UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.

Defendants.
_____/

Case No. 2:06-CV-276

Hon. R. Allan Edgar
U.S. District Judge

DEFENDANTS' OBJECTIONS TO
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Defendants United States of America, the National Indian Gaming Commission ("NIGC") and its Chairman, Philip N. Hogen, and the U.S. Department of the Interior (the "Department") and its Secretary, Dirk Kempthorne, respectfully object to the findings and recommendations in Magistrate Judge Timothy P. Greeley's July 23, 2007, Report and Recommendation ("R&R," Dkt. #40).

Introduction

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*, establishes a "bright line" as to where gaming may occur. Gaming may occur on reservation and trust property as of the date of IGRA's enactment, October 17, 1988; gaming may not occur on land taken into trust after that date ("after-acquired trust land"), subject to limited exceptions. In this case, the Sault Ste. Marie Tribe of Chippewa Indians (the "Tribe") challenges an NIGC decision finding that land placed into trust for the Tribe in 2000 does not fall within an exception to IGRA's prohibition against

gaming on after-acquired trust land. Despite two express warnings from NIGC to forestall construction, the Tribe assumed the risk and built a new casino on that after-acquired trust land.

The R&R recommends that the Court issue an order "permitting" the Tribe "to operate its new casino on the 2000 parcel pending resolution of this case." (R&R at 20.) If the Court adopts this recommendation, it must preemptively enjoin NIGC from initiating an enforcement proceeding to close down the casino. The Tribe is not entitled to such unorthodox and extraordinary preliminary relief: It has not shown that a minor, temporary dip in profits at one if its six casinos constitutes immediate and irreparable harm, and it has not demonstrated that it is likely to succeed on the merits of its claims. Accordingly, as set forth below, Defendants object to Judge Greeley's recommendation that the Court issue a preliminary injunction and to his predicate findings.

Standard

The Court makes "a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. . . ." Fed. R. Civ. P. 72(b); W.D. Mich. LCivR 72.3(b). The Court may "accept, reject, or modify, in whole or in part, the findings made by the magistrate judge." *Id.* The Court may receive additional evidence, or may make a de novo determination based on the record developed before the magistrate judge. *Id.*

As set out in the R&R, "issuance of a preliminary injunction is the 'strong arm of equity and should not occur in doubtful cases.'" (R&R at 8, quoting *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972)). The Tribe bears the burden of establishing its entitlement to a preliminary injunction, "one of the most drastic tools in the arsenal of judicial remedies," *Am. Civil Liberties Union of Ky. v. McCreary County*, 354 F.3d 438, 444 (6th Cir. 2003), based on a balancing of four factors: 1) a strong or substantial likelihood

of success on the merits; 2) irreparable injury; 3) harm to third parties; 4) the public interest. (R&R at 7, citing *Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003).)[1]

Objections

1. The Tribe Has Not Demonstrated Irreparable Harm.

Citing two affidavits filed by the Tribe, the R&R finds that the Tribe has demonstrated that it will suffer immediate and irreparable harm in the absence of a preliminary injunction. (R&R at 11, citing Affidavits of Jake Miklojcik and Victor Matson, Jr.) Neither those affidavits nor any other evidence supports Judge Greeley's conclusion. The Tribe is not being *prevented* from gaming in St. Ignace; it is gaming already by right on the adjacent 1983 parcel. The Tribe's claimed irreparable harm is that it believes it could be making slightly more money at its new casino. Defendants object to Judge Greeley's finding that such speculative and insubstantial injury constitutes irreparable harm.

