Supreme Court, U.S.
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No. ________

In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA), authorizes an Indian tribe to conduct class III gaming under limited circumstances and only on "Indian lands." 25 U.S.C. § 2710(d)(1). This dispute involves a federal court's authority to enjoin an Indian tribe from operating an illegal casino located *off* of "Indian lands." The petition presents two recurring questions of jurisprudential significance that have divided the circuits:

1. Whether a federal court has jurisdiction to enjoin activity that violates IGRA but takes place outside of Indian lands.

2. Whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is the State of Michigan. Respondent is the Bay Mills Indian Community, a federally recognized Indian tribe. Appellee below but not appearing here is the Little Traverse Bay Band of Odawa Indians, a federally recognized Indian tribe.

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OPINIONS BELOW

The opinion of the Sixth Circuit court of appeals, App. 1a–18a, is reported at __ F.3d __, 2012 WL 3326596. The opinion of the district court, App. 19a–39a, is not reported.

JURISDICTION

The judgment of the Sixth Circuit was entered on August 15, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

25 U.S.C. § 2710(d)(7)(A)(ii):

> (7)(A) The 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 entered into under paragraph (3) that is in effect . . . .

INTRODUCTION

This case involves a pair of recurring and widening circuit splits concerning a federal court's authority to hear, and a tribe's sovereign immunity from, disputes under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA). The Sixth Circuit ruled that an Indian tribe has immunity and a federal court lacks jurisdiction to enjoin the tribe's operation of an illegal, off-reservation casino, i.e., located outside "Indian lands" as IGRA defines that term. The Sixth Circuit reached the anti-intuitive conclusion that while Congress intended in IGRA to allow a state to obtain a federal-court injunction when a tribe operates an illegal casino *on* Indian lands, a state may not sue a tribe in federal court for violating an IGRA-governed compact by operating the same illegal casino *off* Indian lands.

The first question is whether the federal courts have jurisdiction over such a dispute. The Sixth Circuit said no, relying on 25 U.S.C. § 2710(d)(7)(A)(ii), which admittedly states that a federal court has jurisdiction to enjoin a class III gaming activity "located *on* Indian lands." App. 9a (emphasis added). What the Sixth Circuit ignored is 28 U.S.C. § 1331, which grants federal-court jurisdiction over *all* civil actions arising under the laws of the United States, presumably including those actions arising under IGRA (such as whether a tribe has violated IGRA by breaching its compact with a state). The Sixth Circuit's decision conflicts with decisions of the Ninth and Tenth Circuits, which take a much broader view of federal-court jurisdiction to resolve disputes under IGRA than does the Sixth Circuit.

The second question is whether Indian tribes have sovereign immunity from suits alleging IGRA violations. The Sixth Circuit said yes, rejecting Michigan's argument that Congress abrogated tribal immunity under § 2710(d)(7)(A)(ii). In so holding, the Sixth Circuit acknowledged a conflict with the Tenth Circuit, then aligned itself with the Eleventh Circuit in rejecting the Tenth Circuit's "muddled" reasoning. App. 13a. But under the Eleventh Circuit's view of tribal immunity, Michigan's lawsuit would likely have been allowed to proceed. And the same is true under the Seventh Circuit's precedent describing the scope of tribal immunity, a view which differs from all three of the aforementioned circuits.

These two circuit splits present jurisprudential issues of great significance to Michigan as well as other states and tribes across the country. Ignoring the circuit splits allows entirely different allocations of authority and sovereignty between states and tribes, dependent solely on the federal circuit where the parties happen to be located. In addition, allowing the Sixth Circuit decision to stand invites the proliferation of off-reservation tribal casinos that violate federal law, i.e., IGRA. The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

A. The Bay Mills casino

Bay Mills is a federally recognized Indian tribe with a reservation in Michigan's Upper Peninsula in Chippewa County, near the town of Brimley. App. 3a. The Tribe's offices are located on the reservation.

In 1993, Bay Mills entered into a Tribal-State Compact with Michigan—a compact governed by IGRA—and thereafter opened and has continuously operated at least one casino on its reservation. As IGRA requires, Bay Mills also adopted a Gaming Ordinance that was approved by the National Indian Gaming Commission. App. 4a. The Gaming Ordinance created a Tribal Gaming Commission charged with regulating all casinos the Tribe owned, including issuing licenses to those casinos. App. 15a. Both the Compact and the Gaming Ordinance prohibited the Tribe from operating a casino outside of Indian lands. App. 5a, 15a.

On October 29, 2010, the Tribal Gaming Commission issued a license to the Tribe to open a new, off-reservation casino on property the Tribe owned near Vanderbilt, Michigan, approximately 100 miles from its reservation. The Tribe opened the casino on November 3, 2010, even though it had not obtained confirmation from either the United States Department of the Interior or the National Indian Gaming Commission that the Vanderbilt property was eligible for casino gaming.

B. Proceedings in the district court

On December 16, 2010, the Michigan Attorney General sent a letter to Bay Mills ordering it to immediately close the casino because it violated state gaming laws. Bay Mills refused, so the State filed this lawsuit on December 21, 2010, seeking to enjoin any further operation of the casino. The State alleged in its Complaint that the court had jurisdiction under 28 U.S.C. § 1331, federal common law, IGRA 25 U.S.C.

§ 2701 *et seq.*, 25 U.S.C. § 2710(d)(7)(A)(ii), 28 U.S.C. § 1367, and 28 U.S.C. § 2201. A short time later, the Little Traverse Bay Bands of Odawa Indians, another federally recognized Indian tribe, filed its own lawsuit against Bay Mills, seeking an injunction against further operation of the Vanderbilt casino. The district court consolidated the two lawsuits. Within hours of these filings, both the Department of the Interior and the National Indian Gaming Commission issued letters formally determining that the Vanderbilt casino was *not* located on Indian lands as defined by IGRA. Letter from Hillary C. Tompkins, Solicitor, Department of Interior, to Michael Gross, Associate General Counsel, National Indian Gaming Commission (Dec. 21, 2010); Memorandum from Michael Gross (Dec. 21, 2010).

The Little Traverse Bay Bands also filed a motion for a preliminary injunction that asked the trial court to enjoin further operation of the Vanderbilt casino. The State supported the motion, and the district court granted it on March 29, 2011.

The district court began its opinion by addressing its jurisdiction. Although § 2710(d)(7)(A)(ii) authorizes a district court to enjoin class III gaming activity "located on Indian land" (and in violation of a compact), the district court recognized its broad subject-matter jurisdiction under 28 U.S.C. § 1331 to resolve *any* civil action arising under federal law. App. 25a. Though not dispositive, the district court also noted that Bay Mills had, in 1999, successfully made the exact same § 2710 request for injunctive relief against another tribe. App. 26a. Concluding the relevant property was not "Indian land" as a matter of federal law, the court enjoined Bay Mills' operation of its Vanderbilt casino. App. 27a.

C. Sixth Circuit ruling

Bay Mills appealed, and the Sixth Circuit vacated the injunction, ruling that the federal courts lacked jurisdiction to enjoin Bay Mills from illegal gaming outside Indian lands, and that Bay Mills was immune from the State's common-law and other statutory claims.

With respect to jurisdiction over Michigan's IGRA claims, the Sixth Circuit declined to apply § 1331. Rather, it looked simply to § 2710 and concluded that the provision did not apply because Michigan alleged that illegal gaming was taking place off reservation, not *on* Indian lands. App. 9a.

Consistent with the narrow scope it had just ascribed to § 2710, the Sixth Circuit also concluded that Bay Mills had sovereign immunity. App. 13a. In so holding, the Sixth Circuit purportedly aligned itself with the Eleventh Circuit and against the Tenth Circuit's view of immunity, a view that would have allowed Michigan's lawsuit here to proceed. App. 13a.

The net result of the Sixth Circuit's approach is that states may not sue in federal court to enjoin a tribe's illegal operation of an off-reservation casino.

REASONS FOR GRANTING THE PETITION

This case involves important and recurring issues of federal law involving federal-court jurisdiction and tribal sovereign immunity in the context of illegal tribal gaming that violates IGRA. As the court of appeals noted below, there is a disagreement among the federal circuits over whether § 1331 vests federal courts with jurisdiction over IGRA claims regardless of 25 U.S.C. § 2710(d)(7)(A)(ii). There is also considerable disagreement among the circuits concerning the scope of tribal sovereign immunity from suits seeking to enjoin unlawful gaming. This Court's clarification of these issues is sorely needed.

I. The petition should be granted to resolve a circuit conflict regarding federal-court jurisdiction when a tribe violates its IGRA gaming compact.

Section 2710(d)(7)(A)(ii) says that the United States district courts shall have 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 entered into under paragraph (3) that is in effect." The Sixth Circuit interpreted § 2710 as exclusionary, *withdrawing* federal-court jurisdiction over any tribal gaming dispute that does not satisfy what the Sixth Circuit characterized as § 2710(d)(7)(A)(ii)'s "five prerequisites":

> (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.

App. 7a. Because Michigan's claim involved an illegal gaming operation *off* Indian lands, the Sixth Circuit reasoned, prerequisite "3" was missing, and the federal courts lacked jurisdiction. App. 7–8a.

But § 2710 is only one of the jurisdictional bases that Michigan and Little Traverse Bay Bands identified in their complaints. Both actions turned on two distinct federal questions: (1) whether Bay Mills had violated IGRA by allegedly breaching its compact with the State of Michigan, and (2) whether lands purchased with earnings from the Michigan Indian Land Claims Settlement Act, Pub. L. 105–143, 111 Stat. 2652, constitute "Indian lands" for purposes of IGRA. Such federal questions are easily encompassed by Congress's general grant of federal-court jurisdiction. 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the . . . laws . . . of the United States.").[1] And nothing in § 2710 purports to strip away federal-question jurisdiction.

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[1] The district court also had jurisdiction over a civil action "brought by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the controversy arises" under federal law. 28 U.S.C. § 1362. As the district court noted, "Little Traverse Bay is such a tribe." App. 25a.

This Court has protected § 1331's integrity in analogous situations. For example, in *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), plaintiffs challenged in federal district court the Sarbanes-Oxley Act's creation of the Public Company Accounting Oversight Board. But the Act, in § 78y, provided plaintiffs the opportunity to bring such an action in a court of appeals. The federal government interpreted § 78y as the exclusive route to review. But this Court rejected that position because § 78y's text "does not expressly limit the jurisdiction that other statutes confer on district courts. See, e.g., 28 U.S.C. §§ 1331, 2201." *Id.* at 3150. "Provisions for agency review do not restrict judicial review unless the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure." *Id.* (quotation omitted). See also *Verizon Md., Inc.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635, 643 (2002) ("[N]othing in 47 U.S.C. § 252(e)(6) purports to strip this [§ 1331] jurisdiction."); cf. *Mims* v. *Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 749–50 (2012) (rejecting the argument that a federal statute created exclusive state-court jurisdiction where nothing in the statute's language "purports to oust federal courts of their 28 U.S.C. § 1331 jurisdiction").

Here, there is nothing in § 2710's plain language that suggests Congress intended to oust federal courts of their § 1331 jurisdiction over illegal tribal casinos simply because the casinos are located off reservation. Congress simply intended to make clear that federal courts have the power to enjoin illegal casinos, even when operated by sovereign Indian tribes.

The Sixth Circuit's contrary conclusion runs counter to *Free Enterprise Fund* and conflicts directly with the Ninth Circuit's conclusion in *Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050 (9th Cir. 1997). There, several tribes sued California to force the state to remit amounts it had collected as license fees from horse racing associations that had received payments pursuant to an off-track betting regime established in a compact between the state and the tribes. That compact also included a provision obligating the state to turn the money over to the tribes if a federal court determined that the payments were illegal. A court made that determination, but the state refused to remit the money to the tribes, who then sued.

Mirroring the Sixth Circuit's logic here, California argued that the federal courts did not have jurisdiction because § 2710(d)(7)(A)(i–iii) conferred jurisdiction in only limited circumstances, and the tribes' lawsuit did not satisfy the prerequisites. The Ninth Circuit rejected California's position. 124 F.3d at 1056. Noting "the importance of the federal issue in federal-question jurisdiction" under § 1331, *id.* (quoting *Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804, 814 n.12 (1986)), the Ninth Circuit agreed with the tribes that "IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein." *Id.*

In sum, the Ninth Circuit recognized that gaming compacts are central to IGRA's structure, and that such compacts will be meaningless if the parties cannot be held in court to honor their promises. Here, Bay Mills breached the parties' compact (and thus violated

IGRA) by opening an off-reservation casino that the compact does not allow. If the Ninth Circuit were evaluating Michigan's claim, there can be little doubt that the court would allow the action to proceed in a federal forum.

The Sixth Circuit's decision here also conflicts with the Tenth Circuit's opinion in *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (10th Cir. 1997). There, New Mexico brought a § 2710(d)(7)(a)(ii) counterclaim alleging that the Tribal-State compact at issue was invalid because New Mexico's governor did not have authority to sign it. Again mirroring the Sixth Circuit's logic here, the Mescalero Apache Tribe argued that the federal court lacked jurisdiction.

Relying on its previous decision in *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546 (10th Cir. 1997), the Tenth Circuit concluded that it had jurisdiction to answer the question of compact validity. *Mescalero*, 131 F.3d at 1386. And the Tenth Circuit's reasoning stands in stark contrast to the Sixth Circuit's analysis here: "IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court." *Pueblo of Santa Ana*, 104 F.3d at 1557.

If the Tenth Circuit were evaluating Michigan's claim, it would also likely allow this dispute to proceed. The action undeniably involves federal questions under IGRA and the Michigan Indian Land Claims Settlement Act. Accordingly, 28 U.S.C. § 1331 vests the federal courts with jurisdiction.

Conversely, if the Sixth Circuit were evaluating the claim in *Mescalero*, it would have denied a federal

forum. Because New Mexico alleged that the parties' compact was not in effect, it would fail Sixth Circuit prerequisite "5" for jurisdiction under § 2710. This Court should not allow such starkly different outcomes depending on nothing more than the *locus* of the case. There is an imminent need to resolve the disagreement among the circuits concerning the scope of federal-court jurisdiction to remedy IGRA violations.

Michigan notes that the Sixth Circuit should have recognized federal-court jurisdiction even under its view that § 2710 somehow takes away the general jurisdiction that § 1331 grants. Michigan alleged in its complaint several "class III gaming activities" that *did* occur on Indian lands, such as the Tribe's licensing of the off-reservation casino and the Tribe's on-going supervision of the casino's operations. App. 59a, ¶¶ 19, 21. The Tribe, through its Executive Council, derives its governmental authority from its reservation. See Constitution and Bylaws of the Bay Mills Indian Community, art. II, § 1. Since a tribe's reservation constitutes "Indian lands" under 25 U.S.C. § 2703(4), authorizing, licensing, and operating an off-reservation casino from the reservation satisfied even the Sixth Circuit's jurisdictional requirements.

Such a conclusion is consistent with congressional intent. Logically, Congress would not have limited federal-court authority to enjoining just gaming itself; conduct that is inextricably linked to class III gaming, such as decisions that make the gaming possible, falls naturally within the broader ambit of gaming "activity" and should be subject to a federal court's jurisdiction and equitable power.

II. The petition should be granted to resolve a circuit conflict regarding tribal immunity from a suit claiming an IGRA violation.

The second question presented involves the scope of Congress's abrogation of tribal immunity through IGRA's enactment. And here, the circuit conflict is even deeper than that regarding federal-court jurisdiction.

The Sixth Circuit observed that § 2710(d)(7)(A)(ii) "supplies federal jurisdiction and abrogates tribal immunity." App. 13a. But again, because this dispute does not involve illegal gaming "on" Indian lands (perquisite "3", according to the panel), the Sixth Circuit said that § 2710 could not apply. App. 9a.

In so holding, the Sixth Circuit acknowledged that it was furthering a circuit split. "It is true, as the plaintiffs point out, that the Tenth Circuit has taken the opposite approach with respect to abrogation of tribal immunity under § 2710(d)(7)(A)(ii)." App. 13a (citing *Mescalero*, 131 F.3d at 1385–86). The Tenth Circuit (followed by the Ninth) has held that "IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought." *Mescalero*, 131 F.3d at 1385–86; accord *Lewis* v. *Norton*, 424 F.3d 959, 962–63 (9th Cir. 2005) ("The IGRA waives tribal sovereign immunity in the narrow category of cases where compliance with the IGRA is at issue.") (citing *Mescalero*). Michigan's claim here falls comfortably within the scope of these Ninth and Tenth Circuit rulings.

But the Sixth Circuit ultimately aligned itself with the Eleventh Circuit, which rejected *Mescalero* and maligned its reasoning as "muddled." App. 13a (citing *Florida* v. *Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999)). According to the Eleventh Circuit, "Congress abrogated tribal immunity only in the narrow circumstance in which a tribe conducts class III gaming in violation of an existing Tribal-State compact." *Seminole Tribe*, 181 F.3d at 1242.

The circuit conflict is actually deeper than even the Sixth Circuit appreciated. To begin, the Eleventh Circuit's ruling in *Seminole Tribe* creates a narrower tribal immunity than does the Sixth Circuit's opinion here. Given that Bay Mills' operation of its illegal off-reservation casino violates the express terms of its Michigan compact (which only authorizes gaming on "Indian lands"), even the Eleventh Circuit appears likely to have allowed Michigan's action to proceed.

In addition, the Seventh Circuit has extended the abrogation of tribal sovereign immunity to *any* claim alleging a violation of a gaming compact arising from the subjects of compact negotiation listed in § 2710(d)(3)(C). *Wisconsin* v. *Ho-Chunk Nation*, 512 F.3d 921, 933 (7th Cir. 2008). Although that ruling did not allow Wisconsin to enforce revenue-sharing agreements entered into in conjunction with a Tribal-State compact, contra *New Mexico* v. *Pueblo of Pojoaque*, 30 Fed. App'x 768 (10th Cir. 2002) (allowing such a suit to proceed), its scope would nevertheless allow Michigan's claim that Bay Mills is violating its compact here.

In sum, tribal immunity under IGRA depends entirely on the circuit making the decision. Certiorari is warranted.

Of course, as noted above, there were other class III gaming activities (such as licensing and ongoing supervision of casino operations) that Michigan alleged in its Complaint and that undeniably took place on Indian lands—the Bay Mills reservation itself. Thus, even were the Court to adopt the Sixth Circuit's approach, rather than that of the Seventh, the Ninth and Tenth, or the Eleventh, the Sixth Circuit should be reversed, and the district court's grant of an injunction against Bay Mills should be sustained.

III. The issues presented are of national importance, implicating allocations of authority and sovereignty between states and tribes.

Having concluded that the federal courts lacked jurisdiction and that Bay Mills had sovereign immunity, the Sixth Circuit did not reach the question of whether the Vanderbilt tract qualifies as "Indian lands" eligible under 25 U.S.C. § 2710(d)(1) for class III gaming. The district court analyzed this issue at length and held that the tract does not constitute "Indian lands," App. 29a–38a, consistent with the views of the Department of the Interior and the National Indian Gaming Commission. Letter from Hillary C. Tompkins, Solicitor, Department of Interior, to Michael Gross, Associate General Counsel, National Indian Gaming Commission (Dec. 21, 2010); Memorandum from Michael Gross (Dec. 21, 2010). There can be no reasonable dispute that Bay Mills has an illegal casino, both under the terms of its Compact and under IGRA.

Given that fact, the Sixth Circuit's holding is remarkable: Michigan has no federal-court remedy to stop illegal tribal gaming that takes place on

Michigan's own sovereign territory, i.e., not on Indian lands. To put it another way, a state can seek to enjoin an illegal casino whenever it is located *on* reservation, but not when located *off* reservation.

That result is troubling in two respects. First, it invites tribes across the country to open off-reservation casinos, then claim immunity and lack of jurisdiction in response to any state request that a federal court enjoin the illegal conduct.

Second, the Sixth Circuit's decision encourages jurisdictional and political conflict between states and tribes. The Sixth Circuit's closing comments leave the door open to state lawsuits or criminal charges against individual Indians who participate in off-reservation gaming activities, as well as suits or charges against tribal officers. App. 17–18a. But, right or wrong, some federal courts in other jurisdictions have dismissed *Ex parte Young*-type claims alleging that a tribal official is violating IGRA. E.g., *Tamiami Partners, Ltd. Ex rel. Tamiami Development Corp.* v. *Miccosukee Tribe of Florida*, 177 F.3d 1212, 1225–26 (11th Cir. 1999) (rejecting IGRA claims against a tribal official because it "is well established that *Ex parte Young* does not permit individual officers of a sovereign to be sued when the relief requested would, in effect, require the sovereign's specific performance of a contract."); *Crosby Lodge, Inc.* v. *National Indian Gaming Association*, 2007 WL 2318581, at *4 (D. Nev. Aug. 10, 2007) ("Crosby may not bring a private cause of action [asserting *Ex parte Young* relief] against Tribal Defendants for alleged non-compliance with IGRA"); *Davids* v. *Coyhis*, 869 F. Supp. 1401 (E.D. Wis. 1994) ("Congress certainly has the power to authorize civil

actions by private parties against tribal officers under the IGRA, but it has chosen not to do so. I will not take it upon myself, without a clearer direction from Congress, to permit the intrusion on tribal sovereignty that adjudication of this [*Ex parte Young*] action would present.").

