APPENDIX TABLE OF CONTENTS

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Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 13a0350p.06

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.

No. 13-1438

Appeal from the United States District Court
for the Western District of Michigan
at Grand Rapids.
No. 1:12-cv-00962—Robert J. Jonker, District Judge.

Argued: October 2, 2013
Decided and Filed: December 18, 2013
Before: ROGERS, STRANCH, and DONALD, Circuit Judges.

COUNSEL

ARGUED: Edward C. DuMont, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Appellant. Louis B. Reinwasser, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Edward C. DuMont, Seth P. Waxman, WILMER

CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Appellant. Louis B. Reinwasser, Kelly M. Drake, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. John F. Petoskey, FREDERICKS PEEBLES & MORGAN LLP, Peshawbestown, Michigan, William A. Szotkowski, Jessica Intermill, Andrew Adams III, HOGEN & HALLORAN, P.C., St. Paul, Minnesota, for Amici Curiae.

OPINION

ROGERS, Circuit Judge. The State of Michigan sued to enjoin the Sault Ste. Marie Tribe of Chippewa Indians from applying to have land taken into trust by the Secretary of the Interior pursuant to the Michigan Indian Land Claims Settlement Act (MILCSA). The Tribe bought land from the City of Lansing, Michigan for the purpose of building a class III gaming facility. To purchase the property, the Tribe used funds appropriated by Congress for the benefit of certain Michigan tribes; MILCSA provides that land acquired with the income on these funds shall be held in trust by the United States. The district court enjoined the Tribe from making a trust submission under MILCSA on the theory that the submission would violate a compact between the State of Michigan and the Tribe. The compact requires that a tribe seeking to have land taken into trust for gaming purposes under the Indian Gaming Regulatory Act (IGRA) secure a revenue-sharing agreement with other tribes. Because the State is not suing to enjoin a class III gaming activity, but

instead a trust submission under MILCSA, § 2710(d)(7)(A)(ii) of IGRA does not abrogate the Tribe's sovereign immunity, and the district court lacked jurisdiction. The issue of whether class III gaming on the casino property will violate IGRA if the Tribe's MILCSA trust submission is successful is not ripe for adjudication because it depends on contingent future events that may never occur. The injunction was therefore not properly entered.

I.

IGRA provides a framework for government regulation of gaming activities on Indian lands, which include "any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe." 25 U.S.C. § 2703(4)(B). IGRA generally prohibits gaming on land taken into trust after October 17, 1988, unless it falls under one of four exceptions provided for in § 20(a). *See* 25 U.S.C. § 2719(a). Two of these exceptions are relevant to this case: one for lands taken into trust as part of "a settlement of a land claim," 25 U.S.C. § 2719(b)(1)(B)(i), and an exception that permits gaming by any tribe on any land if the Secretary determines, subject to the Governor's approval, that a gaming establishment would be in the best interest of the tribe and its members, and not detrimental to the surrounding community, 25 U.S.C. § 2719(b)(1)(A). In addition, IGRA divides gaming into three categories. Class I consists of traditional Indian games or social games for prizes of minimal value, and is regulated exclusively by tribal governments; class II includes activities like bingo, and is regulated by tribes and the National Indian

Gaming Commission, but not by the State; and class III, casino-style gambling, requires a tribal gaming ordinance, approval from the National Indian Gaming Commission, and an IGRA "compact" between the tribe and the State in which the gaming will occur. 25 U.S.C. § 2710(a), (d).

In 1993, the Tribe signed a compact with the State of Michigan to permit class III gaming on tribal lands, pursuant to § 2710(d) of IGRA. Six other Michigan tribes signed virtually identical compacts at the same time. *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Att'y for W.D. of Mich.,* 369 F.3d 960, 962 (6th Cir. 2004). Section 9 of the Tribal-State compact is titled "Off-Reservation Gaming," and provides the following:

> An application to take land into 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.

The Tribe currently operates five class III casinos on tribal lands in the Upper Peninsula of Michigan.

The Tribe entered into a Comprehensive Development Agreement with the City of Lansing, Michigan to purchase two parcels of land for the purpose of building gaming facilities. Under the Agreement, the Tribe may choose to conduct either

class II or class III gaming. The Tribe acquired the first parcel using earnings from a tribal Self-Sufficiency Fund created for the Tribe under the Michigan Indian Land Claims Settlement Act, or MILCSA. Such a purchase requires that the Tribe tender title to the Secretary to have the land taken into trust pursuant to § 108(f) of MILCSA. Pub. L. 105- 143, § 108, 111 Stat. 2652, 2660–62 (1997). The State anticipates that the Tribe will argue that taking land into trust under MILCSA would permit class III gaming to occur on the land without a revenue-sharing agreement.

The State filed suit against the Tribe, seeking a preliminary injunction prohibiting the Tribe from making a trust submission to the Secretary. Counts 1–3 alleged that a MILCSA trust submission would violate § 9 of the Tribal-State compact because the Tribe failed to obtain a revenue-sharing agreement with other Indian tribes. Count 4 alleged that the Lansing property, if acquired in trust, would not come within any exception for land taken into trust after 1988, and that if the Tribe were to conduct class III gaming on the property, it would violate IGRA.[1] The district court issued a preliminary injunction barring the Tribe from applying to have the Casino property taken into trust without a written revenue-sharing agreement with the other

[1] The State also filed suit against members of the Tribe's Board of Directors, but the district court dismissed these claims without prejudice. The district court also dismissed as unripe Counts 5 and 6, which alleged that any class III gaming on the Lansing property would violate the Michigan Gaming Control and Revenue Act, and would be a nuisance. None of these claims is on appeal.

federally recognized Indian tribes in Michigan. The court found that it had jurisdiction over the claim because Section 2710(d)(7)(A)(ii) of IGRA abrogates the Tribe's immunity from suit by allowing a State to sue "to stop prospective class III gaming on prospective Indian lands." The district court likewise accepted the State's proposed alternative basis for jurisdiction, holding that because the Tribe "proposes to violate the forward looking provisions of Section 9 of the Compact" (with a MILCSA trust submission), Section 2710(d)(7)(A)(ii) of IGRA permits the court to enjoin *existing* class III gaming activity at the Tribe's other casinos in the Upper Peninsula of Michigan, even where those operations are not themselves unlawful. In addition, the court held Count 4 "ripe to the extent it puts directly at issue a current controversy between the parties over the possible application of an IGRA Section 20 exception to the Casino property that the Sault Tribe intends to have taken into trust."

The district court concluded that the four traditional factors a court must balance in deciding whether to grant a preliminary injunction weighed in favor of prohibiting the Tribe from making a trust submission to the Secretary of the Interior. First, the court reasoned that the State was likely to succeed on the merits because, in the absence of a revenue-sharing agreement, "the Sault Tribe would inevitably violate § 9 of the Compact by submitting its trust application" under MILCSA. The court reasoned that, without dispute, the Sault Tribe intends to use the property for class III gaming and does not intend to secure a revenue sharing agreement. The court also reasoned that, in the Tribe's view, trust

acquisition would trigger the land claim settlement exception to IGRA's prohibition on gaming on lands taken into trust after 1988. Second, the court found that the State would suffer irreparable injury without the preliminary injunction because the harm to the State "is in no way compensable by monetary damages." Third, the court decided that the risk of harm to others weighed in favor of granting the injunction because the other Tribes that § 9 of the Compact protects would be harmed by the trust submission without a revenue-sharing agreement. Finally, the court determined that the requested injunction would serve the public interest because the public benefits from enforcing all the terms of the Compact, including § 9.

The Tribe now appeals the order.

II.

Counts 1–3

With respect to the first three counts of the complaint, the State's suit to enjoin the trust submission is barred because the Sault Tribe is immune from suit. A tribe's sovereign immunity is abrogated "only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). In addition, "Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear." *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1242 (11th Cir. 1999). The compact between the Sault Ste. Marie Tribe and the State of Michigan

expressly reserves the sovereign immunity of both parties.

Although the Tribe's immunity is subject to statutory exceptions, the asserted statutory exception does not apply. Section 2710(d)(7)(A)(ii) of IGRA, relied upon by Michigan as a statutory basis for abrogating tribal sovereign immunity, does not apply because this suit to enjoin taking land into trust is not a suit "to enjoin a class III gaming activity." 25 U.S.C. § 2710(d)(7)(A)(ii) grants federal jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . that is in effect." In other words, a federal court has jurisdiction under this provision only where (1) the plaintiff is a State or an Indian tribe; (2) *the cause of action seeks to enjoin a class III gaming activity*; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect. *See Michigan v. Bay Mills Indian Cmty.*, 695 F.3d 406, 412 (6th Cir. 2012), *cert. granted*, 133 S. Ct. 2850 (U.S., June 24, 2013) (No. 12-515) (emphasis added). Only the presence of elements 2 and 3 is disputed. Because enjoining a mandatory trust submission under MILCSA does not qualify as enjoining "a class III gaming activity" under § 2710(d)(7)(A)(ii) of IGRA, we need not reach the issue of whether the Lansing property is on "Indian lands."[2]

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[2] This Court in *Bay Mills* held that there was no abrogation of sovereign immunity in that case by virtue of the third

Enjoining a MILCSA trust submission is not the same as enjoining a class III gaming activity. Section 108(f) of MILCSA states that land purchased using the income on the Self-Sufficiency Fund (as it was in this case) "shall be held in trust by the Secretary for the benefit of the tribe." § 108(f), 111 Stat. at 2661–62. This submission to the Secretary to have the land taken into trust is triggered by the nature of the funds used to purchase the property, not by the prospective purpose (explicit or otherwise) for which the property was acquired. Because stopping the Tribe's trust application to the Secretary is not the same as stopping a "gaming *activity*" under § 2710(d)(7)(A)(ii) of IGRA, the provision on its face does not apply.

The State argues that it does apply because the Tribe has committed itself to a path that will result in conducting class III gaming activities in violation of the compact; in other words, the Tribe's sovereign immunity is abrogated so long as the State's objective is to stop prospective class III gaming. Such a broad interpretation would unduly constrict a tribe's immunity. Any injunction would be permitted

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requirement of § 2710(d)(7)(A)(ii) in part because, except for one claim, plaintiff alleged that the gaming in question was *not* on Indian lands. *Id.* at 412–13. For the remaining claim, we held that the fourth requirement (conduct in violation of a Tribal-State compact) was not met. *Id.* at 413. Because the *second* requirement of § 2710(d)(7)(A)(ii) is not met in this case (suit to enjoin gaming activity), it is not necessary for us to determine the applicability of the third and fourth requirements. We therefore decline to hold this appeal in abeyance in anticipation of the Supreme Court's decision in *Bay Mills*, which presumably will address the reasoning of our court regarding the third and fourth requirements.

by means of a mere allegation that the challenged action might facilitate gaming activity. There is no support for such a wholesale abrogation of tribal immunity. The State relies on *Arizona v. Tohono O'odham Nation*, 2011 WL 2357833 (D. Ariz. June 15, 2011), where a district court enjoined a tribe from building a casino on property it had purchased, in violation of a Tribal-State compact. *Tohono* involved whether the land in question had yet become "Indian lands," and not whether the suit was to enjoin gaming. Indeed, the court stated explicitly that the nature of the claim asserted by the plaintiffs was "to enjoin gaming on Indian lands." *Id.* at *4. Here, the State seeks to enjoin the Tribe from asking the Secretary to take land into trust pursuant to a separate statute; it is not asking the court to enjoin class III gaming activity, or "the planned casino."[3]

The State moreover cannot get over this hurdle by suing to enjoin the class III gaming already occurring on tribal land if the alleged violation of the compact occurs independently of that pre-existing gaming. The State argues that even if a MILCSA trust submission is not a class III gaming activity, and even if the Lansing property is not Indian lands for the purposes of § 2710(d)(7)(A)(ii), the court nevertheless has jurisdiction to "enjoin existing gaming at the Sault Tribe's casinos in the Upper Peninsula of Michigan" because "all elements necessary for jurisdiction would be present." The

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[3] In Count 4, the State does ask the court to "enter an Order enjoining the operation of [Class III] games on [the Casino] property," which would qualify as a "class III gaming activity" under IGRA, but for the reasons set forth in Part III, *infra*, this issue is not ripe for adjudication.

convoluted logic of this argument depends on the idea that if a tribe even threatens to violate its compact (by applying to have land taken into trust), it loses the right to conduct class III gaming anywhere. Nothing in the Tribal-State compact or IGRA provides support for such a sweeping proposition, and the State's reliance on *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (7th Cir. 2008) is misplaced. There, the Seventh Circuit upheld jurisdiction over a suit to enjoin a tribe's class III gaming on the basis of its alleged violation of the dispute resolution provision of the compact. *Id*. at 927-40. *Ho-Chunk* supports the proposition that a court may enjoin class III gaming when a compact violation arises out of the particular gaming to be enjoined; it does not provide authority for enjoining class III gaming at sites unrelated to the alleged compact violation. Accordingly, this alternative rationale provides no basis for abrogating the Tribe's sovereign immunity under § 2710(d)(7)(A)(ii) of IGRA.