Defendants object to Judge Greeley's finding that the Tribe presented competent, non-speculative evidence that it faces immediate and irreparable harm. The R&R states: "The Tribe has presented evidence in the form of affidavits establishing that it has suffered a loss of revenue as a result of its inability to open the new casino." (R&R at 10.) The affidavits submitted by the Tribe do not establish a substantial and certain loss of revenue that would be remedied by the grant of a preliminary injunction. The most concrete "evidence" of revenue loss the Tribe submitted indicated that for the first four months of 2007, the St. Ignace casino experienced a loss in gaming revenues of 6.5 percent, and over the 2006 calender year, gaming revenues declined $300,000. (Tribe's

[1]The R&R suggests that the Tribe is subject to a heightened standard because it seeks "mandatory" or affirmative relief, as opposed to "prohibitory" relief that merely maintains the status quo. (R&R at 8, quoting *Wyandotte Nation v. Seblius*, 337 F. Supp. 2d 1253 (D. Kan. 2004).) The Sixth Circuit has rejected that heightened standard. *See United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998).

Opening Br. Ex. 1, Matson Aff. at ¶¶ 18, 19.) The Tribe cannot blame its entire 6.5 percent revenue loss on the fact that it has been operating out of a temporary structure (the "Sprung Structure") – revenues were down for all of 2006, but the Tribe only began operating the Sprung Structure in September 2006, when it closed its existing casino. Plainly, myriad factors have contributed to a decline in revenues at the St. Ignace site (the cost of gas, increased competition, depressed state and local economic conditions, etc.). Indeed, according to Mr. Miklojcik's affidavit, while gaming revenues may be up nationally, Michigan tribal gaming experienced growth of only 0.7 percent in 2006. With an overall growth of 1.1 percent for all its casinos combined, the Sault Tribe fared relatively well in 2006 compared to several of the other Michigan tribes, which experienced negative growth. (*See* Tribe's Reply Ex. 1, Miklojcik Aff. Table 1.)

A party seeking a preliminary injunction must show that it "will suffer 'actual and imminent' harm rather than harm that is speculative or unsubstantiated." *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006). The speculative assertions in the Tribe's affidavits fail to meet this standard. *See e.g.*, Miklojcik Aff. at ¶ 21 ("*potential* financial impact on the Tribe and its health and education programs *could* prove brutal"; ¶ 23 "[t]here is also the *very real possibility* that the loss of patrons, and their loyalty, will also mean lower revenues far into the future"; ¶ 25 "there is strong *reason to believe* that the shortfalls *may* expand"); Matson Aff. at ¶ 26 ("Payment of the debt and the casino itself *could* be threatened"; "Tribal members *may not* get proper or adequate health care"; Elderly tribal members *may not* get appropriate social services") (emphases added).

The Tribe has also failed to establish that even the modest 6.5 percent downturn would be remedied if the Tribe opens its new casino. For example, even if the new casino opens, 80 percent of the St. Ignace casino's patrons will still have to travel from below the bridge to reach it, many of

whom will encounter other tribal casinos along the way. (*See* Miklojcik Aff. ¶¶ 14-16, discussing casino location as the most important consideration affecting a potential patron's selection of a gaming venue.) In any event, any losses fairly traceable to the temporary use of the Sprung Structure, are just that – temporary. Such losses do not constitute irreparable harm. *See, e.g., In re Irrevocable Standby Letter of Credit No. SE4444393W*, 336 F. Supp. 2d 578, 581 (M.D.N.C. 2004) (denying motion for preliminary injunction where movant "had not made any showing that the loss of goodwill resulting from this dispute will result in any permanent loss of customers"). *Cf. Ohio v. Nuclear Reg. Comm'n*, 812 F.2d 288, 290-91 (6th Cir. 1987) (stating, in connection with losses occasioned by nuclear plant's delayed opening, "though the licensee is certain to be economically harmed by a delay, the loss is not substantial. This economic loss can later be recouped when the plant begins full power operation").

