UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

THE STOCKBRIDGE-MUNSEE COMMUNITY,

Plaintiff,

v.

STATE OF WISCONSIN, SCOTT WALKER, and THE HO-CHUNK NATION

Case No. 17-cv-249

Defendants.

HO-CHUNK NATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff, Stockbridge-Munsee Indian Community ("SMC"), seeks the extraordinary remedy of a preliminary injunction to address an ordinary business problem, the potential loss of market share to a competitor. SMC's characterization of the impact on SMC of expanded gaming at Defendant, Ho-Chunk Nation's ("Nation"), gaming facility in Wittenberg—devastation of its economy, reduction or destruction of governmental programs and services, loss of jobs—is of questionable reliability. Even if SMC's allegations are accepted at face value, they amount to nothing more than a poorly disguised attempt to protect its revenue stream by interfering with the business operations of a competitor.

SMC has failed to demonstrate that it meets any of the requirements for a preliminary injunction. SMC has failed to demonstrate that it is suffering or will suffer irreparable harm if the injunction is not issued, which is evident from its failure to request relief to address any current impact on SMC. SMC cannot demonstrate that it has any likelihood of success on the merits, as its claims are subject to summary dismissal. SMC has a remedy at law, which is provided for in its compact: SMC can reduce or withhold its revenue sharing payments to the State. The balance of the hardships tips decisively in favor of the Nation, which will suffer actual irreparable harm arising from SMC's interference with the Nation's self-government and its ability to exercise jurisdiction over its trust land. Finally, it is not in the public's interest for the Court to change the current status quo to enjoin future activities of the Nation that are consistent with the Nation's Tribal-State Compact with the State of Wisconsin ("Nation's Compact") and federal law.

SMC's motion must be denied.

STANDARD FOR GRANTING A PRELIMINARY INJUNCTION

"A preliminary injunction is an extraordinary equitable remedy that is available only when the movant shows *clear need*." *Turnell v. CentiMark Corp.*, 796 F.3d 656, 661 (7th Cir. 2015) (Emphasis supplied); *see also Goodman v. Illinois Dep't of Fin. & Prof'l Regulation*, 430 F.3d 432, 437 (7th Cir. 2005), citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ["[p]reliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion" (Emphasis in original)]. In the Seventh Circuit, a district court engages in a two-step analysis to decide whether such relief is warranted. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of USA, Inc.*, 549 F.3d 1079, 1085–86 (7th Cir. 2008).

In the first phase, the party seeking a preliminary injunction must make a threshold showing that: (1) absent preliminary injunctive relief, it will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) it has a reasonable likelihood of success on the merits. *Turnell* , 796 F.3d at 661–62. *If* the movant makes the required *threshold showing*, then the court proceeds to the second phase, in which it considers: (4) the irreparable harm the moving party will endure if the preliminary injunction is wrongfully denied versus the irreparable harm to the nonmoving party if it is wrongfully granted; and (5) the effects, if any, that the grant or denial of the preliminary injunction would have on nonparties (the "public interest"). *Id.* at 662. A court weighs the balance of potential harms on a "sliding scale" against the movant's likelihood of success: the less likely a movant is to win, the more the balance of harms must weigh in its favor. *Girl Scouts*, 549 F.3d at 1086; *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984).

Rule 65(c) of the Federal Rules of Civil Procedure further requires that "[t]he court may issue a preliminary injunction or a temporary restraining order *only if* the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."

RELEVANT FACTS

The relevant facts of this case are set forth in the Declarations of Shelia D. Corbin, Wilfrid Cleveland, Lester J. Marston, Robert Mudd, Michael P. Murphy, and Thomas Springer in Opposition to the Motion for Preliminary Injunction, filed herewith. Rather than set forth the facts from those declarations in full here, for the convenience of the Court, the Nation hereby incorporates by reference all of the facts set forth in the declarations as if set forth here in full.

ARGUMENT

I. SMC HAS FAILED TO DEMONSTRATE THAT IT WILL SUFFER IRREPARABLE HARM IF THE INJUNCTION IS NOT ISSUED.

A plaintiff seeking a preliminary injunction must demonstrate that in the absence of a preliminary injunction, "the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered". *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008) ("*Winter*") citing 11 AC. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1 at p. 139. In *Winter*, the United States Supreme Court held that a "mere possibility" of irreparable harm is insufficient to warrant a preliminary injunction. *Id*. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id*. "Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant." 11A C. Wright, A. Miller, & M. Kane, Federal Practice and

Procedure § 2948.1, at 153-154. "A preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." *Id*. at 154-155.