Our decision today does not affect the legal viability of a later suit to enjoin, as a violation of either § 9 of the Compact or § 2710(d)(7)(A)(ii) of IGRA, *class III gaming* on the land taken into trust. The Tribe conceded as much at oral argument.[4] Nor

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[4] The following exchange about § 2710(d)(7)(A)(ii) took place during oral argument:

MR. DUMONT: [W]e have never questioned that there will be a time for the State to bring this action, and to get adjudication if we are conducting class III gaming on this property, and even perhaps before we start conducting class III gaming once the property is in trust.

JUDGE: But you've clearly at the outset though expressed the intent to do class III gaming. That's front and center.

MR. DUMONT: If it is legally possible. And if I can say . . . as a practical matter, the Tribe will want that question resolved. So I think you can be confident that the Tribe will tee that question up, . . . which we would do either by going to the Interior Secretary or to the National Indian Gaming Commission and seeking an opinion that we are right about the "Indian lands" issue, and if that opinion is rendered, then it will be challengeable in federal court by the State or others under the APA.

During rebuttal, the Tribe's counsel discussed § 9 of the Tribal-State compact:

MR. DUMONT: Let's assume the State is correct about what Section 9 prohibits, which as you know, we believe they are not. What it entitles them to do is to bar class III gaming on that property at the end of the day.

JUDGE: What they say is the literal terms say it bars taking into trust.

MR. DUMONT: And they've made the argument now that . . . the mechanism it uses is to bar the trust at the beginning, but I want to be clear that—

JUDGE: You would be clear that you would not argue that because it has been taken into trust, that there's no longer any issue under Section 9.

MR. DUMONT: That is correct.

JUDGE: You would not argue that?

MR. DUMONT: We would not argue that.

JUDGE: Instead you would say, it either applies or it doesn't, and if it does, then we can't do class III gaming.

MR. DUMONT: If we applied for the property improperly, and we don't have a revenue-sharing agreement, and if that provision applies, then we can't do class III gaming. That would be our position.

does a suit to enjoin class III gaming have to wait until such gaming is already occurring. Injunctive relief can, and often is, brought before the challenged action occurs. *See, e.g.*, *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violations." (quoting *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928))).

Count 4

Count 4 is not barred by sovereign immunity because the State does challenge class III gaming on Indian lands. However, this claim is not ripe for adjudication, and should have been dismissed.

Under each of the three relevant considerations in a ripeness analysis, the legal issues presented in the challenge to class III gaming in this case are not ripe for review. *See, generally*, *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158 (1967); *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003). First, the legal analysis would benefit from a more concrete factual context. Second, the actions of the Tribe and the federal government that the plaintiff State seeks to enjoin are subject to modification and have not been sufficiently finalized. Third, the State is not faced with the type of practical quandary that militates in favor of ripeness.

1. Benefit to court of a concrete factual context.

The court would benefit from a more concrete factual context before deciding whether class III gaming on the casino property would violate IGRA or

§ 9 of the Tribal- State compact if conducted without a revenue-sharing agreement. The issues are indeed legal. Essentially, they are (1) whether the exception in IGRA (to the prohibition on gaming on land taken into trust after 1988) for land "taken into trust as part of . . . a settlement of a land claim" applies to land taken into trust under MILCSA; and (2) whether Section 9 of the Compact, in the absence of a revenue-sharing agreement, prohibits gaming on land taken into trust under MILCSA. 25 U.S.C. § 2719(b)(1)(B)(i). These issues can best be analyzed if the circumstances of the taking into trust are known to the reviewing court. In particular, will the Secretary take the land into trust? What kinds of undertakings and qualifications, especially with regard to gaming, have been made in connection with the taking into trust? As the Tribe points out, there is even the possibility of judicial review of the Secretary's determination to take the land into trust. The reviewing court will be in a much better position to rule on the legal issues if it has before it the concrete circumstances under which the land has been taken into trust. In contrast, the district court in the *Tohono O'odhom Nation* case found some aspects of the case to be ripe, relying in part on the fact that the Interior Department had already made a final decision to take the land in question into trust. 2011 WL 2357833, at *5.

Our concern in this regard is similar to that of the Supreme Court in *Toilet Goods*, which involved the legality of finalized rules providing for decertifying drug company employees who denied FDA inspectors access to manufacturing facilities. 387 U.S. at 158. The challenge was not ripe where no

decertification had occurred because the legal inquiry depended on a number of factors, including practical ones that could stand on a surer footing in the context of a specific application. *Id.* at 165–66. Similarly, in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998), the Supreme Court held that a challenge to a U.S. Forest Service management plan was not ripe because even though the plan set logging goals, selected the areas suited to timber production, and determined which probable methods of timber harvest were appropriate, "review would have to take place without benefit of the focus that a particular logging proposal could provide." *Id.* at 736; *see also Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003); *Ammex*, 351 F.3d at 706–08. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)). The State's best argument is that the groundwork for class III gaming is being laid; but no class III gaming is currently occurring on the property, and indeed, it may never occur. The Tribe has not been able even to make a trust submission under MILCSA, a process that involves its own contingencies (e.g., whether the Secretary agrees with the Tribe that she is required to hold the land in trust). Even if the land is taken into trust, under the terms of the development agreement with the City of Lansing, however unlikely, the Tribe could choose to offer only class II, not class III, gaming. Count 4 involves contingent, future events that may never occur; a more concrete

factual context would therefore benefit the resolution of this claim.

2. Uncertainty that class III gaming will occur.

The second aspect of ripeness has to do with whether the defendant will actually carry out what is sought to be enjoined, and if so, how. Here, there are intervening steps required before gaming will come to pass. Most importantly, the land has to be actually taken into trust, and that action has to be finally approved administratively in the Department of the Interior. The Tribe will have to consider making concessions to avoid objections made by the State and other tribes in connection with this administrative determination. Moreover, the Tribe asserts the conceivable (albeit probably entirely impracticable) possibility that it will only offer class II gaming (i.e., essentially bingo). In any event, it is not sufficiently clear that class III gaming will ever be imminent. In *Toilet Goods* the Supreme Court relied on the consideration that "[a]t this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order." 387 U.S. at 163. Similarly, we have no clear idea whether or when the land will be taken into trust, and what reasons will underlie the administrative decision. Our reasoning in *Ammex* was similar. The suit in *Ammex* arose out of an action for injunctive relief in which Ammex, a seller of duty-free merchandise, including fuel, sought to bar the Michigan Attorney General from enforcing the Michigan Consumer Protection Act (MCPA) against Ammex. *Ammex*, 351 F.3d at 700. The claim was not ripe because Ammex had been

granted the right to sell gas tax-free, so there was "no basis for assuming that the Attorney General [would] enforce the MCPA against Ammex." *Id*. at 709. Even if Ammex were ultimately forbidden from selling gasoline tax-free, it was still "far from clear what the Attorney General's policy would be with respect to enforcement of the MCPA against Ammex." *Id*. Like Ammex, the State in this case is suing to enjoin the Tribe from taking what the State alleges will be illegal action under IGRA. However, like the Attorney General's predicted course of action in *Ammex*, the course of action the State anticipates the Tribe will take here may never come to pass because the Secretary may refuse to hold the land in trust, or the Tribe may choose (or indeed, be required) to conduct only class II gaming on the property. This consideration weighs strongly against ripeness. *See also Ohio Forestry*, 523 U.S. at 735.

3. Hardship to the State in waiting for enforcement.

Finally, the State is not subject to the type of hardship that can outweigh other concerns in a ripeness analysis. Any hardship the State might incur by waiting to bring this claim against the Tribe is not significant enough to offset the other factors that weigh against ripeness. This is not a situation where, as in *Abbott Labs*, "the claim was ripe in part because the challenged regulation had a direct and immediate impact on the day-to-day operations of the plaintiff drug company." *Ammex*, 351 F.3d at 709. The State will not be harmed because it will have the opportunity to bring this claim against the

Tribe at a later time, and will not suffer any immediate consequences as a result of the delay.

The State is understandably concerned that if it must wait until the Tribe begins operating its casino before the State can assert abrogation of the Tribe's immunity under § 2710(d)(7)(A)(ii), the Tribe will then claim that the balance of harm swings decidedly in its favor, and that a permanent injunction should not be entered. This concern is not weighty because an ultimate determination that the challenged gaming is prohibited by IGRA or by the Compact will require an injunction regardless of the hardship to the Tribe from, for instance, wasted investment. A balance of equities of course strongly affects the exercise of discretion in deciding whether *preliminary* injunctive relief is warranted, where the legal issue has not yet been finally determined; but, in contrast, a final determination of illegality will necessarily trump equitable interests that can be accommodated only by violations of the law.

We do not now presume to determine the exact point at which a suit would be ripe to challenge class III gaming by the Tribe, when such a challenge is based on the theory that such gaming is prohibited by § 9 of the revenue-sharing agreement of the Compact, or by the limits on gaming on lands taken into trust after 1988. At some point the State must be able to obtain a judicial determination of whether one of these provisions prohibits class III gaming at the Lansing location, before the gaming starts. It is sufficient to conclude that the limited statutory abrogation of sovereign immunity does not permit the issue to be litigated by means of an injunction to

prevent purchased land from being taken into trust under MILCSA, and that a suit to enjoin class III gaming is presently not ripe.

III.

The district court's preliminary injunction is reversed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STATE OF MICHIGAN,
Plaintiff,

CASE NO. 1:12-CV-962

v.

HON. ROBERT J. JONKER

THE SAULT STE. MARIE TRIBE
of CHIPPEWA INDIANS, *et al.*,
Defendants.
_____/

OPINION AND ORDER

This matter is before the Court on Plaintiff State of Michigan's (the "State") Motion for Preliminary Injunction (docket # 2) and Defendants Sault Ste. Marie Tribe of Chippewa Indians (the "Sault Tribe") and the named Tribal Directors' Motion to Dismiss under FED. R. CIV. P. 12(b)(1) and 12(b)(6) (docket # 10). The Court heard oral argument on the motions on December 5, 2012 and January 23, 2013. The motions are fully briefed. The Court has thoroughly reviewed the record and carefully considered the applicable law. The motions are ready for decision.

Background

1. The Sault Tribe

The State brings this lawsuit against the Sault Tribe, a federally recognized Indian Tribe, and thirteen Directors of the Sault Tribe, in their official

capacities. (Compl., docket # 1.) The Sault Tribe "is the modern day political organization of the Chippewa bands which inhabited the eastern portion of the Upper Peninsula of Michigan since before the coming of Europeans." *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 576 F. Supp. 2d 838, 840 (W.D. Mich. 2008) (internal quotation marks omitted). The United States formally acknowledged the Sault Tribe in 1972, and in 1975 the Sault Tribe established a governmental structure consistent with the Indian Reorganization Act, 25 U.S.C. § 476. *Id.* at 841. A Board of Directors governs the Sault Tribe. The Sault Tribe has its tribal offices and all of its reservation in the Upper Peninsula of Michigan. (Compl., docket # 1, at ¶ 18.)

2. IGRA

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq*. permits Class III gaming activities (casino-style gaming) on Indian lands only if certain requirements are met. *State of Michigan v. Bay Mills Indian Community*, 695 F.3d 406, 410 (6th Cir. 2012) (citing 25 U.S.C. § 2710(d)). An Indian Tribe that wants to conduct gaming activity on Indian lands must adopt a Tribal Gaming Ordinance and obtain approval from the National Indian Gaming Commission. *Id.* (citing 25 U.S.C. § 2710(d)(1)(A)). The Tribe must also have land taken into trust, and must then negotiate a Tribal-State compact that will govern the gaming. *Id.* (citing 25 U.S.C. § 2710(d)(3)). Once a Tribal-State compact is entered, the gaming must conform to the compact. *Id.* (citing 25 U.S.C. § 2710(d)(1)(C)).

IGRA bars Class III gaming on lands acquired in trust by the Secretary after October 17, 1988, subject to certain specified exceptions. 25 U.S.C. § 2719. Those exceptions include, among others, lands taken into trust as part of a settlement of a land claim. 25 U.S.C. § 2719(b)(1)(B)(i). The implementing regulations establishing criteria for meeting the requirements of the "settlement of a land claim" exception provide, among other things:

> Gaming may occur on newly acquired lands if the land at issue is . . . [a]cquired under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, in legislation enacted by Congress.

25 C.F.R. § 292.5(a) (2012).

3. The 1993 Compact

In August 1993, the Sault Tribe and the State entered into a Tribal-State governing compact (the "Compact") under IGRA. (Compl., docket # 1, at ¶ 19.) After concluding the Compact, the Sault Tribe passed a Tribal Gaming Ordinance. (*Id.* at ¶ 20 and Ex. B.) The Secretary of the Interior (the "Secretary") approved the Compact on November 19, 1993. (*Id.* at ¶ 19.) Under the Compact and Tribal Gaming Ordinance, the Sault Tribe conducts Class III gaming in several casinos it operates on Indian lands in the Upper Peninsula. (*Id.* at ¶ 22.)

Section 9 of the Compact includes a forward-looking provision that addresses the potential for off-reservation gaming on lands taken into trust under IGRA Section 20 in the future:

> Off-Reservation Gaming
>
> An application to take land into 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.

(*Id.* at Ex. A.) This provision is at the heart of the present dispute.