Even if the entire 6.5 percent downturn is due to the Sprung Structure's lack of aesthetic appeal, the financial impact is not substantial enough to warrant a finding of irreparable harm. Negative financial consequences that are incidental to government regulation do not constitute irreparable injury. *See A&B Wiper Supply v. Consumer Prod. Safety Comm'n*, 514 F. Supp. 1145, 1148 (D. Pa. 1981) ("material adverse changes in [company's] manner of doing business, the loss of credit from its principal supplier, its direct loss of a [government] subsidy, and the apparent loss of substantial customers" incidental to FTC enforcement proceeding did not constitute irreparable harm). Indeed, "injury resulting from attempted compliance with government regulation ordinarily is not irreparable harm." *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980). *See also A.O. Smith Corp. v. Fed. Trade Comm'n*, 530 F.2d 515, 527 (3d Cir. 1976). The Tribe seeks to

avoid the ordinary costs faced by all tribes in maintaining compliance with IGRA. The Court should reject Judge Greeley's finding that such ordinary costs constitute irreparable harm.

In addition, although the Tribe cannot recover monetary damages in connection with its APA claims (R&R at 10-11), the lack of an adequate remedy at law is not alone sufficient to establish irreparable harm. *See Moore's Federal Practice 3d* § 65.06[1] at 65-20-1 ("The lack of an adequate remedy at law, by itself, will not be sufficient to sustain a grant of injunctive relief; additional factors must be present").[2]

The R&R also finds that the Tribe's alleged revenue loss might impact the Tribe's governmental services: "A decrease in revenue can have a significant impact on the governmental services available to tribal members." (R&R at 11.) The general nature of this non-controversial statement reflects the general and speculative assertions in the affidavits submitted in support of the Tribe's motion. In summarizing the facts, the R&R refers to two additional affidavits supplied by the Tribe: an affidavit from Aaron Payment, the Tribe's Chairperson, and an affidavit from Kristi Little, the Tribe's Associate Executive Director - Membership Services. The assertions in these

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[2]The cases cited in the R&R regarding the Tribe's inability to recover money damages (R&R at 11) are inapposite, in any event. In *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936), the Court observed that the plaintiff's inability to recover unjust taxes paid to the government merited permanent (not preliminary) injunctive relief. Even there, where a permanent injunction was at issue, the Court emphasized that the case involved First Amendment rights, the abridgement of which constitutes a unique form of irreparable injury: "The tax here is bad not because it takes money from the pockets of the appellees. . . .It is bad because, . . .it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." *Id.* at 250. In *Tristano v. Fed. Bureau of Prisons*, 2004 WL 5284511 (W.D. Wis. Oct. 15, 2004), the court mentioned the plaintiff's inability to recover money damages as establishing a lack of adequate remedy, but proceeded to discuss separately the plaintiff's showing of irreparable harm. *Id.* at *8. Finally, in *Ohio Oil Co. v. Conway*, 279 U.S. 813, 256 (1929), the Court found that the injury to the moving party would be "certain and irreparable;" here, the Tribe has failed to show such a "certain" and direct loss.

affidavits are highly speculative. For example, Chairperson Payment states that if the Tribe is unable to open the new casino, "Tribal members and non-Indian members of the local community will likely lose their jobs. . . ." (Tribe's Opening Br. Ex. 3, Payment Aff. ¶ 22.) Without ever indicating how many jobs are threatened, Chairperson Payment speculates that, "[i]ncreased unemployment would likely result in increased social problems, such as alcoholism, substance abuse, and domestic abuse, all of which would put additional pressure on tribal law enforcement, social services, and health services. . . ." (*Id.* at ¶ 23.) Similarly, Ms. Little speculates that "[a]ny threat or sustained gaming loss would have a considerable negative economic impact in the local communities, and in local programs and services." (Tribe's Opening Br. Ex. 4, Little Aff. ¶ 16.) But Ms. Little acknowledges that only 38.2 percent of the Tribe's health program funding comes from the Tribe itself, and she never identifies what portion of that 38.2 percent derives from gaming revenues as a whole, let alone how much derives from St. Ignace casino revenues. And, of course, the difference in funding that would be available were the Court to issue a preliminary injunction is the *difference* between the current revenues at the St. Ignace temporary casino and speculative projected revenues at its new casino. The Tribe did not demonstrate that this marginal difference is likely to affect the Tribe's ability to provide essential governmental services to any significant degree. Indeed, if the Tribe's ability to provide such services were truly threatened, the Tribe would not have waited over eight months from the date the NIGC issued its final decision to seek a preliminary injunction. *See Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276-77 (2d Cir. 1985) ("failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury"). *See also* Def. Resp. at 17-18 (citing cases).

