IN THE UNITED STATES COURT FOR
THE WESTERN DISTRICT OF MICHIGAN

KEWADIN CASINOS GAMING AUTHORITY,
A duly authorized entity created under the laws of the Sault Ste. Marie Tribe of Chippewa Indians,

Plaintiff,

v.

HONORABLE JOYCE DRAGANCHUK, District Judge, State of Michigan, Ingham County Circuit Court, in her Individual and Official Capacities, JLLJ DEVELOPMENT, LLC, a Michigan Limited Liability Company, and LANSING FUTURE DEVELOPMENT II, LLC, a Michigan Limited Liability Company,

Defendants.

Case No. 2:22-cv-00027

Hon. Hala Y. Jarbou

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

ORAL ARGUMENT REQUESTED

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INTRODUCTION (ORAL ARGUMENT REQUESTED)

Defendants' motions to dismiss must be denied. The motions are based upon Defendants' attempt to get this Court to ignore all but one part of one of the actions by Defendants which far exceed any power that the State can confer on its courts—actions of Defendants which violate the federal constitutional, federal statutes, and federal common law which provide the United States and the Tribe with exclusive power.

Kewadin Casinos Gaming Authority's (Kewadin) complaint discusses multiple violations of Kewadin and the Tribe's federally protected rights. Kewadin alleges that Defendants are violating the Indian law infringement doctrine, and that Defendants are taking actions which are preempted by federal law, including actions for which there is complete federal preemption. Since the initial complaint was filed, the Defendants keep asserting ever-increasing authority to reach onto the federally-owned Reservation of the Sault Ste. Marie Tribe of Chippewa Indians (the Tribe) and order the Tribe, tribal officers, Kewadin, and Kewadin officers to commit criminal violations, including ordering criminal violations in areas of law for which State law is completely preempted.[1]

There is no federal law doctrine which bars this Court from remedying those violations, and notably Defendants do not even attempt to justify the Developers' extreme overreach in the state court case.

If the Tribe were a non-governmental party, perhaps the Anti-Injunction Act or Rooker-Feldman would apply. And while the State Court claims it is justified to act as it does because it asserts that Kewadin is not a governmental party, this Federal Court is required by over 200 years

[1] Kewadin and additional plaintiffs will be filing a motion to very substantially amend their complaint, to include additional allegations of the additional violations, and to provide this Court with the dispositive decision that provides yet one more legal basis for bringing to an end the Developers' vast overreach, Kewadin has not been able to complete that amendment.

of federal law to reject that position, to hold that the Tribe and Kewadin are governmental parties, with the retained sovereign right to make their own laws and to have those laws applicably on their own Reservation. The Tribe, and only the Tribe, has the right to regulate and control its gaming property. The Tribe, and only the Tribe, has the right to issue the definitive interpretation of its own statutes, and to expect and demand that its employees and officers and others on the Reservation comply with those statutes. The State Court does not have any power to order the Tribe or Kewadin to take actions on the Reservation which are in violation of those tribal laws.

Defendants' motions to dismiss, which are based upon law that applies to a non-government plaintiff are inapplicable, and under the law that is applicable, that they did not brief, their alleged defenses are insufficient to defeat the allegations in the complaint of violations of the Indian law infringement doctrine, federal preemption, and the federal court's duty to protect a tribal government from vast overreaching in State Court litigation.

I. THE ROOKER-FELDMAN DOCTRINE DOES NOT APPLY TO THE STATE'S ORDER THAT VIOLATE THE JURISDICTIONAL LIMITS ON STATE COURTS UNDER THE INDIAN LAW INFRINGEMENT DOCTRINE OR THAT ARE PREEMPTED BY FEDERAL LAWS.

The first problem with the Defendants' application of the *Rooker-Feldman* doctrine is that their arguments relate only to the state court's rulings as to Kewadin's sovereign immunity and do not address the separate and distinct issue of state court subject matter jurisdiction. The Defendants' invocation of *Rooker-Feldman* is premised upon the misleading half-truth that "Kewadin's disagreement with state court's waiver-of-sovereign immunity ruling is the basis of Kewadin's instant lawsuit in this Court." PageID.648. But Kewadin's sovereign immunity is just *one of* the bases of this lawsuit; the state court's lack of subject matter jurisdiction is also asserted as a separate basis for relief in Kewadin's Complaint. PageID 118-120 ¶¶ 30, 39, 45, and 48.

"[T]ribal sovereign immunity and a court's lack of subject-matter jurisdiction are different animals." *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Lawrence*, 22 F.4th 892,

906 (10th Cir. 2022). Indeed, the question of subject matter jurisdiction is "wholly distinct" from the defense of sovereign immunity. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786-87 n. 4 (1991). *See also United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 923-924 (9th Cir. 2009) ("sovereign immunity and subject matter jurisdiction present distinct issues."); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007) ("To confer subject matter jurisdiction in an action against a sovereign, *in addition to* a waiver of sovereign immunity, there must be statutory authority vesting a district court with subject matter jurisdiction.") (emphasis added); *Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1574-75 (Fed. Cir. 1995) ("The inquiry … is not whether there is one, jurisdiction, or the other, a waiver of immunity, but whether there is both…."). Put differently, "the absence of [sovereign] immunity does not establish the presence of subject matter jurisdiction." *Lawrence*, 22 F.4th at 906 (citing *Alvarado*, 509 F.3d at 1016). So even assuming *arguendo* that Kewadin waived its sovereign immunity, this does nothing to confer subject matter jurisdiction upon the state court.

And unlike the defense of sovereign immunity, a lack of subject matter jurisdiction cannot be waived, and a court's jurisdiction cannot be consented to or stipulated by the parties. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (defense that court lacks subject-matter jurisdiction "can never be waived or forfeited"); *Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.*, 764 F.3d 210, 215 n. 2 (2d Cir. 2014) ("Consent of a party is wholly insufficient to create subject matter jurisdiction.") (cleaned up, quoting *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 127–28 (1996)); *Punch v. Bridenstine*, 945 F.3d 322, 330 (5th Cir. 2019) ("[S]tipulations cannot create subject-matter jurisdiction."). Hence, Kewadin cannot have "consented to state court jurisdiction" PageID.647 as advanced by the Developers. And the sole premise of the Developers' *Rooker-Feldman* argument – that "Kewadin cannot use its lawsuit to obtain this Court's review the of the

state court's decision" as to waiver of sovereign immunity PageID.648 – has no bearing upon Kewadin's claims in this action relating to the state court's lack of subject matter jurisdiction.

Additionally, Kewadin's complaint to this Court is not solely based upon whether the State Court has jurisdiction over the complaint. Kewadin did not file its complaint in this Court until the Defendants engaged in far greater overreach, far greater violations of the federal law that this Court has the duty to remedy. Defendants did not stop with asserting jurisdiction over the State Court case. They went the next step and began issuing orders directing Kewadin and tribal officers to take actions on the Tribe's Reservation, including actions that are crimes by tribal members and tribal officers in that jurisdiction. And then they went one step further by having the State Court assert authority which is barred by the IGRA and by the State of Michigan's gaming compact with the Tribe. Notably, the Defendants do not provide any argument that Rooker-Feldman or any other law bars this Court from remedying that overreach. The only "argument" that any Defendant makes is to make personal attacks because Kewadin is fighting against the State Court's overreach.