4. Casino Plans for Off-Reservation Gaming in Lansing

In 1997, Congress enacted the Michigan Indian Land Claims Settlement Act ("MILCSA"), Pub. L. No. 105-143, 111 Stat. 2652 (1997). The purpose of MILCSA was to allocate funds to Indian Tribes in Michigan, to satisfy judgments that the Indian Claims Commission had entered in favor of the Tribes. *Bay Mills*, 695 F.3d at 410 (citing MILCSA § 102). MILCSA directs the Sault Tribe to use the funds allocated to it to establish a trust fund for the benefit of the Sault Tribe, known as the Self-Sufficiency Fund. MILCSA § 108(a)(1). MILCSA provides that Self-Sufficiency Fund income shall be

distributed for any of five uses, including "for consolidation or enhancement of tribal lands." *Id.* at § 108(c)(5). MILCSA provides further that "[a]ny lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the Tribe." *Id.* at § 108(f). The Sault Tribe believes lands purchased with income of the Self-Sufficiency Fund meet one of the Secretary's regulatory criteria for a land claim settlement exception under Section 20 of IGRA.

January 2012, the Sault Tribe approved a resolution stating that the Sault Tribe intends to open a casino in the City of Lansing, Michigan. (*Id.* at ¶ 24.) The same month, the Sault Tribe entered a Comprehensive Development Agreement ("CDA") with the City of Lansing. (*Id.* at ¶ 26.) The CDA reflects that the Sault Tribe will use earnings from the Self-Sufficiency Fund to purchase certain parcels of property (the "Casino property") within the City of Lansing. (*Id.* at ¶ 25 and Ex. D.) The CDA also provides that the Sault Tribe will build and operate two casinos on the Casino property. (*Id.*) On November 1, 2012, the Sault Tribe completed the purchase of the initial parcel the CDA covers. (Def.'s Br. in Support of Mot. to Dismiss, docket # 11, at 6.) The Sault Tribe intends to apply to have the Secretary take the Casino property into trust for the benefit of the Sault Tribe, a necessary step in the Sault Tribe's process of moving forward lawful casino gaming on the Casino property. (*Id.* at ¶ 28.)

It is undisputed that the Casino property is off-reservation and not eligible for gaming unless an

IGRA Section 20 exception applies. It is also undisputed that the Sault Tribe and the State's other federally recognized Indian Tribes have not entered into any agreement providing for each of the other Tribes to share in the revenue of the casinos the Sault Tribe aspires to operate on the Casino property. In the absence of such a revenue sharing agreement, the State asserts that the Sault Tribe's application to have the Casino property taken into trust would breach Section 9 of the Compact and violate IGRA. (*Id.* at ¶¶ 35-59.) Several other Tribes agree. (Amicus Curiae Br. of Amicus Saginaw Chippewa Indian Tribe of Michigan, docket # 26; Amicus Curiae Br. of Amicus Nottawaseppi Huron Band of Potawatomi Indians, docket # 32.) The Sault Tribe disagrees, contending among other things that Section 9 of the Compact is no barrier to its proposed trust acquisition under the MILCSA, because Congress mandated trust acquisition of lands purchased under the Act.

5. This Lawsuit

The State filed this lawsuit on September 12, 2012. The State seeks a declaration that any submission by the Sault Tribe of an application to the Secretary to have the Casino property taken into trust necessarily implicates Section 20 of IGRA, and therefore violates the Compact and IGRA, because the Sault Tribe has not secured the revenue sharing agreement Section 9 of the Compact requires. (*Id.*, Counts I - III.) The State seeks injunctive relief to prevent such a violation. The State also seeks a declaration that it is unlawful under federal and state law for the Sault Tribe to operate Class III

gaming on the Casino property, and an injunction on the operation of any Class III gaming on the Casino property. (*Id.*, Counts IV, V.) Finally, the State brings a nuisance claim asserting that any continued operation of a casino on the Casino property by the Sault Tribe would be a public nuisance. (*Id.*, Count VI.)

The State now seeks a preliminary injunction preventing the Sault Tribe from applying to have the Casino property taken into trust during the pendency of the case unless and until the Sault Tribe secures the required revenue sharing agreement. Two other Tribes support the State's request. (Amicus Curiae Br. of Amicus Saginaw Chippewa Indian Tribe of Michigan, docket # 26; Amicus Curiae Br. of Amicus Nottawaseppi Huron Band of Potawatomi Indians, docket # 32.) The Sault Tribe opposes any preliminary injunction. In addition, the Sault Tribe moves to have the case dismissed altogether under FED. R. CIV. P. 12(b)(1), based on the asserted absence of any waiver of its sovereign immunity, or under FED. R. CIV. P. 12(b)(6).

Legal Standards and Analysis

I. Sovereign Immunity and Jurisdiction

A. The Sault Tribe

"Indian tribes are immune from suit except in specific, limited circumstances." *Bay Mills*, 695 F.3d at 413-14 (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998)). An Indian Tribe enjoys immunity from suit unless "Congress has authorized the suit or the tribe has waived its

immunity." *Kiowa Tribe*, 523 U.S. at 754. "An abrogation of tribal immunity 'cannot be implied but must be unequivocally expressed.'" *Bay Mills*, 695 F.3d at 414 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).

IGRA explicitly provides that "[t]he United States district courts shall have jurisdiction over . . . (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . that is in effect[.]" 25 U.S.C. § 2710(d)(7)(A)(ii). *Bay Mills* has distilled the test of federal jurisdiction under section 2710(d)(7)(A)(ii) into five elements:

> (1) the plaintiff is a State or Indian tribe;
> (2) the cause of action seeks to enjoin a class III gaming activity;
> (3) the gaming activity is located on Indian lands;
> (4) the gaming activity is conducted in violation of a Tribal-State compact; and
> (5) the Tribal-State compact is in effect.

Bay Mills, 695 F.3d at 412. IGRA defines Indian lands as:

> (A) all lands within the limits of any Indian reservation; and
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against

> alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4).

There is no dispute that the first and fifth jurisdictional requirements *Bay Mills* describes are present here. The plaintiff is a State, and the Tribal-State compact is in effect. The Sault Tribe argues that the case does not satisfy the remaining jurisdictional requirements because there is no Class III gaming presently occurring on Indian lands in Lansing, and there cannot be any such gaming before the Secretary actually takes land into trust for the Sault Tribe. The State and Amicus Tribes disagree, claiming the Court has jurisdiction because this action seeks to prevent the Sault Tribe's plans for Class III gaming in Lansing that would necessarily be on Indian lands and necessarily violate Section 9 of the Compact now in effect if the anticipated trust application is filed without the required revenue sharing agreement. Alternatively, if the Court concludes the challenged Class III gaming must be presently occurring to satisfy IGRA's jurisdictional grant, the State asserts that it would amend its preliminary injunction request, and move to stop existing Class III gaming on the Sault Tribe's Indian lands in the Upper Peninsula. This would allow, in the State's view, an indirect route to address the Casino property in Lansing and ensure that no trust application occurs before the Sault Tribe honors Section 9 of the Compact.

The core jurisdictional dispute between the parties hinges on what, if any, temporal requirement should apply to the challenged Class III gaming on

Indian lands. Specifically, does the statute permit federal jurisdiction over a claimed breach of a current compact as long as the State's objective is to stop prospective Class III gaming on prospective Indian lands? Or does the statute limit federal jurisdiction to challenges to existing Class III gaming on existing Indian lands, even for claims seeking to enforce a forward-looking provision in an existing compact?

The starting point, of course, is the statutory text itself. The statutory text plainly includes a temporal requirement for one jurisdictional element: namely, that the compact at issue must be presently in effect. But the statute includes no similar temporal requirement for any other element, requiring only that the ultimate purpose of the lawsuit be to enjoin Class III gaming activity on Indian lands in violation of a currently effective compact. That is, of course, exactly what the State seeks to do here. Indeed, given the centrality of the Compact to the operation of Class III gaming, 25 U.S.C. § 2710(d)(1)(C), the most natural reading of the jurisdictional grant is that Congress intended to give the federal courts jurisdiction over a State's claim that a Tribe breached a compact because any such breach would necessarily mean the Class III gaming was unlawful and subject to injunction.

This is the same conclusion reached in *State of Arizona v. Tohono O'odham Nation*, No. CV 11-0296-PHX-DGC, 2011 U.S. Dist. LEXIS 64041 (Az. Dist. June 15, 2011), the only decision that the parties and the Court have been able to find that addresses the issue in a similar context. In *Tohono*, the defendant

Indian Tribe (the "Nation") purchased a parcel of land and petitioned the Secretary to take a portion of the land (the "Parcel") into trust for the benefit of the Nation. *Tohono*, 2011 U.S. Dist. LEXIS 64041, at *2. The Nation had stated its intention to open a casino on the Parcel it purchased. *Id.* at *3. At the time of the *Tohono* decision, the Secretary had made a final decision to take the Parcel into trust but had not decided whether the Parcel was eligible for gaming under IGRA. *Id.* An appeal of the trust decision was pending before the U.S. Court of Appeals for the Ninth Circuit, with the transfer of the Parcel into trust stayed pending the outcome of the appeal. *Id.* The State of Arizona sought to enjoin the planned casino, arguing it would violate a Tribal-State compact. *Id.* at *2.

The Nation moved to dismiss for lack of subject matter jurisdiction under FED. R. CIV. P. 12(b)(1). *Id.* at *7. The Nation argued that because the Parcel "ha[d] not yet been taken into trust by the [Department of the Interior] and therefore [was] not 'Indian lands,' . . . IGRA's narrow abrogation of sovereign immunity [did] not apply." *Id.* at *8. The court rejected this argument. *Id.* The court explicitly acknowledged that the Parcel had not yet been taken into trust. *Id.* But the court emphasized that Congress included just "one temporal limitation on [the] abrogation of tribal sovereign immunity – it required that the suit concern a compact 'that is in effect.'" *Id.* at *9. "Congress did not include a similar temporal limitation on when the land at issue in the suit must become Indian lands. Instead, it focused only on the nature of the claim: 'to enjoin a class III gaming activity located on Indian lands.'" *Id.* at *9-

10. The court found that IGRA's abrogation of sovereign immunity applied though the Parcel had not yet been taken into trust.

Such a reading is not only faithful to the statutory text, but also makes practical sense. IGRA uses the Tribal-State compact as a vehicle for managing and regulating the interests of the State and the Tribe in Class III gaming activities. *See* 25 U.S.C. § 2710(d)(1)(C). It is critical, then, that interested parties have the right to enforce the terms of the compact once a compact is in effect. Thus, the temporal requirement of an existing compact is necessary. But as this case illustrates, terms of a compact may naturally address future activity, just as other bilateral agreements often do. Indeed, in a gaming compact, it is entirely natural that the parties would address whether, how, and under what conditions future gaming establishment could take place. And if and when the parties have a dispute about such a provision that affects existing or proposed Class III gaming on Indian lands, there needs to be a forum for resolving the dispute. Otherwise, the parties cannot enforce the benefit of their bargain. As long as injunctive relief is otherwise appropriate under the normal requirements governing such relief – including without limitation the need to prevent some real and imminent harm – there is no reason to wait for the harm to actually occur before recognizing a basis for federal jurisdiction consistent with the statutory text.

The Sault Tribe objects that *Bay Mills* forecloses this reading of the statute. The Court disagrees. *Bay*

Mills involved a challenge to a casino the Bay Mills Indian Community wished to operate in Vanderbilt, Michigan, more than 100 miles away from the Tribe's reservation. Among other things, the State claimed that operating the casino would violate an existing Tribal-State compact between the Bay Mills Indian Community and the State. But in contrast to this case, in *Bay Mills*, the plaintiff State of Michigan affirmatively alleged that the casino being challenged in that case was not, and never would be, located on Indian lands. *Id.* Indeed, in *Bay Mills* the State's claim for breach of compact depended upon the casino never being located on Indian lands. *See id.* (emphasizing that if the casino were on Indian lands, its operation would not violate the compact). Under that very unusual fact pattern, the court concluded that the jurisdictional requirement that the challenged activity take place on Indian lands was not, and could not, be satisfied in that case, because by the State's own admission it was not seeking to enjoin gaming activity on Indian lands. In contrast to *Bay Mills*, this case involves a stated intention to have the land at issue – the Casino property – taken into trust for the benefit of the Sault Tribe and for eventual Class III gaming on the trust property. The Sault Tribe has already acquired one parcel with the intention of having the land transferred into trust, paving the way for Class III gaming under the land settlement exception of Section 20 of IGRA.

The Court would also have jurisdiction under IGRA if the State pursued its alternative path of seeking to enjoin existing gaming at the Sault Tribe's casinos in the Upper Peninsula of Michigan. Even

under the narrowest reading of IGRA's jurisdictional grant, all elements necessary for jurisdiction would be present: the cause of action would seek to enjoin existing Class III gaming activity located on existing Indian lands conducted despite an alleged breach of an existing compact. *See Bay Mills*, 695 F.3d at 412. It is immaterial that the alleged breach is to Section 9 of the Compact, rather than to some aspect of the existing Class III gaming. The point is that the Sault Tribe has the right to conduct Class III gaming only in accordance with the terms of the entire Compact. 25 U.S.C. § 2710(d)(1)(C). If it violates or proposes to violate the forward looking provisions of Section 9 of the Compact, then its right to conduct Class III gaming is properly in jeopardy. Whether based upon the case as currently framed, or on the State's proposed alternative, the Court has jurisdiction under IGRA.

