No. 13-1438

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Defendant-Appellant.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Robert J. Jonker

Brief of *Amicus Curiae* Saginaw Chippewa Indian Tribe of Michigan in Support of Appellee to Uphold the Preliminary Injunction

June 24, 2013

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-1438 Case Name: State of Michigan v. Sault Ste. Marie

Name of counsel: William A. Szotkowski

Pursuant to 6th Cir. R. 26.1, Saginaw Chippewa Tribe of Michigan
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

n/a: The Tribe is a federally recognized Indian tribe.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

n/a: The Tribe is a federally recognized Indian tribe. As such, it does not have a parent corporation and has issued no stock.

CERTIFICATE OF SERVICE

I certify that on June 24, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/William Szotkowski
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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Identity statement of amicus curiae and authority to file

The Saginaw Chippewa Indian Tribe of Michigan is a federally recognized Indian tribe with reservations 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, including the area now known as Lansing. The Saginaw Chippewa Tribe retains its treaty-based rights to a large portion of eastern Michigan, including the location of the Ste. Marie Tribe's proposed Lansing casino.[1]

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 one of poverty and limited self-determination opportunities. 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

[1] Saginaw Chippewa Tribe's Amicus Brief, RE 26-3, Page ID # 600 (showing area within which the Saginaw Chippewa Tribe retains treaty-based rights).

treatment center, social-services department, and a full-service medical clinic, and is the largest employer in Isabella County.

The Saginaw Chippewa Tribe's Compact with Michigan also includes Compact Section 9's proscription on off-reservation gaming and requires tribal consent of all federally recognized tribes in Michigan. The Saginaw Chippewa Tribe has an important interest in ensuring compliance with the Compacts and enforcement of the Compact's tribal-consent provision. *All* tribes should be held to the Compacts as negotiated, not just some. And because the Sault Tribe's proposed Lansing casino sits squarely within the Saginaw Chippewa Tribe's ancestral homeland and would prove direct and detrimental competition, the Saginaw Chippewa Tribe's interest is great.

Because of the harmful impacts that will occur to the Saginaw Chippewa Tribe if the Sault Tribe moves forward with its planned casino in Lansing, the Saginaw Chippewa Tribe has filed a motion for leave to file its amicus brief. The Saginaw Chippewa Tribe fully supports the State's position in upholding the preliminary injunction.

Summary

In 2002, the Appellant Sault Ste. Marie Tribe of Chippewa Indians (the "Sault Tribe") appeared before the United States Senate Indian Affairs Committee *to oppose* the Bay Mills Indian Community's attempt to use the Indian Gaming

Regulatory Act's ("IGRA")'s land-claims-settlement exception to after-acquired land to avoid Bay Mills' Compact's revenue-sharing-agreement requirement. The Sault Tribe vociferously argued that using the land-claims-settlement exception in IGRA may "divest our tribe, and the five other tribes who signed gaming compacts simultaneously with us . . . , from [Compact Section 9] rights secured by the compacts."[2] Doing so "is a blatant attempt to deprive the Sault Tribe and the other compacting tribes of their right to share in the casino revenues under Section 9" and parties "cannot wish or waive this contract right away."[3] But the Sault Tribe has had an amazing change of heart in the intervening 11 years. What the Sault Tribe so vehemently opposed in 2002 as a sham—an end run around Compact Section 9's revenue-sharing-agreement requirement—it now openly embraces and pursues.

The suit between the Plaintiff State of Michigan ("State") and the Sault Tribe involves the State-Tribal Compact ("Compact"), fee-to-trust applications before the Secretary of the Department of the Interior ("Interior" or "DOI"), eligible-lands-for-gaming determinations by the Office of Indian Gaming, the IGRA, the Michigan Indian Land Claims Settlement Act ("MILCSA") and the interplay among these agreements, processes, and acts. But the Sault Tribe either

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[2] Prepared Statement of Bernard Bouschor, Chairman of the Sault Ste. Marie Tribe of Chippewa Indians, RE Doc. 006111724946, Page ID # 98.
[3] *Id.* at Page ID # 99.

lacks an understanding of the various pieces in play here or intentionally muddies the water to obscure the true nature of the process of having the United States take land into trust for tribes (whether couched as a mandatory- or discretionary-acquisition) and the process for determining whether that trust land (if acquired after October 1988) is eligible lands for Indian gaming.

