UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

The State of Michigan,

Plaintiff,

v.

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

Saginaw Chippewa Indian Tribe of Michigan's
Amicus Curiae Brief in Opposition to Motion to Dismiss

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Saginaw Chippewa Indian Tribe of Michigan's
Amicus Curiae Brief in Opposition to Motion to Dismiss

Indian gaming is a highly regulated industry, and the Indian Gaming Regulatory Act "represents a balance struck by Congress among the interests of tribal governments, the states, and the federal government in gaming activities on Indian lands."[1] Its balance of the rights and responsibilities of three separate sovereigns—the federal, state, and tribal governments—makes it "hard to imagine a federal law that disperses power more widely and among more institutions across more levels of government than IGRA."[2]

But Michigan's compact with the Sault Ste. Marie tribe[3] takes this balance one step even further. In negotiating with the tribe, the State was able to contractually bind Sault Ste. Marie and its officers (collectively, "Sault Ste. Marie") to further balance their own off-reservation gaming interests against those of other Michigan tribes by requiring the Sault Ste. Marie to enter into revenue-sharing agreements with those other tribes before it could pursue off-reservation gaming. In effect, that negotiation changed IGRA's three-legged stool into a four-legged table for any off-reservation expansion of gaming. But despite agreeing to this

[1] *Muhammad v. Comanche Nation Casino*, 742 F. Supp. 2d 1268, 1276 (W.D. Okla. 2010).

[2] Kevin K. Washburn, *Agency Conflict and Culture: Federal Implementation of the Indian Gaming Regulatory Act by the National Indian Gaming Commission, the Bureau of Indian Affairs, and the Department of Justice*, 42 Ariz. St. L.J. 303 (2010). Mr. Washburn was recently confirmed as the Department of the Interior's Assistant Secretary for Indian Affairs. Press Release, Sept. 22, 2012, *available at* http://www.doi.gov/news/pressreleases/Salazar-Applauds-Senate-Confirmation-of-Kevin-Washburn-as-Interiors-Assistant-Secretary-for-Indian-Affairs.cfm (last visited Dec. 20, 2012).

[3] Compact Between the Sault Ste. Marie Tribe of Chippewa Indians and the State of Michigan Providing for the Conduct of Tribal Class III Gaming by the Sault Ste. Marie Tribe of Chippewa Indians, *available at* Dkt. 1-1 ("Compact").

system in 1993, and reaping the benefits of its Compact for the nearly 20 years since, Sault Ste. Marie now seeks to throw that balance under the bus by pretending its longstanding obligations simply do not extend to *this* off-reservation expansion. Because its artificial parsing of the Compact is not supported by the agreement's text or the law, its motion to dismiss should be denied and the Court should decide the merits of the State's claims.

I. Section 9 of the Compact requires the Sault Ste. Marie tribe to enter into a revenue-sharing agreement before it applies to take *any* off-reservation land into trust for gaming purposes.

"Tribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes."[4] And since there are twelve different federally recognized tribes in Michigan, the parties had to craft agreements that balance not only these three broad categories of interests, but also balance the interests of individual tribes against each other. Needless to say, in light of these divergent considerations, enforcing the Compact as the parties intended is critical to the continued success of Indian gaming in Michigan—and its concomitant promotion of economic development and tribal self-sufficiency.

Within the Act itself, IGRA has built-in protections to ensure that Indian gaming is the exception, not the rule. It limits Indian gaming to Indian Lands in place before 1988 (typically limited holdings within a tribe's aboriginal homeland) or to very limited circumstances occurring after 1988. Many Michigan compacts—including those between the State and Sault Ste. Marie and the Saginaw Chippewa Tribe—further limit gaming by

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[4] *Bay Mills Resort & Casino v. Gerbig*, 2008 WL 4606304, at *2 (Mich. Ct. App. Oct. 2, 2008) (quoting *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996)).

requiring tribes that seek to establish off-reservation gaming on lands acquired after 1988 to seek the prior consent of the other Michigan tribes. Specifically, Section 9 of the Compact requires:

> Section 9. 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 Sec. of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribe 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.[5]

This revenue-sharing-agreement requirement specifically accommodates the rights of tribes that are not a party to a specific compact but *were* part of the global negotiations, and affords the State a secondary means of limiting gaming expansion. And since "IGRA only grants the states bargaining power, not regulatory power, over tribal gaming[,]"[6] enforcing such compact provisions is the only means to give the State's role in Indian gaming teeth.