B. Ex Parte Young

The State named all of the Sault Tribe's Directors on the theory that even if the Court concluded the Sault Tribe had sovereign immunity from suit, the State could sue the Tribal Directors for prospective relief under *Ex Parte Young*, 209 U.S. 123 (1908). In *Ex Parte Young*, the Court concluded that a private plaintiff could sue a state officer to restrain his illegal conduct under color of law even though the state itself enjoyed sovereign immunity. The State argues that the same principle applies here. The Sault Tribe disagrees. The Sixth Circuit has not decided whether a plaintiff may sue tribal officers for relief under an *Ex Parte Young* theory. Other Circuits considering the question have concluded that plaintiffs may proceed with such

suits. *Dunlevy v. Stidham*, 640 F.3d 1140 (10th Cir. 2011); *Vann v. Kempthorne*, 534 F.3d 741, 750 (D.C. Cir. 2008); *Vann v. U.S. Dept. of the Interior*, 701 F.3d 927, 928 (D.C. Cir. 2012). Ultimately, the Court need not address the issue, because the Court has jurisdiction over the Sault Tribe under IGRA. Accordingly, the Court will dismiss the defendant Tribal Directors without prejudice.

C. Ripeness

Counts V and VI raise state law claims on the assumption the Sault Tribe actually begins Class III gaming on the Casino property. Count III raises an IGRA claim that seeks to enjoin any Class III gaming on the Casino property, once it is in trust, on the theory that the property would not in fact qualify for any IGRA Section 20 exception permitting gaming. As even the State acknowledges, Counts V and VI are not yet ripe because the Sault Tribe has not begun any gaming activity on the property. Accordingly, the Court dismisses Counts V and VI without prejudice. But Count IV is ripe to the extent it puts directly at issue a current controversy between the parties over the possible application of an IGRA Section 20 exception to the Casino property that the Sault Tribe intends to have taken into trust. This is an issue at the core of the parties' current dispute and not subject to dismissal at this time. In addition, Count IV would be the natural vehicle to implement the State's alternative request to enjoin existing Class III gaming under the existing Compact, if such an alternative request is necessary to support jurisdiction.

II. Preliminary Injunction

The State seeks a preliminary injunction preventing the Sault Tribe from submitting an application to have the Secretary take the Casino property into trust for gaming unless and until the Sault Tribe secures the revenue sharing agreement Section 9 of the Compact requires. In the State's view, Section 9 of the Compact plainly compels this result:

> An application to take land into 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.

(Compl., docket # 1, Ex. A.) The Sault Tribe contends that Section 9 of the Compact does not read on an application to have the Casino property taken into trust in this case because MILCSA mandates trust acquisition of property acquired under its terms. The Sault Tribe acknowledges that its position is that such an acquisition would trigger an IGRA Section 20 land settlement exception to the general rule prohibiting gaming on such property. But the Sault Tribe says that is just the inevitable consequence of MILCSA, and not the exercise of Secretarial discretion, which in the Sault Tribe's view is all that Section 9 of the Compact covers. The Sault Tribe also argues that there is no imminent risk of harm

anyway, because the State may seek an injunction later, if and when Class III gaming actually begins on the Casino property.

A. Applicable Standard

The first question is whether IGRA displaces the normal requirements for a preliminary injunction and effectively mandates a preliminary injunction when the State articulates a good faith claim within the IGRA's jurisdictional grant. The State asserts that IGRA does precisely this, and that the Court need not – in fact, must not – weigh the traditional preliminary injunction factors. There are, of course, some statutes that have been construed to do this. *See, e.g., CSX Transportation, Inc. v. Tennessee State Board of Equalization,* 964 F.2d 548, 555 (6th Cir. 1992) (construing 49 U.S.C. § 11503); *United States v. Szoka*, 260 F.3d 516, 523 (6th Cir. 2001) (construing 47 U.S.C. § 401(b)); *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1098 (9th Cir. 2000) (construing 26 U.S.C. § 7408). But the Court is not persuaded IGRA should be one of them. The State has not identified, and the Court is not aware of, any case that has construed IGRA's jurisdictional grant in this manner. There is certainly nothing explicit in the statutory text that displaces the traditional preliminary injunction analysis. Nor does the statute by its terms articulate an alternative test. Indeed, the statute does not even address preliminary injunctions at all. The best reading of the statute is that it is simply a jurisdictional grant, and not a remedial provision at all. It simply authorizes one category of relief – injunctive – as opposed to traditional money damages, leaving the ordinary equitable standards to apply in deciding

what, if any, injunctive relief is appropriate. The Court therefore finds no basis to depart from the traditional preliminary injunction framework and will apply it here.

A preliminary injunction is a temporary remedy designed "merely to preserve the relative positions of the parties until a trial on the merits can be held." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). The plaintiff seeking a preliminary injunction bears the burden of establishing his entitlement to it. *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009). A court addressing a motion for a preliminary injunction considers four factors: "(1) the likelihood that the movant will succeed on the merits; (2) whether the movant will suffer irreparable harm without the injunction; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest will be advanced by issuing the injunction." *Certified Restoration,* 511 F.3d at 541. A plaintiff need not win on every factor to obtain a preliminary injunction. *Id.* Instead, the factors "are to be balanced against each other." *Id.* (quotation omitted). The court "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." *Id.* at 542 (quotation omitted). The court should, however, "analyze all four of the preliminary injunction factors." *Id.* (quotation omitted).

B. The Propriety of Injunctive Relief

1. Likelihood of Success

To demonstrate the first prong of the test, Plaintiff must "show more than a mere possibility of success." *Id.* at 543 (quotation omitted). "It 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." *Id.* (quotation and alteration omitted). The State has raised such questions here. An 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. There is no dispute that the Sault Tribe intends to use the Casino property for Class III gaming. There is no dispute that the Sault Tribe has not secured and does not intend to secure a revenue sharing agreement with other Tribes. And there is no dispute that, in the Sault Tribe's view, the trust acquisition will inevitably trigger an IGRA Section 20 exception that permits gaming that would otherwise be prohibited. Therefore, the State's claim that the Sault Tribe would inevitably violate Section 9 of the Compact by submitting its trust application has substantial merit. Two other Indian Tribes, both of which negotiated Tribal- State compacts containing similar language to the language of Section 9, support the State's construction of the

language. (Amicus Curiae Br. of Amicus Saginaw Chippewa Indian Tribe of Michigan, docket # 26; Amicus Curiae Br. of Amicus Nottawaseppi Huron Band of Potawatomi Indians, docket # 32.)

The Sault Tribe protests that Section 9 of the Compact applies only to trust applications that the Secretary has discretion to grant or deny, and has no application to what the Sault Tribe terms "mandated" applications. According to the Sault Tribe, MILCSA requires the Secretary to take land acquired with MILCSA funds into trust as long as the land is part of a consolidation or enhancement of tribal land, and regardless of any planned use for the land. But even assuming this is true, the Sault Tribe's argument that Section 9 of the Compact has no bearing on such a trust acquisition is weaker than the State's argument to the contrary. In the first place, nothing in the language of Section 9 of the Compact draws any explicit distinction between so-called discretionary applications and so-called mandatory applications. The language of Section 9 focuses on the intended purpose of the trust acquisition, not on the Secretary's discretion or lack of discretion in the process. Here, the purpose – or at least a significant purpose – of the proposed acquisition is for gaming that can only be allowed "pursuant to [IGRA Section] 20." Second, the inevitable effect of any trust acquisition here will be, at least in the Sault Tribe's view, to trigger an IGRA Section 20 exception based on settlement of a land claim. 25 U.S.C. § 2719(b)(1)(B)(i). Indeed, under the implementing regulations for this exception, something like a MILCSA is a necessary part of the Secretary's qualification of the IGRA Section 20 land

settlement exception. 25 C.F.R. § 292.5 (2012). Finally, the Sault Tribe's construction of Section 9 of the Compact would allow one Tribe to circumvent the mechanism the State and all originally compacting Tribes devised to control the expansion of off-reservation gaming under Section 20 of IGRA. A construction that undermines the mechanism originally accepted by the parties is unconvincing.

The State has established a likelihood of success on the merits.

2. Irreparable Harm

The second factor is whether the State will suffer irreparable injury without the preliminary injunction. A "plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Certified Restoration,* 511 F.3d at 550 (quotation omitted). In this case, the harm the State seeks to avert is in no way compensable by monetary damages, because Congress has not provided any economic remedy for the State. The State can obtain only equitable relief. This is a paradigm case for injunctive relief. *See, e.g., Performance Unlimited, Inc. v. Questar Publishers*, 52 F.3d 1373, 1382 (6th Cir. 1995) (noting that impending loss of plaintiff's business could not be undone through monetary damages and was therefore "precisely the type of harm which necessitates the granting of preliminary injunctive relief").

But the Sault Tribe protests that the State could wait to see whether Class III gaming on the Casino property is ever authorized, and then move to enjoin

the gaming. Until that time, argues the Sault Tribe, there may be apprehension on the part of the State but no real harm. The problem with this argument, however, is that it effectively reads Section 9 out of the Compact, leaving the State without the benefit of its bargain. And if the language has no enforceable independence in this Compact, then presumably it does not in any of the other compacts between the State and other Indian Tribes with similar language. The likely result of such a reading would be market uncertainty and instability. Moreover, draining Section 9 of the Compact of any potential for independent enforcement would create perverse incentives: it would reward with increased leverage those Tribes willing to flout the Section 9 obligation and penalize those Tribes that choose to honor their Section 9 obligation. In the world of Indian gaming under IGRA, negotiating leverage is what makes the process work. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 48-51 (1996) (describing IGRA's "elaborate remedial scheme designed to ensure the formation of a Tribal-State compact"). And, in fact, the gateway to exercise of the negotiating leverage and eventual compact forcing measures of the Secretary's regulations is the taking of land into trust. 25 U.S.C. § 2710(d)(3)(A); 25 C.F.R. §§ 291.1 - 291.15 (2012). So Section 9 of the Compact addresses a critical, practical stage on the road to Class III gaming. When the parties strike a bargain on such a matter in a compact governing Class III gaming, preliminary injunctive relief is appropriate to protect the bargained for position.

This prophylactic function is a routine feature of a preliminary injunction. It arises often, for example,

in the context of non-competition agreements. Common law and some statutes naturally protect an employer against a departing employee who steals company secrets, discloses trade secrets, or otherwise unfairly competes. But an employer need not wait for the actual harm to fall before seeking relief; instead, the employer can seek preliminary relief to prevent the harm. In addition, the employer can secure a non-competition agreement from an employee that as a matter of contract prevents the employee from even working for a competitor for a reasonable time, and may then enforce the contract right with a preliminary injunction. The point in both situations is to prevent harm from happening before it occurs. The courts regularly enforce such agreements to prevent competitive harm. *See, e.g., Basicomputer Corp. v. Scott*, 973 F.2d 507, 511-12 (6th Cir. 1992) (affirming grant of preliminary injunction to enforce non-competition agreements when departing employees removed documents containing customer information and began soliciting business from plaintiff's customers); *Gateway 2000 v. Livak*, 19 F. Supp. 2d 748, 753 (E.D. Mich. 1998) (finding imminent risk of irreparable harm where defendant accepted employment from direct competitor of plaintiff in alleged breach of non-competition and separation agreements). The same holds true for Section 9 of the Compact: the Court can enforce the provisions of Section 9 as the parties' own agreed prophylactic measure regarding the risk of off-reservation gaming expansion even before any Class III gaming actually comes to fruition on prospective Indian lands in Lansing. Congress gave the Court power to enjoin Class III gaming altogether in the face of a compact breach. Surely that grant of power

permits equitable enforcement of the Compact provisions themselves, all of which must be honored as a condition of any lawful Class III gaming. 25 U.S.C. § 2710 (d)(1)(C). The State has demonstrated an imminent risk of irreparable harm.

3. Risk of Harm to Others

The balance of risk of harm also weighs in favor of a preliminary injunction. In fact, an injunction is likely to protect, rather than hurt, third parties. By its terms, Section 9 of the Compact is devoted to the protection of third parties: namely, other federally-recognized Tribes. This case affects not only the State and the Sault Tribe, but all of Michigan's federally-recognized Indian Tribes. Two of those Tribes have filed amicus briefs detailing, among other things, the risk of harm the Sault Tribe's proposed reading presents for them. (docket ## 26, 32.) They note that the language in Section 9 of the Compact attempts to balance the potentially competing interests of all of the federally-recognized Indian Tribes in Michigan, and that the Sault Tribe's proposed interpretation of Section 9 threatens that balance, jeopardizing interests of all of the other federally recognized Tribes. Moreover, if the Sault Tribe proceeds with its trust application while the meaning of Section 9 of the Compact is being contested, other private and public actors may begin to change their own positions in reasonable expectation that Class III gambling will come to the Casino property before that issue is actually resolved. A preliminary injunction, therefore, will not hurt third parties, but will actually serve to prevent harm that may otherwise occur in the absence of a preliminary injunction.