The Compact requires that if a tribe wishes to conduct Indian gaming on after-acquired land (land taken into trust after November 1988), it must have revenue-sharing agreements in place with the other federally recognized Michigan tribes *before* it can make its initial trust application to Interior.[4] The Sault Tribe, however, wants to avoid its obligation revenue sharing and instead make its trust application for gaming purposes *without* first getting the other federally recognized tribes' agreement—in direct violation of the Compact. The Sault Tribe argues that this trust acquisition (the Lansing acquisition) is not bound by Compact Section 9's consent requirement because: 1) tribal agreement is only required for trust acquisitions that will become gaming eligible under 25 U.S.C. § 2719(b)(1)(A), not 25 U.S.C. § 2719(b)(1)(B); 2) the MILCSA demands that the Sault Tribe make a trust-acquisition application regardless of purpose; and 3) Compact Section 9 only applies to Class III gaming and since the Sault Tribe *could* conduct Class II gaming on the Lansing parcel (although publicly stating that it will conduct Class

[4] Compact, RE 1-1, Page ID # 30.

III gaming), Compact Section 9 does not apply here because Class II gaming is not a gaming purpose. As set forth below, the Sault Tribe's claims are all without merit and this Court should uphold the District Court's injunction prohibiting the Sault Tribe from making its trust application absent tribal agreement.

And in evaluating the four-factor test for injunctive relief, the Sault Tribe is unable to avoid Compact Section 9's tribal-agreement requirement and will not succeed on the merits *and* the Saginaw Chippewa Tribe faces substantial harm—two factors to be weighed heavily in favor of upholding the preliminary injunction entered below.

I. 1993 Compacts

> Written agreements matter. Parties who reach an accord, particularly on a matter as important and complicated as tribal gaming, carefully document their agreement in writing. They do so to fix the precise terms of their contract, identify their respective obligations, and avoid later controversy about the nature and scope of their bargain. When disputes do arise, the written document usually constitutes the best evidence of the parties' agreement.[5]

In 1993, the Sault Tribe and the State entered into the Compact authorizing the Sault Tribe to conduct Indian gaming.[6] On the same day, the State entered into

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[5] *Arizona v. Tohono O'odham Nation*, No. CV11-0296-PHX-DGC, 2013 WL 1908378, at *1 (D. Ariz. May 7, 2013) (finding that the Indian Gaming Regulatory Act waived a tribe's immunity from suit to enforce state-tribal compact provisions).

[6] Compact, RE 1-1.

gaming compacts with six additional Michigan tribes, including the Saginaw Chippewa Tribe.[7] All compacts included Section 9:

> 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 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.[8]

Compact Section 9 requires tribal agreement from all Michigan Tribes if:

- A tribe wants to apply to have land taken into trust;
- The land is located off-reservation;
- The land will be used for gaming purposes; *and*
- The trust acquisition will occur after October 17, 1988.

So if a tribe wants to have the federal government take land into trust after October 1988 *and* the tribe intends to conduct gaming thereon, then the Sault Tribe *must* first have the consent of all federally recognized Michigan tribes to begin the trust-acquisition process. The Compact reference to IGRA Section 20 is not a basis for trust-acquisition authority; it is included in the Compact to signify that it will govern trust applications for gaming purposes for land acquired in trust after

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[7] The other 1993 compacting Tribes are: Bay Mill Indian Community, Grand Traverse Band of Ottawa and Chippewa, the Hannahville Indian Community, the Keweenaw Bay Indian Community, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, and the Saginaw Chippewa Tribe. *See* Michigan Gaming Control Board, *Tribal State Compacts in Michigan*, http://www.michigan. gov/mgcb/0,1607,7-120-1380_1414_2182---,00.html (last visited on June 21, 2013).

[8] Compact, RE 1-1.

1988. But through a series of increasingly convoluted arguments, the Sault Tribe argues that Compact Section 9 does not apply to *its* trust application even though it rests squarely within the construct of Compact Section 9's requirements.

A. Compact Section 9's tribal-agreement provision applies to all off-reservation trust applications for gaming purposes; the mechanism by which off-reservation trust land is deemed gaming eligible is immaterial.