Regardless, *Rooker-Feldman* does not preclude this Court's jurisdiction over *any* of Kewadin's claims. The doctrine provides that lower federal courts lack "appellate jurisdiction" to review a final state court judgment when the judgment was rendered before the initiation of the parallel federal court suit. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 294 (2005). Before the Supreme Court's unanimous decision in *Exxon Mobil*, federal courts invoked *Rooker-Feldman* in a variety of circumstances to dismiss federal court suits.[2] The Court granted certiorari in *Exxon Mobil* to "resolve conflict among the Courts of Appeals over the scope of the *Rooker-Feldman* doctrine." *Exxon Mobil*, 544 U.S. at 291. Explaining that the Third Circuit in

[2] *See, e.g.,* Adam McLain, Comment, *The Rooker-Feldman Doctrine: Toward a Workable Role*, 149 U. PA. L. REV. 1555 (2001).

Exxon Mobil had "misperceived the narrow ground occupied by *Rooker-Feldman*," *Id.* at 284, the Court limited the doctrine's scope and held there "is nothing necessarily inappropriate" with a party such as Kewadin "filing a protective action" in federal court. *Id*. at 294, n.9.

In *RLR Invs., LLC v. City of Pigeon Forge*, 4 F.4th 380, 387 (6th Cir. 2021), *cert. denied sub nom. RLR Invs., LLC v. City of Pigeon Forge*, 142 S. Ct. 862 (2022), the Sixth Circuit Court of Appeals observed that following *Exxon Mobil*, "*Rooker-Feldman* is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." (emphasis added). "That is a narrow situation, so narrow the Supreme Court has applied the doctrine just twice in nearly a century, making it applicable so far just to people named Rooker or Feldman." *Van Hoven v. Buckles & Buckles, P.L.C.*, 947 F.3d 889, 892 (6th Cir. 2020) (citing *Skinner v. Switzer*, 562 U.S. 521, 531 (2011)). "The Court repeatedly has chastised lower federal courts for extending the doctrine 'far beyond' its proper scope." *Id.* (quoting *Skinner,* 562 U.S. at 532). The *RLR* court acknowledged that "[u]sually *Rooker-Feldman* cases are complicated because it's difficult to determine if a plaintiff seeks 'review' of a state-court decision, or if a decision counts as a 'judgment.'" F.4th at 388-89 (citations omitted).

As an initial matter, *Rooker-Feldman* clearly cannot bar Kewadin's claim that the state court lacks subject matter jurisdiction because, as this Court correctly observed in its February 8, 2022 Order denying Kewadin's Motion for a Temporary Restraining Order, "the state court did not explicitly decide the question of its subject matter jurisdiction." ECF No. 15 at 5, PageID.623. The state court has yet to even consider the nearly two centuries of federal constitutional, statutory, and decisional law prohibiting state court jurisdiction over suits brought against Indian tribes, their

members, or tribal entities based on claims that arise within Indian country – prohibitions that operate independently of any sovereign immunity.[3] Applying *Rooker-Feldman* to Kewadin's federal court claims for relief from the state court's exercise of subject matter jurisdiction is therefore impossible: there is no state court "judgment" on this issue – indeed, no decision or order of any kind – for this Court to "review." Kewadin is not "complaining of injuries caused by state-court judgments" when it asks this Court to enjoin the state court's unlawful exercise of subject matter jurisdiction because the state court never decided the question. *RLR*, F.4th at 387.

And while the question of whether *Rooker-Feldman* applies to the state court's ruling that Kewadin waived its sovereign immunity is less straightforward – because on this issue there is at least a state court order the Defnendants can point to – Sixth Circuit precedent nevertheless requires this question be answered in the negative. Under the standards set forth in *Exxon Mobil* and *RLR*, that ruling was not a "judgment." *See RLR*, F.4th at 387-88 (citing *Exxon*, 544 U.S. at 284).

Crucially, ***Rooker-Feldman* "does <u>not</u> bar federal jurisdiction 'simply because a party attempts to litigate in federal court a matter previously litigated in state court.'"** *Berry v. Schmitt*, 688 F.3d 290, 298 (6th Cir. 2012) (emphasis added, quoting *Exxon Mobil*, 544 U.S. at 293). *Rooker-Feldman* "applies only when a state court renders a *judgment* – when the court . . . enforces liabilities." *Van Hoven*, 947 F.3d at 892 (cleaned up, emphasis in original, quoting *Feldman*, 460 U.S. at 479). In ruling on the issue of sovereign immunity, the state court here merely denied Kewadin's Motion to Dismiss; it did not grant the Developers a judgment. In *RLR*,

[3] *See, e.g.*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) ("[If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law."); 28 U.S.C. § 1360; 25 U.S.C. §§ 1321-26.

by contrast, the party seeking federal court intervention was contesting a judgment of the state court granting actual relief to the opposing party. 4 F.4th at 388. ("[I]t's clear that RLR asks us to review the state-court order of possession and that the order of possession counts as a judgment under *Rooker-Feldman*."). Similarly, the court in *Pieper v. American Arbitration. Ass'n, Inc*., 336 F.3d 458, 464 (6th Cir. 2003), considered the state court order a "judgment" and applied *Rooker-Feldman* because the state court granted actual relief by ordering the parties to arbitration. In both cases, the parties seeking federal court intervention were "complaining of injuries caused by state-court judgments." *RLR*, F.4th at 387. Here, the state court did not itself issue any judgment causing injury – it merely refused Kewadin's request that it halt the injury caused by the Developers. Under controlling Sixth Circuit precedent this is a critical distinction.

In re Smith, 349 F. App'x 12 (6th Cir. 2009), illustrates how a state court's denial of a motion to dismiss cannot be considered a "judgment" such that *Rooker-Feldman* applies. In *Smith* a state inmate filed a petition in state court against state officials, seeking DNA testing of the evidence underlying his conviction. *Id.* at 13. When the state court denied his petition, he filed a federal lawsuit alleging that he had a federal constitutional right to exonerating evidence and that the state officials had deprived him of that right. *Id.* at 15–16. The Sixth Circuit Court of Appeals held that *Rooker-Feldman* did not apply because the plaintiff's injury was caused by state officials, not the state court judgment denying his petition. *Id.* at 18. *See Skinner*, 562 U.S. at 529, 532 (citing *Smith*, 349 F. App'x at 18 (Sutton, J., concurring in part and dissenting in part)). The state court merely "ratified, acquiesced in, or left unpunished" the actions of those state officials. *Smith*, 349 F. App'x at 18 (quotation omitted). The plaintiff was not "complaining of injuries caused by state-court judgments" (*RLR*, F.4th at 387) because the state officials, not the state court denial of

the plaintiff's petition, was the source of the plaintiff's injuries. *Smith*, 349 F. App'x at 18. *Accord, Van Hoven*, 947 F.3d at 892.