Defendants also object to Judge Greeley's finding that the Tribe is entitled to a preliminary injunction despite the self-inflicted nature of its injury.[3] The R&R fails to appreciate that in determining whether the Tribe's injury was self-inflicted, the critical inquiry is whether the Tribe had an opportunity to avoid the injury it now claims, but chose not to do so. Defendants contend that the Tribe had such an opportunity at least as of July 30, 2004, when the Acting General Counsel of the NIGC advised that she had "serious questions as to whether the lands constitute Indian lands on which the Tribe may conduct gaming," and cautioned the Tribe that it "may want to forestall construction plans while the issues are more carefully considered." (AR 186.) The NIGC warned the Tribe a second time, when construction of the new casino was in its earliest stages: "I would advise against beginning construction of the facility until the Indian lands question is resolved." (AR 194.) The case law is well-settled that, "'[a] preliminary injunction movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted.'" *Lee v. Christian Coal. of Am., Inc.*, 160 F. Supp. 2d 14, 33 (D.D.C. 2001) (quoting *Fiba Leasing Co., Inc. v. Airdyne Indus., Inc.*, 826 F. Supp. 38, 39 (D. Mass. 1993)). The Tribe chose to proceed with construction of its new casino on land that it knew might not be eligible for gaming. The Court should not award the Tribe

[3]Defendants disagree with Judge Greeley's characterization of Defendants' argument on this point as "disingenuous." (R&R at 11.) Defendants acknowledged that bureaucratic delay contributed to the length of time in which the matter was under consideration. (*See* Def. Br. at 7.) Some of the Tribe's actions also caused delay. It was not until November 2004, several months after construction of the new casino began, that the Tribe informed NIGC that most of the new casino would be located on the 2000 parcel. (AR 196.) Until November 2004, the Tribe had indicated that only 200 feet of the new casino would be located on the 2000 parcel. (AR 194.) In a November 3, 2004, letter, after the Tribe had begun constructing the new casino, the Tribe advised that "at least one-half of the casino's gaming floor is located on the 2000 Parcel." (AR 196.) As it turns out, 90 percent of the casino is located on the 2000 parcel.

the extraordinary relief of a preliminary injunction to save it from the consequences of a business risk it knowingly undertook.

2. The Tribe Has Not Demonstrated A Strong Likelihood Of Success On The Merits.

Defendants object to Judge Greeley's finding that the Tribe established a strong likelihood of success on the merits of its claim that the "reservation" component of the NIGC's decision was arbitrary and capricious. An exception to IGRA's prohibition against gaming on after-acquired land permits gaming on land that is contiguous to a tribe's reservation boundaries as of October 17, 1988. *See* 25 U.S.C. § 2719(a)(1). The Tribe contends that this exception applies to the 2000 parcel because it is contiguous to the 1983 parcel, which the Tribe argues is a reservation. Relying on the Department's February 14, 2006, letter, the NIGC found that the 1983 parcel was not a reservation. In the R&R, Judge Greeley finds that the February 14, 2006, letter lacked a "reasoned explanation" for its conclusion, and therefore the Tribe established a strong likelihood of success on the merits of its reservation claim. (R&R at 17.) Defendants object to this finding because it is premised on a fundamental misreading of the opinion, which is neither incomplete nor poorly reasoned.[4]

The R&R proceeds from the premise that the opinion contemplates some set of factors that, if articulated on remand, might allow the 1983 parcel to be considered a *de facto* reservation under IGRA. (R&R at 15, 17.) This premise is incorrect; the Department's February 14, 2006, letter did

