

Stockbridge-Munsee Community

BAND OF MOHICAN INDIANS

TRIBAL COUNCIL OFFICES

March 6, 2017

Gov. Scott Walker
115 East Capitol
P.O. Box 7863
Madison, WI 53707
(govwalker@wisconsin.gov)

Re: State of Wisconsin's Refusal to Enforce Compacts

Dear Governor Walker:

I am writing on behalf of the Stockbridge-Munsee Community (the "Tribe") regarding the State of Wisconsin's (the "State") refusal to comply with key provisions of the class III gaming compact (the "Compact") between the Tribe and the State.

By this letter, the Tribe notifies the State of the Tribe's intent to withhold revenue sharing payments to the State until the State complies with the Compact. Further, this letter serves as notice that the Tribe is invoking its right to utilize the dispute resolution procedures set forth in Section XXII of the Compact.

BACKGROUND

A. The Indian Gaming Regulatory Act

The Indian Gaming Regulatory Act ("IGRA") is a federal law that governs the conduct of tribal gaming activities. IGRA generally prohibits Indian tribes from conducting gaming on lands that were placed into trust status after 1988, subject to limited exceptions. Section 20 of IGRA allows tribes to conduct gaming on lands acquired after 1988 where the Secretary of the Interior and the Governor of the State determine that such gaming is in the best interest of that particular tribe, and that it is not detrimental to the surrounding community (the "Section 20 Exception").

IGRA also requires the Tribe to enter into a compact with the State before it operates class III gaming activities.

B. The Class III Gaming Compact Between the Tribe and the State

The Tribe and the State entered into the Compact in 1992 to ensure proper regulation of the Tribe's gaming activities. The Tribe and the State have agreed to amend the Compact three times since 1992 – most recently, in 2009.

In 1998, the Tribe and the State amended the Compact to require the Tribe to pay a portion of its gaming revenues to the State. In 2003, the Tribe and the State amended the Compact again, which included some changes to the Tribe's obligation to pay gaming revenues to the State. That amendment (the "2003 Amendment") was intended to protect the Tribe from the development by a separate tribe of a tribal gaming facility under IGRA's Section 20 Exception, within 70 miles of the Tribe's existing gaming facility on its reservation. The United States Secretary of the Interior did not approve the 2003 Amendment pursuant to IGRA; instead, the Secretary of the Interior allowed that the 2003 Amendment to take effect without express approval, to the extent it was consistent with federal law.

Federal law, including IGRA, prohibits the State from imposing a tax, fee, charge, or other assessment on the Tribe's gaming revenues. Federal law allows a state to receive a portion of a tribe's gaming revenue, so long as the state is providing something commensurate in value in exchange for payment of such revenue. In exchange for the Tribe's revenue sharing payments through the Compact, the State has agreed to protect the Tribe's exclusive gaming rights, and to protect the Tribe from the operation by a separate Indian tribe of a nearby gaming facility under IGRA's Section 20 Exception. The Tribe's revenue sharing payments are illegal under federal law to the extent that the State is not making a meaningful concession (unrelated to the topics that are subject to IGRA's good-faith negotiation), with a value commensurate to the Tribe's payments.

C. The State's Enforcement of the Tribe's Class III Gaming Compact

In 1998, the State filed a complaint against the Tribe in United States District Court alleging that the Tribe was conducting class III gaming activities on lands that were not eligible for gaming under IGRA, and, by virtue of that allegation, that the Tribe was also in violation of the Compact.

The State asserted that the Tribe was conducting gaming activities on lands that were first placed into trust in 1995. According to the State, the Tribe's gaming parcel was not eligible for gaming because it was subject to IGRA's prohibition against tribal gaming on lands acquired in trust after 1988. The Tribe argued, unsuccessfully, that its gaming activities were lawful because the lands were within the exterior boundaries of its Reservation – qualifying for an exception to IGRA's prohibition.