For the same reasons, the state court's ruling on Kewadin's sovereign immunity is not a "judgment" such that *Rooker-Feldman* can apply.[4] As in *Smith,* the state court merely "ratified" and/or "acquiesced in" the Developers' lawsuit, which is the true source of Kewadin's injuries. 349 F. App'x at 18. The state court did not itself cause Kewadin's injury by "enforcing liabilities" (*Van Hoven*, 947 F.3d at 892) and ordering relief, as did the state court in *RLR* by issuing an order of possession or the state court in *Pieper* by ordering parties to arbitration. Because the state court here has issued no judgment and never even examined the question of its subject matter jurisdiction, "[t]oday's case is not the rare one that threads the *Rooker-Feldman* needle." *Van Hoven*, 947 F.3d at 892.

II. FEDERAL QUESTION JURISDICTION EXISTS

Developers contend that because there was no federal question jurisdiction for their complaint in *JLLJ Development, LLC v. Kewadin Casinos Gaming Authority*, case number 1:20-cv-00231, it necessarily follows, *ipso facto*, that there is no federal question jurisdiction for Kewadin's complaint in this case. PageID.643-645. Developers' contention, resting solely on circular logic, is incorrect. Conveniently, Developers side-step and disregard the established

[4] Judge Draganchuk makes an undeveloped contention that Kewadin's federal law claims are barred by res judicata or issue preclusion. PageID.692-693. However, these doctrines do not apply for the same reasons that *Rooker-Feldman* does not apply. There is no state court judgment on any claim and no final decision on any issue—only a ruling on the pleadings on one issue. Further, there is not even a state court decision on most of the issues raised in Kewadin's complaint, because as alleged in the complaint and as discussed in this brief, the Court has refused to rule on most issues. Finally, these judicially-created doctrines have no application when to apply them would offend the basic dictates of due process, *Hansberry v. Lee*, 311 U.S. 32, 45 (1940), or where their application would result in a manifest injustice. *United States v. LaFatch*, 565 F.2d 81, 84 (6th Cir. 1977). Such would be the case here.

jurisprudence for determining the existence of federal question jurisdiction under 28 U.S.C. § 1331.

District courts have "original jurisdiction of all civil actions" and "all civil actions, brought by any Indian Tribe" that arise "under the Constitution, laws, or treaties of the United States." 28 U.S.C. §§ 1331, 1362. A case arises under federal law if a "well-pleaded complaint establishes either that federal law creates the cause of action *or that the plaintiff's right to relief* necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Board v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 13 (1983) (emphasis added).

Further, under the "well-pleaded complaint rule," federal question jurisdiction is decided on a case-by-case basis. Federal question jurisdiction generally exists "only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Because the focus is on the plaintiff's well-pleaded complaint, it is immaterial whether there are federal-law defenses or a federal law counterclaim that can be anticipated in response to the complaint. *Id*. at 393; *The Homes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 832 (2002) ("we decline to transform the longstanding well-pleaded complaint rule into the 'well-pleaded *complaint-or-counterclaim* rule' urged by respondent.") (emphasis in original). Thus, the well-pleaded complaint rule makes the plaintiff the "master of his complaint." *Id.* at 398-399. And as the "master" of his or her complaint, the plaintiff is free either to embrace, or to eschew, claims based on federal law. *Id.*

Developers' complaint in case number 1:20-cv-00231 chose not to allege any federal question. Instead, Developers' complaint in 1:20-cv-00231 asserted plain-vanilla claims for contract, quasi-contract, and equitable relief—claims that the district court properly dismissed for lack of federal question jurisdiction.

In contrast, Kewadin's separate and distinct complaint in case number 2:22-cv-00027 properly alleges that Kewadin's "right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd.*, 463 U.S. at 13. Kewadin raises that federal law preempts State Court jurisdiction (including a legally correct claim of complete preemption based upon the Indian Gaming Regulatory Act). Compl. ¶3, 4, 14-16, 30-32, 39-41, 45-46, 49, Prayer for Relief B, C. Kewadin asserts that Defendants are very substantially violating the Tribe's federal protected sovereign right to make its own laws and be ruled by those laws. Compl. ¶¶3, 4, 14, 15, 16, 19, 30-32, 40, 42. Kewadin asserts that it has immunity from the enforcement of State law. As discussed below, these are federal law questions.

Federal question jurisdiction is properly invoked when an Indian tribe "relies on federal law 'as a basis for the asserted right of freedom from [state court] interference.'" *Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, 875 F.3d 539, 546-47 (10th Cir. 2017) (citing *Nat'l Farmers Union Insurance Cos v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985)). Indeed, more than a century ago, the United States Supreme Court ruled that federal courts have federal question jurisdiction to determine whether a state court possesses subject matter jurisdiction over legal claims relating to tribal rights guaranteed by federal law:

> It is contended that we are without jurisdiction because no title, right, or immunity was specially set up or claimed under any federal statute and denied. But, leaving aside for a moment all other considerations, it is plain that the defendant below set up a claim of immunity from suit in the state court under the laws of the United States, and that the right to the immunity so asserted under an act or acts of Congress was expressly considered and denied by the state court. True, it is that the immunity which was asserted was first claimed in a petition for rehearing; but, as the question was raised, was necessarily involved, and was considered and decided adversely by the state court, there is [federal] jurisdiction. *Leigh v. Green*, 193 U.S.
> At the threshold lies the question raised and decided below relative to the jurisdiction of the state court over the controversy.

McKay v. Kalyton, 204 U.S. 458, 463-64 (1907); *see also Minnesota v. United States*, 305 U.S. 382, 391 (1939) (affirming the reversal of a state court condemnation of restricted Indian land, holding, *inter alia*, that "the lower [state] court had no jurisdiction of this suit").

Thus, unlike the Developers' complaint in 1:20-cv-00231, Kewadin's complaint is based on rights and immunities secured to Kewadin by federal law. Under the federal Constitution, the regulation of trade and intercourse between Indian tribes and non-Indians is exclusively the province of federal law. U.S. Const. art. I, § 8, cl. 3. And under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et seq.*, "Indian tribes have the exclusive right to regulate gaming activity on Indian lands…." 25 U.S.C. § 2701(5). Plaintiff Kewadin is an entity wholly owned by the Sault Ste. Marie Tribe of Chippewa Indians, a federally recognized Indian tribe. 86 Fed. Reg. 7554 (Jan. 29, 2021). And the claims under Kewadin's federal complaint relate to Indian gaming contracts—an area of law that "is necessarily federal in character," *Metropolitan Life* 481 U.S. at 63-64, and under which state regulatory and adjudicatory jurisdiction is preempted by federal law in this case.

As such, the preemptive force of federal law is "so powerful as to displace entirely any state cause of action" arising out of the Developers' gaming contracts with Kewadin. *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968) (holding that § 301 of the Federal Labor Management Act preempts any state cause of action for breach of a labor contract). As the Supreme Court later explained its holding in *Avco*:

> The necessary ground of decision [in *Avco*] was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." … *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

Franchise Tax Bd., 463 U.S. at 23-24. The Supreme Court then equated the holding in *Avco* to its holding in *Oneida Indian Nation v. County of Oneida*, a seminal case in which the Supreme Court ruled that Indian tribes have a common law right of action to vindicate rights protected by federal law:

> To similar effect is *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 677, 94 S. Ct. 772, 782, 39 L.Ed.2d 73 (1974), in which we held that—unlike all other ejectment suits in which the plaintiff derives its claim from a federal grant, *e.g., Taylor v. Anderson*, 234 U.S. 74, 34 S. Ct. 724, 58 L.Ed. 1218 (1914)—an ejectment suit based on Indian title is within the original "federal question jurisdiction of the district courts, because Indian title creates a federal possessory right to tribal lands, "wholly apart from the application of state law principles which normally and separately protect a valid right of possession." Cf. 414 U.S., at 682-683, 94 S. Ct., at 784-785 (REHNQUIST, J., concurring).