It is important to note that the Sault Tribe's claim requires two separate but related determinations before it may operate a casino on the Lansing parcel—approval of the trust application *and* an Indian-lands-eligibility determination under IGRA Section 20. The trust application—the process involved in this proceeding—is distinct from the determination that after-acquired land is eligible for Indian gaming.[9] Although they are linked and sometimes occur simultaneously, they remain distinct processes. But the *only* process addressed in Compact Section 9 is the trust application process; the Indian-lands-eligibility determination is not at play here.

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[9] *See Gila River Indian Community v. U.S.*, 776 F.Supp.2d 977, 991 (D. Ariz. 2011) (finding that the decision to accept land in trust is separate and not contingent on a gaming-eligibility decision under IGRA). *Accord* Mem. from Asst. Sec'y Echohawk to all Regional Dir.'s *Guidance for Processing Applications to Acquire Land in Trust for Gaming Purposes*, RE 006111707586, Page ID # 89 (stating that "[f]irst, [Interior] must acquire lands in trust for the tribe pursuant to applicable Federal law. Second, those lands must be eligible for gaming pursuant to one of IGRA's exceptions."). Thus, it is entirely possible for a tribe to have land taken into trust but not be able to conduct gaming on it, either because they failed to meet an IGRA exception or they have waived that right.

The Sault Tribe argues that Compact Section 9's prior-consent provision applies *only* if it seeks to game on trust land made gaming eligible under subpart 25 U.S.C. § 2719(b)(1)(A), not 25 U.S.C. § 2719 generally. But that's not what the Compact provides. Compact Section 9 governs trust applications, not Indian-lands-eligibility determinations.[10] The Compact applies IGRA's Section-20 ban on gaming on after-acquired lands without tribal approval—irrespective of *how* a tribe may be able to have after-acquired land deemed gaming eligible. Compact Section 9, on its face, applies to *all* off-reservation trust applications and the District Court properly enjoined the Sault Tribe from making such application absent agreement with the other federally recognized Michigan tribes.

After examining the Parties' arguments regarding the scope of the Compact Section 9 language, the District Court determined that:

> "[a]n entirely reasonable construction of Section 9 of the Compact—in fact, the most plausible construction offered by either party so far—is that the Sault Tribe must secure the required revenue sharing agreement before submitting an application for a trust acquisition that has the stated purpose and inevitable effect of triggering an IGRA Section 20 exception to the general prohibition on gaming that otherwise applies."[11]

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[10] *Accord* Compact RE 1-1, Page ID # 16 (cover letter from Interior to Gov. Engler stating that "Section 9 prohibits tribes from submitting applications for trust land for gaming purposes in the absence of a written agreement from the tribes in the state covering the sharing of gaming revenue.").

[11] Opinion and Order, RE 37, Page ID # 856.

1. The plain and ordinary language of Compact Section 9 applies to all off-reservation applications regardless of how previously barred lands become gaming eligible.

IGRA Section 20 prohibits gaming "on lands acquired *by the Secretary in trust* for the benefit of an Indian tribe after October 17, 1988, unless" an exception applies.[12] And IGRA Section 20 includes numerous exceptions affecting both on-reservation and off-reservation acquisitions.[13] Compact Section 9 is titled "Off-Reservation Gaming" and its consent provisions only apply to off-reservation trust applications. But that is the *only* distinction that Compact Section 9 makes, as between on- and off-reservation applications. It does not further differentiate among the various exceptions by which off-reservation trust land may become gaming eligible.

For off-reservation acquisitions, there are two classes of exceptions that make generally ineligible after-acquired land eligible for gaming: a two-part determination under 25 U.S.C. § 2719(b)(1)(A) or the equal-footing exceptions under 25 U.S.C. § 2719(b)(1)(B). But how the Sault Tribe wants Section 9 to read is that prior tribal consent is only required for a trust acquisition that will gain gaming-eligible status through a two-part determination, i.e., 25 U.S.C. § 2719(b)(1)(A). By focusing almost exclusively on the exceptions to the after-

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[12] 25 U.S.C. § 2719(a)(emphasis added).