The State continued its enforcement efforts against the Tribe for more than six years, culminating in a 2004 decision finding that the Tribe's reservation had been diminished – and that the gaming facility was not located on the Tribe's reservation. The State and Tribe continued to litigate the issue until 2009, when the United States Court of Appeals for the

Seventh Circuit upheld the District Court's decision.¹

NOTICE OF VIOLATION OF COMPACT

Pursuant to Section XXII.B of the Compact, the Tribe hereby notifies the State that the State is in violation of the Compact, and that the Tribe will assert its right to invoke the dispute resolution procedures in the Compact if the State does not cease its violations. As required by Section XXII.B of the Compact, the Tribe has set forth a description of the State's violations of the Compact below.

A. The State is in violation of Section XIII.E ("TAX AND REGULATION") and Section XXXII ("REVENUE SHARING") by allowing the Ho-Chunk Nation to unlawfully operate the Wittenberg Casino.

In 2008, the Ho-Chunk Nation ("HCN") began operating a class III gaming facility in Wittenberg, Wisconsin, within Shawano County (the "Wittenberg Casino"). The Wittenberg Casino is located just 16 miles from the Tribe's previously-existing North Star Casino, which is located on the Tribe's reservation. HCN has been operating the Wittenberg Casino in violation of its class III gaming compact with the State, and in violation of IGRA, since 2008. HCN's expansion of the Wittenberg Casino will exacerbate those violations. More specifically:

- HCN has been operating the Wittenberg Casino on lands that are not eligible for gaming under IGRA (25 U.S.C. § 2719) because they were not acquired in trust by the United States until 1993. As stated above, IGRA prohibits Indian tribes from conducting gaming activities on lands acquired in trust after 1988, except in certain circumstances – including a formal finding by the Secretary of the Interior and concurrence with such finding by the governor of a state, in accordance with 25 U.S.C. § 2719(b)(1)(A). The State's class III gaming compact with HCN similarly prohibits HCN from operating a gaming facility on land that is not eligible for gaming under IGRA. See, Wisconsin-Ho-Chunk Class III Gaming Compact, §§ III.J, and IV.B.
- HCN has been operating the Wittenberg Casino beyond the scope permitted in HCN's class III gaming compact with the State. HCN's class III gaming compact with the State explicitly limits the size and scope of HCN's gaming activities in Shawano County, and requires HCN's gaming facility in Shawano County to be ancillary to another, primary business that generates more than fifty percent of the revenue of the entire enterprise. HCN's expansion of the Wittenberg Casino will exacerbate this compact violation by establishing the Wittenberg Casino as a full-fledged casino-resort. See, Wisconsin-Ho-Chunk Class III Gaming Compact, § XVI.E.

For your review, I have attached a copy of the Tribe's November 17, 2016 letter to Wisconsin Secretary of Administration Scott Neitzel, which sets forth a thorough explanation as to how

¹ See, *Wisconsin v. Stockbridge-Munsee Community*, 366 F.Supp.2d 698 (E.D. Wis. 2004); *aff'd* 554 F.3d 657 (7th Cir. 2009).

HCN's Wittenberg Casino violates HCN's class III gaming compact with the State and applicable federal law. (Attachment A).

Section XIII.E of the Compact states that the Tribe is not obligated "to make any payments [to the State] unless mutually agreed to by the parties, or otherwise set forth in this Compact."

Section XXXII of the Compact requires the Tribe to make annual revenue sharing payments to the State. By continuing to allow HCN to operate the Wittenberg Casino in violation of HCN's class III gaming compact with the State, the State has deprived the Tribe of the benefits negotiated in the Compact, and/or has rendered the Tribe's payments to the State under the Compact to be an illegal tax. Moreover, the State has interpreted its class III gaming compact with HCN in a way that attempts to circumvent the Tribe's right to reduce its revenue sharing payments to the State under Section XXXII of the Compact if another tribe is authorized to operate a class III gaming facility on lands acquired in trust after 1988, and located within 70 miles of the Tribe's North Star Casino.