Id. at 24 n.25. *See also Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234-36 (1985).

The Supremacy Clause to the U.S. Constitution itself furnishes a basis for federal question jurisdiction in this case. *Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n. 14 (1983)* ("A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.").

The cases cited by Developers for a contrary ruling are wholly inapposite. PageID.643-646. It is axiomatic that cases are not authority for propositions that were not considered nor decided by those cases. In contrast to the case at bar, none of the cases cited by the Developers involve the question presented here—the issue of state infringement on tribal rights protected by federal law. *Little River Band of Ottawa Indians v. National Labor Relations Board*, 747 F. Supp. 2d 872 (W.D. Mich. 2010) (involved no issue of state adjudicatory or regulatory infringement on tribal rights protected by federal law); *Lesperance v. Sault Ste Marie Tribe of Chippewa Indians*, 259 F. Supp. 3d 713, 721 (W.D. Mich. 2017) (involved a case in which the Tribe was the

defendant, not the *plaintiff*, as here, and again, no claim of state infringement on tribal rights protected by federal law); *Burley v. OneWest Bank, FSB*, Civ. Nos. 2:14-1349 and 2:14-1567, 2014 WL 4244026 (E.D. Cal., August 26, 2014) (no issue of state adjudicatory or regulatory infringement on tribal rights protected by federal law).

Developers cite two cases for the proposition that the Declaratory Judgment Act does not vest a federal court with federal question jurisdiction, *Toledo v. Jackson*, 485 F.3d 836, 839 (6th Cir. 2007), and *Kialegee Tribal Town v. Zinke*, 330 F. Supp. 3d 255 (D.D.C. 2018). PageID.646. Significantly, however, neither of the cited cases involved a federal plaintiff's contention that "state law must yield to federal law." *Ute Indian Tribe*, 875 F.3d at 546. Kewadin's federal court claims do not rely on the Declaratory Judgment Act as the basis for federal question jurisdiction. Instead, federal question jurisdiction exists in this case because Kewadin's "right to relief necessarily depends on resolution of a substantial question of federal law," *Franchise Tax Bd.*, 463 U.S. at 13, and because Kewadin is relying on its rights and immunities protected by federal law for its "'asserted right of freedom from [state court] interference.'" *Ute Indian Tribe*, 875 F.3d at 546-47. There is federal question jurisdiction for this federal court to determine the state court's jurisdiction over the Developers' state court suit. *McKay v. Kalyton*, 204 U.S. at 463-64.

The Developers are confusing the very simple issue of whether this Court has subject matter jurisdiction (which it plainly does) with the immaterial unpresented question of whether this Court would exercise jurisdiction *if* Kewadin's complaint to this Court only alleged one federal law question--tribal sovereign immunity. Kewadin, as the master of its own complaint, chose to present additional federal law questions, and Defendants do not get to edit and redact from the complaint that Kewadin actually filed. This Court has subject matter jurisdiction.

III. THERE IS NO JUDICIAL IMMUNITY HERE.

In Section III of her brief, Judge Draganchuk argues this Court must dismiss her from the case based upon judicial immunity. PageID.692. As discussed below, that argument fails for two independent reasons. Kewadin also notes that it would only result in dismissal of Judge Draganchuk as a party, not dismissal of any claims, which would proceed against the Developers,

A. BECAUSE THE STATE COURT IS ACTING IN THE COMPLETE ABSENCE OF ALL JURISDICTION, JUDICIAL IMMUNITY DOES NOT APPLY.

In her brief, Judge Draganchuk concedes that "a judge is not immune for actions, though judicial in nature," that are taken in "the complete absence of all jurisdiction," citing *Mireles v. Waco*, 520 U.S. 9 (1991). PageID.697. This concession by Judge Draganchuk is significant because it encapsulates the essence of Kewadin's federal court complaint against the Judge.

> If the matter upon which the judge acts is clearly outside the subject matter jurisdiction of the court over which the judge presides, the act is done in the clear absence of all jurisdiction.

Ireland v. Tunis, 113 F.3d 1435, 1441 (6th Cir. 1997). Judge Draganchuk is not shielded by judicial immunity against Kewadin's claim that state courts in Michigan lack subject matter jurisdiction under *federal law* to adjudicate the Developers' dispute with Kewadin. As explained by the United States Court of Appeals for the Tenth Circuit:

> The federal courts generally have jurisdiction to enjoin the exercise of state regulatory authority (which includes judicial action) contrary to federal law. As the Supreme Court stated in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983): "A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve."

Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence, 875 F.3d 539, 543 (10th Cir. 2017). The Tenth Circuit went on to explain:

> This equitable jurisdiction under § 1331 has repeatedly been employed to police

the boundaries between state and tribal authority. A few days before *Shaw* the Supreme Court upheld a federal-court order enjoining the State of New Mexico from enforcing hunting and fishing laws against non-Indians for acts on the reservation. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 329–30, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983). Two years later, in a mirror image of the case before us, the Court in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852–53, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985), upheld the jurisdiction of a federal court to issue an injunction halting tribal-court proceedings against a non-Indian. The Court first extended the above-quoted statement in *Shaw* to encompass federal common-law claims. *See id.* at 850, 105 S.Ct. 2447 (the grant of jurisdiction in § 1331 "will support claims founded upon federal common law as well as those of a statutory origin" (internal quotation marks omitted)). Explaining its holding, the Court then wrote:

> The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a "federal question" under § 1331. Because petitioners contend that federal law has divested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference. *They have, therefore, filed an action "arising under" federal law within the meaning of § 1331.* The District Court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.

Id. at 852–53, 105 S.Ct. 2447 (footnote omitted) (emphasis added).