And even if Michigan is successful in bringing an *Ex parte Young* action, such litigation is preordained to create friction between a state and a tribe. An *Ex parte Young* suit brought by one sovereign against another sovereign's officials has very different political ramifications than a citizen bringing such a suit against her government. (No one flinches when a Michigan citizen brings an *Ex parte Young* action against a Michigan official, but imagine the international uproar if Michigan tried to circumvent the United Kingdom's sovereign immunity by suing Prime Minister David Cameron.) Yet by closing the door to an injunction against the tribe itself, the Sixth Circuit leaves a state with no other choice when confronted with an illegal gaming operation conducted outside a reservation.

Finally, the questions of federal jurisdiction and tribal sovereign immunity under IGRA extend far beyond the case of illegal, off-reservation casinos, as exemplified by the varying contexts in which these issues have arisen in the circuits. Further delay before resolving the circuit splits at issue here will have significant implications for state and tribal sovereignty. The recurring issues this case presents warrant this Court's immediate intervention and resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: OCTOBER 2012

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF MICHIGAN
and LITTLE TRAVERSE BAY
BANDS OF ODAWA INDIANS,
Plaintiffs-Appellees,
v.
BAY MILLS INDIAN
COMMUNITY,
Defendant-Appellant.

No. 11-1413

Appeal from the United States District Court
for the Western District of Michigan
at Grand Rapids.
Nos. 1:10-cv-1273; 1:10-cv-1278—Paul Lewis
Maloney, Chief District Judge.

Argued: May 31, 2012

Decided and Filed: August 15, 2012

Before: BOGGS, NORRIS, and KETHLEDGE,
Circuit Judges.

COUNSEL

ARGUED: Kathryn L. Tierney, BAY MILLS INDIAN COMMUNITY, Brimley, Michigan, for Appellant. Margaret Bettenhausen, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, Conly J. Schulte, FREDERICKS, PEEBLES & MORGAN, Louisville, Colorado, for Appellees. **ON BRIEF:** Kathryn L. Tierney, Chad P. DePetro, BAY MILLS INDIAN COMMUNITY, Brimley, Michigan, for Appellant. Louis B. Reinwasser, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, Conly J. Schulte, FREDERICKS, PEEBLES & MORGAN, Louisville, Colorado, John Petoskey, FREDERICKS PEEBLES & MORGAN LLP, Peshawbestown, Michigan, James A. Bransky, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, Traverse City, Michigan, for Appellees.

OPINION

KETHLEDGE, Circuit Judge. The State of Michigan and the Little Traverse Bay Bands of Odawa Indians ("Little Traverse") brought this suit to prevent the Bay Mills Indian Community from operating a small casino in Vanderbilt, Michigan. Vanderbilt itself is a small town located in the northern part of Michigan's Lower Peninsula, in forest country more than 30 miles from the nearest Great Lake. Its population, according to Census Bureau estimates, has hovered around 575 residents over the past 10 years. Little Traverse sued Bay Mills on the theory that its Vanderbilt casino (total slot machines: 84) would divert

millions of dollars of revenue from Little Traverse's vastly larger casino in Petoskey, Michigan—a high-end community located on the shores of Lake Michigan. The State sued on the more prosaic theory that the Vanderbilt casino is unlawful.

The district court entered a preliminary injunction ordering Bay Mills to stop gaming (a euphemism often unavoidable for our purposes here) at the Vanderbilt casino. We hold that the district court lacked jurisdiction over some of the plaintiffs' claims, and that Bay Mills's sovereign immunity bars the others, at least in the configuration in which the suit comes to us now. Thus we vacate the injunction.

I.

The Indian Gaming Regulatory Act ("the Regulatory Act") provides that "Class III gaming activities" (*i.e.*, casino-style gaming, as opposed to, say, bingo halls) "shall be lawful on Indian lands only if" certain requirements are met. 25 U.S.C. § 2710(d). An Indian tribe wishing to conduct gaming activity must adopt a gaming ordinance that is approved by the Chairman of the National Indian Gaming Commission ("the Gaming Commission"), *id.* § 2710(d)(1)(A)—which is itself an independent federal agency. The tribe must also negotiate with the state to enter a "Tribal-State compact" that will govern the gambling. *Id.* § 2710(d)(3). Once a compact is entered, the Regulatory Act requires the gambling to conform to the compact. *Id.* § 2710(d)(1)(C).

Bay Mills is a federally recognized Indian tribe with a reservation in Michigan's Upper Peninsula. In 1993, the tribe entered a Tribal-State compact with the

State of Michigan, pursuant to the Regulatory Act. The Gaming Commission approved Bay Mills's tribal gaming ordinance shortly thereafter. Since that time, Bay Mills has operated a casino on its reservation in Chippewa County, Michigan.

In 1997, Congress passed the Michigan Indian Land Claims Settlement Act ("the Settlement Act"), whose purpose was to allocate funds to Bay Mills and other Michigan Indian tribes, in satisfaction of judgments that the Indian Claims Commission had entered in favor of the tribes. *See* Pub. L. No. 105-143, § 102, 111 Stat. 2652. The Settlement Act directed Bay Mills to deposit a portion of its funds into a land trust, with the earnings from that trust to be "used exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange." *Id.* § 107(a)(3). The Settlement Act also provided that "[a]ny land acquired with funds from the Land Trust shall be held as Indian lands are held." *Id.*

In August of 2010, Bay Mills used trust earnings to purchase approximately 40 acres of property in Vanderbilt, Michigan. The property is located more than 100 miles from the tribe's reservation in the Upper Peninsula. Bay Mills then constructed a small casino on the property (initially with 38 electronic gaming machines, later expanded to 84), pursuant to an amended gaming ordinance. Bay Mills began operating the Vanderbilt casino on November 3, 2010.

The State filed suit against Bay Mills the following month, on December 21, 2010. Little Traverse—also a federally recognized Indian tribe—filed suit one day later. Each plaintiff claims that Bay Mills has violated

various provisions of its Tribal-State compact. The State additionally claims that Bay Mills has violated state law. Little Traverse moved for a preliminary injunction. The State supported the motion. The district court granted the motion and enjoined Bay Mills from operating the Vanderbilt casino. Bay Mills sought a stay, which the district court denied. The tribe then sought a stay in this court, which we denied.

Bay Mills now appeals the order entering the injunction.

II.

At the outset, Bay Mills argues that the plaintiffs have not shown any injury for purposes of standing. To establish standing, the plaintiffs must show an injury in fact, fairly traceable to the defendant's conduct, that is likely to be redressed by a favorable decision from the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Each element of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at successive stages of the litigation." *Id.* at 561.

Little Traverse's expert predicted that the Vanderbilt casino will cause Little Traverse to lose tens of millions of dollars by diverting customers from its Odawa Casino Resort in Petoskey. The expert noted the proximity of the two properties (about 40 miles), the Vanderbilt casino's location near a major interstate, and that Bay Mills has offered incentives to new customers who show rewards cards from the Odawa resort. Bay Mills's expert identified defects in the methodology of Little Traverse's expert. But even

Bay Mills's expert acknowledged the likelihood that at least some of the Vanderbilt casino's gaming revenue would have otherwise gone to the Odawa resort.

Little Traverse's evidence of competitive harm is enough to show an injury in fact for standing purposes. This case is different from a previous one where we refused to find standing based on nothing more than the plaintiff's request that we take judicial notice of the distance between allegedly competing casinos. *See Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910, 915–16 (6th Cir. 2002). And because Little Traverse's Tribal-State compact requires it to furnish a portion of its gaming revenue to the State, any loss to Little Traverse will result in a loss to the State. So the State has shown injury as well.

III.

We turn to subject-matter jurisdiction. For each cause of action, federal jurisdiction "must be determined from what necessarily appears in the plaintiff's statement of his own claim . . . unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson*, 234 U.S. 74, 75–76 (1914); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002). We consider each of the plaintiffs' causes of action in turn.

A.

The plaintiffs primarily plead claims under the Regulatory Act, alleging that the Vanderbilt casino violates the Tribal-State compact because it is not located on Indian lands. *See* Bay Mills-Michigan

Compact § 4(H) ("The Tribe shall not conduct any Class III gaming outside of Indian lands"). These claims arise under 25 U.S.C. § 2710(d)(7)(A)(ii), which provides:

> (7)(A) The 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[.]

Two insuperable Article III defects prevent adjudication of these claims. The first is that a statutory prerequisite to jurisdiction is absent. Section 2710(d)(7)(A)(ii) by its terms is conjunctive—that is, the State or tribal plaintiff must meet *all* of the provision's conditions for jurisdiction to exist, rather than just one or two of them. Thus, § 2710(d)(7)(A)(ii) supplies federal jurisdiction only where all of the following are true: (1) the plaintiff is a State or an Indian tribe; (2) the cause of action seeks to enjoin a class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect.

The plaintiffs' own pleadings defeat their argument that the Regulatory Act supplies jurisdiction here. In their complaints, the plaintiffs expressly allege that the Vanderbilt casino is *not* located on Indian lands, which means the plaintiffs cannot meet the third condition (that the "gaming activity [is] located on

Indian lands") recited above. *See* State's Am. Compl. ¶¶ 22, 26–28; Little Traverse's Am. Compl. ¶¶ 13, 17–18.

The Regulatory Act 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). Here, the plaintiffs allege that the Vanderbilt property is not located within the Bay Mills reservation (which is located 100 miles to the north); that title to the property is not held in trust by the United States; that title is not subject to restriction against alienation by the United States; and that Bay Mills does not exercise governmental power over the property. The plaintiffs allege these things because they are essential to the plaintiffs' claim that gaming at the Vanderbilt casino violates Bay Mills's Tribal-State compact. But the allegations mean that, even at the pleading stage, the plaintiffs cannot show federal jurisdiction over their § 2710(d)(7)(A)(ii) claims. *Accord Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616, 618 (6th Cir. 2002) (reaching the same conclusion with respect to a claim brought under a neighboring provision of the Regulatory Act, namely § 2710(d)(7)(A)(i)).

That said, we acknowledge the irony of this case: Bay Mills, the defendant here, alleges that the Vanderbilt casino *is* located on "Indian lands"—in which case § 2710(d)(7)(A)(ii) would supply federal jurisdiction. Thus, the plaintiffs say, the district court should cut to the chase and determine whether the Vanderbilt casino is, in fact, located on Indian lands. But that leads to the second Article III defect in the plaintiffs' claims: there is no possibility of redressing their injury by means of a § 2710(d)(7)(A)(ii) claim. *See Lujan*, 504 U.S. at 561. As the case comes to us here, a determination whether the Vanderbilt casino is located on Indian lands would be purely advisory: if the Vanderbilt casino is not located on Indian lands, there is no jurisdiction for the plaintiffs' claims; if the casino is located on Indian lands, its operation does not violate the compact, which means the claims are meritless. Neither answer would redress the plaintiffs' alleged injuries.

The federal courts lack jurisdiction, therefore, to adjudicate the plaintiffs' § 2710(d)(7)(A)(ii) claims to the extent those claims are based on an allegation that the Vanderbilt casino is not on Indian lands.

B.

But each plaintiff also asserts a § 2710(d)(7)(A)(ii) claim that rests upon an alternative allegation that the Vanderbilt casino *is* located on Indian lands—thereby satisfying, as to this claim, the third prerequisite to federal jurisdiction (and the one missing for the claims above). But this claim merely exchanges one jurisdictional defect for another. The fourth prerequisite for jurisdiction under § 2710(d)(7)(A)(ii), as recited above, is that the challenged gaming is

"conducted in violation of any Tribal-State compact[.]" The compact here requires all gaming to be conducted in compliance with federal law. *See* Bay Mills-Michigan Compact § 4(C) ("The Tribe shall . . . operate . . . all Class III gaming activities pursuant to . . . [the Regulatory Act], and all other applicable federal law"). The plaintiffs argue that the Vanderbilt casino's operation violates 25 U.S.C. § 2719, which provides that "gaming regulated by this chapter shall not be conducted on lands *acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988*," subject to certain exceptions that do not apply here. (Emphasis added.) Thus, for the casino's operation to violate § 2719—and for federal jurisdiction to exist as to this claim—the casino's operations must be conducted on lands so acquired by the Secretary.

But here again the plaintiffs' own pleadings defeat their argument in support of jurisdiction. Each plaintiff affirmatively alleges that the Vanderbilt property was *not* "acquired by the Secretary in trust for the benefit of" Bay Mills. *See* State's Am. Compl. ¶ 26; Little Traverse's Am. Compl. ¶ 13. Indeed it is undisputed that the property was acquired by Bay Mills itself. Thus, we are patently without jurisdiction over this claim.

The preceding analysis knocks out all of Little Traverse's causes of action. We proceed to consider the State's remaining claims.

C.

The State pleads a claim under what it calls the "federal common law" and two claims under state law. As to these claims, the plaintiffs assert that we have

federal question jurisdiction under 28 U.S.C. § 1331. We agree. Although none of these claims are based on a federal statute, the claims "arise under" federal law because they "implicate significant federal issues." *Grable & Sons Metal Prods, Inc. v. Darue Eng'g*, 545 U.S. 308, 312 (2005). Specifically, each claim on its face presents a question of federal law (whether the Vanderbilt casino is located on Indian lands) that is disputed by the parties. *See id.* at 314. That question could have a substantial impact on both the present litigation and on federal Indian-gaming law more generally. *Id.* And there is no reason to think Congress would prefer this question to be resolved by state courts. *Id.* To the contrary, Indian law is primarily the province of the federal courts. So federal jurisdiction does exist for these claims—but only these.

IV.

As to these claims, Bay Mills argues that it is immune from suit. The Supreme Court has held that, "[a]s a matter of federal law," Indian tribes are immune from suit except in specific, limited circumstances. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Although we have treated questions of tribal immunity as jurisdictional, *see Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 919–20 (6th Cir. 2009), tribal immunity is different from other jurisdictional issues in key respects: notably, it does not arise from Article III of the Constitution, but is judicially created, developing "almost by accident." *Kiowa Tribe*, 523 U.S. at 756. Thus, the issue is whether the State's remaining claims fall within those judicially created bounds here.

The Supreme Court has recognized tribal immunity "without drawing a distinction based on where the tribal activities occurred." *Id.* at 754. Thus, although the State may regulate tribal activities that occur outside Indian lands, *see Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973), it may not (absent waiver or abrogation of tribal immunity) enforce those regulations by suing the tribe itself. *See Kiowa Tribe*, 523 U.S. at 755; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991). "There is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe*, 523 U.S. at 755. Under the plain terms of these precedents, therefore, the mere fact that the Vanderbilt casino's operations might (and perhaps likely do) occur outside Indian lands does not mean that the Bay Mills tribe itself can be sued on account of them. *See Cohen's Handbook of Federal Indian Law* § 7.05[1][b] (2005 ed. Supp. 2009) ("The Supreme Court has consistently distinguished between the questions of whether tribal activities are subject to state laws and whether the tribe may be sued to enforce those laws").

Under the Court's precedents, rather, Bay Mills is immune 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." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotation marks and citation omitted). Similarly, a tribe's waiver of its immunity must be "clear." *C & L Enters., v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532

U.S. 411, 418 (2001). So we turn to whether there has been such an abrogation or waiver here.

A.

The State argues that Congress has abrogated Bay Mills's immunity from this suit in two federal statutes. First, the State turns again to the Regulatory Act, specifically 25 U.S.C. § 2710(d)(7)(A)(ii). By its terms, this provision supplies federal jurisdiction and abrogates tribal immunity at a single stroke. But to do so, as discussed above, all of its textual prerequisites must be met. *See Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1242 (11th Cir. 1999). It is true, as the plaintiffs point out, that the Tenth Circuit has taken the opposite approach with respect to abrogation of tribal immunity under § 2710(d)(7)(A)(ii). *See Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385–86 (10th Cir. 1997) (a case unrelated to the Supreme Court's decision in *Jones*, discussed above). But *Mescalero* offers virtually no analysis in support of its contrary reading of § 2710(d)(7)(A)(ii)—a point which the State, to its credit, concedes here; and to the extent the opinion does offer any analysis, it mistakenly cites waiver cases rather than abrogation ones. We agree with the Eleventh Circuit, therefore, that *Mescalero*'s reasoning is "muddled" rather than persuasive. *Seminole Tribe*, 181 F.3d at 1241. Thus, for the same reasons that § 2710(d)(7)(A)(ii) does not supply federal jurisdiction in this case, it does not abrogate Bay Mills's immunity either.

Second, the State argues that Congress abrogated Bay Mills's immunity in 18 U.S.C. § 1166. Section 1166(a) provides the following with respect to gambling

that is not conducted under an approved Tribal-State gaming compact:

> for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

The State acknowledges that it may not bring criminal charges against Bay Mills under this section, since § 1166(d) vests the federal government with exclusive jurisdiction over criminal prosecutions brought under § 1166(a). But the State does argue that § 1166(a) authorizes the State to bring this civil action. Specifically, the State notes that Michigan law authorizes a State prosecutor—or even a citizen—to bring a civil-nuisance suit to enjoin "any person" from allowing a building to be used for gambling. *See* Mich. Comp. Laws §§ 600.3805, 600.3801. Thus, the State says that, by incorporating this provision, § 1166(a) abrogates Bay Mills's immunity with respect to the State's request for injunctive relief here.

This question is closer than the other ones. Michigan's statute authorizing civil suits to abate a nuisance is a "State law[] pertaining to the . . . regulation . . . of gambling," so "for purposes of federal law" it "shall apply" in Indian country "in the same manner" as elsewhere in Michigan. 18 U.S.C. § 1166(a). As a matter of inference, therefore, the State's argument is coherent. But it takes more than inferential logic to abrogate tribal immunity. What it takes is an "unequivocal expression" of Congress.

Santa Clara Pueblo, 436 U.S. at 59. Sometimes that unequivocal expression can be implicit, as § 2710(d)(7)(A)(ii) of the Regulatory Act itself demonstrates. But the expression is too attenuated here. Section 1166(a) itself does not expressly authorize a State to sue anyone, much less an Indian tribe. *See United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss*, 927 F.2d 1170, 1177 (10th Cir. 1991). And neither § 1166(a) nor the cited sections of Michigan law say anything about suing Indian tribes in particular. Meanwhile, the plaintiffs' reading of § 1166(a) would elevate that subsection to a position of paramount importance for tribal-state relations: notwithstanding the particularized remedies authorized by the Regulatory Act or the Tribal-State compact, a tribe's immunity would turn on the happenstance of a particular state's civil anti-gambling statutes, rather than on any provision of federal law. We do not see in § 1166(a) an unequivocal expression of intent to bring about these consequences. That provision therefore does not abrogate Bay Mills's immunity either.

B.

The State also argues that Bay Mills waived its immunity in its tribal gaming ordinance. The ordinance creates a Tribal Gaming Commission. Section 4.18 of the ordinance includes among the Commission's powers the following:

> (Y) To sue or be sued in courts of competent jurisdiction within the United States and Canada, subject to the provisions of this Ordinance and other tribal laws relating to sovereign immunity[.]

Section 4.7 relates to sovereign immunity:

> **Waiver of Sovereign Immunity of the Tribal Commission.** Sovereign immunity of the Tribal Commission may be waived only by express resolutions of both the Tribal Commission and the Tribal Council . . . . Neither the power to sue and be sued provided in Subsection 4.18(Z),[1] nor any express waiver of sovereign immunity by resolution of the Tribal Commission shall be deemed a . . . consent to suit in respect of any land within the exterior boundaries of the Reservation[.]

The State says that, taken together, these two provisions expressly waive the tribe's immunity for suits, like this one, involving land outside the reservation.

The argument is meritless. Section 4.7 only concerns immunity for the *Tribal Commission*, not the Tribe itself. What the State neglects to mention, remarkably, is that § 4.8 addresses the Tribe's immunity—and does so in terms that plainly preclude any waiver here:

> **Sovereign Immunity of the Tribe.** All inherent sovereign rights of the Tribe as a federally-recognized Indian tribe with respect to the . . . activities of the Tribal Commission are hereby expressly reserved, including sovereign immunity from suit in any state,

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[1] We assume that the intended cross reference here is to subsection 4.18(Y). Subsection 4.18(Z) does not provide the power to sue and be sued.

> federal or tribal court. *Nothing in this Ordinance, nor any action of the Tribal Commission, shall be deemed or construed to be a waiver of sovereign immunity from suit of the Tribe*[.]

(Emphasis added.)

Tendentious, junk-drawer arguments like this one are best left out of a brief. They waste opposing counsel's time and ours. We reject the argument here.

C.