[4]The R&R acknowledges that whether the Tribe is likely to succeed on the merits of its claims "presents difficult legal issues. . . ." (R&R at 12.) To the extent the Court has doubts about the Tribe's ability to succeed on the merits of its claims, the Court should deny the motion for preliminary injunction. As this Court has observed, "[t]here is no power. . .more dangerous in a doubtful case, than the issuing of an injunction." (R&R at 8, quoting *Roghan v. Block*, 590 F. Supp. 150, 153 (W.D. Mich. 1984) (internal citations omitted).)

not posit a *de facto* definition of reservation when a tribe has a proclaimed reservation. The February 14, 2006, letter must be read in the context of the question the Tribe posed: Was the 1983 parcel a reservation for IGRA purposes, where the parcel was taken into trust under the Indian Reorganization Act ("IRA"), but was not proclaimed a reservation under the IRA, and the Tribe had two proclaimed IRA reservation parcels as of the date IGRA passed? The opinion says, "no." It provides: "We interpret reservation under the IGRA consistent with the distinction made under the IRA, maintaining the distinction made in the IRA between acquiring land in trust outside a tribe's reservation and the optional second step of proclaiming it a reservation." (Letter at 9.) Applying this interpretation, the opinion concludes: "The 1983 parcel, taken into trust under the IRA, is not located within a formal or proclaimed reservation, nor was it proclaimed a reservation under the IRA. The 1983 parcel does not qualify as a reservation for the purposes of the IGRA." (Letter at 10.) The February 14, 2006, opinion thus provides a reasoned explanation for its conclusion.[5]

In support of its position that the 1983 parcel was a reservation, the Tribe advanced two principal arguments: First, when Congress drafted the contiguous to a reservation exception, its reference to "reservation" was shorthand for "Indian lands." (AR 887.) Second, under *Sac & Fox of Missouri v. Norton,* 240 F.3d 1250 (10th Cir. 2001), the 1983 parcel was a reservation because there was housing on it. (AR 887, AR 935.) The February 14, 2006, opinion letter fully addresses and rejects these arguments.

First, the opinion rejects the Tribe's argument that "reservation" is synonymous with "Indian lands." (Letter at 4-5 Part III.A.i.) It delineates how IGRA differentiates "reservation" from tribal

[5]The February 14, 2006, opinion letter is located at pages 28 to 37 of the Administrative Record. For ease of reference, these objections refer to the letter's internal page numbers, as the R&R does.

or individual trust land and "Indian lands."[6] The opinion explains further that both the IRA and IGRA distinguish between trust land and reservation, and that "not all land acquired in trust under the [IRA] . . . is a reservation." (Letter at 5.) Because the 1983 parcel was taken into trust under the IRA, 25 U.S.C. § 465, but was not proclaimed a reservation under IRA § 467, and because IGRA distinguishes between reservation and trust lands, the February 14, 2006, letter rejects the Tribe's contention that the 1983 parcel's status as trust land was sufficient to invoke the "contiguous to a reservation" exception.

Second, the opinion rejects the Tribe's argument that the presence of housing on the 1983 parcel rendered the parcel a reservation, notwithstanding the fact that it had never been proclaimed as such. (Letter at 5-9, Parts III.A.ii.,iii.)[7] As an initial matter, the opinion delineates what types of property are reservation within the meaning of IGRA: "land within the boundaries of a reservation set aside by treaty, Executive Order, or statute; land Congress expressly legislates to be reservation, and land proclaimed by the Secretary pursuant to 25 U.S.C. § 467 as reservation under the IRA."