Lawrence, 875 F.3d at 543-44. The Tenth Circuit then added:

> We fail to see how we can distinguish these Supreme Court precedents from the case before us with respect to federal-court jurisdiction. If a suit to enjoin a tribe from exercising jurisdiction contrary to federal law is an action "arising under" federal law, then so is a suit to enjoin a State from exercising jurisdiction contrary to federal law. And, indeed, this court has exercised such arising-under jurisdiction over the years. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1237, 1240 (10th Cir. 2001) (affirming a district-court injunction forbidding Kansas authorities from enforcing state motor-vehicle-registration and titling laws against the plaintiff tribe); *United Keetoowah Band of Cherokee Indians v. State of Okla. ex rel. Moss*, 927 F.2d 1170, 1173 (10th Cir. 1991) ("We are persuaded that an action such as this by a tribe asserting its immunity from the enforcement of state laws is a controversy within § 1362 jurisdiction as a matter arising under the Constitution, treaties or laws of the United States."); *Seneca-Cayuga Tribe of Okla. v. State of Okla. ex rel. Thompson*, 874 F.2d 709, 716–17 (10th Cir. 1989) (affirming preliminary injunction preventing State of Oklahoma from interfering with operation of gaming on tribal land and from proceeding with suit in state court). And more recently, in *Ute Indian Tribe of the Uintah & Ouray Reservation*

> *v. Utah*, 790 F.3d 1000, 1007, 1012 (10th Cir. 2015) (Gorsuch, J.), *cert. denied*, *Uintah Cty., Utah v. Ute Indian Tribe of the Uintah & Ouray Reservation*, —— U.S. ——, 136 S.Ct. 1451, 194 L.Ed.2d 550 (2016), and *Wasatch Cty., Utah v. Ute Indian Tribe of the Uintah & Ouray Reservation*, —— U.S. ——, 136 S.Ct. 1451, 194 L.Ed.2d 575 (2016), we reversed the district court's denial of a request for a preliminary injunction against a state prosecution and ordered the court to enter the injunction because the State was attempting to exercise criminal jurisdiction against an Indian for conduct on tribal lands. Although that case did not (as ours does) involve civil jurisdiction, no reason has been offered why that should matter. As we have already noted, Public Law 280 covers both criminal and civil jurisdiction.

Id.

Much of Judge Draganchuk's brief is devoted to a catalogue of the judge's judicial authority under the state laws and constitution of Michigan. PageID.694. But nowhere in her brief does the Judge acknowledge even a single federal law—constitutional, statutory or precedential—that constrains her authority under Michigan *state law*. Yet, no state court judge in the United States is immune from the operation of federal law. The Supremacy Clause of the U.S. Constitution provides that "the Law of the United States … and all Treaties made … shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby." U.S. Constitution, art. VI, § 2. Consequently, "the ultimate authority" on both the Constitution and federal law" is the U.S. Supreme Court, and that Court's decisions are binding on both state and federal courts. Bryan A. Garner, et al., *The Law of Judicial Precedent*, 28-34 (2016). As the Supreme Court itself has said:

> "It is this Court's responsibility to say what [federal law is], and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."
>
> * * * *
>
> The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law.

James v. City of Boise, 577 U.S. 306, 307 (2016) (citations omitted).

B. BECAUSE KEWADIN HAS NOT BROUGHT A CLAIM FOR MONETARY DAMAGES AGAINST THE JUDGE, THE JUDGE'S ARGUMENT FOR JUDICIAL IMMUNITY IS INCORRECT.

Judge Draganchuk's assertion of judicial immunity is also incorrect because the Judge is citing the wrong line of cases. *Every citation* by the Judge is limited to a claim for monetary damages against a judge. The very first line from *Mireles* states, "A long line of this Court's precedents acknowledges that, generally, a judge is immune from a suit for money damages," and the Court then notes that the plaintiff's suit was for monetary damages." All of the Defendant's other citations are also specific to that inapplicable line of cases for claims against a judge for monetary damages.

Kewadin is well aware of those cases, and it is only seeking prospective declaratory and injunctive relief against the Judge, to stop the violations of Kewadin's rights as a unit of a separate sovereign.

> [J]udicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in [his] judicial capacity." Pulliam v. Allen, 466 U.S. 522, 543–44 (1984); see Bridges v. Collette, No. 5:06–cv–46, 2008 WL 53771, at * 2 (E.D. Mich. Jan. 2, 2008).

Nali v. Whitbeck, No. 1:07-CV-544, 2008 WL 5381818, at *6 (W.D. Mich. Dec. 22, 2008). E.g., *Cook v. Cashler*, No. 1:11-CV-637, 2013 WL 1962388, at *3 (W.D. Mich. May 10, 2013), *aff'd* (Apr. 2, 2014) (Judge Bell adopted a magistrate report which distinguished between monetary and non-monetary claims against a state judicial officer, 'holding the report was not in error when it dismissed the monetary claims based upon judicial immunity but did not dismiss the claim for declaratory relief based upon judicial immunity.

Kewadin has properly pled a claim for non-monetary relief against the Judge. Defendant has not made any on-point argument for dismissal of that claim based upon immunity, and the Judge's misplaced argument must be rejected.

IV. THIS MATTER FALLS WITHIN MULTIPLE EXCEPTIONS TO THE ANTI-INJUNCTION ACT.

The whole text of the Anti-Injunction Act (AIA) states:

> A court of the United States may not grant an injunction to stay proceedings in a State court except 1) as expressly authorized by Act of Congress, or 2) where necessary in aid of its jurisdiction, or 3) to protect or effectuate its judgments.

28 U.S.C. § 2283 (numbering added).

Case law also establishes a fourth exception, which applies to actions by the United States or those standing in the shoes of the United States. 17A Wright & Miller Fed. Prac. & Proc. Juris. § 4222 (3d ed.) (citing, inter alia, *Leiter Minerals, Inc. v. United States,* 352 U.S. 220 (1957).

This Court is *required* to rule on the request for injunctive relief unless it were to conclude that the AIA applies.

This matter fits within exceptions 1, 2, and 4, and therefore the AIA is not an impediment to any of the requested relief.

A. FEDERAL LAW PROVIDES THE TRIBE WITH THE EXCLUSIVE RIGHT TO REGULATE GAMING ACTIVITY ON FEDERAL LANDS AND ESTABLISHES THE DIVIDING LINE BETWEEN STATE AND TRIBAL JURISDICTION, AND DEFENDANTS HAVE CROSSED FAR OVER THAT LINE.

"Indian tribes have the exclusive right to regulate gaming activity on Indian lands . . . . " 25 U.S.C. § 2701(5). The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et. seq.*, provides that unless a tribe expressly consents to an exercise of state civil jurisdiction in a gaming compact with the state, state civil jurisdiction over any issue relating to tribal gaming is preempted by federal law. *E.g., Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030 (11th Cir. 1995) ("The occupation of this field by [the IGRA] is evidenced by the broad reach of the statute's regulatory and enforcement provisions and is underscored by the comprehensive regulations promulgated under the statute."); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433–435 (9th Cir. 1994).

The Eighth Circuit in *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996) provides a comprehensive analysis of IGRA's federal preemptive effect over state court jurisdiction with respect to Indian gaming matters. The issue presented in that case was whether remand to state court was appropriate in an action alleging only state law claims against a law firm which advised an Indian tribe not to engage the plaintiff gaming management company – an issue that depended upon the question of whether the IGRA completely preempts state law in the field of Indian gaming regulation. *Id.* at 539. Answering this latter question in the affirmative, the court stated the following with respect to the IGRA's preemptive effect:

> Congress thus chose *not to allow the federal courts to analyze the relative interests of the state, tribal, and federal governments on a case by case basis. Rather, it created a fixed division of jurisdiction.* If a state law seeks to regulate gaming, it will not be applied . . . . Congress left the states without a significant role under IGRA unless one is negotiated through a compact [with the tribe].

*Id.*at 546–47 (emphasis added). Under the AIA, because Congress has fixed the line by statute, the AIA standard does not apply. This Court enforces the line that Congress drew. It does not defer to the erroneous line that the Defendant Judge has drawn.