Our decision today is not to the exclusion of other remedies that might (or might not) be available to the plaintiffs. Notably, they can ask the United States to sue Bay Mills, since tribes are not immune from suits brought by the federal government. *See Cohen, supra*, at § 7.05[1][a] (2005 ed.). And nothing in our decision casts doubt on the State's ability to apply non-discriminatory laws against Indians who go beyond the boundaries of Indian country, so long as there is no federal law to the contrary. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112–13 (2005).

Finally, it appears the Supreme Court has left open the question whether a State may bring claims against tribal officers in their official capacity. *See Okla. Tax Comm'n*, 498 U.S. at 514 ("We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State"). In fact, the State has already amended its complaint to name various Bay Mills tribal officers as defendants. But

those officers are not present in this appeal, and they are not named on the injunction. We express no opinion as to whether, or under what circumstances, those officers may be sued.

* * *

The district court's preliminary injunction is vacated, and the case remanded for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STATE OF MICHIGAN,
Plaintiff,

No. 1:10-cv-1273

-v-

HONORABLE
PAUL L. MALONEY

BAY MILLS INDIAN COMMUNITY,
Defendant,

and

LITTLE TRAVERSE BAY BAND
OF ODAWA INDIANS,
Plaintiff,

No. 1:10-cv-1278

-v-

HONORABLE
PAUL L. MALONEY

BAY MILLS INDIAN COMMUNITY,
Defendant.

OPINION AND ORDER GRANTING PLAINTIFF LITTLE TRAVERSE BAY BAND OF ODAWA INDIAN'S MOTION FOR PRELIMINARY INJUNCTION

The Little Traverse Bay Band of Odawa Indians seeks a preliminary injunction (ECF No. 3 in 1:10-cv-1278) against the Bay Mills Indian Community's

gaming operation in Vanderbilt, Michigan.[1] The State of Michigan ("State") and the Little Traverse Bay Band of Odawa Indians ("Little Traverse Bay") filed nearly identical suits against the Bay Mills Indian Community ("Bay Mills"). Both suits seek declaratory and injunctive relief. The two lawsuits were deemed related and the parties were ordered to file all documents in the first filed lawsuit.[2] (ECF No. 2.) The State has neither filed its own motion for a preliminary injunction nor moved to join Little Traverse Bay's motion. The State has, however, filed a brief in support (ECF No. 13) of Little Traverse Bay's motion for a preliminary injunction. Oral arguments on the motion occurred on March 23, 2011.

I. FACTUAL BACKGROUND

According to Bay Mills, years ago, it sought compensation from the United States under the Indian Claims Commission Act ("ICCA") of 1946, 25 U.S.C. § 70, asserting that Bay Mills had been inadequately compensated for land ceded in various treaties. Ultimately, several judgments were issued in favor of Bay Mills. In the 1970s, Congress appropriated the funds to pay for those judgments, however, no disbursements of the funds occurred. In 1996, Bay Mills sued the Department of the Interior under the

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[1] Both Little Traverse Bay Band of Odawa Indians and Bay Mills Indian Community are federally recognized Indian tribes. Both tribes have negotiated tribal compacts with the State of Michigan, allowing them to operate class III gaming facilities.

[2] Except where specifically noted, all references to document numbers in the electronic case file ("ECF") are to the docket sheet and record in 1:10-cv-1273. The motion for a preliminary injunction has never been filed in 1:10-cv-1273.

Indian Tribal Judgment Funds Act of 1983, 25 U.S.C. § 1401, asserting a failure to facilitate distribution of the allocated funds. The parties reached an agreement requiring the Department of the Interior to draft and submit proposed legislation to the Office of Management and Budget authorizing the use or distribution of the judgment awards.[3] *Bay Mills Indian Cmty. v. Bruce Babbit*, No. 96-0553 SS (D.D.C. Sept. 16, 1996) (unpublished order). The action was dismissed with prejudice upon completion of the Department of the Interior's obligations.[4] *Bay Mills Indian Cmty. v. Bruce Babbit*, No. 96-0553 SS (D.D.C. Apr. 4, 1997) (unpublished order). The proposed legislation, after modifications, was passed by Congress and signed by the President on December 15, 1997, as the Michigan Indian Land Claims Settlement Act ("MILCSA"), Pub. L. 105-143, 111 Stat. 2652.[5]

MILCSA distributes judgment funds and establishes plans and guidelines for the use of those funds for certain groups of Indians in Michigan. In section 104(a) and (b), MILCSA distributes ICCA judgment funds to various tribes, including both Bay Mills and Little Traverse Bay. In addition, in section 107, MILCSA establishes a plan for use and distribution of Bay Mills Indian Community funds. Under section 107(a)(1), Executive Council of Bay Mills must establish a nonexpendable trust known as the Land Trust, and deposit twenty percent of the funds received into the Land Trust. Section 107(a)(4) provides that the principal of the Land Trust shall not

[3] Bay Mills Resp. Ex. A.

[4] Bay Mills Resp. Ex. C.

[5] Bay Mills Resp. Ex. I.

be expended for any purpose. Section 107(a)(3) outlines how the earnings, or interest on the principal, may be expended.

> (3) The earnings generated by the Land Trust shall be used exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange. Any land acquired with funds from the Land Trust shall be held as Indian lands are held.

MILCSA, Pub. Law 105-143 § 107(a)(3).

On August 27, 2010, Bay Mills purchased approximately 40 acres of land in the village of Vanderbilt, Michigan ("Vanderbilt Tract"), along Interstate Highway 75. (Little Traverse Bay Br. Ex. 3 - Warranty Deed.) The Vanderbilt Tract was purchased with funds derived exclusively from the interest generated by the funds in the Land Trust. (Bay Mills Ex. L.) The Vanderbilt Tract is approximately 125 driving miles south of the Bay Mills reservation, which is located near Brimley, Michigan, in the Upper Peninsula. (Little Traverse Bay Br. Ex. 4 - Alan Proctor Dec. Attached Map.) Vanderbilt is located in the lower portion of Michigan. On November 3, 2010, Bay Mills opened a class III gaming facility at the Vanderbilt Tract, which is known as the "Bay Mills Resort & Casinos, Vanderbilt" ("Vanderbilt Casino"). When the Vanderbilt Casino opened, it housed 38 slot machines. (Bay Mills Resp. Ex. E - Jeffrey Parker Dec. ¶ 4.) When this action was filed, Bay Mills was in the process of expanding the Vanderbilt Casino, which has now been completed. The Vanderbilt Casino currently houses 84 slot machines. (*Id.* ¶ 5.) Bay Mills currently

has no plans to expand the Vanderbilt Casino beyond the current number of electronic gaming devices. At oral argument, counsel for Bay Mills acknowledged that the existing compact did not prevent Bay Mills from expanding the Vanderbilt Casino in the future.

Little Traverse Bay currently operates the Odawa Casino Resort in Petoskey, Michigan ("Petoskey Casino"). Little Traverse Bay's Petoskey Casino contains almost 1,500 slot machines, as well as table games. (Little Traverse Bay Br. Ex. 17 - Alea Advisors' Report, 22-23.) The Petoskey Casino also contains a hotel and restaurants. (*Id.*) Bay Mills' Vanderbilt Casino is approximately forty driving miles east of Little Traverse Bay's Petoskey Casino. (Procter Dec. Attached Map.)

II. LEGAL FRAMEWORK FOR ISSUING A PRELIMINARY INJUNCTION

A trial court may issue a preliminary injunction under Fed. R. Civ. P. 65. A district court has discretion to grant or deny preliminary injunctions. *Warshak v. U.S.*, 490 F.3d 455, 465 (6th Cir. 2007). When deciding a motion for a preliminary injunction, a court should consider and balance four factors: (1) whether the moving party has established a substantial likelihood or probability of success on the merits; (2) whether the moving party will suffer an irreparable injury if the court does not grant a preliminary injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief. *Id.* (citation omitted); *G&V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994); *see Winter v. Natural Res. Def. Council, Inc.*, 555

U.S. 7, 129 S.Ct. 365, 374 (2008). "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) (citation omitted). Typically, the purpose of a preliminary injunction is to preserve the status quo. *Smith Wholesale Co., Inc. v. R.J.R. Tobacco*, 477 F.3d 854, 873 n. 13 (6th Cir. 2007) (quoting *U.S. v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004)).

A. Likelihood of Success on the Merits

1. Jurisdiction

Both Little Traverse Bay and Bay Mills begin their discussions of this first factor with assertions about whether this Court has jurisdiction over the allegations in the complaint. Ordinarily, subject matter jurisdiction must be satisfied before a court may consider the merits of a claim. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Where a jurisdictional question is raised, a court may properly consider it as part of the "likelihood of success on the merits" factor. *See U.S. Ass'n of Importers of Textiles and Apparel v. Dep't of Commerce*, 413 F.3d 1344, 1438 (Fed. Cir. 2005).

Bay Mills asserts this Court lacks jurisdiction over the complaint. A district court has authority to "enjoin a class III gaming activity *located on Indian land* and conducted in violation of any Tribal-State compact." 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added). Bay Mills argues the entire basis of Little Traverse Bay's complaint is that the Vanderbilt Casino is not located

on "Indian land." Little Traverse Bay's complaint asserts 28 U.S.C. § 1331, 25 U.S.C. § 2710(d)(7)(A)(ii), and 28 U.S.C. § 1362 as the bases for jurisdiction. (ECF No. 1 in 1:10-cv-1278 - Compl. ¶ 3.) Count III of the complaint alleges a violation of 25 U.S.C. § 2719. (*Id.* ¶¶ 25-29.)

For the purpose of deciding this motion, this Court has jurisdiction over the subject matter in the complaint. Bay Mills addresses only one of the several bases for jurisdiction identified in the complaint. This Court has jurisdiction over civil actions arising under federal law. 28 U.S.C. § 1331. Each claim in the complaint hinges on whether land purchased by earnings in the Land Trust constitutes "Indian lands". That determination requires this Court to interpret MILCSA § 107(a)(3), obviously a federal law. This Court also has jurisdiction over civil actions "brought by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the controversy arises" under federal law. 28 U.S.C. § 1362. Little Traverse Bay is such a tribe.

At oral argument, counsel for Little Traverse Bay asserted that Bay Mills should be estopped from asserting that § 2710(d)(7)(A)(ii) precluded this Court from exercising jurisdiction. Judicial estoppel prevents a party who prevails in one phase of a case from asserting and relying on a contradictory argument to prevail in another phase. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation omitted). Judicial estoppel protects the integrity of the courts by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* at 749- 50 (citation omitted). Judicial estoppel

applies where a party asserts a position that is contrary to one that the party has asserted, under oath, in a prior proceeding, and where the prior court adopted the contrary position as a preliminary matter or part of a final disposition. *Longaberger Co. v. Kolt*, 586 F.3d 459, 470 (6th Cir. 2009) (citation omitted). The Sixth Circuit Court of Appeals has noted that "other courts have found that judicial estoppel bars changes in factual positions and does not extend to inconsistent opinions or legal positions." *Id.* (citations omitted); *see Guaranty Residential Lending, Inc. v. Homestead Mortg. Co. LLC*, 291 F.App'x 734, 743 (6th Cir. 2008) ("Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one.") (citation omitted); *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1220 (6th Cir. 1990) ("Judicial estoppel exists to 'protect the *courts* 'from the perversion of judicial machinery' through a party's attempt to take advantage of both sides of a factual issue at different stages of the proceedings.'") (citation omitted) (emphasis added in *Teledyne*).

On the record before the court, judicial estoppel does not bar Bay Mills from asserting that this Court lacks jurisdiction under 25 U.S.C. § 2710(d)(A)(7)(ii). These two parties were involved in prior litigation. In 1999, Bay Mills sued Little Traverse Bay, challenging whether the Little Traverse Bay's casino, the forerunner of the casino in Petoskey, was on Indian land. Bay Mills sought a preliminary injunction under 25 U.S.C. § 2710(d)(7)(A)(ii) and asked the court to shut down the casino because it was not on "Indian land." (Little Traverse Bay Reply Ex. 2 - Bay Mills

Brief in Support of Motion for Preliminary Injunction in 5:99-cv-88.) The court issued the injunction and concluded that it had jurisdiction under the statute. (Little Traverse Bay Br. Ex. 7 - *Bay Mills Indian Cmty. v. Little Traverse Bay Band of Odawa Indians*, No. 5:99-cv-88 (W.D. Mich. Aug. 30, 1999) Bell, J.) (opinion)). Assuming, for the sake of argument only, that the statements made in the prior litigation are applicable here, Bay Mills' assertions were not factual statements made under oath. Rather, Bay Mills' was asserting a legal conclusion about whether the land where Little Traverse Bay's casino was located was on Indian land. Bay Mills has made no contradictory factual assertions under oath here.

2. Indian Lands

Congress enacted the Indian Gaming Regulatory Act ("IGRA") in 1988 to establish a statutory basis for the operation and regulation of gaming activities by Indian tribes. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 48 (1996). The IGRA authorizes three classes of gaming activities. *Id.* Class III, the most heavily regulated of the three classes, is defined as all forms of gaming that are not class I or class II, and generally includes such things as slot machines, table games, dog racing, and lotteries. *Id.* IGRA authorizes an Indian tribe to allow class III gaming on "Indian lands", only under certain circumstances. 25 U.S.C. § 2710(d)(1). IGRA defines the term "Indian land" to mean (1) land that is part of a reservation, (2) land held in trust by the United States for the benefit of an Indian tribe, or (3) restricted fee lands.[6] 25 U.S.C. § 2703(4). The

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[6] IGRA defines "Indian lands" as

National Indian Gaming Commission ("NIGC") has promulgated regulations that include the same meaning of the term "Indian lands."[7] 25 C.F.R. § 502.12. The Bay Mills' gaming compact allows the Tribe to conduct class III gaming on "Indian lands." (Little Traverse Bay Br. Ex. 2 - Bay Mills Gaming Compact Sec. 1(C).) The Bay Mills compact defines "Indian lands" as

> (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.

(Bay Mills Gaming Compact Sec. 2(B).)

> (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.

[7] The NIGC was created by the IGRA, 25 U.S.C. § 2704, and has the power to promulgate regulations necessary to implement its duties, 25 U.S.C. § 2706(b)(10).

In order to succeed on the merits, Little Traverse Bay must establish that the Bay Mills' Vanderbilt Casino is not on "Indian land." Neither party asserts the Vanderbilt Tract is part of the Bay Mills reservation. Bay Mills acknowledges the Vanderbilt Tract is not held in trust. (Bay Mills Resp., 9.) Therefore, in order for the Vanderbilt Tract to be on "Indian land", the land must be land held in restricted fee. In addition, Bay Mills must have jurisdiction over the tract and it must exercise governmental power over the tract. *See Kansas v. United States*, 249 F.3d 1213, 1228 (2001).

Little Traverse Bay has clearly established a substantial likelihood of success on the merits. Little Traverse Bay asserts the statutory language of MILCSA § 107(a)(3) neither authorizes the purchase of the Vanderbilt Tract nor requires that any such land purchase be held in restricted fee status. If either assertion is true, the Vanderbilt Tract is not on Indian land and the Vanderbilt Casino is operating illegally. The Court agrees with Little Traverse Bay on its first assertion, that MILCSA does not authorize Bay Mills to purchase the Vanderbilt Tract from the earnings in the Land Trust. As a result, the Court need not determine whether land purchases authorized by MILCSA are necessarily held in restricted fee.[8]

In situations requiring statutory construction, federal courts being by considering the language of the statute at issue, here MILCSA § 107(a)(3). *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450

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[8] The parties dispute whether the phrase "held as Indian lands are held" requires that any land purchased by the earning of the Land Trust be held in restricted fee. *See* MILCSA § 107(a)(3).

(2002); *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989). "The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart*, 534 U.S. at 450 (internal quotation marks and citation omitted). "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). When no statutory definitions exist, courts may consult dictionaries for guidance on the plain meaning of the statute. *Appoloni v. United States*, 450 F.3d 185, 199 (6th Cir. 2006) (citations omitted); *see, e.g., Ransom v. FIA Card Servs., N.A.*, ___ U.S. ___, 131 S.Ct. 716, 724 (2011) (consulting dictionaries to determine the plain, ordinary meaning of "applicable"); *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508-09 (1981) (relying on dictionary definitions for the plain meaning of the word "feasible"); *Franklin*, 619 F.3d at 614 (consulting dictionaries for the plain meaning of "clothes").

Section 107(a)(3) authorizes the earnings of the Land Trust to be used for two specific purposes: (1) improvements on tribal land and (2) the consolidation and enhancement of tribal landholdings. Bay Mills does not suggest or argue that the Vanderbilt Tract constitutes an "improvement on tribal land." Bay Mills defends the purchase as authorized by the second purpose. In the context of this provision, the statutory language has a plain and obvious meaning. The word

"consolidate" means "to bring together or unify."[9] The word "enhance" means "to improve or make greater" or "to augment."[10] Obviously, the purchase of the Vanderbilt Tract is an enhancement of tribal landholdings, as the additional land augmented, or made greater, the total land possessed by Bay Mills. However, the statute does not authorize every enhancement. The statute uses the conjunction "and" between the word "consolidation" and the word "enhancement." The use of the word "and" cannot be ignored. *See Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("It is, however, a cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.'") (citations omitted). In order for the purchase of land to be an "enhancement" authorized by the § 107(a)(3), the purchase must also be a "consolidation." The statute requires any land purchase to be *both* a consolidation

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[9] *See* American Heritage Dictionary 403 (3d ed. 1996) (defining "consolidate" as "to unite into one system or whole; combine"); Black's Law Dictionary 327 (8th ed. 2004) (defining "consolidate" as "[t]o combine or unify into one mass or body"); Webster's New Universal Unabridged Dictionary 434 (2d ed. 2003) (defining "consolidate" as "to bring together (separate parts) into a single or unified whole; unite; combine"); The word "consolidate" is the verb form of the noun "consolidation." To be for the purpose of "consolidation", the purchase of land must "consolidate" tribal landholdings.

[10] *See* American Heritage Dictionary 611 (3d ed. 1996) (defining "enhance" as "[t]o make greater, as in value, beauty, or reputation; augment"); Black's Law Dictionary 570 (8th ed. 2004) (defining "enhancement" as "[t]he act of augmenting"); Webster's New Collegiate Dictionary 375 (1979) (defining "enhance" as "to make greater (as in value, desirability, or attractiveness)). The word "enhance" the verb form of the noun "enhancement". To be for the purpose of "enhancement", the land purchase must augment, improve or enlarge the tribal landholdings.

and an enhancement. Under § 107(a)(3), Bay Mills may use the earnings from the land trust to acquire additional land next to, or at least near, its existing tribal landholdings. The statute does not allow Bay Mills to create a patchwork of tribal landholdings across Michigan.

Bay Mills arguments to the contrary are not persuasive. Bay Mills insists that courts have read the word "and" to mean "or" and the word "or" to mean "and," citing *De Sylva v. Ballentine*, 352 U.S. 570, 573 (1956) and *United States v. Moore*, 613 F.2d 1029, 1040 n. 86 (D.C. Cir. 1979). (Bay Mills Resp., 18.) Indeed, in both opinions, the word "or" was interpreted to mean "and". The usefulness of those two opinions is limited to situations where the statute is ambiguous. In *De Sylva*, the Court noted the statute "is hardly unambiguous" and the issue raised in the litigation was "not solved by literal application of words as they are 'normally' used." 352 U.S. at 573. The Court resolved the ambiguity caused by the use of the word "or" by looking to the surrounding provisions. *Id.* at 573-74. Similarly, in *Moore*, the court began by noting that "[n]ormally, of course, 'or' is to be accepted for its disjunctive connotation, and not as a word interchangeable with 'and.'" 613 F.2d at 1040. The court went on to say that the "canon" was not "inexorable" and that sometimes "a strict grammatical construction will frustrate legislative intent." *Id.* The court described, in some detail, its frustration with finding the appropriate interpretation of the statutory provision. *Id.* at 1041. Because of its concerns with the language, the court found it appropriate to examine the legislative history. *Id.* ("With a literal interpretation of Section 1623(d) on this score thus uncomfortably

dubious, we turn to the legislative history for assistance.") Because § 107(a)(3) is unambiguous, there is no need to either depart from the ordinary rules of construction or resort to the provision's legislative history.[11]

Bay Mill's interpretation of the first sentence of § 107(a)(3), that land may be purchased to either enhance or consolidate tribal landholdings, renders the word "consolidation" nugatory or mere surplusage.[12] Every purchase of land from the earning of the Land Trust is an enhancement of tribal landholdings. It does not matter if the tract is next to the Bay Mills reservation in the Upper Peninsula or if the tract is in Detroit. Because every possible purchase of land would be an enhancement, there would be no need for the alternative consideration, a purchase that consolidates tribal landholdings. Thus, Bay Mills' interpretation of the statute fails because it does not give meaning, where possible, to each and every word in the statute. By interpreting the word "and" to mean "or", the words "consolidation" and "and" loses any significance in the statutory provision.