A. Section 9 of the Compact applies to Sault Ste. Marie's trust application.

Sault Ste. Marie's contortions of federal law cannot save it from Section 9 of the Compact. Sault Ste. Marie agreed to the terms of Section 9 and should be held to its word.

1. Section 9 makes no distinction between mandatory and discretionary trust applications.

Under Michigan law, "[t]he primary goal in the construction or interpretation of any contract is to honor the intent of the parties. The Court must look for the intent of the parties

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[5] Compact, § 9.

[6] *Bay Mills Resort & Casino*, 2008 WL 4606304, at *2.

in the words used in the instrument."[7] Section 9 makes absolutely *no* distinction between mandatory or discretionary trust acquisitions and in fact never even mentions that there is a difference. With no language distinguishing between mandatory and discretionary trust applications, Sault Ste. Marie's argument that "the text of Section 9 makes clear that is directed at applications for ordinary trust acquisitions for gaming purposes" and not "special" "mandatory" trust acquisitions, [8] is absurd.

2. Section 9 applies to all trust acquisitions for gaming purposes.

Far from distinguishing between mandatory and discretionary trust acquisitions, Section 9 applies to any trust application where the tribe intends to use the land "for gaming purposes pursuant to Section 20 of IGRA[.]"[9] Sault Ste. Marie argues that Section 9 does not apply here because Interior need not consider its gaming intentions in addressing its trust application,[10] but under Section 9, *this Court* must consider Sault Ste. Marie's gaming intentions because Sault Ste. Marie agreed in the text of the Compact that the Court should consider those gaming purposes. Read in the context of the Compact and the regulatory landscape of IGRA and so construing the contract as a whole,[11] Sault Ste. Marie cannot avoid

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[7] *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 372 (6th Cir. 1998) (internal quotation and citation omitted).

[8] Defendants' Brief in Support of Motion to Dismiss ("Mot. to Dismiss"), Dkt. 11 at 21. For consistency, this brief cites to the page numbers in the Court's ECF headings instead of the page numbers supplied by parties.

[9] Compact, § 9.

[10] Mot. to Dismiss, Dkt. 11 at 17 ("MILCSA contains no requirement that the Tribe state the purpose of a mandatory acquisition. An application for mandatory trust acquisition under MILCSA Section 108(f) therefore is not an application 'for gaming purposes' or a '§ 20 application' governed by Section 9 of the Compact").

[11] *E.g., 51382 Gratiot Ave. Holdings, LLC v. Chesterfield Dev. Co., LLC*, 835 F. Supp. 2d 384, 391 (E.D. Mich. 2011) *reconsideration denied*, 2:11-CV-12047, 2012 WL 205843 (E.D. Mich. Jan. 24, 2012) (quoting *Associated Truck Lines, Inc. v. Baer*, 346 Mich. 106, 77

Section 9 by asking the parties and this Court to simply avert their eyes from their admitted gaming intent.

3. To the extent that Section 9 is ambiguous, its Indian-law mash-up would benefit from additional factual development to determine what the parties intended would trigger the revenue-sharing requirement.

Sault Ste. Marie has committed itself to file an application "to take land in trust *for gaming purposes pursuant to Section 20 of IGRA*"[12] without a revenue-sharing agreement in place. The only way it can possibly avoid a Compact violation is to argue Section 9 is only triggered by an application "*to take land in trust . . . pursuant to Section 20 of IGRA*[.]"[13] Sault Ste. Marie itself advances this reading, seeking to contrast "discretionary trust *applications to the Secretary of Interior filed under Section 20 of IGRA*" with one filed under the Michigan Land Claims Settlement Act,[14] which the parties term "MILCSA."[15] But this reading harbors a significant latent ambiguity.[16] IGRA's Section 20, which has not *ever* been amended, *does not provide a mechanism to take land into trust*. It only specifies which

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N.W.2d 384, 386 (1956)) (internal quotation marks omitted) ("'[A] contract must be "construed as a whole'; 'every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument.'").