[13] Compare 25 U.S.C. § 2719(a) (on-reservation acquisitions) and 25 U.S.C. § 2719(b) (off-reservation acquisitions).

acquired ban, the Sault Tribe directs the Court's attention away from the fundamental question underlying this dispute: is the Sault Tribe's trust application one to have off-reservation land taken into trust, for gaming purposes, after October 1988? If the Court finds the answer to be "yes," then any discussion about exceptions under IGRA's Section-20 ban on gaming is immaterial.

This Court is thus tasked with interpreting Compact Section 9. "General principles of federal contract law govern the Compacts, which are entered pursuant to IGRA."[14] But in this case, "it makes no difference to the case whether [the Court] appl[ies] Michigan's rule of contract interpretation or the rules established by federal common law because they are substantially similar . . . ."[15] When interpreting the terms of a contract, a court must interpret them in their plain and ordinary meaning.[16] Further, it is well settled that contracts that are unambiguous are not open to construction and must be enforced as written.[17]

The Sault Tribe's interpretation of Compact Section 9 strains credulity. The Court needn't follow the Sault Tribe's crabbed interpretation to determine the

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[14] *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010)(citation omitted).. *See also Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 484-85 (9th Cir. 1998) (finding that courts should begin analysis with the legal proposition that compacts are treated like contracts).

[15] *Royal Ins. Co. v. Orient Overseas Container Line Ltd.,* 525 F.3d 409, 421 n.4 (6th Cir. 2008).

[16] *See Nat'l Bank v. Laskowski*, 580 N.W.2d 8, 10 (Mich. Ct. App. 1998).

[17] *See Britton v. John Hancock Mut. Life Ins. Co.*, 186 N.W.2d 781, 782 (Mich. Ct. App. 1971).

threshold question of what Compact Section 9 means. If the Parties intended Compact Section 9 to only apply to gaming-eligibility determinations under 25 U.S.C. § 2719(b)(1)(B), they could have easily done so. But the parties did not do that; instead, they tied the tribal-consent requirement to the trust-application process, not the gaming-eligibility determination. The Sault Tribe's interpretation of Compact Section 9 strains not only that section's plain language, it practically demands that common sense be abandoned. Such an interpretation is contrary to the axiomatic principle of contract interpretation that provisions be given their plain and ordinary meaning.

2. *The Court should enforce Compact Section 9 according to its terms, as previous Indian-gaming cases have done.*

The Sault Tribe cites *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Att'y for the W.D. of Mich.*,[18] to support its contention that Compact Section 9 only applies to trust acquisitions where land will be deemed gaming eligible under 25 U.S.C. § 2719(b)(1)(A).[19] Not only does *Grand Traverse* not stand for the Sault Tribe's stated proposition, it actually reinforces that "[w]here the terms of the contract are clear and unambiguous, those terms are dispositive of the parties' intent."[20] Moreover, *Grand Traverse* dealt with Compact Section 2(C),

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[18] 198 F. Supp. 2d 920 (W.D. Mich. 2002).
[19] Sault Tribe's Substitute Brief, RE 006111707586, Page ID # 52-33.
[20] *Grand Traverse*, 198 F. Supp. 2d at 937.

not Section 9 and the Court's analysis there neither alters nor informs the plain reading of Compact Section 9.

In *Grand Traverse*, the Grand Traverse Band brought a declaratory-judgment action against the United States to determine whether its gaming operation was lawfully operated. The United States and Michigan asserted that the Grand Traverse parcel—acquired in trust after October 1988—was barred from gaming by 25 U.S.C. § 2719. The United States and Michigan argued that Compact Section 2(C) required the Governor's concurrence before gaming was permitted on after-acquired land. Compact Section 2(C) provides:

> Notwithstanding subsection 2(B) above, any lands which the Tribe proposes to be taken into trust by the United States for purposes of locating a gaming establishment thereon shall be subject to the Governor's concurrence power, pursuant to 25 U.S.C. § 2719 or any successor provision of law.

The Court found that Section 2(C) permitted gaming on after-acquired land subject to the Governor's concurrence power provided in 25 U.S.C. § 2719.[21] And since the only concurrence power found in Section 2719 was for two-part determinations (25 U.S.C. § 2719(b)(1)(A)), Section 2(C)'s concurrence requirement only applied to two-part-determination decisions. Since Grand Traverse's gaming-eligibility determination was *not* subject to a two-part determination, its gaming operation did not need gubernatorial concurrence.