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[11] After this litigation was initiated, the Department of the Interior and the NIGC issued opinions concerning the proper interpretation of MILCSA § 107(a)(3). (ECF Nos. 7-1 and 7-2.) The parties disagree about the weight the Court should assign to these two documents. Because the Court finds the statutory provision is not ambiguous, resort to these two opinions is not necessary.

[12] As part of its defense of its interpretation, Bay Mills claims the Executive Council of the Tribe, as trustee of the Land Trust, MICSCA § 107(a)(2), acted within the discretion afforded it under the statute, and approved the purchase of the Vanderbilt Tract. The Executive Council's discretion is not unfettered; the Executive Council must exercise its discretion to approve land purchases within the parameters established by the statute.

Bay Mills reliance on the Indian canons of statutory construction does not compel a different conclusion. Under the Indian canons of construction, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Where the statutory language is not ambiguous, this canon does not apply. *See Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 555 (1987); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist, ...").

B. Irreparable Harm

The parties dispute whether Little Traverse Bay currently suffers any economic harm and whether Little Traverse Bay will suffer any economic harm in the future. Little Traverse Bay argues the Vanderbilt Casino harms the Petoskey Casino through unfair competition, loss of customer goodwill and by competing for the same gambling revenue streams. In an analysis of the economic impact of Vanderbilt Casino on the Petoskey Casino, Alea Advisors concludes the Pestosky Casino will "begin to operate at a loss." (Alea Advisors Report, 29.) Bay Mills challenges both the assumptions and the methodology in the Alea Advisors Report. (Bay Mills Resp. Ex. 4 - Jacob Miklojcik Dec.)

"A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Overstreet*, 305 F.3d at 578 (citing *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511

(6th Cir. 1992)). When evaluating the harm alleged to occur if an injunction is not granted, courts should consider three factors: (1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided. *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). A loss of market share has been held to constitute irreparable harm. *See Novartis Consumer Health, Inc. v. Johnson & Johnson - Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) ("In a competitive industry where consumers are brand loyal, we believe the loss of market share is a 'potential harm which cannot be redressed by a legal or an equitable remedy following a trial.'") (citation omitted).

Little Traverse Bay has established that it has and will suffer irreparable harm.[13] Little Traverse Bay has established that Bay Mills' Vanderbilt Casino targets, through advertising, customers of the Petoskey Casino. Bay Mills offers "Free Play" dollars for new customers to its casino who show rewards cards from the Petoskey Casino. (Little Traverse Bay Reply, Ex. A - David Wolf Dec. ¶¶ 8-11.) Mr. Wolf, a general manager at the Odawa Casino, estimates the Petoskey Casino may lose between $250,000 and $400,000 per month to the Vanderbilt Casino's 84 slot machines. (*Id.* ¶ 12.) Bay Mills' own expert, Jacob Miklojcik, concludes, with the current 84 slot machines at the Vanderbilt Casino, and using an "optimistically high average per machine per day figure," "it is difficult to believe that more than

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[13] For the reasons identified here, Little Traverse Bay has also established standing. Bay Mills argues Little Traverse Bay does not have standing to sue because it has not suffered any concrete injury fairly traceable to the Vanderbilt Casino.

25% (or $1.5 million) will be shifted from spending otherwise flowing to the [Petoskey] Casino." (Miklojcik Dec. ¶ 23.)

Additionally, as a federally recognized Indian tribe, Bay Mills is immune from suit for damages. *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territory. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.") (internal citation and citation omitted). "Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Chamber of Commerce of United States v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010); *see QEP Field Servs. Co. v. Ute Indian Tribe of Uintah and Ouray Reservation*, 740 F.Supp.2d 1274, 1283-84 (D. Utah 2010) (finding irreparable harm for the purpose of a preliminary injunction because, under the agreement at issue, the defendant tribe had not waived its immunity from suit for money damages).

C. Impact of an Injunction on Others

Under this third factor, the plaintiff must show that the balance of the harm weighs in favor of granting an injunction. *See Winter,* 129 S.Ct. at 374. In other words, "courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 376 (quoting *Amoco Prod.*, 480 U.S. at 542). The balance of harms do not clearly favor either side. Gamblers will spend their money at either of the

two casinos. If an injunction is not granted, gamblers will continue to patronize the Vanderbilt Casino and Bay Mills and the Vanderbilt community will enjoy the resulting economic benefits, while the Petoskey Casino and the surrounding community will be deprived of those revenue streams. If the injunction is granted, gamblers will shift their patronage to the Petoskey Casino and Little Traverse Bay and the Petoskey community will enjoy the resulting economic benefits, while the Vanderbilt Casino and the surrounding community will be deprived of those same dollars. As the Court has already concluded, Little Traverse Bay has established a likelihood of success on the merits. Accordingly, the Vanderbilt Casino will likely have to be shut down at some point, tilting the balance of the harm in the favor of granting a preliminary injunction.

D. Public Interest

The public interest favors the issuance of a preliminary injunction. First, the continued operation of the Vanderbilt Casino deprives the State of income. Under its compact with the State, Little Traverse Bay pays the State money based, in part, on the revenue generated by electronic games of chance. (Little Traverse Bay Ex. 21 - Second Amendment to Gaming Compact Sec. 17.) Bay Mills' compact has no such similar provision. (Bay Mills Gaming Compact.) Second, on this record, this Court has already concluded Little Traverse Bay has a likelihood of success on the merits. The Court finds that Bay Mills is operating the Vanderbilt Casino illegally. As a result, through the continuing operation of the Vanderbilt Casino, Bay Mills invites the public to violate Michigan's prohibition on attending gambling houses,

a misdemeanor. *See* Mich. Compl. Laws § 750.309. The public has an interest in not being enticed to violate the law.

III. CONCLUSION

Little Traverse Bay has established a factual and legal basis for this Court to issue a preliminary injunction against the continued operation of Bay Mills' Vanderbilt Casino. For the purpose of this motion, the Court has jurisdiction over the lawsuit and Little Traverse Bay has established standing. Little Traverse Bay has demonstrated a likelihood of success on the merits. MILCSA did not authorize Bay Mills to purchase land in Vanderbilt, Michigan. Such purchase is not a "consolidation and enhancement of tribal landholdings." Therefore, the Vanderbilt Casino is not on Indian land. Little Traverse Bay has established irreparable harm. The evidence in the record demonstrates that the Vanderbilt Casino directly competes for gambling dollars with the Petoskey Casino and that gamblers who were previously going to the Petoskey Casino are now going to the Vanderbilt Casino. Because Bay Mills is immune from suit for damages, Little Traverse Bay has no remedy to recover that revenue. The balance of harms do not clearly favor either party. To the extent that Little Traverse Bay has established a likelihood of success, the third factor weighs in favor of granting an injunction. Finally, the public's interest in the State's share of revenue from electronic games at the Petoskey Casino and the public's interest in the enforcement of State law favor granting the injunction.

ORDER

For the reasons provided in the accompanying opinion, **IT IS HEREBY ORDERED**

1. Little Traverse Bay Band of Odawa Indian's motion for a preliminary injunction (ECF No. 3 in 1:10-cv-1278) is **GRANTED.**

2. Pending a final decision on the merits or further order of this Court, Bay Mills Indian Community is hereby **PRELIMINARILY ENJOINED** from operating a casino on the land it purchased in Vanderbilt, Michigan using funds from the Michigan Indian Land Claim Settlement Act Land Trust. Bay Mills shall cease operating slot machines and other electronic games of chance or any other gaming activities currently offered on its property in Vanderbilt, Michigan. Bay Mills shall not offer any other gaming activities on its property in Vanderbilt, Michigan, that may otherwise be allowed under its gaming compact with the State of Michigan.

3. Bay Mills shall comply with this order and shall cease its operation of the Vanderbilt Casino no later than 12:00 p.m., noon, on Tuesday, March 29, 2011.

Date: March 29, 2011 (9:26am)

/s/ Paul L. Maloney
Paul L. Maloney
Chief United States District Judge

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STATE OF MICHIGAN,
Plaintiff,

Case No. 1:10-cv-01273-PLM

v.

HONORABLE
PAUL L. MALONEY

BAY MILLS INDIAN COMMUNITY, et al.,
Defendant.

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,
Plaintiff,

Case No. 1:10-cv-01278-PLM

v.

BAY MILLS INDIAN COMMUNITY
Defendant.

BAY MILLS INDIAN COMMUNITY ANSWER TO AMENDED COMPLAINT OF THE STATE OF MICHIGAN

NOW COMES Defendant, Bay Mills Indian Community ("Bay Mills"), by and through its attorneys, and in answer to the Amended Complaint of the State of Michigan ("State") states as follows:

JURISDICTION

1. (a) Bay Mills denies the legal conclusions contained in Paragraph 1(a) of the Amended Complaint that this Court has subject matter jurisdiction under 28 U.S.C. §1331 and federal common law.

(b) Bay Mills denies the legal conclusions contained in Paragraph 1(b) of the Amended Complaint that this Court has subject matter jurisdiction based on 25 U.S.C. §2710(d)(7)(A)(ii).

(c) Bay Mills denies the legal conclusions contained in Paragraph 1(c) of the Amended Complaint that this Court has subject matter jurisdiction under 28 U.S.C. §1367.

(d) Bay Mills denies the legal conclusions contained in Paragraph 1(d) that this Court has subject matter jurisdiction under 28 U.S.C. §2201.

PARTIES

2. Bay Mills admits the allegations contained in Paragraph 2.

3. Bay Mills admits the allegations contained in Paragraph 3.

4. Bay Mills admits the allegations contained in Paragraph 4 that the Bay Mills Indian Community Tribal Gaming Commission ("Commission") is a governmental subdivision of Bay Mills created by Section 4 of the Bay Mills Gaming Ordinance.

5. Bay Mills admits the allegations contained in Paragraph 5

6. Bay Mills admits the allegations contained in Paragraph 6.

7. Bay Mills admits the allegations contained in Paragraph 7.

8. Bay Mills admits the allegations contained in Paragraph 8.

9. Bay Mills admits the allegations contained in Paragraph 9.

10. Bay Mills admits the allegations contained in Paragraph 10.

VENUE

11. Bay Mills admits that it has Tribal offices in Chippewa County, Michigan and that venue is appropriate.

GENERAL ALLEGATIONS

12. Bay Mills admits the allegations contained in Paragraph 12.

13. The allegations of Paragraph 13 set forth conclusions of law to which no response is required. To the extent that a response is deemed required, the Gaming Compact and 25 U.S.C. §2703(8) speak for themselves and must be read in their entirety and in context.

14. The allegations of Paragraph 14 set forth conclusions of law to which no response is required. To the extent that a response is deemed required, the

Gaming Ordinance speaks for itself and must be read in its entirety and in context.

15. The allegations contained in Paragraph 15 set forth conclusions of law to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, the Gaming Ordinance speaks for itself.

16. Bay Mills admits the allegations contained in Paragraph 16.

17. The allegations contained in Paragraph 17 set forth conclusions of law to which no response is required as such conclusions are exclusively within the province of the court.

18. Bay Mills admits the allegations contained in Paragraph 18 that it conducts Class III gaming in casinos it operates in Chippewa County, but denies the allegation contained therein that those facilities are the only ones operated by Bay Mills on Indian lands.

19. Bay Mills admits the allegations contained in Paragraph 19.

20. Bay Mills admits the allegations contained in Paragraph 20.

21. Bay Mills admits the allegations contained in Paragraph 21.

22. The allegations contained in Paragraph 22 state legal conclusions to which no response is required, as such are exclusively within the province of the court.

23. Bay Mills admits the allegations contained in Paragraph 23.

24. Bay Mills admits the allegations contained in Paragraph 24.

25. Bay Mills denies the allegations contained in Paragraph 25, but to the extent that they state legal conclusions, no response is made as legal conclusions are exclusively within the province of the court.

26. Bay Mills admits the allegations contained in Paragraph 26.

27. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 27.

28. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 28.

29. Bay Mills admits the allegations contained in Paragraph 29 that a letter was sent on December 16, 2010, by an Assistant Attorney General for the State of Michigan, and denies any other allegations contained in said paragraph and leaves the State to its proofs.

30. Bay Mills admits the allegations contained in Paragraph 30.

31. The allegations contained in Paragraph 31 state legal conclusions to which no response is required. To the extent that a response is required, Bay Mills denies the allegations that Bay Mills has waived its sovereign immunity by entering into the Compact with the State.

32. The allegations contained in Paragraph 32 state legal conclusions to which no response is required. To the extent that a response is required, Bay Mills denies the allegations that its sovereign immunity was abrogated by Congress for the purposes of this legal action.

33. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 33.

34. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 34.

COUNT I—VIOLATION OF COMPACT SECTION 4(H)

35. Bay Mills hereby adopts and incorporates herein by reference Paragraphs 1-34 of this Answer as if set forth fully as Bay Mills' response to Paragraph 35.

36. The allegations contained in Paragraph 36 state legal conclusions to which no response is required. To the extent that a response is required, Bay Mills states that its Compact speaks for itself.

37. The allegations contained in Paragraph 37 state legal conclusions to which no response is required. To the extent that a response is required, Bay Mills states that its Compact speaks for itself.

38. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 38.

39. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 39.

40. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 40.

41. Bay Mills denies the allegations of mixed law and fact contained in Paragraph 41.

42. The allegations contained in Paragraph 42 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, 25 U.S.C. §2710(d)(7)(A)(ii) actually states: "The United States district courts shall have jurisdiction over any cause of action initiated by a State or Indian tribe to enjoin a class III gaming facility *located on Indian lands* and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect." [emphasis added]

COUNT II—VIOLATION OF COMPACT SECTION 4(C)

43. Bay Mills hereby adopts and incorporates herein by reference Paragraphs 1-42 of this Answer as if set forth fully as Bay Mills' response to Paragraph 43.

44. As its response to Paragraph 44, Bay Mills states that the Section 4(C) of the Compact speaks for itself.

45. The allegations contained in Paragraph 45 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court.

46. The allegations contained in Paragraph 46 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, 18 U.S.C. §1955 speaks for itself and must be read in its entirety and in context.

47. The allegations contained in Paragraph 47 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, 18 U.S.C. §1955 speaks for itself and must be read in its entirety and in context.

48. The allegations contained in Paragraph 48 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, M.C.L. 750.301 *et seq.* and M.C.L. 432.201 *et seq.* speak for themselves and must be read in their entirety and in context.

49. Bay Mills admits the allegations contained in Paragraph 49, to the extent that these allegations reference Bay Mills' operations of its Vanderbilt casino before it was closed by order of this court.

50. Bay Mills admits the allegations contained in Paragraph 50.

51. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 51.

52. The allegations contained in Paragraph 52 set forth conclusions of law to which no response is required, as such conclusions are exclusively within the

province of the court. To the extent that a response is required, §5.5(A) of the Gaming Ordinance speaks for itself and the Ordinance must be read in its entirety and in context.

53. The allegations contained in Paragraph 53 set forth conclusions of law to which no response is required, as such conclusions are exclusively within the province of the court. To the extent that a response is required, §5.5(A) of the Gaming Ordinance speaks for itself and must be read in its entirety and in context.

54. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 54.

55. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 55.

56. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 56.

57. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 57.

58. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 58.

59. The allegations contained in Paragraph 59 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, 25 U.S.C. §2710(d)(7)(A)(ii) actually states: "The United States district courts shall have jurisdiction over any cause of action initiated by a State or Indian tribe to enjoin a class III gaming facility *located on Indian lands* and conducted in violation of any Tribal-

State compact entered into under paragraph (3) that is in effect." [emphasis added]

COUNT III—VIOLATION OF IGRA

60. Bay Mills hereby adopts and incorporates herein by reference paragraphs 1-59 of this Answer as if set fully forth as Bay Mills' response to Paragraph 60.

61. The allegations contained in Paragraph 61 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, 25 U.S.C. §2710(d) speaks for itself and must be read in its entirety and in context.

62. As its response to the allegations contained in Paragraph 62, Bay Mills states that IGRA speaks for itself.

63. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 63.

64. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 64.

65. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 65.

66. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 66.

67. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 67.

68. The allegations contained in Paragraph 68 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, 25 U.S.C. §2710(d)(7)(A)(ii) actually states: "The United States district courts shall have jurisdiction over any cause of action initiated by a State or Indian tribe to enjoin a class III gaming facility *located on Indian lands* and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect." [emphasis added]

COUNT IV—VIOLATION OF FEDERAL COMMON LAW

69. Bay Mills hereby adopts and incorporates herein by reference Paragraphs 1-68 of this Answer as if set fully forth as Bay Mills' response to Paragraph 69.

70. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 70.

71. The allegations contained in Paragraph 71 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court. To the extent that a response is required, Bay Mills denies the allegation that its operation of the Vanderbilt casino was not in conformance with the requirements of IGRA.

72. The allegations contained in Paragraph 72 state legal conclusions to which no response is required as such conclusions are exclusively within the province of the court.

73. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 73.

74. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 74.

75. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 75.

COUNT V—VIOLATION OF MICHIGAN GAMING CONTROL AND REVENUE ACT

76. Bay Mills hereby adopts and incorporates herein by reference Paragraphs 1—75 of this Answer as if set fully forth as Bay Mills' response to Paragraph 76.

77. As its response to the allegations contained in Paragraph 77, Bay Mills states that M.C.L. 432.220 speaks for itself and must be read in its entirety and in context.

78. Bay Mills admits the allegations contained in Paragraph 78.

79. Bay Mills admits the allegations contained in Paragraph 79.

80. Bay Mills admits the allegation in Paragraph 80 that gambling game equipment was used in the Vanderbilt casino, but denies the allegation that the equipment was used for unauthorized gambling.

81. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 81.

COUNT VI–NUISANCE

82. Bay Mills hereby adopts and incorporates herein by reference Paragraphs 1—81 of this Answer as if set fully forth as Bay Mills' response to Paragraph 82.

83. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 83.

84. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 84.

85. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 85.

86. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 86.

87. Bay Mills denies the allegations of mixed fact and law contained in Paragraph 87.

AFFIRMATIVE DEFENSES

88. As a federally recognized Indian Tribe, Bay Mills enjoys sovereign immunity from unconsented suit and that immunity has not been waived or abrogated. For this reason, the claims must be dismissed against Bay Mills as required by Fed.R.Civ.P. 12(b)(1) and 12(h)(3).

89. Bay Mills is a necessary party under Fed.R.Civ.P. 19. It has a substantial interest in the subject matter of this action, but cannot be joined because it enjoys sovereign immunity from unconsented suit and that immunity has not been waived or abrogated. This action cannot proceed

without Bay Mills, requiring dismissal of the entire case.

90. The State fails to state a claim upon which relief can be granted.

91. This Court lacks subject matter over the State's claims.

92. To the extent that its claims relate to interpretation of the law of the Bay Mills Indian Community, the State has failed to exhaust its remedies in the Bay Mills Indian Community. Tribal Court.

Respectfully submitted,
BAY MILLS INDIAN COMMUNITY

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2011, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

By /s/ Chad P. DePetro
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN,

Plaintiff,

Case No. 1:10-cv-01273-PLM
Case No. 1:10-cv-01278-PLM

v.

Honorable Chief
Judge Paul L. Maloney

AMENDED COMPLAINT

THE BAY MILLS INDIAN
COMMUNITY, BAY MILLS
INDIAN COMMUNITY
TRIBAL GAMING COMMISSION,
INDIVIDUAL UNKNOWN MEMBERS OF
THE BAY MILLS INDIAN
COMMUNITY TRIBAL GAMING
COMMISSION in their official
capacity, JEFFREY PARKER,
CHAIRMAN in his official capacity,
TERRY CARRICK, VICE CHAIRMAN,
in his official capacity,
RICHARD LEBLANC, SECRETARY
in his official capacity, JOHN
PAUL LUFKINS, TREASURER
in his official capacity and
BUCKO TEEPLE, COUNCIL
PERSON in his official capacity.

Defendants.

AMENDED COMPLAINT

Plaintiff State of Michigan brings the following Amended Complaint for declaratory and injunctive relief, and for an accounting and forfeiture:

JURISDICTION

1. The Court has federal subject matter jurisdiction of this action pursuant to:

a) 28 U.S.C. § 1331, as this Complaint alleges violations of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.*, and federal common law;

b) 25 U.S.C. § 2710(d)(7)(A)(ii), as Plaintiff is a State which seeks to enjoin gaming activity conducted in violation of a tribal-state compact;

c) 28 U.S.C. § 1367 as this Complaint alleges violations of State antigambling and other laws; and

d) 28 U.S.C. § 2201, as this Complaint also seeks a declaratory judgment.

PARTIES

2. Plaintiff is the State of Michigan (State).

3. Defendant Bay Mills Indian Community (Bay Mills) is a federally recognized Indian tribe.

4. Defendant Bay Mills Indian Community Tribal Gaming Commission (Tribal Commission) is a governmental subdivision and arm of Bay Mills created by Section 4 of the Bay Mills Gaming Ordinance

(Gaming Ordinance) (excerpts from most recent version of amended Gaming Ordinance as approved by the National Indian Gaming Commission on September 15, 2010, attached as Exhibit C) to operate for the sole benefit and interest of Bay Mills.