[12] Compact, § 9 (emphasis added).

[13] *Id.* (emphasis added).

[14] Defendants' Opposition to the State of Michigan's Motion for a Preliminary Injunction, Dkt. 9 at 15 (emphasis changed from original)

[15] Pub. L. No. 105-143, § 108(c)(5), 11 Stat. 2652, 2661 (1997).

[16] A court may consider parole evidence to determine whether a provision is ambiguous. *Turner Const. Co. v. Robert Carter Corp.*, 162 F.3d 1162, *6 (6th Cir. 1998) ("Because the contracts contain integration clauses, Michigan's strictures regarding parol evidence are implicated. The parol evidence rule, as we have noted above, while not allowing extrinsic evidence to *create* an ambiguity, will nonetheless permit extrinsic evidence to demonstrate the *existence* of an ambiguity.").

already-taken-into-trust lands may be used by a tribe for a gaming operation.[17] Put differently, there is no such thing as "[a]n application to take land in trust for gaming purposes pursuant to § 20 of IGRA." So if the Compact were read in this manner, there is no way Section 9 could ever impose any obligation because Section 20 does not and has not ever provided a means to take land into trust "pursuant to" its terms.

Giving effect to every provision of a contract,[18] this cannot be what the parties intended. Just as courts "will resort to legislative history . . . where the legislative history clearly indicates that [the legislature] means something other than what it said[,]"[19] where the language of a contract "is inconsistent on its face, the contract is ambiguous and a factual development is necessary to determine the intent of the parties."[20] Other readings of Section 9 avoid this ambiguity, but at a minimum, the complaint against Sault Ste. Marie should not be dismissed before the parties can develop a factual record about what they intended would trigger the revenue-sharing-agreement requirement.

B. Sault Ste. Marie overstates the importance and effect of MILCSA—the Act does not allow Sault Ste. Marie to avoid Section 9.

Whatever import Section 9 has, its language does not support the statute-by-statute parsing Sault Ste. Marie argues for. Sault Ste. Marie argues that

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[17] 25 U.S.C. § 2719. *See also* Memo from Asst. Sec'y Artman to Regional Dir's, Jan. 3, 2008, at 2, attached as Ex. 4 ("[N]o trust land acquisition authority is granted to the Secretary by IGRA.").

[18] *51382 Gratiot Ave.*, 835 F. Supp. 2d at 391.

[19] *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001). *See also Cortez Byrd Chips, Inc. v. Bill Harbet Construction Co.*, 529 U.S. 193, 198-204 (2000) (examining extrinsic sources to determine the intended meaning of "may" in venue statutes).

[20] *Cook v. Little Caesar Enterprises, Inc.*, 972 F. Supp. 400, 416 (E.D. Mich. 1997) *aff'd*, 210 F.3d 653 (6th Cir. 2000) (applying Michigan contract law).

> Section 9 applies only to discretionary applications that seek to "take land into trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719)." Compl., Ex. A, § 9. It does not bar an application for trust land acquired under MILCSA—a statute that was enacted long after Section 9 was drafted and that *requires* the Secretary to hold any land that meets its requirements in trust regardless of the uses (gaming or otherwise) to which the land might ultimately be put. [21]

Of course, since there is no such thing as an application to "take land into trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719)" the fact that Sault Ste. Marie has not made such an application is hardly surprising. But Sault Ste. Marie's argument that it can entirely bypass its obligations under Section 9 of the Compact because its trust application is under MILCSA goes too far. First, the fact that MILCSA was drafted after the Compact was negotiated has no bearing on whether it triggers Section 9. Second, even if Section 9's application depended on whether a trust acquisition is "mandatory" or "discretionary" (and as discussed above, it doesn't), MILCSA is not a "mandatory" trust statute as Sault Ste. Marie argues. Third, whether an acquisition with MILCSA funds settles a "land claim" is a question for the NIGC—precisely the question a Section 20 inquiry answers. And fourth, MILCSA itself confirms that it does not settle a "land claim."