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[21] *Id.*

So the Sault Tribe's argument that *Grand Traverse* supports its claim that Compact Section 9's tribal-consent provision only applies to gaming-eligibility determinations under two-part determinations is grossly misplaced. In fact, because the *Grand Traverse* court followed the plain language of the compact provision—which this Court must do here—*Grand Traverse* actually supports the Saginaw Chippewa Tribe's claim that the plain language of Compact Section 9 applies to all off-reservation trust applications regardless of how such land may become gaming eligible.

In *Nevada v. U.S.*,[22] Congress enacted land-claims-settlement legislation for the Fallon-Paiute Shoshone Indians. The legislation permitted the Tribe to acquire land within certain counties and to have that land held in trust. The Fallon-Paiute acquired land using settlement funds and applied to have that land taken into trust, which Interior did. But earlier, Nevada and the DOI had entered into a Memorandum of Understanding ("MOU") addressing required consultations between Nevada and Interior before Interior would take land into trust. Because Interior took the Fallon-Paiute land into trust *without* consultation, Nevada sued to invalidate the Fallon-Paiute acquisition.

The parties disputed whether the MOU applied to all trust applications or only to discretionary acquisitions. And although the Court eventually found that

[22] 221 F. Supp. 2d 1241 (D. Nev. 2002).

the MOU only applied to discretionary acquisitions, it did so by relying on the MOU's plain language. The MOU referenced 25 C.F.R. § 151 multiple times, attached a copy of Part 151 to the MOU, and included a statement that one of the objectives of the MOU was to meet the requirements of 25 C.F.R. § 151—the section that only applies to discretionary acquisitions. By its very clear terms, the MOU was limited to discretionary acquisitions. Again, as in *Grand Traverse*, the court relied on the actual language of the MOU and found it clear and unambiguous.

Following *Grand Traverse* and *Nevada*, this Court must examine the plain and ordinary language used in Compact Section 9. If the Parties had intended to restrict the tribal-consent requirement to *only* discretionary gaming-eligibility determinations, the Parties could have easily done two things: 1) expressly restricted Compact Section 9's tribal-consent language to gaming-eligibility determinations under 25 U.S.C. § 2710 (b)(1)(A) specifically rather than 25 U.S.C. § 2710 generally; or 2) incorporate a reference to 25 C.F.R. § 151—the regulations governing discretionary acquisitions. But the Parties did neither of these things. Only now, in an attempt to avoid its obligations under the Compact, does the Sault Tribe attempt to drawn a distinction between the plain language of Compact Section 9 and its preferred reading. The District Court properly determined that the Sault Tribe's trust acquisition, regardless of whether it is discretionary or

mandatory, requires the consent of all federally recognized Michigan tribes because the acquisition is for gaming purposes.

B. Compact Section 9 restricted the Sault Tribe's IGRA-created right to have after-acquired land deemed gaming eligible absent the approval of all federally recognized tribes.

The Sault Tribe argues that because it bought the Lansing parcel with settlement money *and* that land must be held in trust *and* it qualifies for an IGRA Section 20 exception, it is entitled to violate Compact Section 9 to assert its IGRA Section 20 rights. But does IGRA's Section 20 land-claims-settlement exception apply if a tribe has essentially contracted away or restricted its right to use the land-claims-settlement exception?

Generally, IGRA Section 20 prohibits gaming on Indian land if the United States acquired the land in trust after October 17, 1988. But IGRA Section 20 creates a number of exceptions that will permit gaming if they are met—including land acquired in a land-claims settlement. The Sault Tribe believes that because it qualifies for a land-claims-settlement exception to IGRA's Section 20 general prohibition (in its opinion), it can exercise that federal right without regard to the Compact provisions. But the Sault Tribe has contractually restricted its right to game on eligible land under the land-claims-settlement exception *unless and until* it obtains the consent of all federally recognized Michigan tribes.