4. Public Interest

The State has also established that the requested preliminary injunction would serve the public interest. Under the IGRA framework, the Tribal-State compact becomes the key bargain that protects and enforces the interests of the State and the Tribes in Class III gaming. There is no independent federal or state statute that regulates Class III gaming on Indian lands. The compact becomes the substitute vehicle for a State to protect its interests. For the system Congress created through IGRA to function, all sides must have confidence that the agreed terms of the compact are meaningful and enforceable. The State has no other means of enforcing its interests in the gambling that occurs on Indian lands within its borders. The Tribal-State compact is the sole vehicle establishing and protecting State and tribal interests in Class III gaming in Michigan. It therefore benefits the public to enforce all of the terms of the Compact, including Section 9.

Each of the four preliminary injunction factors favors the State's request for a preliminary injunction preventing the Sault Tribe from applying to have the Casino property taken into trust during the pendency of the case unless and until the Sault Tribe secures the required revenue sharing agreement. The Court therefore concludes that the State is entitled to the preliminary injunction it requests.

III. Failure to State a Claim

FED. R. CIV. P. 8(a)(2) requires that a complaint contain a "short and plain statement of the claim

showing that the pleader is entitled to relief." Detailed factual allegations are not necessary. *See, e.g.*, FED. R. CIV. P. Form 11 (describing a complaint for negligence); *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to dismiss under FED. R. CIV. P. 12(b)(6), a plaintiff "must allege facts that, if accepted as true, are sufficient 'to raise a right to relief above the speculative level,' and to 'state a claim for relief that is plausible on its face.'" *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007) (internal citations omitted)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

The State easily satisfies the threshold showing necessary to survive a motion to dismiss under Rule 12(b)(6). The State's claims of breach of compact and related breach of IGRA are plausible on their face. Indeed, for the reasons stated in the preliminary injunction analysis, the State has the stronger argument on the merits of these claims. There is no dispute that the State and the Sault Tribe entered the Compact in accordance with IGRA. The State proposes a reasonable interpretation of Section 9 of the Compact. No one disputes that if the State's interpretation of Section 9 of the Compact prevails, the Sault Tribe's planned trust acquisition application and development of the Casino property without a revenue sharing agreement would violate the Compact and IGRA. Dismissal under FED. R. CIV. P. 12(b)(6) is not warranted.

Conclusion

For these reasons, the Court concludes that the State is entitled to the preliminary injunction it seeks, and further concludes that dismissal for lack of jurisdiction or failure to state a claim is not appropriate.

ACCORDINGLY, IT IS ORDERED:

1. Plaintiff State of Michigan's Motion for Preliminary Injunction (docket # 2) is **GRANTED** to the extent consistent with this Order and is **DENIED** in all other respects. Defendant Sault Ste. Marie Tribe of Chippewa Indians is **PRELIMINARILY ENJOINED** during the pendency of this action from applying to have the Casino property taken into trust unless and until it obtains a written revenue sharing agreement with the other federally-recognized Indian Tribes in Michigan.

2. Defendants Sault Ste. Marie Tribe of Chippewa Indians and Tribal Directors' Motion to Dismiss (docket # 10) is **GRANTED** to the extent the motion seeks dismissal of the named Tribal Directors without prejudice; is **GRANTED** to the extent the motion seeks dismissal of Plaintiff State of Michigan's Counts V-VI without prejudice; and is **DENIED** in all other respects.

Dated: March 5, 2013

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES
DISTRICT JUDGE

No. 13-1438

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 13, 2014
DEBORAH S. HUNT, Clerk

STATE OF MICHIGAN,	)
Plaintiff-Appellee,	)
v.	) ORDER
THE SAULT STE. MARIE TRIBE	)
OF CHIPPEWA INDIANS,	)
Defendant-Appellant.	)

BEFORE: ROGERS, STRANCH, and DONALD, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt
Deborah S. Hunt, Clerk

[Page 1; Page ID#747]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STATE OF MICHIGAN,
Plaintiff,

DOCKET NO. 1:12-cv-962

vs.

SAULT STE. MARIE TRIBE OF
CHIPPEWA INDIANS, et al.,
Defendants.
_____/

TRANSCRIPT OF OMNIBUS HEARING
BEFORE THE HONORABLE ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE
GRAND RAPIDS, MICHIGAN
December 5, 2012

Court Reporter: Glenda Trexler
Official Court Reporter
United States District Court
685 Federal Building
110 Michigan Street, N.W.
Grand Rapids, Michigan 49503

Proceedings reported by stenotype, transcript
produced by computer-aided transcription.

[Page 2; Page ID#748]

A P P E A R A N C E S:

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Grand Rapids, Michigan
December 5, 2012
2:45 p.m.

P R O C E E D I N G S

THE COURT: All right. This is the State of Michigan against the Sault Ste. Marie Tribe of the Chippewa, 1:12-cv-962.

[Page 24; Page ID#770]

the kind that would be necessary to -- a necessary predicate for the entry of a preliminary injunction.

Now, I don't want to be coy about where the Tribe stands on any of this. We do intend to file a land-in-trust application, if you want to call it that, although it's different from the standard land-in-trust application as you were alluding to a moment ago.

THE COURT: Wait. It will be under -- or will it be under the Land Settlement Act or will it be under 465? Or don't you know?

MR. DUMONT: It will be under the Land Settlement Act.

THE COURT: Okay.

MR. DUMONT: The premise of that submission will be that the land has been acquired with funds from the Settlement Act and that the statute requires that it be held in trust by the Secretary.

There's an open question whether we ought to need to submit an application at all to the Secretary. Whether this is just something that happens as a matter of law. But the Secretary has a process, and obviously we want to respect that process.

THE COURT: Okay. So do you expect the application to address the Section 20 issues? Are you going to say, And this is, for example, a land -- is it the Tribe's position that

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it's a land settlement and that that's the exception? Or do you still have to go through the governor's concurrence exception?

MR. DUMONT: I don't know -- well, there's a few questions there. I don't know whether the actual submission to Interior, this submission, will or will not address the Section 20 issues at any length. Obviously those issues will have to be addressed if the Tribe ever wants to game on the property, which it does.

The important legal point, I think, is that there is no requirement that this submission say anything at all about what use the land will be put to.

Now, as I've said, the Tribe is not trying to be cute about this, so I don't think we're trying to hide from you or from Interior or anybody else what we intend to do with the land. But there is no legal requirement that we address that at all in this application. And that is what distinguishes it fundamentally from the kind of trust application that is addressed by Section 9 of the compact, which clearly was intended to address the kinds of discretionary applications that were in existence at the time. This statute didn't even exist obviously. And primarily it was intended to address two-part determinations.

I mean, that is -- if you read that language understanding that the two-part process was out there and that

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was what everyone was thinking about in terms of how would you get off-reservation gaming done, you know, that provision is not artfully drafted, but it makes sense in that context. It doesn't have anything to do with special mandatory statutory applications.

Now, obviously, I realize that's the merits, but part of the injunction standard would be their likelihood of success. And after you get through the fact that they have no jurisdiction and that their other claims are unripe, you know, as to claims 1 and 3, our submission is that there's a failure to state a claim.

So I think it's instructive when Mr. Reinwasser was talking about the Arizona case, because what he

was saying was, well, this case is just like that one. But that's not correct. Because while we disagree with Judge Campbell's decision there in terms of whether there was jurisdiction, what he was looking at was a case that challenged not only gaming that would be on Indian lands in the future but also a claim for relief in that case is a claim for an injunction to bar class III gaming on that land.

Now, that's not at all what the State is asking for here. The State is asking for an injunction prohibiting us from sending in a submission to the Department of the Interior saying we've acquired this land under this other federal statute, we believe that under the terms of that statute you

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are required to take that land into trust for us. They are just not commensurate.

So when he's talking about, well, you know, Judge Campbell is doing the same thing because if I can't get this remedy now, I will have no remedy for my harm," he's playing a little bit of a shell game, I think, because the harm that would be addressed by a suit like the Arizona suit is class III gaming on the property. And there will be many opportunities in the future, if we are lucky enough, for him to address that. If we can convince the Department of Interior that our theory is correct and they need to take this land into trust, then there will be a chance to raise those issues. And later on down the road when we presumably get approval from the NIGC to do class III gaming, if class III gaming is what we ultimately

decide to do, then there will be a further opportunity for consideration there.

Now, you know, the State has said --

THE COURT: At this point do you object, whether on legal or practical grounds, to saying as long as we can file our application to take land into trust under the Land Settlement Act and don't seek a ruling on the Section 20 issues now, the right to game, do you object to that? I'm not sure Mr. Reinwasser would accept that. He wants it to stay out of trust altogether for practical reasons, as he says control the process. But -- or have greater control or voice in the

[Page 28; Page ID#774]

process. But does the Tribe object to that?

MR. DUMONT: Well, the tribe's priority certainly is to get the application filed and underway. The submission filed and underway. It doesn't need to address Section 20. Whether it would be preferable or not or whether the Tribe would be willing to agree at this point not to ask the Department to opine on those issues, I would have to check with my client. But there's certainly nothing that would legally stand in the way of that sort of resolution.

Now, I guess one point I would make there is that Mr. Reinwasser has said, "Well, I will have no ability – the State will have no ability to participate in that process." I just think that's a little bit of an overstatement, shall we say.

I've been involved in these processes. The Court may be familiar with them. There is ample opportunity. We will be happy -- the Tribe will to commit to give the State notice if and when the application is filed. And the State -- there's no reason the State will not be able to know who at the Department of Interior is responsible for ruling on that application.

And the Arizona case is another good example. If you looked at the administrative record in that case, you would see that there is no derth of opportunities for parties that have views on applications pending before the Department of the Interior to make those views known. And I have much too much

[Page 29; Page ID#775]

respect for the State to think that they will not be able to find and avail themselves of those opportunities. So I think they will have an opportunity to have their voice heard.

Now, is it a legal process in which they are a party? No. He's correct about that. But I just want to be clear about the practicalities, because I believe that was being advanced as a practical argument.

There was another point that was made. I think it was that if we got through to the end of this litigation, this current litigation, without having had a preliminary injunction in place and so that the application had been filed, and if contrary to our submissions Your Honor were to find that there was jurisdiction and that we were -- the claims were ripe for adjudication, or at least the first three claims

were, and that we were wrong on the merits and that we should not have filed this application, and that it was enforceable and all the other things that you would have to find, I would anticipate that one remedy you would consider would be an order at that point telling us to advise the Department of Interior of your ruling and to withdraw our application.

I have no reason to think that they would not honor such a ruling. I have yet to encounter a situation in which the Department of the Interior is so eager to proceed that it would do so against the wishes of the party that has asked for action and while a federal court order was pending.

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Now, would we appeal that, would we perhaps seek a stay? I think we probably would. But there's no question in my mind that the Tribe would abide by an order to do that and that it would be effective to provide the State with the relief, if it were entitled to that relief, which it is not.

To touch briefly on the underlying merits issue of what Section 20 means. I guess we've talked about this a little bit already. Well, in fact I think we've covered that, so . . .

THE COURT: On Section 20 -- you mean Section 9 as it discusses Section 20, or are you talking about --

MR. DUMONT: I'm sorry, I was speaking about Section 9 to the extent it references Section 20. Which it doesn't. The two are -- well, Section 9 is

written in a way that can't be divorced from Section 20.

THE COURT: All right.

MR. DUMONT: Which is obviously why -- the primary reason why we think it really does not apply in this case.

THE COURT: Before you leave Section 20 -- and it's not really the compact issue specifically -- but you'd agree, I guess, at a minimum in order for there to be class III gaming eventually, you have to fit within one of the 27 -- or the 2719(b) exceptions?

MR. DUMONT: Yes.

THE COURT: Either the initial (b)(1)(A) or, you

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know, the settlement of a land claim, the initial reservation or restoration? One of those?

MR. DUMONT: Yes. Yes, we would, Your Honor.

THE COURT: Have you settled on what your theory is yet or what your multiple theories are for what you think qualifies? Because here is what I'm wondering: If it's all going to go down to (b)(1)(A)), then the Governor is automatically involved by statute. If it's going to be the Tribe's position that it's a settlement of a land claim because at least in part that's arguable construction of the Land Settlement Act, you know, then the Governor might get cut out of that. At least in the formal way that the consultation would be required. And I don't know if

the Tribe has taken a position or if you've settled on that theory yet.

MR. DUMONT: I do not anticipate that this would be a two-part determination under (b)(1)(A). In fact, if it were, it's conceivable we would be covered by Section 9, but we're not. It's not that kind of application. And it -- I believe that the primary theory will be a settlement of a land claim theory. It's after all the Michigan Indian Land Claim Settlement Act that provides the money here.

THE COURT: Right, but it doesn't specify the land.

MR. DUMONT: That's correct.

THE COURT: I mean, you can go buy land anywhere, right?

[Page 32; Page ID#778]

MR. DUMONT: That's correct. There was something else. Just to be clear again that we're not trying to hide the ball on anybody, I think Mr. Reinwasser has said a couple of times that he's not sure whether we intend to seek a revenue-sharing agreement with the other tribes. Just to be clear, we do not. The Tribe does not have any intention of doing that. So the submission will be made without that.