1. That MILCSA was passed after the Compact was entered is of no consequence.

Sault Ste. Marie's unsupported argument that somehow (though it does not explain how) Section 9 does not apply to a MILCSA acquisition because MILCSA came *after* Section 9 is easily disposed of. Statutes like MILCSA that settled Indian Claims

[21] Mot. to Dismiss, Dkt. 11 at 20.

Commission dockets certainly existed before Section 9,[22] so the parties would well have known that Congress could, after the Compact was entered, pass another such act. In fact, many tribes had long been pressing for just such legislation.[23] And parties often use contracts as a tool to prescribe how they will respond to potential future events—both contemplated or not.[24] When they sat at the negotiation table in 1993, the parties knew MILCSA or a statue like it was possible—and that it was possible for Congress to devise any other manner of trust-acquisition process. They nevertheless agreed in broad language that did not distinguish between mandatory and discretionary trust acquisitions that the State would allow Sault Ste. Marie to use a parcel acquired by any such method for gaming—so long as Sault Ste. Marie *first* entered into a revenue-sharing agreement with the other Michigan tribes.

2. MILCSA is not a "mandatory" trust statute.

Sault Ste. Marie correctly describes that there are generally two types of trust acquisitions—"mandatory" and "discretionary."[25] And as would be expected, the source Sault Ste. Marie relies on in making this distinction explains that in a "discretionary" acquisition, the Secretary has discretion to accept or deny a request, but in a "mandatory"

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[22] For example, the Seneca Nation (New York) Land Claims Settlement, Pub. L. No. 101-503, 104 Stat. 1292 (codified at 25 U.S.C. § 1774), settled the Seneca Nation's Docket 342-G (*available at* 39 Ind. Cl. Comm. 355 (1977)) claims in 1990, and so would have been fresh in the Compact drafters' 1993 minds.

[23] *See generally* 25 U.S.C. Ch. 19, Indian Land Claims Settlements.

[24] *Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236, 239 (6th Cir. 1994) ("Contract law operates on the premise that commercial actors, because of their ability to bargain for the terms of the sale, will be able to allocate the risks and costs of a product's potential nonperformance.").

[25] Mot. to Dismiss, Dkt. 11 at 21.

acquisition, the Secretary lacks that discretion.[26] But the simple identification of two classes of acquisitions does nothing to identify which category the Casino parcel fits within.

Sault Ste. Marie insists that MILCSA directs mandatory acquisition because "[a]ny lands acquired using amounts from interest . . . of the self-sufficiency fund *shall* be held in trust by the Secretary for the benefit of the tribe."[27] But the Deputy Commissioner of Indian Affairs has explained that in the trust-acquisition process, "[a] determination that a statute is mandatory is made on a case by case basis" because "[n]o clear definition of a mandatory statute currently exists."[28] And the Deputy Commissioner made clear that "in order for a statute to be considered mandatory, the statutory language must include some restrictions on the Secretary's discretion in addition to the word 'shall.'"[29] But MILCSA begins and ends with the word shall—it includes no other restriction on the Secretary's discretion to accept the land into trust.[30] Sault Ste. Marie's italics can't trump the Department of the Interior's

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[26] Excerpt of Department of the Interior, Bureau of Indian Affairs Fee-to-Trust Handbook, Version II, July 13, 2011, at § 2) (excerpt attached as Ex. 7) (cited in Mot. to Dismiss, Dkt. 11 at 21).

[27] Mot. to Dismiss, Dkt. 11 at 21 (quoting MILCSA, Pub. L. No. 105-143, § 108(f),11 Stat. at 2661-62 (1997) (emphasis added by Sault Ste. Marie).

[28] Memo from Deputy Comm'r of Indian Affairs to Reg. Dirs. and Agency Sup'ts, April 17, 2002, at 1, attached as Ex. 3.