SMC asserts that the Nation is currently conducting gaming in violation of the Indian Gaming Regulatory Act, 25 U.S.C. § 2710 et seq. ("IGRA") and its Tribal-State compact ("Compact") with the State of Wisconsin ("State"). Yet, SMC does not ask the Court for an order enjoining the Nation's current gaming operations. It asks only that the Court enjoin the construction and operation of its expansion of the Nation's existing gaming ("Project") at its Wittenberg trust lands ("Parcel"). Thus, SMC is not taking the position that it is currently suffering irreparable harm. Rather, SMC argues that it will suffer irreparable harm when the Project increases the number of gaming devices operated on the Parcel from 509 to 820. That will not occur until after the construction of the expansion Project on the Parcel has been completed. Declaration of Robert Mudd In Opposition To Motion For Preliminary Injunction ("Mudd Declaration"), pp. 2-3, ¶ 4. The construction is currently scheduled to be completed at the earliest in November, 2017. Mudd Declaration, p. 3, ¶5. Since SMC does not argue that it is seeking relief from irreparable harm that it is currently suffering, and the activity that SMC alleges will cause it irreparable harm will not begin before late this year, denial of preliminary injunctive relief will not cause harm to SMC. Denial of the motion will preserve the status quo that SMC is seeking to alter through its motion.

Moreover, by the time that the Project has been completed, this matter almost certainly will have been dismissed. The Nation will be filing a motion to dismiss based on the Nation's and the State's sovereign immunity and for failure to join an indispensable party in the next two weeks. As the analysis set forth in Section III, below, makes clear, long before the proposed injunction would take effect, that motion will almost certainly be granted.

The ills that SMC asserts will befall it, furthermore, are not certain or even likely to happen. SMC alleges in its Statement of Facts that, if this Court does not issue a preliminary injunction, there will be a seventy-four percent (74%) decline in profits from SMC's gaming operations, and that this in turn will result in significant job losses, and drastic cuts to essential governmental services that SMC currently provides to its Tribal members, its residents and the surrounding community. SMC Statement of Facts, p. 13, ¶¶ 49-50. That is, at best, speculation.[1] As such, the irreparable harm claimed by SMC is far from likely, and is, in fact, remote and speculative. Any possible effect on SMC's gaming revenue is a mere possibility, and this alleged harm does not justify an extraordinary remedy.

Finally, the issuance of a preliminary injunction will introduce a new, volatile influence on the status quo. Such a disruption is not only unnecessary prior to a final resolution in this matter, it is contrary to the purpose of a preliminary injunction. "The district judge, sitting as a chancellor in equity considering a preliminary injunction, endeavors to achieve a rough justice between the parties that will maintain the status quo pending trial." *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1435 (7th Cir. 1986), citing Moore's Federal Practice at para. 65.04[1]. While SMC argues that "the purpose of a preliminary injunction is to minimize the hardship to the parties pending the ultimate resolution of the lawsuit," *Faheem–El v. Klincar*, 841 F.2d 712, 717 (7th Cir.1988), as will be discussed in Section IV, the issuance of an injunction will have a broad range of detrimental effects on the Nation, including the disruption of the Project, damage

[1] SMC seems to contend that the potential loss of employees or the potential loss of customer goodwill constitutes irreparable harm as a matter of law. *See* Memorandum In Support to Plaintiff's Motion For Preliminary Injunction ("Memorandum"), at 4 *citing Girl Scouts of Manitou Council, Inc.* 549 F.3d at 1090 (7th Cir. 2008); *Meridian Mut. Ins. Grp., Inc.*, 128 F.3d 1111, 1120 (7th Cir. 1997); and *Gateway E. Ry. V. Terminal R.R. Ass'n*, 35 F.3d 1134, 1140 (7th Cir. 1994)). However, the cases relied on by the SMC do not support this broad proposition. Rather, these authorities simply establish that the potential loss of employees or potential loss of customer goodwill *can* lead to a finding of irreparable harm along with other factors, which, in the cases relied by the SMC, involved imminent business insolvency and the infringement of intellectual property rights. *See Girl Scouts of Manitou Council*, 549 F.3d at 1089; *Meridian Mutual Insurance Co.*, 128 F.3d at 1114 – 20; *Gateway Eastern Railway*, 35 F.3d at 1140.

to the Nation's commercial reputation and the direct interference in the ability of the Nation to exercise its right of tribal self-government over its reservation lands.

The simple reality of this dispute is that SMC has filed this lawsuit in an effort to protect its gaming operation from competition. That is not a harm that would support the issuance of a preliminary injunction in this case.