THE COURT: And your theory on why that wouldn't breach the contract if eventually you get it in trust and get permission to game is that -- is that what? Is it what we talked about earlier, your

reading of Section 9 that it's limited to a specific kind of application?

MR. DUMONT: That's exactly right. Section 9 addresses a certain kind of discretionary trust application which would be made under 465 under the Indian Reorganization Act. It would be addressed to the discretion of the Secretary. And it would require -- and this is what is the critical distinction -- it would require in order for the Secretary to know how to exercise his discretion that the Tribe state the purpose for which it was acquiring the land, and then if the purpose was gaming, demonstrate to the satisfaction of the Secretary that it came within a Section 20 exemption. And that -- none of that is true about a mandatory land acquisition submission under -- this happens to be under MILCSA. It wouldn't be true of any mandatory transmission. It wasn't true

[Page 33; Page ID#779]

in Tohono either. So that is a critical distinction. Because under the kind of discretionary application that is addressed by Section 20, the purpose of the land is critical. And whether there's a legal path to that purpose is something the Secretary of the Interior has to pass on in order to exercise its discretion to acquire the land.

Here there is no discretion about whether to acquire the land. There are a set of requirements that have to be met, and the Secretary has to pass on those under MILCSA. But once those findings have been made, there's no discretion as to whether to

acquire the land or not, and there is no consideration of purpose. So they are fundamentally different.

THE COURT: So just so I understand, your theory would be once the Secretary takes it in trust using those factors that you've just described, your theory is the right to conduct class III gaming would essentially be self-executing under the statute? That it would be settlement of a land claim in your view, the Secretary wouldn't have to say so, you've got the gaming compact, and the only way then to raise the issues the State wants to raise would be in any litigation they could bring at that time?

MR. DUMONT: Yes, in theory. Now, I think as a practical matter there are a couple of other steps that are very likely to happen, although they are probably not legally required. One is that the Tribe might for its own reasons want

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to go either to the Secretary or to the National Indian Gaming Commission and get express approval of its theory under Section 20. So there might be that additional step.

But if the Tribe did not do that and simply started to game, then, yes, I think the mechanism would be a suit at that time directed at the harm, the real harm, if there is a harm, which would be class III gaming on the property. And it would be -- and then the statutory mechanism would line up, because that's what it was intended to address, is that kind of suit by the state to enjoin that gaming presently occurring on Indian lands.

THE COURT: So you'd have a merit defense in that hypothetical suit but not a jurisdictional defense?

MR. DUMONT: In that situation if gaming is occurring on the property and is the State is the plaintiff?

THE COURT: Right.

MR. DUMONT: I think that actually is what -- I can never remember -- that (d)(7)(A)(ii) is designed to permit.

THE COURT: Okay.

MR. DUMONT: Yeah, they have to have -- they have to have a legal theory about why it's --

THE COURT: I understand. That's why -- so you'd have a defense on the merits?

MR. DUMONT: Right, we'd have defenses on the merits, but I don't think we have a jurisdictional defense.

United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, D.C. 20240

NOV 19 1993

LEGAL COUNSEL
DEC 06 1993

Honorable John Engler
Governor of Michigan
State of Michigan
P.O. Box 30013
Lansing, Michigan 48909

Dear Governor Engler:

We have reviewed the Compact Between the Sault Ste. Marie Tribe of Chippewa Indians (Tribe) and the State of Michigan (State) Providing for the Conduct of Tribal Class III Gaming by the Sault Ste. Marie Tribe of Chippewa Indians (Compact) dated August 20, 1993, and conclude that it does not violate the Indian Gaming Regulatory Act (IGRA), other Federal law or our trust responsibilities. Therefore, pursuant to my delegated authority and Section 11 of the IGRA, we approve the Compact. The Compact shall take effect when notice of our approval is published in the FEDERAL REGISTER, pursuant to 25 U.S.C. § 2710(d)(3)(B).

We note that Section 2(B) of the Compact defines "Indian lands" and 2(C) references the concurrence requirement in Section 20 of the IGRA, 25 U.S.C. § 2719. While the language of 2(B) and (C) does not exactly track the language of the IGRA, we have

been assured by the Tribe's attorney that the language was intended to follow the requirements of the IGRA. We concur that this language can be interpreted to reflect the requirements of the IGRA without adding or taking away from the responsibilities of the parties.

We also believe that Section 9 is consistent with the IGRA and the Secretary's authorities governing the acquisition of land into trust. 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. While this provision limits the Tribe's discretion to submit trust applications, we do not believe it places limits on the Secretary's discretion to acquire such land in trust. Furthermore, while it is not clear that one tribe can own such an establishment and distribute revenue to the other tribes, we believe that the IGRA does permit tribal co-ownership of a gaming establishment with a concomitant sharing of the revenue. Thus, this section does not violate Federal law.

Notwithstanding our approval of the Compact, Section 11 (d)(1) of the IGRA (25 U.S.C. §2710(d)(1)) requires that tribal gaming ordinances be approved by the Chairman of the National Indian Gaming Commission (NIGC). On July 8, 1992, the NIGC published in the FEDERAL REGISTER proposed regulations to govern the approval of Class II and Class III gaming ordinances. The final regulations were published on January 22, 1993 (58 Fed. Reg. 5802), and became effective on February 22, 1993.

Under the statute and regulations, even previously existing gaming ordinances must be submitted to the NIGC for approval when requested by the Chairman.

In addition, if the Tribe intends to enter into a management contract for the operation and management of the Tribe's gaming facility, the contract must likewise be submitted to, and approved by the Chairman of the NIGC pursuant to Section 11 (d)(9) of the IGRA, 25 U.S.C. § 2710(d)(9), and the NIGC's regulations governing management contracts. The Tribe may want to contact the NIGC at (202) 632-7003 for further information on submitting the ordinance and management contract for approval by the NIGC. We wish the Tribe and the State success in this economic venture.

Sincerely,
Ada E. Deer
Ada E. Deer
Assistant Secretary - Indian Affairs

Enclosures

63262 Federal Register / Vol. 58, No. 228 / Tuesday, November 30, 1993 / Notices

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming, Bureau of Indian Affairs, Interior

ACTION: Notice of approved Tribal-State Compacts.

SUMMARY: Pursuant to 25 U.S.C. § 2710, of the Indian Gaming Regulatory Act of 1988 (Pub. L. 100-497), the Secretary of the Interior shall publish, in the **Federal Register**, notice of approved Tribal-State Compacts for the purpose of engaging in Class III (casino) gaming on Indian reservations. The Assistant Secretary-Indian Affairs, Department of the Interior, through her delegated authority, has approved Tribal-State Compacts between the following tribes and states: The Grand Traverse Band of Ottawa and Chippewa Indians and the State of Michigan, executed on 8/20/93; the Hannahville Indian Community and the State of Michigan, executed on 8/20/93; the Bay Mills Indian Community and the State of Michigan, executed on 8/20/93; the Keweenaw Bay Indian Community and the State of Michigan, executed on 8/20/93; the Saginaw Chippewa Indian Tribe of Michigan and the State of Michigan, executed on 8/20/93; the Sault Ste. Marie Tribe of Chippewa Indians and the State of Michigan, executed on 8/20/93; and the Lac Vieux Desert Band of Lake Superior Chippewa Indians and the State of Michigan, executed on 8/20/93.

DATES: This action is effective November 30, 1993.

FOR FURTHER INFORMATION CONTACT: Hilda Manuel, Director, Indian Gaming Management Staff, Bureau of Indian Affairs, Washington, DC 20240, (202) 219-4066.

Dated: November 19, 1993.

Ada E. Deer,

Assistant Secretary-Indian Affairs.

[FR Doc. 93-29179 Filed 11-29-93; 8:45 am)

Billing Code 4310-02-P

A COMPACT BETWEEN THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS AND THE STATE OF MICHIGAN PROVIDING FOR THE CONDUCT OF TRIBAL CLASS III GAMING BY THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

THIS COMPACT is made and entered into this *20th* day of *August*, 1993, by and between the **SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS** (hereinafter referred to as "Tribe") and the **STATE OF MICHIGAN** (hereinafter referred to as "State").

RECITALS

WHEREAS, the State of Michigan is a sovereign State of the United States of America, having been admitted to the Union pursuant to the Act of January 26, ch. 6, 1837, 5 Stat. 144 and is authorized by its constitution to enter into contracts and agreements, including this agreement with the Tribe; and

WHEREAS, the Tribe is a federally recognized Indian Tribe (reorganized under Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984; 25 U.S.C. § 476) and its governing body, the Board of Directors, is authorized by the tribal constitution to enter into contracts and agreements of every description, including this agreement with the State; and

WHEREAS, the Congress of the United States has enacted the Indian Gaming Regulatory Act of

1988 (25 U.S.C. § 2701 et seq.) (hereinafter "IGRA") which permits Indian tribes to operate Class III gaming activities on Indian reservations pursuant to a tribal-state compact entered into for that purpose; and

WHEREAS, the Tribe presently operates gaming establishments on Indian lands in the State of Michigan, and by Resolution of the Board of Directors and Tribal Ordinance has adopted rules and regulations governing the games played and related activities at said establishments; and

WHEREAS, the State presently permits and regulates various types of gaming within the State (but outside Indian lands), including casino style charitable gaming such as craps, roulette, and banking card games, as well as a lottery operating instant scratch games, and "pick number" games, most of which would be Class III games if conducted by the Tribe; and

WHEREAS, the Michigan Supreme Court in Automatic Music & Vending Corp. v. Liquor Control Comm., 426 Mich. 452, 396 N.W. 2d 204 (1986), appeal dismissed, 481 U.S. 1009 (1987), and the Michigan Court of Appeals in Primages Int'l of Michigan v. Michigan, No. 136017, slip op., 1993 WL 99733 (Mich. Ap. Apr. 6, 1993), appeal denied, No. 96368 (Mich. May 25, 1993), have held that the statutory exception found at MCL 750.303(2) allows for the play of electronic gaming devices, which includes computerized or electronic games of chance, albeit subject to specified restrictions regarding the mode of play; and

WHEREAS, said casino style table games and electronic gaming devices are, therefore, permitted "for any purpose by any person, organization or entity," within the meaning of IGRA, 25 U.S.C. § 2710(d)(1)(B); and

WHEREAS, a compact between the Tribe and the State for the conduct of Class III gaming satisfies the prerequisite, imposed by the United States Congress by enactment of IGRA, for the operation of lawful Class III gaming by the Tribe on Indian lands in Michigan; and

WHEREAS, the State and the Tribe, in recognition of the sovereign rights of each party and in a spirit of cooperation in the interests of the citizens of the State and the members of the Tribe, have engaged in good faith negotiations recognizing and respecting the interests of each party and have agreed to this Compact.

NOW, THEREFORE, the Tribe and the State agree as follows:

SECTION 1. Purpose and Objectives.

The purpose and objectives of the Tribe and State in making this Compact are as follows:

(A) To evidence the good will and cooperative spirit between the State and the Tribe;

(B) To continue the development of effective working relationships between the State and tribal governments;

(C) To compact for Class III gaming on Indian lands of the Tribe in Michigan as authorized by IGRA;

(D) To fulfill the purpose and intent of IGRA by providing for tribal gaming as a means of generating tribal revenues, thereby promoting tribal economic development, tribal self-sufficiency and strong tribal government;

(E) To provide tribal revenues to fund tribal government operations or programs, to provide for the general welfare of the Tribe and its members and for other purposes allowed under IGRA;

(F) To provide for the operation of Class III gaming in which, except as provided in 25 U.S.C. §§ 2710(b)(4) and (d)(2)(A) of IGRA, the Tribe shall have the sole proprietary interest and be the primary beneficiary of the Tribe's gaming enterprise;

(G) To recognize the State's interest in the establishment by the Tribe of rules for the regulation of Class III gaming operated by the Tribe on Indian lands;

(H) To recognize the State's interest in the establishment by the Tribe of rules and procedures for ensuring that Class III gaming is conducted fairly and honestly by the owners, operators, and employees and by the patrons of any Class III gaming enterprise of the Tribe; and

(I) To establish procedures to notify the patrons of the Tribe's Class III gaming establishment(s) that the establishment(s) are not regulated by the State

of Michigan and that patrons must look to the tribal government or to the federal government to resolve any issues or disputes with respect to the operations of the establishment(s).

SECTION 2. Definitions.

For purposes of this Compact, the following definitions pertain:

(A) "Class III gaming" means all forms of gaming authorized by this Compact, which are neither Class I nor Class II gaming, as such terms are defined in §§ 2703(6) and (7) of IGRA. Only those Class III games authorized by this Compact may be played by the Tribe.

(B) "Indian lands" means:

(1) all lands currently within the limits of the Tribe's Reservation;

(2) any lands contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; and

(3) any lands title to which is either held in trust by the United States for the benefit of the Tribe or individual or held by the Tribe or individual subject to restriction by the United States against alienation and over which the Tribe exercises governmental power.

(C) 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.

(D) "Tribal Chairperson" means the duly elected Chairperson of the Board of Directors or Tribal Council of the Tribe.

