice and Procedure* § 2948.2 (courts frequently consider that "giving plaintiff all of the relief requested, even temporarily, would impose a disproportionate burden on defendant, that could not be adequately compensated should defendant prevail at trial").

D. The Public Interest Does Not Favor An Injunction

Finally, a preliminary injunction is not justified because it would disserve, not further, the public interest. That is so for at least two reasons. First, "denying the injunction … serve[s] the fundamental public interest goal of respecting tribal sovereign immunity." *Keweenaw Bay Indian Cmty. v. Michigan*, 11 F.3d 1341, 1348 (6th Cir. 1993). Second, the public interest is served by avoiding undue interference with land acquisition and development that "promot[e] tribal self-sufficiency and self-government." *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y for W.D. of Mich.*, 46 F. Supp. 2d 689, 705 (W.D. Mich. 1999) (applying this interest in the context of assessing a motion for a preliminary injunction); *see also Seneca-Cayuga Tribe of Okla. v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989) (noting "paramount federal policy that Indians develop independent sources of income and strong self-government" as weighing in favor of a preliminary injunction by a tribe); *Prairie Band of Potawatomi Indians*, 253 F.3d at 1253 ("tribal self-government may be a matter of public interest").

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ability to honor the CDA. In view of the absence of any irreparable injury to the State, there is no justification for preventing the Tribe from getting the process started.

The State asserts (PI Br. 16 n.8) that "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." In fact, that consideration cuts in the opposite direction. The public interest lies in avoiding the unnecessary drain on judicial resources that would arise from litigating these issues now, rather than as part of the variety of legal and factual questions that will be litigated after initial administrative decisions are made with respect to the Lansing property. *See Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie*, 856 F.2d 1384, 1390 (9th Cir. 1988) ("judicial economy is always a policy consideration"); *Hunter v. FERC*, 527 F. Supp. 2d 9, 18 (D.D.C. 2007) (recognizing the "public's interest in conserving judicial resources").

CONCLUSION

The State's motion for a preliminary injunction should be denied.

Dated: November 12, 2012

Respectfully submitted,

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