5. Individual unknown Members of the Bay Mills Indian Community Tribal Gaming Commission are officials of Bay Mills appointed by the Bay Mills Executive Council pursuant to the Gaming Ordinance, § 4.11(A) (Tribal Officials). Plaintiff does not know the names of the individuals who have been on the Gaming Commission during times relevant to this action, but will substitute those names as they become known through discovery.

6. Jeffrey Parker is Chairman of the Executive Council for Bay Mills.

7. Terry Carrick is Vice-Chair of the Executive Council for Bay Mills.

8. Richard LeBlanc is Secretary of the Executive Council for Bay Mills.

9. John Paul Lufkins is Treasurer of the Executive Council for Bay Mills.

10. Bucko Teeple is a Council Person on the Executive Council for Bay Mills (Messrs. Parker, Carrick, LeBlanc, Lufkins and Teeple referred to collectively as "Council Members.")

VENUE

11. Defendant Bay Mills has its Tribal offices and reservation in Chippewa County, in the Upper Peninsula of Michigan. Venue is therefore appropriate in this Court pursuant to 28 U.S.C. § 1391(b)(1).

GENERAL ALLEGATIONS

12. On or about August 20, 1993, John Engler, the Governor of the State of Michigan at that time, entered into a tribal-state gaming compact (the "Bay Mills compact") with Bay Mills. A true and correct copy of this compact is attached as Exhibit A.

13. The Bay Mills compact permits Bay Mills to operate casino games, also known as "Class III gaming" (which is defined in IGRA, 25 U.S.C. § 2703(8)), only on "Indian lands" as defined in Section 2(B) of the compact. See Exhibit A.

14. The Gaming Ordinance permits Bay Mills to conduct Class III gaming only on "Indian lands" as defined in Section 2.30 of the Gaming Ordinance. See Exhibit C.

15. The Gaming Ordinance only permits the operation of casinos owned by Bay Mills. Exhibit C, § 5.3(C).

16. Bay Mills created the Tribal Commission when it adopted its Gaming Ordinance which authorizes the Tribal Commission to approve and regulate all casinos operated by Bay Mills.

17. The Tribal Commission has the authority to close Tribally owned casinos that violate federal and/or Tribal law.

18. Since the Bay Mills compact was signed, Bay Mills has conducted Class III gaming in one or more casinos it operates on Indian lands in Chippewa County in the Upper Peninsula.

19. On or about November 3, 2010, ostensibly with the approval of the Tribal Commission, Bay Mills began operating a casino in a renovated building located in or near the village of Vanderbilt (the "Vanderbilt casino") in Otsego County in the Lower Peninsula of Michigan.

20. The Bay Mills Executive Council is authorized to take certain actions on behalf of Bay Mills.

21. The Bay Mills Executive Council, through the Tribal Council Members, made the decision to open and operate the Vanderbilt Casino.

22. The land on which the Vanderbilt casino is being operated is not part of the Bay Mills reservation.

23. The land on which the Vanderbilt casino is being operated was acquired by Bay Mills after October 17, 1988.

24. The land on which the Vanderbilt casino is being operated was not contiguous to the boundaries of the Bay Mills reservation on October 17, 1988.

25. The Vanderbilt casino is approximately 100 miles by road from the Bay Mills reservation.

26. The title to the land on which the Vanderbilt casino is being operated has not been taken into trust by the United States for the benefit of Bay Mills.

27. The land on which the Vanderbilt casino is being operated is not subject to restriction by the United States against alienation.

28. Bay Mills does not exercise governmental power over the land on which the Vanderbilt casino is being operated.

29. After consultations between Bay Mills and the State of Michigan failed to resolve the dispute giving rise to this action, the State sent a letter on December 16, 2010 to Bay Mills demanding that Bay Mills immediately cease the operation of all Class III gaming at the Vanderbilt casino. A true and correct copy of this letter is attached as Exhibit B.

30. Despite this demand, Defendants have refused to cease Class III gaming at the Vanderbilt casino.

31. By entering into the Tribal-State compact, Bay Mills waived its sovereign immunity for purposes of this legal action which seeks injunctive and declaratory relief to remedy violations of the Bay Mills compact and federal law.

32. Bay Mills' sovereign immunity was abrogated by Congress for purposes of this legal action when Congress adopted IGRA.

33. Bay Mills waived any sovereign immunity of the Tribal Commission for actions not in respect of lands within the exterior boundaries of Bay Mills'

Reservation when it adopted the Gaming Ordinance, including specifically §§ 4.7 and 4.18(Y).

34. The Tribal Commission and Bay Mills are alter egos, as evidenced in part by Bay Mills' absolute control over the Tribal Commission (see Gaming Ordinance generally); therefore this waiver also extends to Bay Mills.

COUNT I—VIOLATION OF COMPACT SECTION 4(H)

35. Plaintiff incorporates paragraphs 1-34 above as if fully stated in Count I.

36. Section 4(H) of the Bay Mills compact states: "The Tribe shall not conduct any Class III gaming outside of Indian lands."

37. Section 2(B) of the Bay Mills compact defines "Indian lands" to mean: "(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."

38. For the reasons stated in paragraphs 22-28 above, the land on which the Vanderbilt casino is situated is not "Indian lands" as defined in the Bay Mills compact.

39. The operation of Class III gaming at the Vanderbilt casino therefore violates and is a breach of the Bay Mills compact.

40. As the Class III gaming conducted at the Vanderbilt casino in violation of the Bay Mills compact violates Tribal laws (see Count II below), the laws of the State of Michigan, including but not limited to M.C.L. 750.301 *et seq.* (see Count II below), M.C.L. 432.201 *et seq.* (see Count V below) and federal anti-gambling statutes (18 U.S.C. § 1955), it harms the public interest and the balance of harm caused by this Class III gaming weighs heavily in favor of the State.

41. There is no adequate remedy at law for this violation by Defendants of the Bay Mills compact which causes the State irreparable injury.

42. IGRA vests this Court with jurisdiction to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C. § 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay Mills compact, (2) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT II—VIOLATION OF COMPACT SECTION 4(C)

43. Plaintiff incorporates paragraphs 1-42 above as if fully stated in Count II.

44. Section 4(C) of the Bay Mills compact states:

> 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 the 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. (Emphasis added.)

45. The violation of IGRA, 25 U.S.C. § 2710(d)(1), set forth in Count III below, therefore also violates Section 4(C) of the Bay Mills compact.

46. 18 U.S.C. § 1955 makes it illegal for any person to conduct, finance, manage, supervise or own all or part of an illegal gambling business.

47. An illegal gambling business is defined in 18 U.S.C. § 1955 as a gambling business which is a violation of state law in which it is conducted, involves five or more persons and remains in business for more than 30 days, and grosses more than $2,000 in any single day.

48. Operation of the Vanderbilt casino violates Michigan's anti-gambling statutes, including M.C.L. 750.301 *et seq.* and M.C.L. 432.201 *et seq.*

49. On information and belief, the Vanderbilt casino involves more than five people and grosses more than $2,000 in a single day.

50. Before it was closed by Order of this Court, the Vanderbilt casino was in business more than 30 days.

51. Operation of the Vanderbilt casino therefore violates applicable federal antigambling laws, including 18 U.S.C. § 1955, and therefore violates Section 4(C) of the Bay Mills compact.

52. Section 5.5(A) of the Gaming Ordinance restricts operation of any Tribal casino to Indian lands which are defined in Section 2.30 of the Gaming Ordinance to mean: "(A) all lands within the limits of the Reservation of the Bay Mills Indian Community; and (B) all lands title to which is either held in trust by the United States for the benefit of the Bay Mills Indian Community or held by the Bay Mills Indian Community subject to restriction by [the] United States against alienation and over which the Tribe exercises governmental power."

53. Section 5.5(A) of the Gaming Ordinance also restricts operation of any Tribal casino to Indian lands that comply with Section 20 of IGRA, 25 U.S.C. § 2719.

54. For the reasons stated in paragraphs 22-28 above, the land on which the Vanderbilt casino is situated is not "Indian lands" as defined in the Gaming Ordinance.

55. For the reasons set forth in paragraph 66 below, the Vanderbilt casino does not comply with the requirements of 25 U.S.C. § 2719.

56. The operation of Class III gaming at the Vanderbilt casino therefore violates the Gaming Ordinance which is Tribal law and therefore violates Section 4(C) of the Bay Mills compact.

57. As the Class III gaming conducted at the Vanderbilt casino in violation of the Bay Mills compact violates Tribal laws, the laws of the State of Michigan and federal anti-gambling statutes, it harms the public interest and the balance of harm caused by this Class III gaming weighs heavily in favor of the State.

58. There is no adequate remedy at law for this violation by Bay Mills of its compact which causes the State irreparable injury.

59. IGRA vests jurisdiction with this Court to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C. § 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay Mills compact; (2) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino; and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT III—VIOLATION OF IGRA

60. Plaintiff incorporates paragraphs 1-59 above as if fully stated in Count III.

61. Section 2710(d)(1) of IGRA permits Class III gaming only on "Indian lands" as that term is defined

in IGRA, and only if conducted "in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) [25 U.S.C. §2710(d)(3)] that is in effect" and only if authorized by a Tribal ordinance that meets the requirements of IGRA [25 U.S.C. § 2710(d)(1)(A)].

62. IGRA defines "Indian lands" to mean: "(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."

63. Based on the facts alleged in paragraphs 22-28 above, the Class III gaming conducted by Bay Mills at the Vanderbilt casino is not being conducted on Indian lands and therefore violates IGRA.

64. The Class III gaming conducted by Defendants at the Vanderbilt casino also violates IGRA because, for the reasons stated in Counts I and II of this Complaint, this gaming is not being conducted "in conformance with" the Bay Mills compact.

65. The Class III gaming conducted by Defendants at the Vanderbilt casino also violates IGRA because, for the reasons stated in Count II of this Complaint, this gaming is not authorized by a duly enacted Tribal ordinance.

66. Finally, Class III gaming is prohibited pursuant to 25 U.S.C. § 2719 on the land on which the Vanderbilt casino is located, even if it is Indian lands,

because it was acquired by Bay Mills after October 17, 1988 and does not qualify for any of the exceptions described in 25 U.S.C. § 2719(b).

67. There is no adequate remedy at law for this violation by Defendants of IGRA which causes the State irreparable harm; since the operation of the Vanderbilt casino violates IGRA it cannot be in the public interest and the balance of harm of its continued operation weighs heavily in favor of the State.

68. IGRA vests jurisdiction with this Court to enjoin Class III gaming activities conducted in violation of any Tribal-State compact. 25 U.S.C. § 2710(d)(7)(A)(ii).

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino violates the Bay Mills compact; (2) declaring that the gaming at the Vanderbilt casino violates IGRA; (3) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino; and (4) granting Plaintiff such other relief as the Court deems appropriate.

COUNT IV—VIOLATION OF FEDERAL COMMON LAW

69. Plaintiff incorporates paragraphs 1-68 above as if fully stated in Count IV.

70. As set forth above, because it is not on Indian lands, operation of the Vanderbilt casino violates State anti-gambling laws.

71. The Defendants did not have authority under federal law to approve and operate a casino that does not conform with the requirements of IGRA and that violates State antigambling laws.

72. When a Tribe and/or Tribal representatives permit and operate a casino which exceeds the scope of their authority, they violate federal common law governing Indian Tribes.

73. As the Class III gaming conducted at the Vanderbilt casino in violation of federal common law also violates Bay Mills compact (see Counts I and II above), Tribal law (see Count II), the laws of the State of Michigan, including but not limited to M.C.L. 750.301 *et seq.* (see Count II), M.C.L. 432.201 *et seq.* (see Count V below), and federal anti-gambling statutes (18 U.S.C. § 1955) (see Count II), it harms the public interest and the balance of harm caused by this Class III gaming weighs heavily in favor of the State.

74. There is no adequate remedy at law for this violation by Defendants of federal common law which causes the State irreparable injury.

75. Because the licensing and continued operation of the Vanderbilt Casino violated the Gaming Ordinance which requires that licenses be issued only to gaming establishments that are located on Indian lands, Council Members that authorized and operate the casino, and the Tribal Officials that approved the license for the Vanderbilt Casino and allowed its continuing operation exceeded their authority under Tribal law and they are therefore subject to prospective relief Ordered by this Court.

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino exceeds the scope of Defendants' authority under federal law; (2) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino; and (3) granting Plaintiff such other relief as the Court deems appropriate.

COUNT V—VIOLATION OF MICHIGAN GAMING CONTROL AND REVENUE ACT

76. Plaintiff incorporates paragraphs 1-75 above as if fully stated in Count V.

77. M.C.L. 432.220 states in relevant part:

> In addition to other penalties provided for under this act, a person who conducts a gambling operation without first obtaining a license to do so . . . is subject to a civil penalty equal to the amount of gross receipts derived from wagering on the gambling games, whether unauthorized or authorized, conducted on that day as well as confiscation and forfeiture of all gambling game equipment used in the conduct of unauthorized gambling games.

78. Defendants did not first obtain a State-issued license before operating the Vanderbilt casino.

79. On information and belief, Defendants derived gross receipts from wagering at the Vanderbilt casino on some or all of the days it was operated before being closed by Order of this Court, in a total amount that

Plaintiff believes is in the range of at least hundreds of thousands of dollars.

80. Gambling game equipment was used in the conduct of unauthorized gambling games at the Vanderbilt casino.

81. The violation of M.C.L. 432.220 subjects the above-described gross receipts and gambling game equipment to forfeiture.

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order requiring (1) an accounting and forfeiture of all gross receipts obtained and gambling game equipment used by Defendants in violation of M.C.L. 432.220 and (2) granting Plaintiff such other relief as the Court deems appropriate.

COUNT VI—NUISANCE

82. Plaintiff incorporates paragraphs 1-81 above as if fully stated in Count VI.

83. As set forth above, any continued operation of the Vanderbilt casino is proscribed by law.

84. Any continued operation of the Vanderbilt casino would therefore be a public nuisance.

85. Defendants do not have authority to operate the Vanderbilt casino.

86. Any continued operation of the Vanderbilt casino harms the public interest and the balance of harm caused by such operation weighs heavily in favor of the State.

87. There is no adequate remedy at law for the continued operation of the Vanderbilt casino which causes the State irreparable injury.

WHEREFORE, Plaintiff respectfully requests that the Court enter its Order: (1) declaring that the gaming at the Vanderbilt casino is a public nuisance, (2) permanently enjoining Defendants from permitting and conducting Class III gaming at the Vanderbilt casino and (3) granting Plaintiff such other relief as the Court deems appropriate.

Plaintiff further requests that it be awarded its costs and attorney fees incurred in bringing this action.

Respectfully submitted,

Bill Schuette
Attorney General

/s/ Louis B. Reinwasser

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Dated: July 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, I electronically filed the foregoing document with the Clerk of the court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

/s/ Louis B. Reinwasser
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Exhibit A

A COMPACT BETWEEN THE BAY MILLS INDIAN COMMUNITY AND THE STATE OF MICHIGAN PROVIDING FOR THE CONDUCT OF TRIBAL CLASS III GAMING BY THE BAY MILLS INDIAN COMMUNITY

THIS COMPACT is made and entered into this 20th day of August, 1993, by and between the **BAY MILLS INDIAN COMMUNITY** (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 General Tribal Council, 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 General Tribal Council Resolution 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)(l)(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. Regulation of Class III Gaming.

(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 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 $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 agreements 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:

(l) 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)(1), 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 BAY MILLS INDIAN COMMUNITY.

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 General Tribal Council;

(B) Endorsement by the Governor of the State and concurrence in 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 as its address appearing below or such other address as any party shall hereinafter inform the other party hereto by written notice given at aforesaid:

Notice to the Tribe shall be sent to:

Tribal Chairperson
Bay Mills Tribal Center
Route 1
Brimley, MI 49715

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 Bay Mills Indian Community and the Governor acting for the State of Michigan have hereunto set their hands and seals.

Dated August 20, 1993
BAY MILLS INDIAN COMMUNITY

By Jeff Parker
Jeff Parker, Chairperson

Dated August 20, 1993
STATE OF MICHIGAN

By John Engler
Governor

APPROVAL BY THE SECRETARY OF THE INTERIOR

The foregoing Compact between the Bay Mills Indian Community and the State of Michigan is hereby approved this 19th day 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

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30755
Lansing, Michigan 48909

MIKE COX
ATTORNEY GENERAL

December 16, 2010

Via e-mail

Kathryn Tierney
Bay Mills Indian Community
12140 West Lakeshore Drive
Brimley, MI 49715

Dear Ms. Tierney:

This letter follows up on conversations between representatives of the Bay Mills Indian Community (Bay Mills) and representatives of the Governor's office and the Attorney General's office concerning the operation of class III gaming by Bay Mills at a site in Vanderbilt, Michigan (Vanderbilt casino). In brief, Bay Mills asserts that the Vanderbilt property is "Indian lands" and that class III gaming can take place on the property under the Indian Gaming Regulatory Act (IGRA) without the need for any review, approval, or other actions by the state or federal governments because Bay Mills has an approved gaming ordinance and compact with the State.

Our office and the Governor's legal counsel have considered the arguments presented by Bay Mills both in meetings with State representatives and in the written document you provided, a "Request for Indian Lands Opinion" submitted to the Secretary of the U.S. Department of Interior dated July 7, 2009. After due deliberation, the State of Michigan respectfully disagrees with your position and is not persuaded that the Vanderbilt casino is on "Indian lands" as required for lawful gaming under IGRA and Bay Mills' compact with the State.

Bay Mills' reliance on the Michigan Indian Land Claims Settlement Act (MILCSA) is misplaced. Simply stated, the phrase "as Indian lands are held" within Section 107 of the MILCSA does not indicate Congressional intent to vest Bay Mills with broad and unconstrained authority to buy land anywhere within the State to be held by Bay Mills in "restricted fee" status. Even if such status might be obtained through some additional federal action (we are not aware of any tribe in Michigan that holds land in restricted fee status), the mere purchase of real property with MILCSA funds, as apparently Bay Mills now contends, does not convert such property to a restricted fee status. Further, even assuming that the provisions of the MILCSA could vest restricted fee status upon lands properly acquired with the trust moneys, Section 107 only authorizes the purchase of property for the "consolidation and enhancement of tribal landholdings." The purchase of land in Vanderbilt does not meet this requirement.

Additionally, even if the Vanderbilt casino were located on Indian lands, either lands held in trust or

restricted fee lands, Bay Mills' use of this property for class III gaming violates the prohibition against gaming on property acquired by a tribe after October 17, 1988, as set forth in Section 20 of IGRA. We understand your argument that this prohibition only applies to trust lands, and that the Vanderbilt property is not held in trust. But the only court decision we could find that addresses this issue unequivocally held that the prohibition against gaming on after-acquired property included gaming on *both* trust lands and lands held in restricted fee status. *Citizens Against Casino Gambling v Hogen,* 2008 U.S. Dist. LEXIS 52395 (W.D.N.Y. July 8, 2008). Thus, even assuming the Vanderbilt property were restricted fee land, IGRA's prohibition is operative here.

These are the three primary points of disagreement with your position. But this is not intended to be an exhaustive analysis and you should be aware that we believe there are multiple deficiencies in the analysis and reasoning underlying your position. And all lead to the conclusion that the operation of this casino is not authorized by IGRA and therefore violates state and federal laws prohibiting gambling, including but not limited to MCL 750.301 *et seq,* and 18 USC § 1955. The State therefore demands that Bay Mills immediately cease operation of all class III gaming at the Vanderbilt casino. If such class III gaming is not terminated after Bay Mills' receipt of this letter, the State will take appropriate action to ensure compliance with its laws and compel closure of the Vanderbilt casino.

Please do not hesitate to call me or Louis Reinwasser if you have any questions.

Sincerely,

S. Peter Manning
S. Peter Manning
Division Chief
Environment, Natural
Resources, and Agriculture
Division
(517) 373-7540

SPM:neh

EXHIBIT C

National Indian Gaming Commission

September 15, 2010

By First Class Mail

Kathryn L. Tierney
Bay Mills Indian Community
12140 West Lakeshore Dr.
Brimley, MI 49715

Re: Bay Mills Indian Community gaming ordinance amendment

Dear Ms. Tierney:

This letter responds to your request to review and approve an amendment to the Community's gaming ordinance. The amendment was adopted by the Executive Council Resolution No. 10-7-30 on July 30, 2010, and submitted to NIGC on August 2, 2010. The amendment rescinds two previous amendments enacted earlier this year, Resolution Nos. 10-2-9 and 10-5-20. The amendment removes site-specific language in the ordinance in favor of a general definition of Indian lands that is comparable to the provisions in the IGRA.