In *Gaming Corporation*, the compact between the tribe and the state did "not change the allocation of civil jurisdiction among federal, state, and tribal courts." *Id.* at 547. The court therefore concluded the state court lacked subject matter jurisdiction over the plaintiff gaming company's state law claims because they related to Indian gaming:

> IGRA has a carefully balanced jurisdictional scheme, through which Congress gave the states the right to negotiate tribal-state compacts but declined to grant them broader authority without tribal consent. The statute itself and its legislative history show the intent of Congress that IGRA control Indian gaming and that state regulation of gaming take place within the statute's carefully defined structure. We therefore conclude that IGRA has the requisite extraordinary preemptive force necessary to satisfy the complete preemption exception to the well-pleaded complaint rule.

Id. at 547. The court further noted:

> Subject to congressional divestment, the [tribal] nation has a great interest in not having its decisions questioned by the tribunal of another sovereign. IGRA reflects the intent of Congress that tribes maintain considerable control of gaming to further their economic and political development . . . . Those causes of action which would interfere with the [tribal] nation's ability to govern gaming should fall within the scope of IGRA's preemption of state law.

Id. at 549-550.

This preemption of state court jurisdiction over all state law claims that relate to Indian gaming has correspondingly been acknowledged by state courts that have examined the issue. *E.g., Kizis v. Morse Diesel Intern*., Inc., 260 Conn. 46, 794 A.2d 498 (2002). In a breach of contract action brought by a gaming manager against an Indian tribe and its officials, the court in *Great Western Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 88 Cal. Rptr. 2d 828 (2d Dist. 1999) affirmed the lower court's holding that it lacked subject matter jurisdiction because the plaintiff's state law claims related to Indian gaming regulated by the IGRA. Specifically, the court held the IGRA preempted state contract law underlying the gaming manager's breach of contract action because the contract in question related to Indian gaming, thus depriving the state court of subject matter jurisdiction. *Id*. at 1424-1425 ("Federal law has completely preempted the field of Indian gaming, thus the state court had no jurisdiction over the claims raised in the complaint."). Noting that "[b]ased on Congress's statement of purpose and the act's comprehensive regulatory scheme, courts which have considered the question conclude federal courts have exclusive jurisdiction to review issues involving Indian gaming activities," the court held the IGRA did not permit the resolution of contract disputes relating to Indian gaming in state court. *Id*. at 1426 (citing *Tamiami Partners*, 63 F.3d 1030; *Cabazon Band of Mission Indians*, 37 F.3d 430).

In the gaming compact between the Tribe and the State of Michigan, the State did not compact for civil jurisdiction over the Tribe's gaming activities – to the contrary, it affirmatively

agreed that the Tribe's gaming operations shall comply with the *Tribe's* gaming statute – i.e., the Tribe's law. Exhibit A at ¶ 6. So as a matter of both federal law and the State of Michigan's own compact with the Tribe, state court jurisdiction over Kewadin's conduct as a licensed gaming operation is preempted and thus completely precluded by the IGRA.

B. THIS COURT IS REQUIRED TO ACCEPT THE BINDING DECISION OF THE SAULT STE. MARIE GAMING COMMISSION, AND THE AIA DOES NOT PROVIDE A BASIS FOR THIS COURT TO REFUSE TO ACCEPT THAT BINDING DECISION.

As discussed above, the Tribe has exclusive jurisdiction to regulate the Tribe's gaming operation. Here, and making short work for this Court, the Tribe has affirmatively exercised that jurisdiction through the law applying forum that has been delegated that authority by the Tribe--the Sault Ste. Marie Gaming Commission. The Gaming Commission has determined that the Gaming Agreements are void ab initio, applying the Tribe's laws to the facts. Exhibit B. **That decision is binding on this Court**, just as a decision by the Michigan Supreme Court based upon Michigan law would be binding on this Court.

The United States Supreme Court first addressed this issue in *Talton v. Mayes*, 163 U.S. 376 (1896), holding that interpretation of tribal laws is "solely a matter within the jurisdiction of the Courts of that Nation." *Id.* at 385. Subsequent Supreme Court case law has strengthened the line of cases originating with *Talton*. *Iowa Mutual Ins.*, 480 U.S. at 19 (holding that "Unless a federal court determines that the Tribal Court lacked jurisdiction ... proper deference to the tribal court system precludes relitigation of issues raised ... and resolved in the Tribal Courts"); *id.* at 16 ("Adjudication of such matters by any nontribal court also infringes upon tribal law-making because tribal courts are best qualified to interpret and apply tribal law.").

Every federal appellate court which has reached the issue concludes that a tribal forum's application of its own laws is binding in every non-tribal forum. *Prescott v. Little Six, Inc.*, 387 F.3d 753, 756 (8th Cir. 2004) (holding that "in this Circuit, we defer to the tribal courts'

interpretation of tribal law."); *FMC v. Shoshone–Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990); *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d, 1294, 1300 (8th Cir. 1994) (citing *FMC*); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996) (citing *FMC*). *See also* Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Federal Courts after National Farmers Union and Iowa Mutual*, 78 Minn. L. Rev. 259, 298 (1993) ("it is a pure contradiction in terms for a federal court to declare that tribal law is not precisely what the tribe's high court announces.").

In the field of Indian gaming, the rule that a tribal forum's decision under its gaming law is binding is also codified into supreme federal law (as are the legal doctrines of infringement and complete preemption, as discussed above). IGRA provides that unless a tribe expressly consents to an exercise of state civil power in a gaming compact between a state and a tribe, the state lacks civil or criminal jurisdiction over tribal gaming, and thus, state regulatory or adjudicatory jurisdiction is completely preempted. *E.g.*, 25 U.S.C. § 2701(5); 25 U.S.C. § 2709(d)(3)(C)(i-ii) S. Rep. 100–446, at 5–6, *reprinted in* 1988 U.S.C.A.N. at 3075 (IGRA "provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities. The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of state jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact."); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

The Supreme Court's decision in *Cabazon* grew out of the infringement and preemption doctrines discussed above. In *Cabazon*, California had argued that it had to be permitted to

regulate tribal gaming, to prevent tribal gaming from corrupting influences and to protect state citizens. The United States Supreme Court rejected the state's argument.

It noted that tribal gaming should be protected from corrupting influences, but it *upheld an injunction* against state court proceedings. It noted that under federal law, the presumption is that state jurisdiction is precluded, and it then discussed that any alleged state interest to regulate tribal gaming-related activities is insufficient, even in a "PL 280 state"[5] to overcome the Indian infringement doctrine. Because there were three sovereigns involved, the AIA provision did not even enter into the determination of whether the injunction against the state proceeding was proper.

The IGRA codified the infringement and preemption holding from *Cabazon* in the gaming context, and then added the one possible exception—permitting state jurisdiction if but only if a state and tribe agreed to state jurisdiction in the compact.