In 1993, when the tribes negotiated the Compacts, they knew that IGRA created many statutory exemptions to the general prohibition of gaming on after-acquired lands. And the tribes agreed, nonetheless, to restrict those statutory rights created under IGRA Section 20 by requiring tribal consent for all off-reservation trust applications. "Michigan courts have consistently permitted the contractual modification of statutory rights in the absence of an express statutory prohibition against such modification."[23]

The Sault Tribe knowingly restricted its right to game on any land found to be gaming eligible under Section 20 lands *unless* all the other Tribe's agreed. Compact Section 9 is a clear bar to the Sault's statutory rights under IGRA Section 20. The District Court properly enjoined the Sault Tribe's trust application because it would violate Compact Section 9.

C. Compact Section 9 does not limit gaming on after-acquired land to just Class III gaming; any "gaming purpose"—including Class II gaming—triggers the tribal-consent provision.

The Sault Tribe argues that if it were to operate a Class II facility on the Lansing parcel, prior tribal consent to make a trust application would not be necessary because Compact Section 9 only applies to off-reservation Class III gaming.[24] And although the Sault Tribe *could* conduct Class II gaming on the site,

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[23] *Francis v. AT & T Mobility, LLC*, 2009 WL 416063, at *5 (E.D. Mich. 2009) (citation omitted).

[24] Sault Tribe's Substitute Br., RE 006111707586, Page ID # 38 and 67.

it does not *want* to conduct Class II gaming in Lansing. The Sault Tribe has, at every turn, promoted the Lansing casino as a Class III facility offering slot machines and table games. But again, the Class II versus Class III distinction is immaterial because Compact Section 9 does not use that language. As it did in its mandatory-versus-discretionary argument, the Sault Tribe again tries to read language into Compact Section 9 that just isn't there.

Compact Section 9 provides:

> 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 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.[25]

The plain language of Compact Section 9 bars applications for trust land for *gaming purposes*, not applications for trust land for *Class III gaming purposes*. The Compact does not define the term "gaming purposes" but it does define "Class III gaming."[26] And even though "Class III gaming" is a defined term, the parties did not use it in Compact Section 9. As discussed *supra* at I(A)(1), when interpreting the terms of a contract, a court must interpret them in their plain and

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[25] Complaint, RE 1-1, Page ID # 30 (emphasis added).
[26] Compact, RE 1-1, Page ID # 19.

ordinary meaning.[27] And here, the Parties could have limited Compact Section 9 to Class III gaming by using that term; but they did not. The plain and ordinary meaning of "gaming purposes" encompasses much more than just Class III gaming. Moreover, the purpose of Compact Section 9 was to prevent the proliferation of Indian gaming—not just Class III gaming—throughout Michigan on lands Tribes acquired after the Compacts were entered into.

Although is true that Class III gaming can *only* exist under a State-Tribal Compact, and that if the Sault Tribe engages in Class II gaming it would not be subject to state jurisdiction. But those facts don't impact the rights the Sault Tribe waived under Compact Section 9. Whether seeking Class II or III gaming, the classification of gaming does not triggers the tribal-consent provision, it is the existence of a gaming purpose—*any* off-reservation gaming—that activates the tribal-consent provision.

And although the State does not regulate or oversee Class II Indian gaming, that doesn't mean a tribe, through its Compact, can't restrict its ability to conduct off-reservation Class II gaming for a more favorable Class III compact. The Sault Tribe's argument that Compact Section 9 does not apply because it *could* conduct Class II gaming on the Lansing parcel is unavailing. The plain language of

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[27] *See Nat'l Bank v. Laskowski*, 580 N.W.2d 8, 10 (Mich. Ct. App. 1998).

Compact Section 9 is tied to "gaming purposes" and squarely includes Class II operations.

II. The Sault Tribe must still make a trust application and follow Interior procedure for trust acquisitions and gaming-eligibility determinations.

The Sault Tribe argues that its trust application for the Lansing parcel is not really an application, but more of a "claim" or "submission" that doesn't trigger Compact Section 9.[28] But just because the Sault Tribe doesn't call it an application, doesn't mean that Interior sees it as anything other than an application. "In the absence of statutory or judicial language requiring the Secretary to proceed with the mandatory acquisition without notice or application, the individual Indian or Tribe *must* submit a written request to commence the acquisition process."[29] So even before Interior can reach the issue of whether an acquisition is mandatory or discretionary, the Sault Tribe must violate Section 9 in order to press its claim by making a request—whether by application, claim, or submission—to Interior.