The ordinance amendment satisfies the requirements of IGRA and NIGC regulations, and this letter constitutes my approval of it. It is important to note that approval is granted only for gaming on Indian lands as defined by IGRA over which the Community has jurisdiction. Thank you for your

submission. The NIGC staff and I look forward to working with you on future gaming issues. If you have questions, please do not hesitate to contact Dawn Sturdevant Baum, Staff Attorney, at 202-632-7003.

Sincerely,

T. Stevens
Tracie L. Stevens
Chairwoman

NATIONAL HEADQUARTERS 1441 L St NW Suite 9100, Washington, DC 20005 Tel: 202.632.7003 Fax: 202.632.7066 WWW.NIGC.GOV

REGIONAL OFFICES Portland, OR; Sacramento, CA; Phoenix, AZ; St Paul, MN; Tulsa, OK

Bay Mills Indian Community
12140 West Lakeshore Drive
Brimley, Michigan 49715
(906) 248-3241 Fax-(906) 248-3283

AUG -2 2010

RESOLUTION
Resolution No. 10-7-30
Amendment to Gaming Ordinance

WHEREAS: The Bay Mills Indian Community is a federally recognized Indian tribe with a Constitution enacted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. sec. 461, *et seq.*, and

WHEREAS: The Tribe regulates gaming on its tribal lands under a compact with the State of Michigan and under its Gaming Ordinance, and

WHEREAS: The Executive Council has determined that it is in the best interest of the Bay Mills Indian Community to describe the lands upon which gaming may be conducted pursuant to this Ordinance and in conformance with the Indian Gaming Regulatory Act, 25 U.S.C. sec. 2701, *et seq.*

NOW, THEREFORE BE IT RESOLVED, that the Executive Council of the Bay Mills Indian Community hereby amends the Gaming Ordinance by revising Sections 2.30, and 5.5(A), and deleting Section 2.45, and renumbering Sections 2.31 through 2.45, with additions underlined and deletions struck out:

2.30 "**Indian land**" means:

(A) All lands within the limits of the Reservation of the Bay Mills Indian Community; and

(B) Any lands title to which is either held in trust by the United States for the benefit of the Bay Mills Indian Community or held by the Bay Mills Indian Community subject to restriction by United States against alienation and over which the Tribe exercises governmental power.

2.31 "**IRS**" means . . . .

2.32 "**Key employee**" means . . .

2.33 "**License**" means . . .

2.34 "**Manager**" means. . .

2.35 "**National Indian Gaming Commission**" means.. .

2.36 "**Net proceeds**" means. . .

2.37 "**Operator**" means . . .

2.38 "**Ordinance**" means. . .

2.39 "**Participate**" or "**Participation**" or "**Participating**" in any gaming activity means . . .

2.40 "**Person**" means. . .

2.41 "**Player**" means. . .

2.42 "**Primary management official**" means. . .

2.43 "**Progressive gaming**" means. . .

2.44 "**Pull-tabs, punchboards and tip jars**" means . . .

2.45 "**Reservation Raffle**" means. . .

5.5 **Threshold Criteria Which a Potential Operator Must Meet**. The Tribal Commission shall automatically issue the above license to any tribally-owned or tribally-operated Class II or Class III proposed gaming enterprise if:

(A) The proposed gaming activity is to be located on "Indian lands", as defined in Section 2.30 of this Ordinance, and is not prohibited by Section 20 of IGRA ~~land which is held in trust for the Tribe prior to October 17, 1988; or on trust lands which were located within or contiguous to the boundaries of the Reservation on October 17, 1988, on lands taken into trust after October 17, 1988 as a settlement of land claim.~~

AND BE IT FURTHER RESOLVED, that Resolution Nos. 10-2-9 and 10-5-20 are hereby rescinded as redundant and superfluous upon enactment of this Resolution.

APPROVED:

Jeffrey Parker
Jeffrey D. Parker, President
Bay Mills Indian Community
Executive Council

ATTEST:

Richard A. LeBlanc
Richard A. LeBlanc, Secretary
Bay Mills Indian Community
Executive Counsel

CERTIFICATION

I, the undersigned, as Secretary of the Bay Mills Indian Community Executive Council, do hereby certify that the above resolution was adopted and approved at a meeting of the Bay Mills Indian Community Executive Council held at Bay Mills, Michigan, on the 30th day of July, 2010, with a vote of 4 for, 0 opposed, 0 absent, and 1 abstaining. As per provisions of the Bay Mills Constitution, the Tribal President must abstain except in the event of a tie.

Richard A. LeBlanc
Richard A. LeBlanc, Secretary
Bay Mills Indian Community
Executive Counsel

GAMING ORDINANCE
BAY MILLS INDIAN COMMUNITY

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2.28 "**Immediate family**" means, with respect to the person under consideration, a husband or wife, and any other individual who resides in the household of the person under consideration.

2.29 "**In privity with**" means a relationship involving one who acts jointly with another or as an accessory before the fact to an act committed by the other or as a coconspirator with the other.

2.30 "**Indian lands**" means:

(A) All lands within the limits of the Reservation of the Bay Mills Indian Community; and

(B) Any lands title to which is either held in trust by the United States for the benefit of the Bay Mills Indian Community or held by the Bay Mills Indian Community subject to restriction by the United States against alienation and over which the Tribe exercises governmental power.

2.31 "**IRS**" means the United States Internal Revenue Service.

2.32 "**Key employee**" means:

(A) A person who performs one or more of the following functions:

(1) Bingo caller;

(2) Counting room supervisor;

(3) Chief of security;

(4) Custodian of gaming supplies or cash;

(5) Floor manager;

(6) Pit boss;

(7) Dealer;

(8) Croupier;

(9) Approver of credit; or

(10) Custodian of gaming devices including persons with access to cash and accounting records within such devices.

(B) If not otherwise included, any other person whose total cash compensation is in excess of $50,000 per year; or,

(C) If not otherwise included, the four most highly compensated persons in the gaming operation; or

(D) any employee whom the Tribal Commission may by written notice classify as a key employee.

2.33 "**License**" means the official, legal, and revocable permission granted by the Tribal Commission to an applicant to conduct "licensed" gaming activity on the lands of the Tribe.

2.34 "**Manager**" means an entity who has a management contract pursuant to Section 9.4 to operate a tribal gaming enterprise.

2.35 "**National Indian Gaming Commission**" means the National Indian Gaming Commission established by the Indian Gaming Regulatory Act.

2.36 "**Net proceeds**" or "net revenues" means gross gaming revenues of a gaming operation less amounts paid out as, or paid for, prizes, and total gaming-related operating expenses, excluding management fees.

2.37 "**Operator**" means a person which has obtained a gaming license under this Ordinance or which is otherwise permitted by this Ordinance to perform, promote, conduct, or operate any lawful gaming activity on tribal lands at a gaming establishment.

2.38 "**Ordinance**" means the Gaming Ordinance of the Bay Mills Indian Community, as it may from time to time be amended.

2.39 "**Participate**" or "**Participation**" or "**Participating**" in any gaming activity means operating, directing, financing or in any way assisting

in the establishment of or operation of any class of gaming or any site at which such gaming is being conducted, directly or indirectly, whether at the site in person or off the Reservation.

2.40 "**Person**" means any individual, partnership, joint venture, corporation, joint stock company, company, firm, association, trust, estate, club, business trust, municipal corporation, society, receiver, assignee, trustee in bankruptcy, political entity, and any owner, director, officer or employee of any such entity, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise, the government of the Tribe, any governmental entity of the Tribe, or any of the above listed forms of business entities that are wholly owned or operated by the Tribe; provided, however, that the term does not include the federal government and any agency thereof. The plural of "person" is "people".

2.41 "**Player**" means a person participating in a game with the hope of winning money or other benefit, but does not include an operator, or any assistant of an operator.

2.42 "**Primary Management Official**" means

(A) The person having management responsibility for a management contract;

(B) Any person who has authority:

(1) To hire and fire employees; or

(2) To set up working policy for the gaming operation; or

(C) The chief financial officer or other person who has financial management responsibility.

2.43 "**Progressive gaming**" means any game in which a cash prize which, not being won by any player during any game, is retained and further monetarily enhanced by the operator or eligible organization, and offered as a prize to players in the next game.

2.44 "**Pull-tabs, punchboards and tip jars**" means a form of gaming in which preprinted cards utilizing symbols or numbers in random order which are uncovered by random choice in expectation of cash prizes if prescribed combinations of symbols and numbers are revealed.

2.45 "**Raffle**" means a form of gaming in which each player buys a ticket for a chance to win a prize with the winner determined by a random method. "Raffle" does not include a slot machine.

2.46 "**State**" means the State of Michigan.

2.47 "**Takeout**" means that portion of a wager which is deducted from or not included in the pari-mutual pool, and which is distributed to people other than those placing wagers.

2.48 "**Tele-bet**" means any system of telephone account wagering on a gaming event.

2.49 "**Tele-bingo**" means a form of lawful gaming in which the game defined as "bingo" is conducted on tribal lands, but through a system combining the use of computers and cable television or telephone lines, and does not require the presence of the players at the site

from where the telecast is originating. The presence of players is required, however, at the site on the reservation where the tele-bingo game is being offered.

2.50 "**Tribal Commission**" means the Gaming Commission described in Section 4 of this Ordinance.

2.51 "**Tribal Court**" means the Tribal Court of the Bay Mills Indian Community.

2.52 "**Tribe**" means the Bay Mills Indian Community.

2.53 "**Twenty-one**", also known as "**blackjack**," is the card game played by a maximum of seven players and one dealer wherein each player plays his hand against the dealer's hand, and the object of which is for a player to obtain a higher total card count than the dealer by reaching 21 or as close to 21 as possible without exceeding that count. The cards have the following value:

> (A) Aces count either one or 11, at the player's option.
>
> (B) Kings, queens, and jacks each have a count of ten.
>
> (C) All other cards are counted at their face value.

2.54 "**Wager**" means the initial bet made in any game.

2.55 "**Wagering Office**" means any location within tribal lands at which wagers are placed or accepted by an operator.

Section 3. General Provisions.

3.1 **Authority and Sovereign Powers and Responsibilities**. This ordinance is enacted pursuant to the inherent sovereign powers of the Tribe. The power to enact these ordinances is expressly delegated to the Tribal Council in Article VI of the Tribal Constitution.

3.2 **Title, Repeal of Prior Laws, and Effect of Repeal**. This Ordinance may be cited as the Bay Mills Gaming Ordinance.

All titles, chapters, and sections of the Tribal Code of the Bay Mills Indian Community which pertain to gaming, and are in effect as of the date that this Ordinance becomes operative, are hereby repealed, and all other laws, or parts thereof, inconsistent with the provisions of this Ordinance are hereby repealed.

Repeal of this Ordinance or any portion thereof shall not have the effect of reviving any prior Law, Ordinance, or Resolution theretofore repealed or suspended.

3.3 **Classes of Gaming**. This Ordinance shall divide gaming into the following three Classes: Class I, Class II and Class III.

3.4 **Construction**. In construing the provisions of this Ordinance, unless the context otherwise requires, the following shall apply:

> (A) This Ordinance shall be liberally construed to effect its purpose and to promote substantial justice.

(B) Words in the present tense include the future and past tenses.

(C) Words in the singular number include the plural, and words in the plural number include the singular.

(D) Words of the masculine gender or neuter include masculine and feminine genders and the neuter.

3.5 Savings Clause. If any section of this Ordinance is invalidated by a court of competent jurisdiction, the remaining sections shall not be affected thereby.

Section 4. Tribal Gaming Commission.

4.1 **Establishment**. The Council hereby charters, creates and establishes the Gaming Commission as a governmental subdivision of the Tribe. The Commission shall be referred to throughout this Ordinance as the Tribal Commission.

4.2 **Location and Place of Business**. The Tribal Commission shall be a resident of and maintain its headquarters, principal place of business and office on the Bay Mills Reservation, Michigan. The Tribal Commission may, however, establish other places of business in such other locations as the Tribal Commission may from time to time determine to be in the best interest of the Tribe.

4.3 **Duration**. The Tribal Commission shall have perpetual existence and succession in its own name, unless dissolved by the Tribal Council pursuant to Tribal law.

4.4 <u>**Attributes**</u>. As a governmental subdivision of the Tribe, the Tribal Commission has been delegated the right to exercise one or more of the substantial governmental functions of the Tribe. In creating the Tribal Commission, it is the purpose and intent of the Tribal Council that the operations of the Tribal Commission be conducted on behalf of the Tribe for the sole benefit and interests of the Tribe, its members and the residents of the Reservation. In carrying out its purposes under this Ordinance, the Tribal Commission shall function as an arm of the Tribe. Notwithstanding any authority delegated to the Tribal Commission under this Ordinance, the Tribe reserves to itself the right to bring suit against any person or entity in its own right, on behalf of the Tribe or on behalf of the Tribal Commission, whenever the Tribe deems it necessary to protect the sovereignty, rights and interests of the Tribe or the Tribal Commission.

4.5 <u>**Recognition as a Political Subdivision of the Tribe**</u>. The Tribe, on behalf of the Tribal Commission, shall take all necessary steps to acquire recognition of the Tribal Commission as a political subdivision of the Tribe, recognized by all branches of the United States Government as having been delegated the right to exercise one or more substantial governmental functions of the Tribe.

4.6 <u>**Sovereign Immunity of the Tribal Commission**</u>. The Tribal Commission is clothed by federal and tribal law with all the privileges and immunities of the Tribe, except as specifically limited by this Ordinance, including sovereign immunity from suit in any state, federal or tribal court. Nothing in this Ordinance shall be deemed or construed to be a waiver

of sovereign immunity of the Tribal Commission from suit, which shall only be waived pursuant to subsection 4.7. Nothing in this Ordinance shall be deemed or construed to be a consent of the Tribal Commission to the jurisdiction of the United States or of any state or of any other tribe with regard to the business or affairs of the Tribal Commission.

4.7 **Waiver of Sovereign Immunity of the Tribal Commission**. Sovereign immunity of the Tribal Commission may be waived only by express resolutions of both the Tribal Commission and the Tribal Council after consultation with its attorneys. All waivers of sovereign immunity must be preserved with the resolutions of the Tribal Commission and the Tribal Council of continuing force and effect. Waivers of sovereign immunity are disfavored and shall be granted only when necessary to secure a substantial advantage or benefit to the Tribal Commission. Waivers of sovereign immunity shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds, if any, of the Tribal Commission subject thereto, and shall specify the court having jurisdiction pursuant thereto and the applicable law. Neither the power to sue and be sued provided in Subsection 4.18(z), nor any express waiver of sovereign immunity by resolution of the Tribal Commission shall be deemed a consent to the levy of any judgment, lien or attachment upon property of the Tribal Commission other than property specifically pledged or assigned, or a consent to suit in respect of any land within the exterior boundaries of the Reservation or a consent to the alienation, attachment or encumbrance of any such land.

4.8 **Sovereign Immunity of the Tribe**. All inherent sovereign rights of the Tribe as a federally-recognized Indian tribe with respect to the existence and activities of the Tribal Commission are hereby expressly reserved, including sovereign immunity from suit in any state, federal or tribal court. Nothing in this Ordinance, nor any action of the Tribal Commission, shall be deemed or construed to be a waiver of sovereign immunity from suit of the Tribe; or to be a consent of the Tribe to the jurisdiction of the United States or of any state or any other tribe with regard to the business or affairs of the Tribal Commission or the Tribe; or to be a consent of the Tribe to any cause of action, case or controversy, or to the levy of any judgment, lien or attachment upon any property of the Tribe; or to be a consent to suit with respect to any land within the exterior boundaries of the Reservation, or to be a consent to the alienation, attachment or encumbrance of any such land.

4.9 **Credit of the Tribe**. Nothing in this Ordinance nor any activity of the Tribal Commission shall implicate or any way involve the credit of the Tribe.

4.10 **Assets of the Tribal Commission**. The Tribal Commission shall have only those assets specifically assigned to it by the Council or acquired in its name by the Tribe or by it on its own behalf. No activity of the Tribal Commission nor any indebtedness incurred by it shall implicate or in any way involve any assets of tribal members or the Tribe not assigned in writing to the Tribal Commission.

4.11 **Membership**.

(A) Number of Commissioners. The Tribal Commission shall be comprised of five (5) Tribal Gaming Commissioners consisting of persons appointed by the Executive Council.

(B) Qualification of Commissioners. Each Commissioner must be a member of the Tribe, and, as of the date of appointment, shall not be:

(1) An employee of a gaming enterprise of the Tribe; or

(2) A member of the Gaming Commission staff.

(C) Background Check. Prior to the time that any Tribal Commission member takes office on the Tribal Commission, the Tribe shall perform or arrange to have performed a comprehensive background check on each prospective member, the results of which shall be transmitted to the Executive Council. No person shall serve as a Commissioner if:

(1) His prior activities, criminal record, if any, or reputation, habits or associations:

(a) Pose a threat to the public interest; or

(b) Threaten the effective regulation and control of gaming; or

(c) Enhance the dangers of unsuitable, unfair, or illegal practices, methods, or activities in the conduct of gaming; or

(2) S/he has been convicted of or entered a plea of nolo contendere to a felony or any gaming offense in any jurisdiction or to a misdemeanor within five (5) years of consideration for appointment involving a matter which would be a crime under the provisions of the Michigan Penal Code or the controlled substance provisions of the Michigan Public Health Code; or

(3) S/he has a present interest in the conduct of any gaming enterprise or in any business which is licensed as a vendor to a gaming enterprise of the Tribe; or

(4) S/he has a member of his immediate family employed as a primary management official by any tribal gaming establishment.

4.12 **Term of Office**. Each Commissioner shall serve a term of four years, commencing on January 1st, or until a successor Commissioner is appointed. On January 1, 1998, two Commissioners shall be appointed for a term of two years, and three Commissioners shall be appointed for a term of four years. Thereafter, all Commissioners shall serve four-year terms. The Council's appointment of any Commissioner who is not a member of the Executive Council shall be by resolution.

4.13 **Ex Officio Members**. At the direction of the Tribal Council, any member of the Tribal Council, any Tribal or Bureau of Indian Affairs employee or any other person may be designated to participate, without vote, in Tribal Commission meetings.

4.14 **Meetings**.

(A) Regular Meetings. The Tribal Commission shall hold at least two regular monthly meetings, which shall take place on the first and third Tuesdays of each month. If the meeting date falls on a holiday, it may be rescheduled to another date not in conflict with the regular meetings of the Executive Council on the second and fourth Mondays of each month.

(B) Special Meetings. Special meetings may be called at the request of the Tribal Council, the Chairman of the Tribal Commission or three (3) or more members of the Tribal Commission.

(C) Compensation of Commissioners. An honorarium set by the Executive Council may be paid to Commissioners as compensation.

(D) Quorum. A quorum for all meetings shall consist of four (4) members.

(E) Voting. All questions arising in connection with the action of the Tribal Commission shall be decided by majority vote. The Chairman of the Tribal Commission shall only be entitled to vote to break a tie.

4.15 **Organization**. The Tribal Commission shall develop its own operating procedures and shall elect from within itself a Chairman to direct meetings, a reporter to be responsible for keeping Tribal Commission minutes and transmitting to the Tribal Council a copy of those minutes, handling correspondence and reporting Tribal Commission decisions and such other officers as it deems advisable.

4.16 **Removal of Members or Vacancies**.

(A) Removal.

(1) A Commissioner shall be immediately removed by the Executive Council for any action which bars eligibility for serving in that capacity under subsections 4.11(C)(2), (3), or (4) of this Ordinance.

(2) A Commissioner may be removed by the Council for the following reasons: serious inefficiency, neglect of duty, malfeasance, misfeasance, nonfeasance, misconduct in office, or for any conduct which threatens the honesty and integrity of the Tribal Commission or otherwise violates the letter or intent of this Ordinance. Except as provided below, no Commissioner may be removed without notice and an opportunity for a hearing before the Council, and then only after the Commissioner has been given written notice of the specific charges at least ten days prior to such hearing. At any such hearing, the Commissioner shall have the opportunity to be heard in

person or by counsel and to present witnesses on his behalf. If the Council determines that immediate removal of a Commissioner is necessary to protect the interests of the Tribe, the Council may immediately remove the Commissioner temporarily, and the question of permanent removal shall be determined thereafter pursuant to Tribal Commission hearing procedures. A written record of all removal proceedings together with the charges and findings thereon shall be kept by the Tribal Secretary. The decision of the Council upon the removal of a Commissioner shall be final.

(B) Vacancies. If any Commissioner shall die, resign, be removed or for any reason be unable to serve as a Commissioner, the Council shall declare his position vacant and shall appoint another person to fill the position. The terms of office of each person appointed to replace an initial Commissioner shall be for the balance of any unexpired term for such position, provided, however, that any prospective appointee must meet the qualifications established by this Ordinance.

4.17 **Conflict of Interest**. No person shall serve as a Commissioner if s/he or any member of his immediate family is a primary management official of, or has a financial interest in, any management contract or gaming supply business, or if s/he has any other personal or legal relationship which places him in a conflict of interest.