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[6]A reservation is one subset of Indian lands, 25 U.S.C. § 2703(4)(A), and individual or tribal trust land over which a tribe exercises jurisdiction and governmental power is a second subset. 25 U.S.C. §§ 2703(4)(B), 2710(a), (d)(1)(A)(i). IGRA provides that a tribe with a reservation on October 17, 1988, may game on contiguous after-acquired trust land. 25 U.S.C. § 2719(a)(1). Section 2719(a)(1) does not refer to land contiguous to tribal or individual trust land lands or Indian lands. In contrast, another exception provides that for tribes in Oklahoma, gaming may occur contiguous to "former reservation[s]" and "to other land held in trust. . . ." 25 U.S.C. § 2719(a)(2). Because IGRA's plain language does not establish a general "contiguous to Indian lands" exception, but, instead, distinguishes between reservations and trust lands in establishing the contours of the "contiguous" exception, the February 14, 2006, letter properly rejected the Tribe's argument.

[7]The Tribe argued, for example, "[b]ecause numerous tribal housing units are located on the Sault Tribe's 1983 trust parcel, that parcel meets the definition of reservation as determined by the court in *Sac and Fox.*" (AR 893-94.)

(Letter at 5.)[8] Because the 1983 parcel did not qualify as a reservation under this traditional definition, the opinion turned to the Tribe's argument that under *Sac & Fox*, the definition of reservation should be broadened to include trust land with housing. (Letter at 5.) The Department's opinion disagrees with the Tribe's reading of *Sac & Fox*. *See* Letter at 7 ("We do not interpret the court's holding . . . as support for the proposition that all land taken into trust for residential uses of tribal members qualifies as reservation.") The opinion further finds that housing is not a determinative factor under either the IRA or IGRA.[9]

The Tribe did not raise the broader argument it now advances in this Court – that the 1983 parcel has multiple uses and is a *de facto* reservation – until after the Department issued its February 14, 2006, opinion. (AR 1222, AR 1303, requesting reconsideration). Thus, the Department's February opinion did not directly address the *de facto* reservation argument. The NIGC considered and rejected that argument, however, when it adopted the Department's opinion in its Final Decision and Order. The Tribe continued to press the issue with the Department, despite having received the

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[8]The opinion also finds that a reservation may be created through court order when the United States is a party, in certain instances. (Letter at 5, at n.2.)

[9]As to the IRA: "[T]he IRA does not make residential use the distinction between reservation and trust land. Rather, the IRA relies on a proclamation by the Secretary, which provides notice to the public and indicates a Federal intent to assume jurisdiction over the property. *Cf. City of Sherrill v. Oneida Indian Nation,* 125 S. Ct. 1478, 1493 (2005) (finding the unilateral creation of a checkerboard of alternating state and tribal jurisdiction by the Tribe to seriously burden the administration of state and local governments." (Letter at 8.) As to IGRA: "We conclude, therefore, that neither residential use by tribal Indians on trust land, nor the exercise of tribal jurisdiction, is the determinative factor in defining reservation under the IGRA." (Letter at 8, footnote omitted.) Significantly, Congress overrode the *Sac & Fox* court, which had disregarded the Department's reservation opinion based on the premise that only NIGC could determine whether land constituted a reservation for IGRA purposes. Congress clarified that the authority to determine whether a specific area of land is a reservation for purposes of IGRA was delegated to the Secretary. 115 Stat. 414, 442-43 (Nov. 5, 2001).

final agency action needed for APA review. Ultimately, the Department denied the Tribe's request for reconsideration, reiterating the controlling fact that "the tribe had a proclaimed reservation on that date and the 1983 parcel was taken into trust under the Indian Reorganization Act and not proclaimed a reservation." (AR 1352, footnote omitted.)[10]

Judge Greeley thus misreads the February 14, 2006, opinion as embracing the concept that a tribe may have a reservation for IGRA purposes under some set of undefined parameters even when that tribe had a proclaimed IRA reservation when IGRA was passed. (R&R at 17.) The opinion does *not* provide that IRA tribal trust land may fall within the meaning of reservation as used in IGRA when that property is not proclaimed and the tribe has an IRA-proclaimed reservation, as the Sault Tribe does. Rather, the opinion concludes that the IRA and IGRA should be interpreted consistently, *maintaining* the distinction for IRA-acquired property between trust land and land proclaimed to be a reservation. It was reasonable to interpret the two statutes consistently and conclude that when a tribe has a reservation proclaimed pursuant to the IRA, its other IRA trust lands are not a reservation, absent a proclamation. Thus, there are no parameters to define for purposes of the 1983 parcel and the opinion is complete.