> [T]he St. Croix contends that if the Four Feathers application is granted, its own casino operations will become less profitable. That interest, however, does not resemble any that the law normally protects. . . . Although the IGRA requires the Secretary to consider the economic impact of proposed gaming facilities on the surrounding communities, it is hard to find anything in that provision that suggests an affirmative right for nearby tribes to be free from economic competition.

Sokaogon Chippewa Community v. Babbitt, 214 F.3d 941, 947 (7th Cir. 2000).

II. SMC HAS AN ADEQUATE REMEDY AT LAW.

SMC's claims are not about irreparable harm; they are about money. SMC's claims assert that SMC will be damaged by possible future loss of revenue resulting from the increased gaming from the Project on the Parcel. The reductions in tribal programs, services, and employment would arise from the alleged future loss of market share arising from the increased gaming. There is no other alleged interference with SMC's sovereignty or governmental activities. SMC's claims arise from the potential loss of business revenue. Those consequences would occur in any normal business cycle in which SMC's revenues were reduced, such as a loss of market share from competition or poor management or a downturn in the local economy. SMC's argues that it has no remedy at law because it cannot assert claims for money damages because the State and the Nation enjoy the protection of sovereign immunity. That is simply not true.

SMC is correct in asserting that it cannot sue the Nation for damages. SMC admits that the cause of action and abrogation of tribal sovereign immunity provided for in 25 U.S.C. § 2710(d)(7)(A)(ii) of IGRA do not encompass money damages. Memorandum, p. 16. SMC, nevertheless, has remedies that are provided for in its Tribal-State Compact with the State ("SMC Compact") that would compensate SMC for lost revenue arising from violations of its Compact. Section XXXII(B) of SMC's Compact provides that, in the event that a tribe is permitted to conduct gaming on lands taken into trust pursuant to a two part determination, 25 U.S.C. § 2719(b)(1), SMC's obligation to make revenue sharing payments to the State is reduced. Section XXXII(D) allows SMC to withhold all of its revenue sharing payments if the payments are determined to be a tax or fee on the gaming, in violation of 25 U.S.C. § 2710(d)(4)[2]

SMC also explicitly argues that the State's sovereign immunity does not bar a claim for past payments to the State. "The State's immunity from monetary damages should not be viewed as barring SMC's claims that it disgorge and return to SMC the substantial payments SMC has paid to the State, if this litigation results in a determination that SMC's payments to the State under the SMC Compact are an illegal tax in violation of 25 U.S.C. § 2710(d)(4)." Memorandum, p. 16, fn. 6.

Thus, SMC and the State have already agreed to the mechanism for addressing precisely the claims set forth in the Complaint. There is, therefore, no need for the "extraordinary remedy" of a preliminary injunction.

[2] SMC appears to have already acted on this provision and has ceased making any revenue sharing payments to the State, without a court determination that the State is imposing a tax or fee on the gaming. http://www.jsonline.com/story/news/politics/2017/03/06/tribe-withholding-casino-payment-over-dispute-another-tribe/98808454/

SMC's argument that court decisions that have granted preliminary injunctions where the consequences of losses are serious and devastating are applicable to this case is meritless. All of the cited cases involved very different procedural postures and the alleged consequences in those cases were far greater than in this case. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975), "[[T]hese respondents alleged (*and petitioner did not deny*) that absent preliminary relief they would suffer a substantial loss of business and perhaps even bankruptcy. Certainly the latter type of injury sufficiently meets the standards for granting interim relief, for otherwise *a favorable final judgment might well be useless*." (Emphasis added.)]; *Commodity Futures Trading Comm'n v. British American Commodity Options Corp.*, 434 U.S. 1316, 1321-1322 (1977) ["[T]the regulation would fundamentally alter the ground rules for doing business in a substantial industry, *with potentially fatal consequences* for a number of the firms currently in the trade, . . . (Emphasis added.)]; *Tri-State Generation & Transmission Asso. v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986) ["If Shoshone is allowed to sell its assets now, other cooperatives will undoubtedly follow suit -- perhaps before an ultimate decision on the merits that Shoshone, as well as these others, may not legally sell. . . . As a result of this 'domino effect,' Tri-State *would be unable to repay its debts to the REA, would be forced into bankruptcy, and would likely collapse*." (Emphasis added.)] Even SMC's catastrophizing of the potential consequences of a denial of its motion would not support the conclusion that such a denial would make a favorable final decision in this case too late to prevent the complete collapse of SMC's economy and government.