4.18 **Powers of the Tribal Commission**. In furtherance, but not in limitation, of the Tribal Commission's purposes and responsibilities, and subject to any restrictions contained in this Ordinance or other applicable law, the Tribal Commission shall have and is authorized to exercise by majority vote, the following powers in addition to all powers already conferred by this Ordinance:

(A) To regulate all day-to-day gaming activity within the jurisdiction of the Tribe including tele-bingo and other unusual games.

(B) To promote the full and proper enforcement of all tribal civil and criminal gaming laws and policies.

(C) To enact and enforce such rules and regulations regarding its activities and governing its internal affairs as the Tribal Commission may deem necessary and proper to effectuate the powers granted by this Ordinance and the powers granted and duties imposed by applicable law.

(D) To publish and distribute copies of this Ordinance, Tribal Commission rules, and any Council, Tribal Commission or Tribal Court decisions regarding gaming matters.

(E) To prepare and submit for Council approval proposals, including budget and monetary proposals, which could enable the Tribe to better carry forth the policies and intent of this Ordinance.

(F) To work with the staff of any tribal department, program, project, or operation and to cooperate with the Council or any Council Committee in regard to gaming issues.

(G) Where it is in the best interest of the Tribe, to develop a cooperative working relationship with federal and state agencies and officials.

(H) To arrange for and direct such inspections and investigations as it deems necessary to ensure compliance with this Ordinance and implementing regulations. In undertaking such investigations, the Tribal Commission may request the assistance of tribal gaming staff, federal, state and tribal law enforcement officials, legal counsel and other third parties.

(I) To maintain and keep current a record of new developments in the area of Indian gaming.

(J) To request the assistance of the Tribal Court or Tribal Appellate Court in conducting gaming hearings, defining terms used in this Ordinance or other tribal laws, or in any other matter in which the Tribal Commission deems such assistance to be necessary or proper.

(K) To consider any gaming matter brought before it by any person, organization or business, and all matters referred to it by the Tribal Council.

(L) To obtain and publish a summary of federal revenue laws relating to gaming and to insure compliance with the same.

(M) To arrange for training of Tribal Commission members, tribal employees and others in areas relating to the regulation or operation of gaming.

(N) With the approval of the Council, to employ such advisors as it may deem necessary. Advisors may include, but are not limited to, lawyers, accountants, law enforcement specialists and gaming professionals.

(O) To make recommendations to the Council on the hiring of all supervisory gaming employees.

(P) To promulgate rules and regulations to implement and further the provisions of this Ordinance.

(Q) To approve or disapprove any application for a tribal gaming license.

(R) To consult with and make recommendations to the Council regarding changes in tribal gaming laws and policies.

(S) To administer oaths, conduct hearings, and by subpoena compel the attendance of witnesses and the production of any books, records and papers relating to the enforcement of tribal gaming laws, regulations and policies.

(T) To make, or cause to be made by its agents or employees, an examination or investigation of the place of business, equipment, facilities, tangible personal property, and the books, records, papers, vouchers, accounts, documents

and financial statements of any gaming or enterprise operating, or suspected to be operating, within the jurisdiction of the Tribe.

(U) When necessary or appropriate, to request the assistance and utilize the services of the courts, law enforcement and government officials and agencies, and private parties, in exercising its powers and carrying out its responsibilities.

(V) To examine under oath, either orally or in writing, any person or agent, officer, or employee of any person, with respect to any matters related to this Ordinance.

(W) To delegate to an individual member of the Commission, or to an individual member of the Tribal Council, or to the Tribal Commission or tribal staff, such of its functions as may be necessary to administer these ordinances efficiently; provided, that the Tribal Commission may not re-delegate its power to exercise any of the substantial governmental functions of the Tribe delegated to the Tribal Commission by the Tribe; and provided further, that the Tribal Commission may not delegate its power to promulgate rules and regulations. It may also not delegate to anybody except the Tribal Council or Tribal Court the power to revoke a tribal gaming license permanently. The Tribal Commission may, however, delegate the power to suspend a gaming license temporarily and to close a licensed gaming enterprise for no more than 30 days when its continued operation threatens the public health, welfare or safety.

(X) To close permanently, after notice and a hearing, any game or games which are operating in violation of tribal law.

(Y) To sue or be sued in courts of competent jurisdiction within the United States and Canada, subject to the provisions of this Ordinance and other tribal laws relating to sovereign immunity; provided, that no suit shall be brought by the Tribal Commission without the prior explicit written approval of the Tribal Council.

(Z) To purchase, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve and use property and assets of every description, real and personal, tangible or intangible, including money, securities, or any interests therein, rights and services of any kind and description or any interest therein; provided that the Tribal Commission shall have authority to purchase any interest in real property, whether located on or off the Reservation, only with the express, prior written consent of the Tribal Council as to each such action, and title to such real property and property which is to become a fixture or permanent improvement or part of the real property shall be taken in the name of the Tribe or in the name of the United States in trust for the Tribe, and title to all trust and restricted real property shall remain in trust or restricted status.

(AA) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its personal property and assets.

(BB) With the prior permission of the Tribal Council, to borrow money and to make, accept, endorse, execute and issue bonds, debentures, promissory notes, guarantees and other obligations of the Tribal Commission for moneys borrowed, or in payment for property acquired or for any of the purposes of the Tribal Commission and to secure payment of any obligations by secured interest, mortgage, pledge, deed, indenture, agreement or other instrument of trust or by other lien upon, assignment of or agreement in regard to all or any part of the property, rights or privileges of the Tribal Commission.

(CC) To arbitrate, compromise, negotiate or settle any dispute to which it is a party relating to the Tribal Commission's authorized activities.

(DD) To enter into, make, perform and carry out any agreement, partnership, joint venture contract or other undertaking with any federal, state or local governmental agency, tribe, person, partnership, corporation or other association or entity for any lawful purpose pertaining to the business of the Tribal Commission or which is necessary or incidental to the accomplishment of the purposes of the Tribal Commission.

(EE) To invest and reinvest its funds in such mortgages, bonds, notes, debentures, share of preferred and common stock, and any other securities of any kind whatsoever, and property, real, personal or mixed, tangible or intangible, as the Tribal Commission shall deem advisable

and as may be permitted under applicable law, provided that the Tribal Commission shall have authority to invest or reinvest in real property, whether located on or off the Reservation, subject to the restrictions set forth in Subsection 4.18 (DD) above.

(FF) To exercise the tribal power to tax authorized by the Tribal Constitution, and, in accordance with other applicable law, by establishing and collecting gaming fees from gaming enterprises.

(GG) To purchase insurance from any stock or mutual company for any property, or against any risk or hazard.

(HH) To establish and maintain such bank accounts as may be necessary or convenient.

(II) To engage in any and all activities which directly or indirectly carry out the purposes of the Tribe as set forth in this Ordinance.

(JJ) With prior approval of the Tribal Council, to make application and accept grants and other awards from private and governmental sources in carrying out or furthering the purposes of the Tribal Commission or the Tribe.

(KK) To exercise all authority delegated to it or conferred upon it by law and to take all action which shall be reasonably necessary and proper for carrying into execution the foregoing powers and all of the powers vested in this Ordinance as permitted by the purposes and powers herein

stated and which are deemed to be in the best interests of the Tribe, exercising prudent management and good business judgment, all in compliance with applicable law.

4.19 **Annual Budget**. The Tribal Commission shall prepare an annual operating budget for all Tribal Commission activities and present it to the Council by November 15th of each year.

4.20 **Tribal Commission Regulations**.

(A) Tribal Commission regulations necessary to carry out the orderly performance of its duties and powers shall include, but shall not be limited to the following:

(1) Internal operational procedures of the Tribal Commission and its staff;

(2) Interpretation and application of this Ordinance as may be necessary to carry out the Tribal Commission's duties and exercise its powers;

(3) A regulatory system for all gaming activity, including accounting, contracting, management and supervision;

(4) The findings of any reports or other information required by or necessary to implement this Ordinance; and

(5) The conduct of inspections, investigations, hearings, enforcement

actions and other powers of the Tribal Commission authorized by this Ordinance.

(B) No regulation of the Tribal Commission shall be of any force or effect unless it is adopted by the Tribal Commission by written resolution and subsequently approved by a resolution of the Tribal Council and both filed for record in the office of the Tribal Secretary.

(C) The Tribal Court and any other court of competent jurisdiction shall take judicial notice of all Tribal Commission regulations adopted pursuant to this Ordinance.

4.21 **Right of Entrance; Monthly Inspection**. The Tribal Commission and duly authorized officers and employees of the Tribal Commission, during regular business hours, may enter upon any premises of any operator or gaming establishment for the purpose of making inspections and examining the accounts, books, papers, and documents, of any such operator or gaming establishment. Such operator shall facilitate such inspection or examinations by giving every reasonable aid to the Tribal Commission and to any properly authorized officer or employee. A Commissioner or a member of the Tribal Commission's staff shall visit each tribally-owned or tribally-operated gaming establishment during normal business hours for the purpose of monitoring its operation. Such visits shall be unannounced.

4.22 **Investigations**. The Tribal Commission, upon complaint or upon its own initiative or whenever it may deem it necessary in the performance of its duties

or the exercise of its powers, may investigate and examine the operation and premises of any person who is subject to the provisions of this Ordinance. In conducting such investigation, the Tribal Commission may proceed either with or without a hearing as it may deem best, but it shall make no order without affording any affected party notice and an opportunity for a hearing pursuant to Tribal Commission regulations.

4.23 **Hearings; Examiner**. Pursuant to regulations, the Tribal Commission may hold any hearing it deems to be reasonably required in administration of its powers and duties under this Ordinance. Whenever it shall appear to the satisfaction of the Tribal Commission that all of the interested parties involved in any proposed hearing have agreed concerning the matter at hand, the Tribal Commission may issue its order without a hearing. The Tribal Commission may designate one of its members to act as examiner for the purpose of holding any such hearing or the Tribal Commission may appoint another person to act as examiner under subsection 4.24 below. The Tribal Commission shall provide reasonable notice and the right to present oral or written testimony to all people interested therein as determined by the Tribal Commission.

4.24 **Appointment of Examiner; Power of Examiner**. The Tribal Commission may appoint any person qualified in the law or possessing knowledge or expertise in the subject matter of the hearing to act as examiner for the purpose of holding any hearing which the Tribal Commission, or any member thereof, has power or authority to hold. Any such appointment shall constitute a delegation to such examiner of all powers

of a Commissioner under this Ordinance with respect to any such hearing.

4.25 **Staff of Gaming Commission**. Staff of the Gaming Commission are employees of the Bay Mills Indian Community, subject to the governmental personnel policies of the Tribe and supervised by the Commission.

(A) Any staff position which includes responsibility for monitoring, reviewing and investigating the day-to-day gaming operations of a tribally-operated gaming enterprise, or supervision of such monitoring, review, and investigation, must be held by a person who meets the standards contained in subsection 4.11(C) of this Ordinance.

(B) All other staff positions maintained by the Gaming Commission must be held by persons who meet the standards contained in subsection 4.11 (C) (1) -- (3) of this Ordinance.

(C) No staff member may serve as a Commissioner of the Tribal Gaming Commission.

4.26 **Quarterly Reports**. The Tribal Commission shall file a quarterly report to the Council summarizing reports received from each of the Tribe's Primary Management Officials, and making such comments as it deems necessary to keep the Council fully informed as to the status of its various gaming operations.

Section 5. Gaming Licenses.

5.1 **Applicability**. This Ordinance applies to all people engaged in gaming within the jurisdiction of the Tribe. The application for license and the conduct of gaming within the jurisdiction of the Tribe shall be deemed to be a consent to the jurisdiction of the Tribe and the Tribal Court in all matters arising from the conduct of such gaming, and all matters arising under any of the provisions of this Ordinance or other tribal laws.

5.2 **License Required**. No person shall operate Class II or Class III gaming within the jurisdiction of the Tribe unless such gaming is licensed by the Tribe.

5.3 **Types of Licenses**. The Tribe shall issue each of the following types of gaming licenses:

(A) Tribally-Owned or Tribally-Operated Class II. This license shall be required of all tribally-owned or tribally-operated gaming enterprises operating one or more Class II gaming activities.

(B) Tribally-Owned or Tribally-Operated Class III. This license shall be required for all tribally-owned or operated gaming enterprises operating any gaming other than Class I or Class II gaming.

(C) Privately Owned Gaming Not Licensable. No license may be issued for any gaming operation, whether for one or more occasions, which are owned or operated by any person other than the Tribe.

5.4 **Application Procedures**.

(A) Tribally-Owned or Tribally-Operated Class II. Before issuing a license to a tribally-owned or operated Class II gaming activity the Tribal Commission shall:

(1) Review the proposed gaming activity to ensure that all threshold criteria required by this Ordinance shall be met.

(2) Perform the necessary background checks on management contractors, primary management officials and key employees required by this Ordinance.

(3) Review and approve the accounting procedures to be used in such gaming activity.

(4) Take any additional steps necessary to ensure the integrity of such gaming activity.

(B) Tribally-Owned or Tribally-Operated Class III. Before issuing a license to a tribally-owned or operated Class III gaming activity, the Tribal Commission shall:

(1) Review the proposed gaming activity to ensure that all threshold criteria required by this Ordinance shall be met.

(2) Perform the necessary background checks on management contractors,

primary management officials and key employees required by this Ordinance.

(3) Review and approve the accounting procedures to be used in such gaming activity.

(4) Take any additional steps necessary to ensure the integrity of such gaming activity.

(5) Review all aspects of the proposed gaming operation to ensure that it will be in compliance with the provisions of the applicable state/tribal compact.

5.5 Threshold Criteria Which a Potential Operator Must Meet. The Tribal Commission shall automatically issue the above license to any tribally-owned or tribally-operated Class II or Class III proposed gaming enterprise if:

(A) The proposed gaming activity is to be located on "Indian lands", as defined in Section 2.30 of this Ordinance, and is not prohibited by Section 20 of IGRA.

(B) The proposed gaming activity is to be played as Class II gaming as defined by this Ordinance and the IGRA.

(C) The proposed gaming activity is authorized by a Tribal Council resolution.

(D) The Tribe or one of its subdivisions will have the sole proprietary interest and the Tribe will

have the exclusive responsibility for the conduct of the proposed gaming activity.

(E) The resolution authorizing the proposed gaming activity provides that:

(1) The revenues of the proposed gaming activity shall be audited annually and copies of those audits will be provided to the Tribal Commission and the National Indian Gaming Commission.

(2) The proposed gaming activity shall comply with all IRS reporting and filing requirements.

(3) All of the proceeds of the proposed gaming activity shall be used for the purposes stated in subsection 9.2.

(4) All contracts for supplies services or concessions for an amount in excess of $25,000 annually, except contracts for legal and consulting services, shall be subject to an annual independent audit.

(5) The construction or maintenance of the gaming facility and the operation of the proposed gaming activity shall be conducted in a manner which the Tribal Commission finds will adequately protect the environment and the public health and safety.

(6) All primary management officials and key employees shall pass the background

checks and obtain the tribal gaming employee licenses required by this Ordinance.

(7) The Tribal Commission shall have the authority to regulate the proposed gaming activity.

(8) The proposed gaming activity shall pay to the National Indian Gaming Commission such fees as federal law may require to be paid.

(9) In the event the gaming activity is Class III gaming, such gaming activity meets all other criteria established by the Tribal-State Gaming compact.

5.6 **License Application Fees**. An application fee shall be required for a or tribally-operated Class II or Class III gaming enterprise. Said fee shall be in the amount of $250 and shall accompany the application.

5.7 **License Tax**. No annual license tax shall be required for a tribally-owned or tribally-operated Class II or Class III gaming operation.

5.8 **Terms of License**. A tribally-owned and tribally-operated Class II and Class III gaming license shall be valid for a period of one year from the date of issuance.

5.9 **Posting of Licenses**. Each operator shall post his tribal gaming license in a conspicuous location at his place of business. If an operator has more than one location, the operator must obtain and post a separate license for each location.

5.10 **Gaming License Renewals**. Each annual tribal gaming license must be renewed every 365 days from the date of issuance. A renewal fee shall be required for a tribally-owned Class II or Class III license in the amount of $100. In order to obtain a renewal of a license, the operator shall submit a written renewal application to the Tribal Commission on the form provided by the Tribal Commission. No renewal application shall be approved until the annual report, required by subsection 5.11, has been properly filed. All renewal applications submitted by a tribally-owned Class II or Class III gaming enterprise shall be approved in 30 days or less unless the Commission believes, based on reasonable grounds, that the enterprise has been or will be operated in violation of tribal, federal or other applicable law or the terms and conditions of the Tribal-State Compact.

5.11 **Annual Reports**. Each operator who possesses an annual Class II or Class III license must file an annual report with the Tribal Commission and the Tribal Council between the 15th and the last day of the 12th month duration of each such license. The report shall be submitted to the Tribal Commission on the annual report form provided by the Tribal Commission and shall include, at a minimum, the following information:

(A) The name, address and telephone number of the operator;

(B) The names, addresses and titles of all of the current managers of the operator;

(C) A description of the gaming activity that it has operated and the total gross sales;

(D) A written copy of any changes it proposes to initiate in its rules;

(E) A statement of the specific date or dates and time or times on which it wishes to operate its gaming activity over the next license period;

(F) The name and addresses of the person who will be designated as primary management official over the next license period;

(G) A statement of any changes in the primary management officials or key employees who will operate the gaming activity over the next license period;

(H) The names and addresses of any employees who the Tribal Commission may determine to be key employees during review of the application;

(I) Written proof that the operator has paid to the National Indian Gaming Commission such fees as federal and tribal law may require it to pay and will continue to do so;

(J) A sworn statement that the operator has complied with the Internal Revenue Codes and Regulations, including written notice of customer winnings, and a statement that the operator shall continue to obey all tribal and federal laws and shall hold the Tribal Commission and the Tribe harmless for failure to do so;

(K) Any location at which the gaming activity has been conducted and any new location which will be established in the next license period;

(L) The number of full-time equivalent people, on an annualized basis, employed by the operation during the past 12 months, together with a projection of the number of full-time equivalent people who are expected to be employed during the next license period;

(M) The total gross revenue of the operator attributable directly or indirectly to tribally licensed gaming activity over the preceding 12 months;

(N) Written proof that the operator has paid to the Tribe the gross receipts tax, and a sworn statement that it will continue to make such payments as may be required during the next license period;

(O) A sworn statement that the operator will continue to comply with all tribal and federal laws applicable to the operator's gaming operation;

(P) A sworn statement that the operator and all of its key employees and management contractors continue to consent to Tribal Court jurisdiction and service of process in all matters arising from the conduct of tribally-licensed gaming activity;

(Q) If the operator is a corporation, a copy of any amendment to its articles of incorporation,

properly certified by the incorporating government, unless a current copy has already been filed with the Tribal Commission.

5.12 Closure of a Tribally Licensed Gaming Activity. If the Tribal Commission finds that any tribally owned gaming activity is operating in violation of this Ordinance, or otherwise presents a threat to the public, the Tribal Commission must immediately notify the Tribal Chairman and the Tribal Council. The Tribal Council may close down any tribally owned or operated gaming activity temporarily or permanently at any time with or without cause.

Section 6. Gaming Employee Requirements.

6.1 Current and Valid Gaming Employee License Required. Each primary management official and key employee of a Class II or Class III gaming operation must possess a current, valid gaming employee license.

6.2 Application Procedure for Employment.

(A) Any person seeking employment with a gaming enterprise licensed by the Commission shall submit an application to the Tribal Commission on such form or in such manner as the Tribal Commission may require. The application form and any changes thereto shall be reviewed and approved by the Bay Mills Indian Community Executive Council prior to utilization.

(B) At a minimum, the application shall contain the following information:

(1) All information required under Part 556 of Title 25, Code of Federal Regulations, as that may from time to time be amended.

(2) The name, address and telephone number of the Primary Management Official for whom the applicant is applying to work and the specific location at which s/he or she is applying to be employed.

(3) The name and job description of the position the applicant is applying for.

(4) The names and addresses of the applicant's living parents, grandparents, spouse, children, brothers, and sisters, including step-, half - and in-law.

(5) A sworn statement that neither the applicant nor any member of his immediate family has a past or current financial interest, other than a salary interest, in any gaming-related enterprise anywhere. If the applicant has any relative who has such a relationship, the applicant shall fully disclose his name and the nature of the relationship.

(6) Written permission giving the Tribal Commission or its designee the right to investigate the applicant's background, including his criminal record, civil and criminal judgments and credit history.

(7) A disclosure of any civil judgments rendered against the applicant, which constitute a collection action for money owed by the applicant, including the case number, a description of the judgment and the name and address of the court involved.

(8) Any other information which might bring into question his fitness to serve as a primary management official or key employee of a licensed gaming operation.

(9) Each application shall be accompanied by a sworn statement that the applicant will submit to the jurisdiction of the Tribe and the Tribal Court, if employed.