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[10]In denying reconsideration, the Department also clarified that it did not intend for its February 14, 2006, opinion to be interpreted as providing that non-proclaimed reservations under the "Indian country" criminal jurisdiction statute, 18 U.S.C. § 1151(a), were reservations for IGRA purposes, as the Indian country statute does not distinguish between reservation and trust land in the same manner as IGRA. (AR 1352-53.) This clarification was consistent with the February opinion's rejection of the Tribe's argument that tribal trust land was synonymous with reservation under IGRA. (Letter at 4-5.) Thus, even if the 1983 parcel were to "meet the definition of reservation found in 18 U.S.C. § 1151(a)" (R&R at 18), that conclusion is not dispositive as to whether the parcel is a reservation under IGRA. Further, the cases addressing "informal" reservations under § 1151(a) have their genesis in Oklahoma, which has many former reservations. IGRA has separate provisions for lands in Oklahoma. 25 U.S.C. § 2719(a)(2).

Judge Greeley focuses on *dicta* in the February 14, 2006, opinion that there are some circumstances – "not present here" (Letter at 9) – in which a tribe might be able to establish that a parcel of land is a reservation under IGRA even though it was not proclaimed. (R&R at 18.) The Department's opinion explains that an alternative analysis might be used for a tribe that had no formal reservation parcel at the time IGRA was enacted (unlike the Sault Tribe), but does not fully articulate the contours of such an alternative analysis because there was no need to do so. Rather, the opinion explains that the alternative analysis might be relevant to Indian tribes such as rancherias and pueblos, which (unlike the Sault Tribe) did not involve land acquired under the IRA, but land set-asides equivalent to land reserved from cession or statutory reservations.[11] The discussion of these cases, thus, is *dicta* in the February 14, 2006 opinion. The opinion does not equate IRA trust land or the 1983 parcel to rancherias or pueblos, or permit property taken into trust under the IRA and not proclaimed a reservation to be a *de facto* reservation where, as here, the tribe has an IRA-proclaimed reservation. The references to rancherias and pueblos do not provide otherwise.

The R&R also focuses on the February 14, 2006, opinion's statement that, "absent additional evidence that indicates a federal intent that the 1983 parcel was to serve as the Tribe's permanent settlement, it is not reservation within the meaning of the IGRA." (R&R at 15, quoting Letter at 9.) This statement must be read in the context of the opinion as a whole, the two-step process for

[11]For instance, land set-asides prior to the enactment of the IRA may not use the term "reservation." *See, e.g.*, Executive Order, April 24, 1912. (Letter at 5, n.2 (referencing the Picayune Rancheria Indian lands opinions).) Similarly, pueblo land grants are land acquired by a tribe from the Kingdom of Spain prior to the land coming under the jurisdiction of the United States, and were acknowledged by the United States. *See United States v. Sandoval*, 231 U.S. 28, 38-39 (1913). Indian colonies may also fall into this category. *See* Executive Order, May 6, 1913, re: the Nevada or Colony tribe of Indians, and *United States v. McGowan,* 302 U.S. 535, 537 (1938) (regarding land acquired in 1917 for the use of landless Indians, now the Reno Indian Colony).

proclaiming a reservation under the IRA, and the actual question presented to the Department. The first sentence of the paragraph reiterates that the Department interprets the IRA and IGRA consistently. And, as the rest of that paragraph makes plain, the Department's conclusion was that no such federal intent could be gleaned in the situation presented – where the Tribe already had proclaimed reservation parcels when IGRA was passed. The presence of housing could not transform a non-proclaimed parcel into a reservation. For example, the sentence following, which concludes the Department's legal analysis, states: "When the Tribe has a formal or declared reservation, we do not find that a housing development on trust land outside the boundaries of that reservation is a reservation for purposes of the IGRA." (Letter at 10.) In essence, Judge Greeley disregarded the essential conclusion of the February 14, 2006, letter: that non-proclaimed trust land does not constitute a "reservation" under IGRA when a tribe had defined, proclaimed reservation parcels when IGRA was passed.[12]