In the gaming compact between the Tribe and the State of Michigan, the State does not compact for any civil jurisdiction over the Tribe's gaming, and instead the State *affirmatively agrees* that that the Tribe's gaming operation shall comply with the Tribe's gaming statute and that the Tribe is required to exercise the regulatory authority provided for in the Tribe's Gaming Code. Compact §4.C.[6] Similarly, IGRA requires a tribe to submit its gaming code to the National Indian Gaming Commission (NIGC) and obtain approval of that code, and the tribe is then required to take all proper enforcement actions provided for in the approved code. 25 U.S.C. § 2710(d). The Tribe's Gaming Code, which is the law of the land on the Tribe's Reservation, also requires the

[5] PL 280 provides state courts in California and a handful of other states with civil jurisdiction over some on-Reservation matters. Michigan is not a "PL280" state.

[6] Available at https://www.michigan.gov/mgcb/-/media/Project/Websites/mgcb/Tribal-Gaming/compacts/SSM_Compact.pdf?rev=a9db572b04184b91a1c072cb7ec24f96&hash=36325F9AB3ADCFCD8B6FDEFC28A0B95D

Gaming Commission to regulate, and to determine whether entities like the Developers and their officers are violating the Gaming Code, and to then impose the remedies under that Code.

Therefore in the current matter, the IGRA, the state (through the Gaming Compact), the Tribe (through its Gaming Code) and the NIGC (through is regulations under the IGRA) do not merely permit the Tribe's Gaming Commission to determine whether the alleged contracts are void ab initio. They require the Tribe's Gaming Commission to make that determination, and they all then agree that the Tribe's Gaming Commission decision is dispositive and binding. It is binding in this Court.[7]

C. THE AIA DOES NOT BAR THIS ACTION.

Based upon the discussion above, this matter falls within Exception 2 in the AIA. For the reasons discussed in detail throughout this brief, the injunction is necessary in aid of this Court's jurisdiction to protect the Tribe and Kewadin's federally protected right unlawful state court encroachment and to maintain federal supremacy in Indian affairs. As alleged in the complaint and as discussed throughout the brief, Kewadin has attempted to obtain a decision from the State Court, but the State Court has adamantly refused to issue an order on jurisdiction, has refused to rule on Kewadin's arguments regarding the Indian law infringement and preemption rules, and has refused to discuss why it has authority to issue orders that compel tribal officers to commit civil

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[7] Because this Court does not have any authority to "overrule" the Sault Ste. Marie Gaming Commission's decision and its interpretation of tribal law, there is no need to discuss in this Court why that decision is correct. The time for the Developers to provide their arguments was in the Tribal Gaming Commission hearing, but they chose not to attend and therefore have waived any challenge to the order.

The remedy that the Gaming Commission imposed is the standard and required remedy for an unapproved gaming management contract. Tribal Code §§42.222; 42.229(1); 42.301; 42.302, 42.501(2); 42.601. *See also* NIGC Bulletin 1994-5 (Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void).

The Developers have no one to blame but themselves and their agents. Their vast overreaching, seeking and obtaining powers to control and to manage parts of the Tribe's Gaming operation, resulted in the remedy.

and criminal violations of tribal gaming law and tribal confidentiality law on the Tribe's Reservation. It has now issued a default against Kewadin despite refusing to rule on these profound federal questions. Federal law provides jurisdiction over those issues to the Tribe, not the State. The AIA therefore does not bar this suit alleging those violations. *E.g., White Mountain Apache Tribe v. Smith Plumbing Co.,* 856 F.2d 1301, 1304 (9th Cir. 1988); *Tohono O'odham Nation v. Schwartz,* 837 F. Supp. 1024, 1027–1028 (D. Ariz. 1993); *Nash*, 854 F. Supp. 2d at 1142-43; *Bowen v. Doyle*, 880 F. Supp. 99 (W.D.N.Y. 1995).

For example, in *Bowen*, the Tribe alleged that a state action violated its treaty rights, the Indian law infringement doctrine, and tribal immunity. The Court held that those claims that the State sovereign was violating those alleged rights of a tribal sovereign were not barred by the Anti-Injunction Act. The Court held the tribes' allegations of such rights:

> are obviously questions of federal Indian law that directly affect tribal sovereignty and which should, therefore, be resolved in the first instance by the federal courts.
> …
> [A] federal injunction is necessary to "preserve [the] judgments" of the Nation's courts. Without federal injunctive relief the State's assumption of jurisdiction over this dispute will directly and irreparably undermine the tribal court's authority to resolve this dispute. The Anti–Injunction Act has no application where an injunction against a state court is necessary to defend a federal court's judgments from inconsistent state directives. The rule has equal application to protect a tribal court's order from inconsistent state court directives. The "federal courts do have jurisdiction and authority to enjoin state court proceedings when it is necessary ... to preserve the integrity of Indian sovereignty." *Tohono O'odham,* 837 F. Supp. at 1028–29 (citing *White Mountain Apache,* 856 F.2d at 1304–06).

Bowen at 131.

The same applies here. Kewadin's complaint alleges substantial violations of the Tribe's right to make its own laws and be ruled by those laws, and the related right to not allow "the State's assumption of jurisdiction" to order the Tribe and Kewadin to violate tribal confidentiality laws and gaming laws. This includes multiple alleged violations of IGRA's complete preemption of Indian gaming and its prohibition of state authority over Indian gaming. Where, as here, a state

court is violating the limitations on State Jurisdiction in the IGRA, the "aid in jurisdiction" exception plainly applies. *E.g.*, *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994) (holding that a state court attempted to prosecute tribal officers for Indian gaming activities, the matter came within two exceptions to the Anti-Injunction Act.) As the Court in *Sycuan Band* held:

> The state court proceedings were in derogation of federal jurisdiction. Accordingly, the district court held that the injunction was within two exceptions to the Anti–Injunction Act: it was necessary to preserve federal jurisdiction over Indian gaming and it was "authorized by Act of Congress."

54 F.3d at 535. See also Seneca–Cayuga Tribe of Oklahoma v. Oklahoma, 874 F.2d 709, 711-716 (10th Cir. 1989) (the Tenth Circuit upheld a decision to enjoin ongoing state court proceedings because of its duty to protect the tribe from improper state court encroachment; *Cabazon*, 480 U.S. 202.

As is obvious, the result in *Seneca-Cayuga* and *Cabazon* would be different if, instead of a tribe as plaintiff, the party seeking to enjoin the state suit were non-Indian entities, for actions in a state. But when there is a third sovereign involved—federal, state, and tribal--the federal courts have the duty to act in a way that they never could for most individuals seeking an injunction against alleged wrongful state conduct. When, as here, the claims raise the line between state and tribal jurisdiction, deference to the State Court is contrary to federa law. States and state court litigants have been attempting to use state court legal processes to take land, jurisdiction, and authority from tribes, e.g., *Worcester v. Georgia*, 31 U.S. 515 (1832), and for over 200 years the federal courts have been the bulwark against that state overreaching.

The injunction also come within exception 1 to the AIA. This action is expressly authorized by acts of Congress. 25 U.S.C. § 2710(d)(7)(A)(ii) (expressly providing federal court jurisdiction for a suit by an Indian Tribe to "enjoin class III gaming activity" which is alleged to

be in violation of a state tribal compact); 25 U.S.C.(d)(3)(c)(2) (permitting state jurisdiction over tribal gaming only if authorized by a compact); the non-Intercourse Act, 25 U.S.C. § 177; 28 U.S.C. § 1362. *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 472 (1976) ("we find an indication of a congressional purpose [in section 1362] to open the federal courts to the kind of claims that *could have* been brought by the United States as trustee") (emphasis added).