[29] *Id. See also* Letter from Asst. Sec'y Echo Hawk to Chairman Norris, July 23, 2010, at 4, attached as Ex. 5 ("Echo Hawk Letter") ("The Department [of the Interior] construes mandatory acquisitions to be those authorized by legislation expressly stating that the land 'shall' be acquired in trust, *as well as some additional restriction* on the Secretary's discretion." (emphasis added).

[30] *Compare* MILCSA, Pub. L. No. 105-143, 11 Stat. 2652 *et seq. with, e.g.*, Gila Bend Indian Reservation Lands Replacement Act, P.L. 99-503, 100 Stat. 1798 (1986) ("Gila Bend Act"). The Department of the Interior has determined that the Gila Bend Act is a "mandatory" trust statute because it states the land "shall" be acquired into trust *and* includes an "additional restriction on the Secretary's discretion" because it "limit[s] acquisitions under the Act to a specific geographic area." Echo Hawk Letter, Ex. 5 at 4.

underline. MILCSA is just as discretionary as an "ordinary"[31] trust acquisition Sault Ste. Marie seeks to distinguish.

3. Whether land placed into trust under MILCSA may be used for gaming presents a Section 20 question.

In trying to cast a trust acquisition with MILCSA funds as "mandatory," Sault Ste. Marie seems to argue that "mandatory"-acquisition parcels can be put to any land use, gaming or otherwise. It argues that a MILCSA acquisition "would not require the Secretary to address any Section 20 questions at all[,]"[32] and suggests that "detailed consideration of whether land newly acquired in trust would be eligible for gaming under IGRA Section 20" would be inappropriate in this case.[33] This is fundamentally misleading.

Determining whether an acquisition is mandatory or not is the first step in answering the question of whether a parcel should be taken into trust. But whether gaming can occur on that land *after* it's taken into trust is a separate question. All Indian gaming must occur on trust land, but not all trust land may be used for Indian gaming. And for all trust parcels acquired after October 17, 1988 (the effective date of IGRA), Section 20 of IGRA answers whether a parcel may be used for gaming. So regardless of whether Sault Ste. Marie seeks to have the land taken into trust under a mandatory or discretionary authority, as Sault Ste. Marie concedes, "[i]t is a separate legal question whether land so acquired, having been taken into trust after 1988, is nevertheless eligible for IGRA gaming by virtue of the Section 20 exception for land 'taken into trust as part of . . . a settlement of a land claim.'"[34]

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[31] Mot. to Dismiss, Dkt. 11 at 21.
[32] *Id.* at 20 (emphasis in original).
[33] *Id.* at 21.
[34] *Id.* at 10.

Because Sault Ste. Marie seeks to game on land that was not in trust at the passage of IGRA, the NIGC *must* specifically determine whether gaming can occur on the parcel before Sault Ste. Marie can use it for that purpose.[35] And this makes sense. Sault Ste. Marie can use the MILCSA funds to purchase land *anywhere*.[36] If it were correct that MILCSA is a "mandatory" statute and that moniker exempts it from Section 20, Sault Ste. Marie could purchase land across the street from the Capitol building, Governor's residence, or even across the street from a high school, demand that Interior take that land into trust, and build a casino without any objection from the State, the surrounding community, or the federal government. That's simply not the case. That's what Section 20 is designed to prevent.

Section 20 of IGRA outlines where Indian gaming can occur. Sometimes the NIGC has discretion in granting Section 20 requests, such as when a tribe argues that gaming would be in the best interest of the tribe and is not detrimental to the surrounding community.[37] Sometimes the NIGC does not.[38] But *every* time a parcel of land outside of its reservation is taken into trust, if the tribe wants to use the land for gaming, it *must* meet the requirements of Section 20.[39] So while it is technically true that *if* MILCSA trust acquisition were mandatory, then the Secretary would not have to consider the proposed land use before accepting it into trust, *regardless* of whether MILCSA trust acquisition is mandatory, the Secretary must consider whether the parcel meets Section 20 of IGRA before Sault Ste. Marie may conduct gaming on the parcel.[40]