The Sault Tribe next argues that because its trust submission is mandatory and it needn't file a statement of purpose for which the property will be used, its trust application somehow no longer triggers the Compact Section 9 tribal-consent requirements. But nothing changes if the Sault Tribe isn't required to disclose its

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[28] Sault Tribe's Substitute Br., RE 006111707586, Page ID # 54-55.

[29] *See* Bureau of Indian Affairs Fee-to-Trust Handbook, Version II p. 24 (2001) ("BIA Handbook") at http://www.bia.gov/cs/groups/xraca/documents/text/idc-002543.pdf (last visited June 21, 2013). The BIA Handbook uses the phrases "written request" and "application" interchangeably. *See* p. 7 and 20.

acquisition purpose to Interior. Its trust application is still one for gaming purposes on off-reservation land—Compact Section 9 still applies. But just because the Sault Tribe believes it isn't *obligated* to disclose the purpose of the acquisition in its application to Interior, that fact doesn't somehow convert its application for gaming purposes into a non-gaming application. All the Parties know that the purpose of the trust acquisition is for gaming purposes. Interior's application requirements for and processing of trust applications *does not* affect whether this trust acquisition meets the requirements of Compact Section 9. So while Interior may not need to consider the Sault Tribe's gaming intentions in addressing its trust application, *this Court* must consider the Sault Tribe's gaming intentions because the Sault Tribe 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 background of IGRA, the Sault Tribe cannot avoid Compact Section 9 by asking the Parties and this Court to simply avert their eyes from the admitted gaming intent. The District Court properly found that the Sault Tribe's intended trust application was barred by operation of Compact Section 9.

III. Four-factor test for injunction relief

A plaintiff need not win on every factor to obtain a preliminary injunction.[30] And although a court should analyze all four factors, it "is not required to make specific findings concerning each of the four factors used in determining a motion for preliminary injunction if fewer factors are dispositive of the issue."[31] The District Court properly found that the State will likely prevail in its challenge to the Sault Tribe's trust application, the State has demonstrated a risk of irreparable harm, harm to the other federally recognized Michigan tribes will occur, and enjoining the Sault Tribe promotes the public interest. As set forth below, the Saginaw Chippewa Tribe will suffer great and real harm if the Sault Tribe is permitted to openly violate the Compact and pursue off-reservation gaming.

A. Likelihood of success

The first factor to consider is whether the State has demonstrated "a strong likelihood of success on the merits."[32] A party is not required to prove its case in full at the preliminary-injunction phase. However, "[i]n order to establish success on the merits of a claim, a plaintiff must show more than a mere possibility of

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[30] *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (citation omitted).
[31] *Id.* (citation omitted).
[32] *Tumblebus, Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005) (citation omitted).

success."[33] "[I]t is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation."[34]

The State and Saginaw Chippewa Tribe have demonstrated a strong likelihood of success on the merits. A straightforward reading of Compact Section 9 makes clear that the Sault Tribe's proposed fee-to-trust application would violate the Compact. The Sault Tribe's arguments present an unreasonable interpretation of the Compact. Based on the plain language of the Compact *and* Michigan's requirement to give the Compact terms their plain and ordinary meanings, the State will likely prevail on its Compact Section 9 claim.

B. Risk of Harm to Others

"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."[35] 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. The Compacts balance individual tribal interests against those of the other federally

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[33] *Six Clinics Holding Corp. v. Cafcomp Sys., Inc.,* 119 F.3d 393, 402 (6th Cir. 1997) (citation omitted).
[34] *Id.*
[35] *Bay Mill 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)).

recognized Michigan tribes by requiring a tribe to enter into revenue-sharing agreements with the other tribes before it could pursue off-reservation gaming. If the Sault Tribe is permitted to willfully violate Compact Section 9, the delicate balance struck among the federally recognized Michigan tribes regarding off-reservation gaming will be destroyed, causing serious and imminent injury to the Saginaw Chippewa Tribe.

The Saginaw Chippewa Tribe's Isabella reservation is located in central Michigan. 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, 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.[36] 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

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[36] *See generally*, History of the Tribe, *available at* http://www.sagchip.org/ziibiwing/aboutus/history.htm (last visited June 20, 2013).