Finally, the matter comes within the fourth exception. *Cayuga Indian Nation of New York v. Fox*, 544 F. Supp. 542, 551 (N.D.N.Y. 1982) (because the Cayuga Nation's action under 28 U.S.C. § 1362 sought an injunction that the United States could have sought, the matter came within the fourth exception to the AIA).

D. THE CLAIM FOR DECLARATORY RELIEF IS NOT SUBJECT TO DISMISSAL UNDER THE AIA.

In the Judge's motion to dismiss, the Judge does not move for dismissal of the request for declaratory relief against her based upon the AIA. Therefore, this Court cannot dismiss that claim, and those claims should proceed.[8]

The Developers nominally move to dismiss the request for declaratory relief under the AIA, but they do not provide a developed argument on that issue. PageID.653-654. Instead, they assert that any claim for declaratory relief which would be the equivalent of an injunction would be barred, but they do not provide any analysis of why that rule would lead to dismissal of all of the requests for declaratory relief. Here, Kewadin is seeking, inter alia, a declaration that the developers are barred from seeking or obtaining any order from the State Court compelling the Tribe or Kewadin to take action within the Tribes' Indian Country or to violate the Tribe's laws.

[8] The Anti-Injunction Act is not jurisdictional and only goes to the form of relief permitted *In re Mooney Aircraft, Inc.*, 730 F.2d 367, 5th Cir. 1984. *Tyler v. Russel*, 410 F.2d 490 (10th Cir. 1969). If the Judge were to later move to dismiss that claim, Kewadin would assert that she has waived the issue.

Developers would have to allege that enjoining that discovery would enjoin their state court suit, but they have not, and presumably would not, make that allegation.

V. ABSTENTION UNDER THE *COLORADO RIVER* DOCTRINE WOULD BE IMPROPER.

Developers invoke the *Colorado River* Doctrine as grounds for dismissing Kewadin's suit. PageID.649-650. However, what Developers don't mention is the important caveat that the Supreme Court made a point of emphasizing in *Colorado River*:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest."

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-14 (1976).

Developers also don't mention that the *Colorado River* doctrine *presumes* the existence of valid subject matter jurisdiction in *both* a state court and a federal court *simultaneously*, and the doctrine was devised to avoid wasteful duplication of litigation. *Id*. at 817-18 ("the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention.").

Abstention is simply "a judge-fashioned vehicle for according appropriate deference to the "respective competence of the state and federal court systems." *England v. La. State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964) (quoting *Louisiana P. & L. Co. v. Thibodaux,* 360 U. S. 25, 29 (1959)).

Here, as discussed in detail above, Kewadin disputes that there is concurrent state and federal court jurisdiction. Kewadin contends the Michigan state court lacks subject matter jurisdiction over the Developers' suit, and further contends that its challenge to the state court's

subject matter jurisdiction presents a paramount "threshold question" of federal law that should be decided by a federal court in the first instance. Under similar facts, even *Younger* abstention has been rejected by federal courts in cases likes Kewadin's, involving the issue of state court jurisdiction over Indians, Indian tribes, and tribal entities:

> The [State judge's] argument, however, overlooks the threshold question raised by Tamaya and Santa Ana [Indian Pueblo], namely whether the state court has jurisdiction in the first place to hear the Personal Representatives' tort claims. Resolving this jurisdictional question implicates tribal sovereign immunity—an issue that is paramount and federal. *See Seneca-Cayuga Tribe*, 874 F.2d 709, 713 (10th Cir. 1989) ("federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian Country"); *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1204-05 (10th Cir. 2003) (affirming the district court's conclusion that the threshold question of whether the state had jurisdiction to tax a tribe "was a matter of federal, not state law"). Accordingly, due to the primacy of this federal jurisdictional issue, the state's interest in the litigation is not significant enough to justify *Younger* abstention. *Seneca-Cayuga Tribe*, 874 F.2d at 714 (finding that when state court is asked to decide "issues of federal law where federal interests predominate," such as whether state had jurisdiction to regulate tribes, "the State's interest in the litigation is … not important enough to warrant *Younger* abstention"); *Fort Belknap Indian Cmty. of the Fort Belknap Indian Reservation v. Mazurek*, 43 F.3d 428, 431-32 (9th Cir. 1994) (finding the "threshold question"—whether the state had jurisdiction to prosecute—to be "paramount and federal," making *Younger* abstention inappropriate); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994) (finding *Younger* abstention inappropriate where threshold issue was whether state had jurisdiction to prosecute Indians pursuant to state gaming laws).

Pueblo of Santa Ana v. Nash, 854 F. Supp. 2d 1128, 1141 (D.N.M. 2012).

Because of the number of Indian tribes located within the territorial area of the Tenth Circuit, that appeals court has "repeatedly" had to "police the boundaries between state and tribal authority." *Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, 875 F.3d 539, 543 (10th Cir. 2017). And the Tenth Circuit has explained its refusal to invoke abstention in such cases:

> State courts are, of course, competent to decide such jurisdictional questions, but the fact that this central issue is not one of state law indicates that the importance of the State's interest in the state litigation is minimal. Where, as in this case, a state

> court is asked to decide issues of federal law in an area in which federal interests predominate, the State's interest in the litigation is in our view not important enough to warrant *Younger* abstention. Nor would resolution of these issues in state court prevent conflict between the interests of the Tribes, protected by federal law, and the interests of the State. That conflict is inevitable. Because abstention would not mitigate this conflict, the proper forum to resolve it is federal court. *Cf. United States v. Composite Bd. of Medical Examiners,* 656 F.2d 131, 136 (5th Cir.1981) (holding alternatively that purpose of *Younger* abstention is to avoid conflict between state and federal governments; where conflict unavoidable, proper forum is federal court).

Seneca-Cayuga Seneca-Cayuga Tribe of Okla. v. State of Okla. ex rel. Thompson, 874 F.2d 709, 711–14 (10th Cir. 1989) (affirming preliminary injunction against state officers, including a state court judge, from proceeding with state court suit to enjoin Indian gaming). *See also Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1007, 1012 (10th Cir. 2015) (Gorsuch, J.).

Finally, none of the requisites for *Colorado River* abstention exist here. First, there is no concurrent jurisdiction. Secondly, insofar as Kewadin cannot seek its federal court remedies through the state court suit, the federal and state court proceedings cannot be deemed "parallel proceedings." And even if the Court were to apply *Colorado River* abstention, the proper course is not dismissal of Kewadin's federal court suit, but rather, the issuance of a stay that Kewadin can then appeal. *Healthcare Co. Ltd. v. Upward Mobility, Inc.*, 784 Fed. Appx. 390, 393 (6th Cir. 2019). Accordingly, *Colorado River* abstention provides no grounds for the dismissal of Kewadin's case. At most, it requires entry of a stay that *Kewadin* can then appeal.

Respectfully submitted this 13th day of April, 2022.

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