The State has deprived the Tribe of the benefit of its bargain with the State, while also demanding that the Tribe continue to make annual revenue sharing payments. Thus, the State has effectively imposed an unlawful tax, fee, charge, or other assessment on the Tribe's gaming revenues in violation of Section XIII.E of the Compact and federal law.

B. The State is in violation of Section XX ("ENFORCEMENT") of the Compact by refusing to enforce the size and location requirements of its class III gaming compact with the Ho-Chunk Nation, after the State enforced similar provisions in the Tribe's Compact.

The State's 1998 lawsuit against the Tribe to enforce the Compact has had a lasting and devastating impact on the Tribe. The judicial opinions issued in that lawsuit have diminished the Tribe's reservation, created confusion amongst local governments and the Tribe, and affected the daily lives of members of the Tribe's community.

Whereas the State vigorously fought to enforce the land restrictions in the Compact, the State has refused to enforce the same restrictions in HCN's gaming compact.

HCN is operating the Wittenberg Casino on lands that were not placed into trust until 1993. The State has been aware of this issue since at least 2008. The Tribe has notified the State that the Wittenberg Casino is operating unlawfully on lands that are not eligible for gaming, and that the State has the duty and authority to enforce the terms of its compact with HCN. The State has refused to enforce the land restrictions in HCN's compact with the same vigor that it enforced similar restrictions in the Tribe's Compact.

Section XX.C of the Tribe's Compact prohibits the State from enforcing the terms of the Compact in an arbitrary or capricious manner, and allows the Tribe to invoke the dispute resolution provisions in the Compact if the State's enforcement is arbitrary and capricious.

The State's aggressive enforcement of the land restrictions in the Tribe's Compact was followed by the State's refusal, under factually similar circumstances, to enforce similar terms in its gaming compact with HCN. The State's enforcement of the Tribe's Compact is therefore arbitrary and capricious, and violates Section XX.C of the Compact.

CONCLUSION

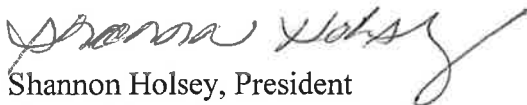
The Tribe has generally enjoyed a good relationship with the State, including the relationship between the Tribe and the State during your term as Governor. I regret that it has become necessary for the Tribe to invoke the dispute resolution provisions in our Compact.

Nevertheless, the Tribe believes that it is important for the Tribe and the State to live up to the agreement that has been negotiated. The Tribe has acted in good faith, with the understanding that the State would protect the Tribe's interests, and that the State would enforce all tribal gaming compacts fairly. The Tribe, along with its members, employees, neighboring communities and business partners, depends upon the State's compliance with, and fair enforcement of, the Compact. Mutual compliance with the Compact protects jobs, programs and services for thousands of Wisconsin's citizens – including tribal members and non-tribal members alike.

Pursuant to Section XXII of the Compact, the Tribe hereby notifies the State that the Tribe will invoke the dispute resolution procedures in the Compact after thirty (30) days from the date of this letter, unless the State fully complies with the terms of the Compact. It is important to note that the State may be required to immediately refund all of the revenue sharing payments that the Tribe has made under the Compact in the event that the dispute resolution procedures result in a determination that the Compact's revenue sharing provisions are unenforceable or invalid.

I appreciate your consideration of this letter, and your willingness to work with the Tribe on a solution that benefits the people of Wisconsin. In order to avoid prolonged arbitration, mediation or litigation, I would be pleased to meet with you and/or your representatives within the next thirty (30) days, with a goal of reaching an agreement on a resolution of the State's violation of the Compact. Please do not hesitate to contact me with questions or concerns.

Sincerely,



Shannon Holsey, President
Stockbridge-Munsee Community