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[35] 25 U.S.C. § 2719.
[36] *See generally* Pub. L. No. 105-143, § 108(c)(5),11 Stat. 2652, 2661 (1997).
[37] 25 U.S.C. § 2719(b)(1)(A).
[38] *Id.* at § 2719(a)(1).
[39] *Id.* at § 2719(b)(1)(A).
[40] *Id.*

4. MILCSA does not settle a land claim.

Because, as Sault Ste. Marie acknowledges, off-reservation gaming can only occur after a two-step process—first: trust acquisition; second: Section 20 determination[41]— it remains several steps away from beginning any gaming at the Casino parcel. This suit seeks to stop Sault Ste. Marie even though gaming has not yet begun because once a party declares its intent to injure others, those facing a reasonable prospect of harm need not wait until the blow lands.[42] But in weighing the equities of deciding whether to stop Sault Ste. Marie at the beginning of its illegal journey, it is important to recognize that *even if* Sault Ste. Marie succeeds in securing a trust designation for the parcel, it will not ever be able to game on the parcel because it does not meet a Section 20 exception. That is, the harm Sault Ste. Marie complains it would suffer if its trust application is enjoined—an inability to fulfill the terms of this Development Agreement—is wholly illusory because it will never be able to conduct gaming on the Casino parcel anyway.

Section 20 of IGRA allows off-reservation gaming on a parcel taken into trust after 1988 if it was "taken into trust as part of . . . a settlement of a land claim[.]"[43] Sault Ste. Marie argues that it meets this exception, presumably because the legislation that provided the funds for the acquisition was titled the "Michigan Indian Land Claims Settlement Act." But the Act's title does not make the payment a "settlement of a land claim" within the meaning of IGRA.

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[41] Mot. to Dismiss, Dkt. 11 at 10.

[42] *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) ("'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.'") (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923) (internal alteration omitted).

[43] 25 U.S.C. § 2519(b)(1)(B)(i).

The IGRA does not itself define the term "land claim." But its implementing regulations specifically and conclusively answer the question "When can gaming occur on newly acquired lands under a settlement of a land claim?"[44] Its answer is reproduced in full here:

> This section contains criteria for meeting the requirements of 25 U.S.C. 2719(b)(1)(B)(i), known as the "settlement of a land claim" exception. Gaming may occur on newly acquired lands if the land at issue is either:
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> (a) Acquired under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, in legislation enacted by Congress; or
>
> (b) Acquired under a settlement of a land claim that:
>
> (1) Is executed by the parties, which includes the United States, returns to the tribe all or part of the land claimed by the tribe, and resolves or extinguishes with finality the claims regarding the returned land; or
>
> (2) Is not executed by the United States, but is entered as a final order by a court of competent jurisdiction or is an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue.[45]

So Sault Ste. Marie can only meet Section 20 of IGRA if MILCSA fits within one of these categories. It doesn't. MILCSA settled three tribes' Indian Claims Commissions claims[46] (termed "dockets"): dockets 18-E and 58[47]; docket 364[48]; and docket 18-R.[49]

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[44] 25 C.F.R. § 292.5.
[45] *Id.*
[46] *See* MILCSA, Pub. L. No. 105-143, § 108(c)(5), 111 Stat. at 2653.
[47] Opinion of the Commission, 26 Ind. Cl. Comm. 538 (1971), attached as Ex. 8 ("Dockets 18-E and 58").
[48] Opinion of the Commission, 40 Ind. Cl. Comm. 6 (1977), attached as Ex. 10 ("Docket 364").
[49] Opinion of the Commission, 32 Ind. Cl. Comm. 303 (1973), attached as Ex. 9 ("Docket 18-R").

Dockets 18-E and 58 concerned additional compensation for lands ceded to the United States by an 1836 treaty.[50] Docket 364 was an "accounting case" seeking to recover deposited trust funds, dept payments, educational expenses, promised annuities, and attorney fees.[51] And Docket 18-R concerned additional compensation for a particular tract ceded to the United States by an 1820 treaty.[52] To the extent that these dockets concerned land—Docket 364 did not concern land *at all*—there was no dispute about who held title to or properly occupied the land. Rather, these claims only concerned accounting matters and the conscionability of consideration for land the parties agreed the Sault Ste. Marie no longer had an interest in.