SECTION 3. Authorized Class III Games.

(A) The Tribe may lawfully conduct the following Class III games on Indian lands:

(1) Craps and related dice games;

(2) Wheel games, including "Big Wheel" and related games;

(3) Roulette;

(4) Banking card games that are not otherwise treated as Class II gaming in Michigan pursuant to 25 U.S.C. § 2703(7)(C), and non-banking card games played by any Michigan tribe on or before May 1, 1988;

(5) Electronic games of chance featuring coin drop and payout as well as printed tabulations, whereby the software of the device predetermines the presence or lack of a winning combination and payout. Electronic games of chance are defined as a microprocessor-controlled electronic device which allows a player to play games of chance, which may be affected by an element

of skill, activated by the insertion of a coin or currency, or by the use of a credit, and awards game credits, cash, tokens, or replays, or a written statement of the player's accumulated credits, which written statements are redeemable for cash; and

(6) Keno.

This Compact shall apply to card games that are considered to be Class II games pursuant to 25 U.S.C. § 2703(7)(C) only if those games are expanded beyond their "nature and scope" as it existed before May 1, 1988, and only to the extent of such expansion. The term "nature and scope" shall be interpreted consistent with IGRA, the legislative history of IGRA, any applicable decisions of the courts of the United States and any applicable regulations of the National Indian Gaming Commission.

Any limitations on the number of games operated or played, their location within Indian lands as defined under this Compact, hours or period of operation, limits on wagers or pot size, or other such limitations shall be determined by duly enacted tribal law or regulation. Any state law restrictions, limitations or regulation of such gaming shall not apply to Class III games conducted by the Tribe pursuant to this Compact.

(B) Additional Class III games may be lawfully conducted by mutual agreement of the Tribe and the State as follows:

(1) The Tribe shall request additional games by letter from the tribal Chairperson on behalf of the Tribe to the Governor on behalf of the State. The request shall identify the additional proposed gaming activities with specificity and any proposed amendments to the Tribe's regulatory ordinance.

(2) The State acting through the Governor shall take action on the Tribe's request within ninety (90) days after receipt. The Governor's action shall be based on:

(a) Whether the proposed gaming activities are permitted in the State of Michigan for any purpose by any person, organization or entity; and

(b) Whether the provisions of this Compact are adequate to fulfill the policies and purposes set forth in the IGRA with respect to such additional games.

SECTION 4. <u>Regulation of Class III Gaming.</u>

(A) The Tribe has enacted a comprehensive gaming regulatory ordinance governing all aspects of the Tribe's gaming enterprise. This Section 4 is intended to supplement, rather than conflict with the provisions of the Tribe's ordinance. To the extent any regulatory requirement of this Compact is more stringent or restrictive than a parallel provision of the Tribe's ordinance, as now or hereafter amended, this Compact shall control.

(B) The regulatory requirements of this Section 4 shall apply to the conduct of all Class III gaming authorized by the Compact. At all times in which it conducts any Class III gaming under this Compact, the Tribe shall maintain, as part of its lawfully enacted ordinances, requirements at least as restrictive as those set forth herein.

(C) The Tribe shall license, operate, and regulate all Class III gaming activities pursuant to this Compact, tribal law, IGRA, and all other applicable federal law. This shall include but not be limited to the licensing of consultants (except legal counsel with a contract approved under 25 U.S.C. §§ 81 and/or 476), primary management officials, and key officials of each Class III gaming activity or operation. Any violation of this Compact, tribal law, IGRA, or other applicable federal law shall be corrected immediately by the Tribe.

(D) The Tribe may not license, hire, or employ as a key employee or primary management official as those terms are defined at 25 CFR 502.14 and 502.19, in connection with Class III gaming, any person who:

(1) Is under the age of 18; or

(2) Has been convicted of or entered a plea of guilty or no contest to a gambling-related offense, fraud or misrepresentation; or

(3) Has been convicted of or entered a plea of guilty or no contest to any offense not specified in subparagraph (2) within the immediately preceding five years; this

provision shall not apply if that person has been pardoned by the Governor of the State where the conviction occurred or, if a tribal member, has been determined by the Tribe to be a person who is not likely again to engage in any offensive or criminal course of conduct and the public good does not require that the applicant be denied a license as a key employee or primary management official; or

(4) Is determined by the Tribe to have participated in organized crime or unlawful gambling or whose prior activities, criminal record, reputation, habits, and/or associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods and activities in the conduct of gaming or to the carrying on of the business and financial arrangements incidental to the conduct of gaming.

(E) All management contracts entered into by the Tribe regarding its gaming enterprise operated pursuant to this Compact shall conform to all the requirements of IGRA, including 25 U.S.C. § 2711, and tribal law. If the Tribe enters into a management contract for the operation of any Class III gaming or component thereof, the State shall be given fourteen (14) days prior written notice of such contract.

(F) All accounting records shall be kept on a double entry system of accounting, maintaining detailed, supporting, subsidiary records. The Tribe

shall maintain the following records for not less than three (3) years:

(1) Revenues, expenses, assets, liabilities and equity for each location at which Class III gaming is conducted;

(2) Daily cash transactions for each Class III game at each location at which gaming is conducted, including but not limited to transactions relating to each gaming table bank, game drop box and gaming room bank;

(3) All markers, IOUs, returned checks, hold checks or other similar credit instruments;

(4) Individual and statistical game records (except card games) to reflect statistical drop and statistical win; for electronic, computer, or other technologically assisted games, analytic reports which show the total amount of cash wagered and the total amount of prizes won;

(5) Contracts, correspondence and other transaction documents relating to all vendors and contractors;

(6) Records of all tribal gaming enforcement activities;

(7) Audits prepared by or on behalf of the Tribe; and

(8) Personnel information on all Class III gaming employees or agents, including

rotation sheets, hours worked, employee profiles and background checks.

(G) No person under the age of 18 may participate in any Class III game.

(H) The Tribe shall not conduct any Class III gaming outside of Indian lands.

(I) The rules of each Class III card game shall be posted in a prominent place in each card room and must designate:

(1) The maximum rake-off percentage, time buy-in or other fee charged;

(2) The number of raises allowed;

(3) The monetary limit of each raise;

(4) The amount of ante; and

(5) Other rules as may be necessary.

(J) Upon written request by the State, the Tribe will provide information on all consultants (except legal counsel with a contract approved under 25 U.S.C. §§ 81 and/or 476), management personnel, suppliers and employees sufficient to allow the State to conduct its own background investigation as it may deem necessary and to make an independent determination as to suitability of these individuals, consistent with the standards set forth in § 4(D) herein.

(K) The regulatory requirements set forth in this section of this Compact shall be administered and enforced as follows:

(1) The Tribe shall have responsibility to administer and enforce the regulatory requirements.

(2) A representative authorized in writing by the Governor of the State shall have the following right to inspect all tribal Class III gaming facilities and all tribal records related to Class III gaming, including those records set forth in § 4(F) herein, subject to the following conditions:

(a) With respect to public areas, at any time without prior notice;

(b) With respect to private areas not accessible to the public, at any time during normal business hours, with 12 hours prior written notice; and

(c) With respect to inspection and copying of all tribal records relating to Class III gaming, with 48 hours prior written notice, not including weekends.

(3) Except as otherwise provided by law or as also allowed by the exceptions defined below, the State agrees to maintain in confidence and never to disclose to any third party any financial information, proprietary ideas, plans, methods, data, development, inventions or other proprietary information

regarding the gambling enterprise of the Tribe, games conducted by the Tribe, or the operation thereof which is provided to the State by the Tribe without the prior written approval of a duly authorized representative of the Tribe, provided that the information is marked as confidential information when received by the State. Nothing contained in this § 4(K)(3) shall be construed to prohibit:

(a) The furnishing of any information to a law enforcement or regulatory agency of the United States government;

(b) The State from making known the names of persons, firms or corporations conducting Class III gaming activities pursuant to the terms of this Compact, locations at which such activities are conducted or the dates on which such activities are conducted;

(c) Publishing the terms of this Compact;

(d) Disclosing information as necessary to audit, investigate, prosecute, or arbitrate violations of this Compact or other applicable laws or to defend suits against the State;

(e) Complying with any law, subpoena or court order.

(4) The Tribe shall have the right to inspect State records concerning all Class III gaming

conducted by the Tribe consistent with Michigan's Freedom of Information Act.

(5) The Tribe shall reimburse the State for the actual costs the State incurs in carrying out any functions authorized by the terms of this Compact, in an amount not to exceed twenty-five thousand dollars ($25,000.00) per annum. All calculations of amounts due shall be based upon a fiscal year beginning October 1, and ending September 30, unless the parties select a different fiscal year. Payments due the State shall be made no later than sixty (60) days after the beginning of each fiscal year. Payments due the State during any partial fiscal year this Compact is in effect shall be adjusted to reflect only that portion of the fiscal year. Within sixty (60) days after each fiscal year in which this Compact is in effect, the State shall submit to the Tribe an accounting of actual costs incurred in carrying out any functions authorized by the terms of this Compact. Any amount of said twenty-five thousand dollars ($25,000.00) not expended by the State on said actual costs shall be returned to the Tribe by the State within sixty (60) days after the fiscal year or treated as a pre-payment of the Tribe's obligation during the subsequent fiscal year.

(6) In the event the State believes that the Tribe is not administering and enforcing the regulatory requirements set forth herein, it

may invoke the procedures set forth in Section 7 of this Compact.

(L) The Tribe shall comply with all applicable provisions of the Bank Secrecy Act, P.L. 91-508, October 26, 1970, 31 U.S.C. §§ 5311-5314.

SECTION 5. Employee Benefits.

The Tribe shall provide to any employee who is employed in conjunction with the operation of any gaming establishment at which Class III gaming activities are operated pursuant to this compact, such benefits to which the employee would be entitled by virtue of Michigan Public Act No. 1 of 1936, as amended (being MCL 421.1 et seq.), and Michigan Public Act No. 317 of 1969, as amended (being MCL 481.101 et seq.) if his or her employment services were provided to an employer engaged in a business enterprise which is subject to, and covered by, the respective Public Acts.

SECTION 6. Providers of Class III Gaming Equipment or Supplies.

(A) No Class III games of chance, gaming equipment or supplies may be purchased, leased or otherwise acquired by the Tribe unless the Class III equipment or supplies meet the technical equipment standards of either the State of Nevada or the State of New Jersey.

(B) Prior to entering into any lease or purchase agreement, the Tribe shall obtain sufficient information and identification from the proposed seller or lessor and all persons holding any direct or

indirect financial interest in the lessor or the lease/purchase agreement to permit the Tribe to conduct a background check on those persons. The Tribe shall not enter into any lease or purchase agreement for Class III gaming equipment or supplies with any person or entity if the lessor, seller, or any manager or person holding direct or indirect financial interest in the lessor/seller or the proposed lease/purchase agreement is determined to have participated in or have involvement with organized crime or has been convicted of or entered a plea of guilty or no contest to a gambling-related offense, fraud or misrepresentation, or has been convicted of or entered a plea of guilty or no contest to any other felony offense within the immediately preceding five years, unless that person has been pardoned.

(C) The seller, lessor, manufacturer, or distributor shall provide, assemble and install all Class III games of chance, gaming equipment, and supplies in a manner approved and licensed by the Tribe.

SECTION 7. Dispute Resolution.

(A) In the event either party believes that the other party has failed to comply with or has otherwise breached any provision of this Compact, such party may invoke the following procedure:

(1) The party asserting noncompliance shall serve written notice on the other party. The notice shall identify the specific Compact provision alleged to have been violated and shall specify the factual and legal basis for

the alleged noncompliance. The notice shall specifically identify the type of game or games, their location, and the date and time of the alleged noncompliance. Representatives of the State and Tribe shall thereafter meet within thirty (30) days in an effort to resolve the dispute.

(2) In the event an allegation by the State is not resolved to the satisfaction of the State within ninety (90) days after service of the notice set forth in Section 7(A)(l), the party may serve upon the office of the tribal Chairperson a notice to cease conduct of the particular game(s) or activities alleged by the State to be in noncompliance. Upon receipt of such notice, the Tribe may elect to stop the game(s) or activities specified in the notice or invoke arbitration and continue the game(s) or activities pending the results of arbitration. The Tribe shall act upon one of the foregoing options within thirty (30) days of receipt of notice from the State. Any arbitration under this authority shall be conducted under the Commercial Arbitration rules of the American Arbitration Association except that the arbitrators shall be attorneys who are licensed members of the State Bar of Michigan, or of the bar of another state, in good standing, and will be selected by the State picking one arbitrator, the Tribe a second arbitrator, and the two so chosen shall pick a third arbitrator. If the third arbitrator is not chosen in this manner within ten (10) days after the second

arbitrator is picked, the third arbitrator will be chosen in accordance with the rules of the American Arbitration Association. In the event an allegation by the Tribe is not resolved to the satisfaction of the Tribe within ninety (90) days after service of the notice set forth in Section 7(A)(1), the Tribe may invoke arbitration as specified above.

(3) All parties shall bear their own costs of arbitration and attorney fees.