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 employer in Isabella County. This is precisely the point of IGRA,[37] and the Sault Tribe has reaped similar benefits. But despite having five casino properties in the Upper Peninsula—its core market—the Sault Tribe wants more.

As the Assistant Secretary of Indian Affairs explained in 2008, 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 reservations."[38] 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

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[37] 25 U.S.C. § 2701(1).

[38] Memo from Asst. Sec'y Artman to Regional Dir.'s, Jan. 3, 2008, RE 26-5, Page ID # 604. This memo was later withdrawn by Asst. Sec'y EchoHawk on other grounds, Memo from Asst. Sec'y Echohawk to Regional Dir.'s, June 13, 2011, RE 006111707586, Page ID # 88, but Assistant Secretary Echohawk'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 # 90.

covering the area now known as Lansing, to the United States.[39] 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 Tribe seeks, through a contortion of federal law, to "reestablish" a land base it never before held within the Saginaw Chippewa Tribe's aboriginal homeland.

The Sault Tribe's Lansing casino plan directly threatens IGRA's carefully struck balance of interests and the de jure and de facto policies of Interior. Because the Saginaw Chippewa Tribe's flagship casino, Soaring Eagle, draws tens of millions of dollars from customers in the Lansing metro area, and 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. The Sault Tribe'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 revenue 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 revenue would *also* directly impact funding to those other local governments.

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[39] Treaty with the Chippewa, 7 Stat. 528 (1837).

To be sure, Congress enacted IGRA to regulate Indian gaming "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,"[40] and a Lansing casino would certainly promote the Sault Tribe'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 the Sault Tribe seeks to "enhance" its tribal lands 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 services funded with two-percent payments from the Saginaw Chippewa Tribe's gaming revenue. A trust application by the Sault Tribe for the Lansing parcel would be an affront to the historical record and to the careful balance struck by IGRA. The Saginaw Chippewa Tribe would be gravely and permanently harmed if the Sault Tribe pursues its off-reservation trust designation without the consent of the other federally recognized Michigan tribes.

Conclusion

The State and the federally recognized Michigan tribes all agreed to put limits on the development of off-reservation gaming. To this end, the parties

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[40] 25 U.S.C. § 2702(1).

included Compact Section 9 that required any tribe wishing to conduct off-reservation gaming to enter into revenue-sharing agreements with the other federally recognized Michigan tribes. The Sault Tribe seeks to have off-reservation land taken into trust and conduct Class III gaming thereon. But the Sault Tribe doesn't want to play by the rules and honor the commitments it made during the compacting process. The Sault Tribe tries valiantly to craft clever and novel arguments about why Compact Section 9 is not involved here. But the fact of the matter remains—the Sault Tribe's trust application is for off-reservation gaming purposes. To avoid Compact Section 9, the Sault Tribe first argues that what Compact Section 9 says isn't what it actually means, ignoring the plain-and-ordinary-interpretation rule. Next, they argue that because Interior must take the land into trust (which the Saginaw Chippewa Tribe disputes), it somehow obviates the Compact Section 9 requirements. And finally, the Sault Tribe argues that its trust-acquisition request isn't really an application so Compact Section 9 doesn't apply.

Finally, the Saginaw Chippewa Tribe will be gravely injured if the Sault Tribe is permitted to violate the carefully crafted bargain contained in Compact Section 9. The Sixth Circuit should not countenance the Sault Tribe's willful and flagrant violation of the Compact and should uphold the District Court's injunction against application.

Dated: June 24, 2013

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CERTIFICATE OF COMPLIANCE

This brief contains 6,458 words. Amici have requested permission of the court to file this brief, in excess of the limitations of FRAP 29(d). This brief complies with the typeface requirements of FRAP 32(a)(5) because this brief has been prepared in a proportionally- spaced typeface using Microsoft Word in 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2013, I electronically filed the following documents with the Clerk of the Court for the 6th Circuit Court of Appeals in the above captioned case.

- Brief of *Amicus Curiae* Saginaw Chippewa Indian Tribe of Michigan in Support of Appellee to Uphold the Preliminary Injunction;
- Corporate Disclosure;
- Word Count Compliance; and
- Certificate of Service.

Participants in the case who are registered with ECF will be served by the CM/ECF system

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