And because they did not concern title or other usage rights, they were not "land claims" within the meaning of IGRA. MILCSA's payment of these judgments does not settle a land claim under 25 C.F.R. § 292.5(a) because it does not "result[] in the alienation or loss of possession of some or all of the lands claimed by the tribe." Nor does it settle a land claim under 25 C.F.R. § 292.5(b)(1) because it did not "return[] to the tribe all or part of the land claimed by the tribe." In Dockets 18-E and 58[53]; Docket 364[54]; and Docket 18-R,[55] there were no claims to regain or extinguish title, so there were no land claims.[56] Congressional imprecision in titling the Act cannot create rights where none existed, so even if it could secure trust status of the Casino parcel, it is very unlikely that Sault Ste. Marie

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[50] Dockets 18-E and 58, Ex. 8 at 538.
[51] Docket 364, Ex. 10 at 6-7.
[52] Docket 18-R, Ex. 9 at 303 ("In this case plaintiffs seek additional compensation . . . for lands which were ceded to the United States . . . .").
[53] Dockets 18-E and 58, Ex. 8.
[54] Docket 364, Ex. 10.
[55] Docket 18-R, Ex. 9.
[56] *Contra* Rhode Island Claims Settlement Act, 25 U.S.C. §§ 1701 *et seq.* (extinguishing the Narragansett Tribe's present-day aboriginal title claims to particular parcels in exchange for compensation).

could convince the Secretary of Interior to allow gaming on the parcel. Far from injuring the Sault Ste. Marie, an injunction stopping the trust acquisition process will only preserve the bargained-for rights of Michigan, Sault Ste. Marie, and the remaining Michigan tribes.

II. The Saginaw Chippewa Tribe has an interest in this litigation and faces imminent injury by Sault Ste. Marie.

The Saginaw Chippewa Indian Tribe of Michigan is a federally recognized Indian tribe with a reservation located in central Michigan and on Saginaw Bay. The Saginaw Chippewa Tribe is the modern-day successor of three bands of Ojibwe—the Saginaw, Black River, and Swan Creek bands—who historically occupied a significant swath of middle Michigan from the shores of Lake Huron to as far south and east as the current-day city of Kalamazoo, and including the area now known as Lansing.

The Saginaw Chippewa Tribe owns and operates two casinos in Michigan—the Soaring Eagle Casino and Resort near Mt. Pleasant and the Saganing Eagles Landing Casino north of Bay City. Like many tribes, the Saginaw Chippewa Tribe's pre-gaming history was a grim one of swindle and poverty.[57] But the Saginaw Chippewa Tribe's gaming successes have allowed the Tribe to better provide for the needs of its members, improving access to housing, health care, and educational opportunities for the past 20 years. Today, the Saginaw Chippewa Tribe serves its members with such culturally appropriate services as Ojibwe immersion schools, Elder-care facilities, a behavioral health and treatment center, social-services department, and a full-service medical clinic, and has grown to be the largest

[57] *See generally*, History of the Tribe, *available at* http://www.sagchip.org/ziibiwing/aboutus/history.htm (last visited Dec. 18, 2012).

employer in Isabella County. This is precisely the point of IGRA,[58] and Sault Ste. Marie has reaped similar benefits. Sault Ste. Marie currently owns five casino properties in the Upper Peninsula—its core market area.[59] But it wants more.

As the Assistant Secretary of Indian Affairs explained in 2008, the Department of the Interior "has taken the position that although IGRA was intended to promote the economic development of tribes by facilitating Indian gaming operations, it was not intended to encourage the establishment of Indian gaming facilities far from existing reservation."[60] Instead, tribal gaming facilities are generally located on or contiguous to a tribe's reservation and well within a tribe's historic homeland.