(B) Nothing in Section 7(A) shall be construed to waive, limit or restrict any remedy which is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact. Nothing in this Compact shall be deemed a waiver of the Tribe's sovereign immunity. Nothing in this Compact shall be deemed a waiver of the State's sovereign immunity.

SECTION 8. Notice to Patrons.

In each facility of the Tribe where Class III gaming is conducted the Tribe shall post in a prominent position a Notice to Patrons at least two (2) feet by three (3) feet in dimension with the following language:

NOTICE

THIS FACILITY IS REGULATED BY ONE OR MORE OF THE FOLLOWING: THE NATIONAL INDIAN GAMING COMMISSION, BUREAU OF INDIAN AFFAIRS OF THE U.S. DEPARTMENT OF THE INTERIOR AND THE GOVERNMENT

OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS. THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN.

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.

SECTION 10. Regulation of the Sale of Alcoholic Beverages.

(A) The Tribe hereby adopts and applies to its tribal Class III gaming establishment as tribal law those State laws, as amended, relating to the sale and regulation of alcoholic beverages encompassing the following areas: sale to a minor; sale to a visibly intoxicated individual; sale of adulterated or misbranded liquor; hours of operation; and similar substantive provisions. Said tribal laws, which are defined by reference to the substantive areas of State laws referred to above, shall apply to the tribal Class III gaming establishment in the same manner and to the same extent as such laws apply elsewhere in the State to off-reservation transactions.

(B) The Tribe, for resale at its Class III gaming establishment, shall purchase spirits from the Michigan Liquor Control Commission, and beer and

wine from distributors licensed by the Michigan Liquor Control Commission, at the same price and on the same basis that such beverages are purchased by Class C licensees.

SECTION 11. Effective Date.

This Compact shall be effective immediately upon:

(A) Endorsement by the tribal Chairperson after approval by the Board of Directors;

(B) Endorsement by the Governor of the State and concurrence m that endorsement by resolution of the Michigan Legislature;

(C) Approval by the Secretary of the Interior of the United States; and

(D) Publication in the Federal Register.

SECTION 12. Binding Effect, Duration, and Severability.

(A) This Compact shall be binding upon the State and the Tribe for a term of twenty (20) years from the date it becomes effective unless modified or terminated by written agreement of both parties.

(B) At least one year prior to the expiration of twenty (20) years after the Compact becomes effective, and thereafter at least one year prior to the expiration of each subsequent five (5) year period, either party may serve written notice on the other of its right to renegotiate this Compact.

(C) In the event that either party gives written notice to the other of its right to renegotiate this Compact pursuant to subsection (B), the Tribe may, pursuant to the procedures of IGRA, request the State to enter into negotiations for a successor compact governing the conduct of Class III gaming activities. If the parties are unable to conclude a successor compact, this Compact shall remain in full force and effect pending exhaustion of the administrative and judicial remedies set forth in IGRA and/or any other applicable federal law.

(D) The Tribe may operate Class III gaming only while this Compact or any renegotiated compact is in effect.

(E) In the event that any section or provision of this Compact is held invalid by any court of competent jurisdiction, it is the intent of the parties that the remaining sections or provisions of this Compact, and any amendments thereto, shall continue in full force and effect.

SECTION 13. Notice to Parties.

Unless otherwise indicated, all notices, payments, requests, reports, information or demand which any party hereto may desire or may be required to give to the other party hereto, shall be in writing and shall be personally delivered or sent by first-class, certified or registered United States Mail, postage prepaid, return receipt requested, and sent to the other party at its address appearing below or such other address as any party shall hereinafter inform the other party hereto by written notice given as aforesaid:

Notice to the Tribe shall be sent to:

Chairperson
Sault Ste. Marie Tribe of Chippewa Indians
206 Greenough Street
Sault Ste. Marie, MI 49783

Notice to the State shall be sent to:

Governor's Office
State of Michigan
P.O. Box 30013
Lansing, MI 48909

Office of Attorney General
Treasury Building
First Floor
Lansing, MI 48922

Every notice, payment, request, report, information or demand so given shall be deemed effective upon receipt, or if mailed, upon receipt or the expiration of the third day following the day of mailing, whichever occurs first, except that any notice of change of address shall be effective only upon receipt by the party to whom said notice is addressed.

SECTION 14. Entire Agreement.

This Compact is the entire agreement between the parties and supersedes all prior agreements, whether written or oral, with respect to the subject matter hereof. Neither this Compact nor any provision herein may be changed, waived, discharged, or terminated orally, but only by an

instrument in writing signed by the Tribe and the State.

SECTION 15. **Filing of Compact with Secretary of State.**

Upon the effective date of this Compact, a certified copy shall be filed by the Governor with the Michigan Secretary of State and a copy shall be transmitted to each house of the Michigan State Legislature and the Michigan Attorney General. Any subsequent amendment or modification of this Compact shall be filed with the Michigan Secretary of State.

IN WITNESS WHEREOF, the Tribal Chairperson acting for the Sault Ste. Marie Tribe of Chippewa Indians and the Governor acting for the State of Michigan have hereunto set their hands and seals.

Dated: *August 20, 1993*
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

By *Bernard Bouschor*
Bernard Bouschor, Chairperson

Dated: *August 20, 1993*
STATE OF MICHIGAN

By *John Engler*
Governor

APPROVAL BY THE SECRETARY OF THE INTERIOR

The foregoing Compact between the Sault Ste. Marie Tribe of Chippewa Indians and the State of Michigan is hereby approved this *19th* day of *November*, 1993, pursuant to authority conferred on me by Section 11 of the Indian Gaming Regulatory Act, 102 Stat. 2472. I direct that it be promptly submitted to the Federal Register for publication.

Ada E. Deer
Ada E. Deer
Assistant Secretary - Indian Affairs

Sault Ste. Marie Tribe of Chippewa Indians

Min Waban Dan
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Government Services
Membership Services
Economic Development Commission

RESOLUTION NO: *2012-11*

APPROVAL OF COMPREHENSIVE DEVELOPMENT AGREEMENT WITH THE CITY OF LANSING, MICHIGAN AUTHORIZATION TO PURCHASE LAND IN LANSING, MICHIGAN USING INCOME FROM THE LAND SETTLEMENT TRUST FUND APPROVAL OF INTERGOVERNMENTAL AGREEMENT WITH THE CITY OF LANSING, MICHIGAN

WHEREAS, the Sault Tribe Ste. Marie Tribe of Chippewa Indians settled certain land claims against the United States as evidenced and implemented by the Michigan Indian Land Claims Settlement Act

(the "Act"), PL 105-143, Ill Stat 2652 (Dec 15, 1997); and

WHEREAS, in section 108 of that Act, Congress mandated that settlement funds provided to the Tribe under the Act were to be deposited into a trust fund created by the Act for the benefit of the Tribe, to be known as the "Self-Sufficiency Fund," and further provided that the Board of Directors of the Tribe shall be the trustee of and shall administer that Fund in accordance with the provisions of the Act; and

WHEREAS, section 108, subsection (c) of the Act specifies the purposes for which interest and income of the Fund and expressly includes, among those authorized purposes, the acquisition of land to consolidate or enhance tribal lands; and

WHEREAS, section 108, subsection (f) expressly provides that any lands acquired using interest or other income of the Fund *"shall* be held in trust" by the Secretary of the Interior for the benefit of the Tribe; and

WHEREAS, these provisions of the Act create a valuable and unique opportunity for the Tribe to engage in economic development opportunities that will be of substantial benefit to the Tribe and to the tribal community; and

WHEREAS, the Board of Directors is authorized by Article VII, section 1(d) of the Tribe's Constitution and Bylaws to expend funds for public purposes of the Tribe and to regulate the conduct of trade and the acquisition, use, and disposition of property, and

is further authorized by Article VII, section 1(k) to manage, lease, sell, acquire, or otherwise deal with tribal lands, interest in lands and water or other tribal assets; and

WHEREAS, the Sault Tribe has negotiated a proposed Comprehensive Development Agreement (the "Lansing CDA") with the city of Lansing, Michigan under which the Tribe would acquire lands located in the city of Lansing using interest or income from the Self-Sufficiency Fund, seek to have those lands placed into mandatory trust pursuant to section 108 (c) and (f) of the Act, and establish its legal right to construct and operate a casino gaming enterprise on those lands; and

WHEREAS, the Tribe has also negotiated a proposed Intergovernmental Agreement with the city of Lansing (the "Lansing IGA") under which the City will provide active support for the project, will recognize the Tribe's exclusive jurisdiction over the lands to be acquired by the Tribe, agrees to cross-deputization of tribal and city law enforcement officers, and agrees to provide other essential city services, all in return for limited revenue sharing payments from the project: and

WHEREAS, the Board of Directors has examined the legal theories supporting this project and is persuaded that, under section 108 of the Act, the Tribe has a substantial and unique legal claim and a valuable opportunity that it can and should pursue in good faith and, further, is satisfied that this project has been structured so as to substantially minimize and limit the expenses and risks to the Tribe; and

WHEREAS, the Board of Directors has determined that, while this project necessarily requires the purchase of lands using interest or income from the Self-Sufficiency Fund, steps should be taken to ensure that this expenditure will not adversely affect the annual distribution to the Tribe's elders and, further, that a portion of the future proceeds from this project will be returned to the Self-Sufficiency Fund as additional principal under section 108(a)(1)(C) of the Act.

NOW, THEREFORE, BE IT RESOLVED, that the Board of Directors hereby approves the proposed Lansing CDA and authorizes the Tribal Chairman to execute that agreement and to subsequently acquire the parcels of land described in that agreement, subject to the terms and conditions set forth in the agreement, and further authorizes the Chairman or his designee to sign, amend, and execute any documents necessary to effectuate the purposes of this resolution.

BE IT FURTHER RESOLVED, that the Board of Directors hereby determines that the purchase of the lands described in the Lansing CDA will consolidate or enhance tribal landholdings, will generate an economic development opportunity beneficial to the Tribe and its members, and that, accordingly, the Tribal Chairman is authorized and directed to accomplish that purchase using interest and/or income from the Self-Sufficiency fund, notwithstanding the provisions of Resolution 98-47, which shall otherwise remain in force and effect.

BE IT FURTHER RESOLVED, that the Board of Directors likewise approves the proposed

Intergovernmental Agreement with the City of Lansing (the Lansing IGA) and authorizes the Tribal Chairman or his designee to execute and to take all necessary steps to implement that agreement.

BE IT FURTHER RESOLVED, that the Board of Directors hereby expressly approves and authorizes the specific limited waiver of sovereign immunity and of tribal court jurisdiction set forth in Article 8 of the Lansing CDA and the similar limited waiver of immunity set forth in section 7 of the Lansing IGA provided that, as is set forth more fully in those agreements, each such waiver:

1. is granted solely for the limited purpose of enforcement of the agreement within which it is contained;

2. extends only to claims that are (a) brought by the city of Lansing, (b) allege a breach of one or more specific obligations or duties under the applicable agreement, and (c) seek specific performance and/or injunctive relief;

3. shall continue for the longer of one (1) year following the termination of the agreement or two (2) years after the claim accrues or is discovered upon the exercise of due diligence; and

4. is enforceable in the United States District Court for the Western district of Michigan or any federal court having appellate jurisdiction over that court.

BE IT FURTHER RESOLVED, that prior to the closing date on each of the two parcels of land

described in the Lansing CDA, the Tribe's Chief Financial Officer is directed to identify alternative tribal funds that shall be used to supplement the next subsequent annual distribution to the tribal elders under Resolution 98-47 in an amount sufficient to avoid any reduction in the amount of that distribution that would otherwise result from the acquisition of that parcel as authorized by this resolution.

BE IT FINALLY RESOLVED, that at such time as the enterprise contemplated by this resolution begins to generate income from the Gaming Authority to the Tribe, after the payment of all necessary cost and expenses:

1. Ten percent (10%) of the annual income to the Tribe from this project shall be deposited in the Self-Sufficiency Fund as an addition to principal as authorized by section 108(1)(C) of the Act:

2. Three percent (3%) of the annual income to the Tribe from this project shall be distributed among and deposited in the following funds: the Elder Health Self-Sufficiency Fund, the Elder Employment Self-Sufficiency Fund, the Funeral Assistance Self-Sufficiency Fund, and the Education Assistance Self-Sufficiency Fund; and

3. Two percent (2%) of the annual income to the Tribe from this project shall be deposited into a fund to establish a college scholarship program for the tribal members irrespective of blood quantum.

4. The intention of this Board is to bring parity in wages and benefits to the members in the seven county service area.

CERTIFICATION

We, the undersigned, as Chairman and Secretary of the Sault Ste. Marie Tribe of Chippewa Indians, hereby certify that the Board of Directors is composed of 13 members, of whom *11* members constituting a quorum were present at a meeting thereof duly called, noticed, convened, and held on the *24* day of *January* 2012; that the foregoing resolution was duly adopted at said meeting by an affirmative vote of *8* members for, *2* members against, *0* members abstaining, and that said resolution has not been rescinded or amended in any way.

Joe V. Eitrem
Joe V. Eitrem, Chairman
Sault Ste. Marie Tribe of Chippewa Indians

Cathy Abramson
Cathy Abramson, Secretary
Sault Ste. Marie Tribe of Chippewa Indians