(10) Each application shall be accompanied by a sworn statement that the applicant will abide by all applicable tribal and federal laws, regulations and policies.

(11) Each application for a gaming employee license shall be accompanied by an application fee of $10.00.

6.3 **Review Procedure**.

(A) The Tribal Commission or its designee shall forward a copy of each application to a tribal or state law enforcement agency and arrange for that agency to verify in writing the accuracy of the applicant's criminal record. The Commission or its designee shall also contact each reference

provided in the application and take other appropriate steps to verify the accuracy of the other information presented and prepare a report of their findings for the Commission. Once these two reviews are completed, the Commission shall review the findings and either grant or deny the license, if one is required by this Ordinance, or advise the Primary Management Official that the applicant's information has been reviewed and there exists no barrier to employment. The applicant shall be notified in writing of the Commission's decision. If the Commission votes to deny a license, it shall include within this notification the specific reasons for its decision.

(B) A copy of the application, the results of the background checks performed and the Tribal Commission's findings and decision shall be forwarded to the National Indian Gaming Regulatory Commission before a license is issued.

(C) All applications, background checks and Commission decisions shall be retained in the Commission files for a period of at least five (5) years.

6.4 <u>Scope of License</u>.

(A) Any employee gaming licenses issued pursuant to this section shall be effective for only the location, job and employer contained in the application.

(B) Any licensed employee shall apply to have his license transferred to a new location by requesting that transfer in writing to the Tribal Commission in a manner which details the new job and location and the operator for whom s/he proposes to work.

(C) The Tribal Commission may waive the requirements contained in subsections 6.4 (A) and 6.4 (B) for those employees of a licensed operator when the Commission determines:

(1) The position for which the employee is licensed requires carrying out employment responsibilities in more than one location on a regular basis; and

(2) Providing authorization to carry out employment responsibilities in more than one location does not conflict with the Commission's minimum internal control standards and does not compromise the integrity of the licensed gaming operations.

6.5 **Licensing Period**. Any permanent employee gaming license issued pursuant to this section shall be effective for a period of one year from the date of issuance and shall contain the licensee's photograph and shall state on its face the name of the employee, the location at which s/he is licensed to work, the gaming operator who employs him, the date that the license became effective and the date that it expires.

6.6 **Renewals**. A holder of an employee gaming license shall petition to have his license renewed, by applying

to the Tribal Commission for a renewal before his original license has expired and updating all information contained in the original application.

6.7 **Requirement to Produce License Upon Request**. Any person receiving an employee gaming license must carry that license upon his person during all working hours and must produce that license upon the request of any person.

6.8 **Suspension or Termination of Employee License**.

(A) Grounds for Suspension or Termination. The Tribal Commission may suspend or terminate the license of any employee, after notice and an opportunity for a hearing, for any of the following reasons:

(1) The employee has withheld pertinent information on his application;

(2) The employee has made false statements on the application;

(3) The employee has participated in gaming activity which was not authorized by any tribal gaming license;

(4) The employee has attempted to bribe a tribal council member, Commissioner or other person in an attempt to avoid or circumvent tribal law;

(5) The employee has offered something of value or accepted a loan, financing or

other thing of value from a Tribal Commission member, a subordinate employee or any person participating in any gaming activity;

(6) The employee has knowingly promoted, played or participated in any gaming activity operated in violation of tribal or federal law or the tribal/state gaming compact;

(7) The employee has been knowingly involved in the falsification of books or records which relate to a transaction connected with the operation of gaming activity;

(8) The employee has violated any provision of this Ordinance or the rules and regulations of the Tribal Commission;

(9) The employee has been convicted of, or has entered a plea of nolo contendere to, any crime involving gaming, fraud, theft, embezzlement or other activity which, if perpetrated at his operator's place of employment, would injure or pose a threat to the public interest, or the integrity of the gaming activity, or the effective regulation of gaming or enhance the dangers of unfair, unsuitable or illegal gaming practices;

(10) The employee has refused to comply with any lawful order, inquiry or

directive of the Tribal Commission, the Tribal Council, the federal government or any court of competent jurisdiction;

(11) The employee has been convicted of, or entered a plea of nolo contendere to, a crime involving the sale of illegal narcotics or controlled substances; or

(12) The employee has been determined to have present or prior activities, criminal record, if any, or reputation, habits and associations which pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming.

(B) <u>Procedure for Suspension or Termination</u>. Whenever it is brought to the attention of the Tribal Commission that a person has failed to comply with any of the conditions of subsection (A), above, the Tribal Commission or its designee may either undertake an investigation of the gaming enterprise, or serve upon such person or any agent of such person an order to show cause why the employee should not be subject to disciplinary action. Such notice shall state the reason for the order, the time and place for the show cause hearing before the Tribal Commission, and that the person shall have an opportunity to present testimony and cross examine opposing witnesses, and to present any other evidence as to why a disciplinary action should not be issued. The

hearing shall be set for not less than ten (10) days nor more than 14 days from the date of the notice. The hearing shall be governed in all respects in accordance with tribal law and Tribal Commission regulations.

6.9 **Temporary Suspension of Employee Gaming License**.

(A) Any employee gaming license may be temporarily and immediately suspended by the Tribal Commission, the Tribal Court or the Council or its designee for not more than 30 days if any of the following have occurred:

(1) The employee has been charged with a violation of any gaming law.

(2) The employee's continued employment as a primary management official or key employee of a game or gaming enterprise poses a threat to the general public.

(3) The employee has made a material false statement in his license application.

(4) The employee has participated in gaming activity unauthorized by his tribal gaming license.

(5) The employee has refused to comply with any lawful order of the Tribal Commission, the Council, the Tribal Court or the National Indian Gaming Commission.

(B) In the event the Tribal Commission determines that any employee meets any of the criteria stated in subsections 6.9 (A) (1) through 6.9 (A) (5) above or that his non-compliance with this Ordinance is a direct and immediate threat to the peace, safety, morals or health or welfare of the community, the Tribal Commission or its designee shall issue a notice of temporary suspension of his employee gaming license which shall be served upon the employee or any agent of the employee. The order shall state the grounds upon which it is issued and the employee's right to a hearing. The employee shall cease and desist operating in his management position or in his capacity as a key employee immediately upon receipt of the order, but s/he may file a notice of appeal with the Tribal Commission which shall hold a hearing on the order within 14 calendar days of its receipt of the appeal. At the hearing the employee shall have an opportunity to present testimony and cross-examine opposing witnesses, and to present any other evidence as to why a temporary suspension order or an injunction should not be issued. The hearing shall be governed in all respects in accordance with tribal law and Tribal Commission regulations.

Section 7. Provisions of General Applicability to All Operators.

7.1 Gaming License Required. Each Class II or Class III gaming activity within the jurisdiction of the

Tribe shall be conducted only by an operator who possesses a current and valid tribal gaming license.

7.2 Site and Operator Specified. Each tribal gaming license shall be applicable only to one gaming site and the operator named on such license.

7.3 License Not Assignable. No tribal gaming license shall be sold, lent, assigned or otherwise transferred.

7.4 Employee Licenses Required. Each management and key employee of a licensed gaming operation shall possess a current and valid tribal gaming employee license.

7.5 Eligible Licensees. A tribal gaming license shall be issued only to a person who qualifies therefor under the Ordinance, or to the Tribe or a tribal subdivision.

7.6 Employee Drug Tests. Any person employed in a Commission-licensed gaming enterprise may be randomly selected for testing for utilization of marijuana, cocaine, amphetamines, opiates and phencyclidine (PCP). Random drug testing of employees is a mandatory operating procedure for all operators.

7.7 Regulations Posted or Available. Each operator shall have a copy of this Ordinance and regulations readily available for inspection by any person at each authorized gaming site.

7.8 Minimum Age to Play. In any gaming facility which has a retail alcoholic beverage license, the minimum age to play any Class III game is 21 years of age. In any gaming facility which does not have a retail

alcoholic beverage license, the minimum age to play is 19 years of age.

7.9 **Minimum Age to Enter Facility**. No person, other than a Class III enterprise employee, shall be permitted to:

(A) Enter the area of any building which has a retail alcoholic beverage license and in which Class III gaming is conducted, if under 21 years of age;

(B) Enter the area of any building which does not have a retail alcoholic beverage license and in which Class III gaming is conducted, if under 19 years of age.

7.10 **Posting of Rules of Play**. Each operator shall post in a conspicuous location near where any gaming activity is being played, or shall otherwise provide the public with an explanation of the rules of play of every specific game s/he operates.

7.11 **Equipment Rental Restrictions**. Each operator of a gaming activity is prohibited from renting or lending gaming equipment to any person.

7.12 **Restrictions on Gaming Apparatus Exchange**. Each operator is prohibited from exchanging pull-tabs, punchboards, sports pools, and twenty-one boxes (shoes). All other gaming equipment may be exchanged without prior approval. Any request for approval shall be made to the Tribal Commission at least 5 days prior to the exchange.

7.13 **Approval of Gaming Materials Required**. Any operator who anticipates the printing, manufacture, or construction of any equipment for gaming activity shall first notify the Tribal Commission of his intention and shall have the finished product approved by the Tribal Commission before it is placed in service.

7.14 **Requisite Sale and Redemption Value**. Gaming chips and other tokens of value shall only be sold and redeemed by the operator and only for full value.

7.15 **Record Maintenance Requirements**. Each licensed gaming operation shall maintain and keep for not less than five (5) years permanent books of accounts and records, including inventory records of gaming supplies, sufficient to establish the gross and net income, deductions, expenses, receipts and disbursements of the enterprise.

7.16 **Liquor Sale Restrictions**. There shall be no sale of liquor at any gaming site without the requisite license for such sale issued under the Tribe's liquor control ordinance.

7.17 **Form of Payment for Chance to Play**. Consideration for the chance to play in any gaming activity shall only be cash, house token or chip, and shall be presented at the time the game is played. No other form of consideration shall be allowed unless the Tribal Commission gives prior written approval.

7.18 **Documentation of Winnings and Losses for Tax Purposes**. Evidence of any win or loss incurred by a player may, upon request, be provided to such player.

7.19 <u>**Taxes, Fees and Reports Timely Transmitted**</u>. Each operator shall pay all applicable taxes and fees, including those assessed by the National Indian Gaming Commission, and file all applicable reports on time.

7.20 <u>**Response to Regulatory Inquiries**</u>. Each operator shall respond immediately to and obey all inquiries, subpoenas or orders of the Tribal Commission, the Tribal Council, the Tribal Court, or the National Indian Gaming Commission.

7.21 <u>**Display of Gaming License**</u>. Each operator shall prominently display at each gaming site a current, valid tribal gaming license.

7.22 <u>**Maintenance of Premises**</u>. Each operator shall, at all times, maintain an orderly, clean, and neat gaming establishment, both inside and out.

7.23 <u>**Facility Security**</u>. Each operator shall provide adequate security to protect the public before, during and after any gaming activity.

7.24 <u>**Cooperation with Law Enforcement**</u>. Each operator shall cooperate at all times with law enforcement personnel.

7.25 <u>**Record Inspection**</u>. Each operator shall make its premises and books and records available for inspection during normal business hours by the Tribal Commission or their designee, and by authorized representatives of the National Indian Gaming Commission.

7.26 **Gaming Occasion Restrictions**. No gaming shall be conducted on special days of observance designated by the Tribal Council.

7.27 **Discrimination Prohibited**. No operator may discriminate on the basis of sex, race, color, or creed in the conduct of any licensed gaming activity. Employment preference for tribal members and other Native Americans shall not constitute discrimination by the operator.

7.28 **Financial Record Review**. Each operator shall keep accurate books and records of all moneys received and paid out and provide authorized representatives of the National Indian Gaming Commission and the Tribal Commission or its designee with copies of or access to the same upon request.

7.29 **Use of Net Proceeds**. All net proceeds of any gaming activity shall be used only in a manner prescribed by this Ordinance.

7.30 **Reporting Requirement Compliance**. Every operator shall comply with all applicable tribal and federal revenue reporting laws.

7.31 **Tribal Law Violation**. It shall be a violation of the Tribe's Criminal Code to violate any provision of this Ordinance, any regulation of the Tribal commission, or any order of the Tribal Court.

7.32 **Employee Misconduct**. Each operator may immediately suspend without pay any employee who is charged with an offense described in subsection 10.2(BB) or any offense related to the sale, possession, manufacture and/or transport of illegal drugs. If a

suspension is made on these grounds, the operator shall also immediately notify the Tribal Commission in writing of the name of the person and the pending charge and advise the Tribal Commission of the outcome of the case. If the employee is convicted or pleads nolo contendere to the charge, his or her employment shall be terminated. An employee terminated under this section for a drug-related conviction may be rehired, provided that such person is eligible for a gaming license, and provided further that such person passes a pre-employment drug screen test, and furnishes a substance abuse assessment by a licensed substance abuse program, and demonstrates compliance with that program's rehabilitation/ counseling plan.

Section 8. Gross Proceeds Tax.

8.1 Rate. There is hereby levied upon and there shall be collected from all enterprises an annual tax for the purpose of funding the Tribal Gaming Commission equal to one (1) per cent of the adjusted gross proceeds thereof, as that term is defined in subsection 2.1 of this Ordinance. The tax levied by this section shall be a personal obligation of the taxpayer.

8.2 Separate Accounting Practices. Any enterprise which obtains revenue from sources other than activities directly related to gaming, such as the sale of food and beverages, shall keep books to show separately the transactions used to determine the tax levied in this section.

8.3 Tax Due Date; Accrual, Return and Signature.

(A) Duty of Enterprise. The enterprise shall, on or before the fifteenth (15th) day of each month, make out a return for the preceding month on a form prescribed by the Tribe, showing the entire amount of adjusted gross proceeds of his gaming activities, and the amount of tax for which it is liable, and shall transmit the return signed by the Primary Management Official, together with payment of the amount of tax owed, on or before the fifteenth day of the month. If the return is prepared by other than said Manager, the return shall so state, and shall give the name and address of the person preparing the return, together with his signature and the name of his employer, if any.

(B) Accrual of Tax. The tax imposed by this section shall accrue to the Tribe on the last day of the month in which the gaming activity occurred.

8.4 **Annual Periodic Reconciliations**. In the event that the annual financial report provided by each enterprise indicates that the amount of adjusted gross proceeds for the year differs from the total of the adjusted gross proceeds reported monthly under sec. 8.3, the enterprise shall file with the Commission a reconciliation return, which indicates the proper amount of the adjusted gross proceeds, and if, additional tax is due, provide the correct amount together with one per cent (1%) penalty interest, compounded monthly, on the amount unreported or underreported, commencing with the month in which the report required by sec. 8.3 was due.

8.5 <u>**Tax Revenue Distribution**</u>. All sums of money received and collected under this section shall be deposited by the Tribe to the credit of an Internal Service Fund to be used solely for the purpose of funding the operations of the Tribal Gaming Commission, in carrying out its responsibilities pursuant to this ordinance, the Indian Gaming Regulatory Act, and the Tribe's Compact with the State of Michigan, published at 58 Fed. Reg. 63262 (Nov. 29, 1993).

8.6 <u>**Internal Service Fund**</u>. The Fund is used to account for the financing of goods and services provided by one department or agency to other departments or agencies of the governmental unit, or to other governmental units, on a cost reimbursement basis.

8.7 <u>**Excess of Receipts over Expenses**</u>. In the event that receipts exceed expenses, as determined by the annual audit, the Internal Service Fund will rebate such excess to enterprises proportionately.

8.8 <u>**Annual Budget**</u>. The Tribal Gaming Commission will prepare and submit for approval by the Executive Council an annual budget.

Section 9. Operation of Tribally-Owned or Tribally- Operated Games.

9.1 <u>**Management by a Primary Management Official**</u>.

(A) The Tribal Council shall appoint one person who shall serve as Primary Management Official at each of its tribally-operated gaming

establishments. The person appointed shall undergo a background check by the Tribal Commission and shall obtain an employee gaming license before commencing work. The Tribal Council shall be the direct supervisor of the Primary Management Official.

(B) The Primary Management Official shall be responsible for managing and overseeing the day-to-day operations of the gaming operation. S/he shall have such authority as the Tribal Council may delegate.

(C) The Primary Management Official shall present a written monthly report to the Tribal Commission and the Tribal Council which details the number of patrons served, the amount of income generated, the numbers of employees working at the establishment, a detailed description of any patron complaints and other problems experienced at the establishment, also a written statement of any changes in key employees or primary management officials and all bills which are 30 days or more past due.

(D) Any patron's cash winnings shall be paid in cash or check and shall be paid within 72 hours after it is won.

(E) The Primary Management Official shall propose and the Tribal Commission shall approve a patron's complaint process. Each tribally-owned and tribally-managed gaming establishment shall post at least one sign in each gaming room informing patrons that they

may file any complaints that they have directly with the Tribal Commission, and advising them of the Tribal Commission's address and phone number.

(F) Each tribally-owned or tribally-operated gaming establishment shall carry sufficient liability insurance to protect the public in the event of an accident. The Tribal Council shall determine the amount of liability insurance required for each gaming establishment.

(G) Each tribally-owned or tribally-operated gaming establishment shall post the rules of play of each game in a conspicuous place in the establishment, and shall make written copies of them available to any member of the general public upon request.

(H) The Primary Management Official shall be personally responsible for seeing that gaming activity is managed in accordance with tribal and federal law and that such gaming activity complies with all IRS reporting requirements.

9.2 **Use of Net Revenues of Tribally-Owned or Tribally-Operated Gaming Enterprises**.

(A) All net proceeds of a tribally-owned or tribally-operated gaming enterprise shall be held in the name of the Tribe. Such net proceeds may only be expended by the Tribal Council by resolution and only for the following purposes:

(1) To fund tribal government operations or programs.

(2) To provide for the general welfare of the Tribe and its members.

(3) To promote tribal economic development.

(4) To donate to charitable organizations.

(5) To help to fund operations of local government agencies.

9.3 **Audit Requirements**.

(A) The Tribal Commission and the Primary Management Official of each tribally-owned or tribally-operated gaming establishment shall obtain an annual outside audit of such gaming establishment. A copy of such audit shall be provided to the Tribal Commission, the Tribal Council and the National Indian Gaming Commission.

(B) Each contract for supplies, services (other than legal and accounting services) or concessions for a contract amount in excess of $25,000.00 annually shall be subject to an independent audit. A copy of such audit will be provided to the Tribal Commission, the Tribal Council and the National Indian Gaming Commission.

9.4 **Management Contracts**.

(A) Each management contract is subject to the prior approval of the National Indian Gaming Commission.

(B) Each management contract shall be approved by the Council with the advice and comment of the Tribal Commission. Before giving final consideration to any proposed management contract, the Council shall direct the Tribal Commission to obtain the following information and submit it to the Council for review:

(1) Background information on the proposed management contractor including its name, its address, the names and addresses of each person or entity having a direct financial interest or management responsibility for the proposed management contractor, and in the case of a corporation, the names and addresses of each member of its board of directors and all stockholders who hold directly or indirectly 10 percent or more of its issued or outstanding stock.

(2) A description of any previous experience that each person listed in subsection 9.1 above has had with other gaming contracts with Indian tribes or with the gaming industry generally, including the name and address of any tribal government or licensing agency with which such person has had a contract relating to gaming.

(3) A complete financial statement of each person listed in subsection 9.4(B)(1) above.

(4) The Tribal Commission shall contact each of the tribal governments and licensing agencies in Subsection 9.4(B)(2) above to determine the performance history of the proposed management contractor.

(5) The Tribal Commission shall arrange to have each proposed management contractor investigated to learn of his personal attributes and to determine whether s/he has a prior criminal record or any pending criminal charges.

(6) The Tribal Commission shall obtain an independent verification of the completed financial statements of each proposed management contractor.

(7) The Commission shall undertake any additional steps it can to determine the character and reputation of each proposed management contractor.

(8) If the Tribal Council, after reviewing the above described information still desires to enter into a management contract with the proposed management contractor, such management contract shall be placed in writing and submitted to legal counsel for review before the Council approves it.

(C) Any management contract approved by the Council must contain at a minimum the

following with respect to the gaming enterprise to which the contract is applicable:

(1) A provision requiring a monthly financial accounting of the gaming enterprise's income and expenses, with an annual financial accounting to be prepared by an independent auditor who is acceptable to the Tribe.

(2) A provision providing the Tribe absolute access to the daily operation of the gaming enterprise and to its books, and the Tribe's absolute right to verify the daily gross revenues of the gaming enterprise at any time.

(3) A provision guaranteeing the Tribe a minimum guaranteed payment which shall always take precedence over the management contractor's right to recoup development and construction costs.

(4) An agreed upon ceiling for the management contractor's development and construction costs.

(5) A provision that the contract shall not exceed the term limit established by federal law.

(6) A provision for termination of the contract and the grounds for termination.

(D) If the Council is satisfied with the information it receives it shall submit its

proposed contract along with all of the above described information to the Chairman of the National Indian Gaming Commission for approval.