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

[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.

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 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]

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[3]Bay Mills Resp. Ex. A.

[4]Bay Mills Resp. Ex. C.

[5]Bay Mills Resp. Ex. I.

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 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 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).)

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

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[6]IGRA defines "Indian lands" as
(A) all lands within the limits of any Indian reservation; and
(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

[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).

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 (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

[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).

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); s*ee, 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

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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)

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 *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.

(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.

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

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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.

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.

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 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

[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.

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