Because the February 14, 2006, opinion upon which the NIGC relies in its final decision offers and applies a reasonable interpretation of IGRA, Judge Greeley should have found that it is

[12]In emphasizing that "the 1983 parcel was intended to be used in exactly the same manner and for the same purposes as the reservation land in Sault Ste. Marie" (R&R at 17), Judge Greeley gives no weight to the fact that the Secretary proclaimed the Sault Ste. Marie parcel to be a reservation in 1984, but has never done so with regard to the 1983 parcel. The R&R also appears troubled by the fact that the Tribe's other proclaimed reservation parcel, the Sugar Island parcel, is a reservation, despite its limited use by the Tribe. (R&R at 15.) Judge Greeley fails to acknowledge, however, that proclaiming land a reservation is a discretionary act; there are no regulatory standards to apply. A tribe may request a reservation proclamation for a variety of reasons. In the case of Sugar Island, that parcel became the Tribe's land base that enabled the Tribe to reorganize its government under the IRA. (AR 31-32). It was the Tribe that requested the reservation proclamation and the Tribe that chose how it would use the parcel. To determine what constitutes a reservation for IGRA purposes, it is necessary to determine what Congress intended when it used the word in the Act. The Department's determination that Congress intended that the term be interpreted consistently with the term's use in the IRA – that is, Congress intended to reference a proclaimed reservation or other formal reservation – is reasonable.

entitled to deference and thus, the Tribe failed to show a likelihood of success on the merits of its reservation claim. *See Citizens Exposing Truth About Casinos v. Kempthorne,* No. 06-5354, 2007 WL 1892080, *5-6, 11 & n.1 (D.C. Cir. July 7, 2007) (applying *Chevron* deference to Secretary's determination of initial reservation and rejecting argument that property was a *de facto* reservation).

Finally, in the course of discussing the Tribe's likelihood of prevailing on its reservation claim, Judge Greeley pauses to consider "the equities." (R&R at 18-19.) Judge Greeley finds that "Defendants will not suffer an injury if the injunctive relief is granted" while "if Plaintiff is not permitted to use its facility, the injury could be devastating." (R&R at 19.) Defendants object to these findings, which plainly overstate the case, in each instance.[13] This injunction is directed to the very heart of NIGC's enforcement authority. Granting a preliminary injunction to prevent the NIGC from exercising its enforcement authority – where the Tribe has not shown that its fiscal well-being is threatened to any significant degree – substantially undermines that authority and interferes with the exercise of prosecutorial discretion. Under the R&R's approach, it is difficult to imagine circumstances in which any regulated party would fail to seek a preliminary injunction before a determination on the merits is made. Compliance with any regulatory scheme will virtually always affect a party's bottom line to some extent. In short, issuance of a preliminary injunction here would not respect the principle that a preliminary injunction is among the most drastic tools in the arsenal

[13]At various places, Judge Greeley indicates that this case does not involve permitting additional gaming to occur in St. Ignace, only moving the location of an existing gaming venue. *See, e.g.*, R&R at 10 (characterizing issue as whether the Tribe can "change the location [of the casino] by a few hundred feet"); R&R at 9 ("the Tribe's request will not determine whether or not gambling occurs in St. Ignace, as gambling is presently occurring in the Sprung Structure."). In permitting gaming on the 2000 parcel, however, the Court will effectively double the amount of gaming that may occur in St. Ignace, as there is nothing to prevent the Tribe from continuing to game on the 1983 parcel, either in the Sprung Structure or in any other structure the Tribe may decide to erect.

of judicial remedies; instead, it would encourage parties to seek preliminary injunctions in ordinary cases contesting agency decisions.

Respectfully submitted,

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