The Saginaw Chippewa Tribe has occupied Michigan for centuries, but over time ceded the vast majority of its ancestral homeland to the United States through a series of treaties. In 1837, The Saginaw Chippewa Tribe ceded roughly a quarter of what has become Michigan's Lower Peninsula, including the forestland covering the area now known as Lansing, to the United States.[61] Today, over 350 years after first contact, and over 150 years after the Saginaw Chippewa Tribe ceded the area now encompassing the City of Lansing to the United States, the Sault Ste. Marie tribe seeks, through a contortion of federal law, to

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[58] 25 U.S.C. § 2702 (1).

[59] Mayor Bernero, Sault Tribe Chairman Payment Announce Completed Land Purchase for Casino Project *available at* http://lansingkewadin.wordpress.com (last visited Dec. 18, 2012).

[60] Memo from Asst. Sec'y Artman to Regional Dir's, Jan. 3, 2008, at 2, attached as Ex. 4 ("Artman Memo"). This memo was later withdrawn by Asst. Sec'y Echo Hawk on other grounds, Memo from Asst. Sec'y Echo Hawk to Regional Dir's, June 13, 2011, attached as Ex. 6, but Assistant Secretary Echo Hawk's analysis does not dispute Assistant Secretary Artman's description of Interior's position regarding off-reservation gaming, and in fact confirmed that Interior has only "rarely authorized a tribe to engage in off-reservation gaming." *Id.* at 3.

[61] Treaty with the Chippewa, 7 Stat. 528 (1837), attached as Ex. 1. *See also* Royce Map 29, Ex. 2, showing the Saginaw cession in pink.

"reestablish" a land base it never before held within the Saginaw Chippewa Tribe's aboriginal homeland.

Sault Ste. Marie's Lansing casino plan directly threatens IGRA's carefully struck balance of interests and the de jure and de facto policies of the Department of the Interior. Because the Saginaw Chippewa tribe's flagship casino, Soaring Eagle, draws tens of millions of dollars from customers in the Lansing metro area, any Lansing casino would directly compete with the Saginaw Chippewa Tribe. Those revenues directly fund the Saginaw Chippewa Tribe's governmental services to its members and surrounding community—services like police and fire services, immersion schooling, and elder programs. Sault Ste. Marie's Lansing plan would place a competing enterprise squarely within the Saginaw Chippewa Tribe's core market area and threaten revenue used for those services. Moreover, the Saginaw Chippewa Tribe pays two percent of its gaming revenues to local units of government within the vicinity of the Saginaw Chippewa Tribe's casinos. So any impact on the Saginaw Chippewa Tribe's gaming revenues would *also* directly impact funding to these other local governments.

To be sure, Congress enacted IGRA to regulate Indian gaming "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,"[62] and a Lansing casino would certainly promote Sault Ste. Marie's economic development. But it would do so by jeopardizing the Saginaw Chippewa Tribe's revenue base. IGRA does not choose such favorites. It promotes "strong tribal governments," not one tribal government at the expense of another. To the extent that Sault Ste. Marie seeks to "enhance"

[62] 25 U.S.C. § 2702 (1).

its tribal lands[63] with purchases in Lansing, and to promote its own gaming activities on such land, it does so at the Saginaw Chippewa Tribe's expense and the expense of the citizens of Isabella and Arenac Counties who benefit from employment at the Saginaw Chippewa Tribe's gaming facilities or from enhanced local-government services funded with two-percent payments from the Saginaw Chippewa Tribe's gaming revenues. A trust application by the Sault Ste. Marie tribe for the Lansing parcel would be an affront to the historical record and to the careful balance struck by IGRA.

CONCLUSION

The Sault Ste. Marie tribe's actions have created a very real threat of imminent injury not just to the State but also to neighboring tribes. These injuries are concrete and present serious legal questions, and Sault Ste. Marie's work to characterize, obfuscate, and duck these questions cannot change the fact that they are ripe for decision and properly before this court. Because Sault Ste. Marie has violated Section 9 of its compact, its motion to dismiss should be denied, and the Court should proceed to a decision on the State's motion to enjoin the Sault Ste. Marie tribe.

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[63] MILCSA, Pub. L. No. 105-143, § 108(c)(5),11 Stat. at 2661.

Dated: December 21, 2012

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN

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**Application for admission forthcoming*