III. SMC WILL NOT SUCCEED ON THE MERITS OF ITS CLAIMS.

SMC will not succeed on the merits of its claims, for two main reasons. First, the Court cannot address the merits of SMC's claims because they are barred by the Nation's and the

State's sovereign immunity. SMC's claim that the Nation is violating the Nation's Compact by conducting gaming on the Wittenberg Parcel is barred because the cause of action created by the IGRA does not encompass SMC's claim that the Nation is conducting gaming on land that does not qualify as Indian lands under the IGRA. SMC's claims are also barred by SMC's inability to join a number of indispensable parties. Finally, SMC claims are barred by the applicable statutes of limitation.

Second, even if these procedural barriers did not exist, SMC's claims are manifestly without merit. The Wittenberg Parcel clearly qualifies as "Indian lands" for the purposes of the IGRA. SMC's assertion that the Project does not and will not meet the definition of an "Ancillary Facility" as defined in the Nation's Compact is on its face unsupportable.

1. Stockbridge-Munsee's Claims Are Barred By The Nation's And The State's Sovereign Immunity.

A. The Nation Enjoys Sovereign Immunity From Unconsented Suit.

"Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("*Potawatomi*"), *quoting Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 Pet. 1, (1831). As dependent domestic nations, the tribes are subject to the plenary control of Congress. *United States v. Lara*, 541 U.S. 193, 200 (2004). They remain, nevertheless, "separate sovereigns pre-existing the Constitution…." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("*Santa Clara*"). Unless Congress acts, Indian tribes retain their historic sovereign authority. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

A fundamental element of the sovereignty that tribes possess is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara*, 436 U.S. at 58. Sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Three*

Affiliated Tribes of Fort Berthold Reservation v. World Engineering, 476 U.S. 877, 890 (1986). Tribal immunity is qualified to the degree that it can be modified or abrogated by Congress. *See United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940). The Supreme Court has "time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Michigan v. Bay Mills Indian Community*, 572 U.S. __, 134 S. Ct. 2024, 2030-31 (2014) ("*Bay Mills*"), quoting *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998) ("*Kiowa*"). *Accord Lac du Flambeau v. Norton*, 327 F. Supp. 2d 995, 1001 (W.D. Wis. 2004), ["When sovereign immunity is asserted and not waived, a court has no choice but to recognize it."] Tribal sovereign immunity extends to governmental and commercial activities whether they occur on or off of the reservation. *Kiowa*, 523 U.S. at 754-55.

In order for the Nation to be made subject to the personal jurisdiction of the Court, the Nation would have to have waived its sovereign immunity with regard to SMC's claims or Congress would have had to have abrogated the Nation's immunity. *Id.*

B. The Cause Of Action And Abrogation Of Tribal Sovereign Immunity Set Forth In The Indian Gaming Regulatory Act Is Limited And Specific.

In *California v. Cabazon*, 480 U.S. 202, 221-222 (1987) ("*Cabazon*"), the Supreme Court held that California had no jurisdiction over gambling in Indian country. After *Cabazon*, states had no authority to regulate tribal gaming in Indian country. *See Sycuan Band v. Roache*, 54 F. 3d 535 (9th Cir. 1994). "Congress adopted IGRA in response to this Court's decision in *California* v. *Cabazon Band of Mission Indians* . . . which held that States lacked any regulatory authority over gaming on Indian lands. . . ." *Bay Mills*, 134 S. Ct. at 2034. Congress's primary purpose in enacting the IGRA was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong

tribal governments....” while granting states limited authority to regulate Class III gaming so that states could protect their interests in ensuring that organized crime was not involved in the gaming activities and that the games were being played fairly. 25 U.S.C. §2702(1)-(2). In order to achieve these purposes, Congress established three “classes” of gaming that may be conducted on Indian lands: Class I (ceremonial and social games); Class II (bingo, games similar to bingo, and non-banked card games if not prohibited by state law); and Class III (all other forms of gaming that are not Class I or Class II gaming, including slot machines of any kind). 25 U.S.C. §2703(6)-(8).

Under the IGRA, a tribe has the right to engage in Class III gaming on its Indian lands if: (1) the tribe enacts a gaming ordinance, that authorizes Class III gaming, which must be approved by the Chair of the National Indian Gaming Commission (“NIGC”); (2) the state in which the tribe’s Indian lands are located permits any person, organization, or entity to play the games that the tribe is seeking to play; and (3) the tribe negotiates and enters into a tribal-state compact that authorizes Class III gaming. 25 U.S.C. §2710(d)(3).

With the enactment of the IGRA, Congress chose to grant states limited involvement in the regulation of tribal gaming through the mechanism of tribal-state gaming compacts. “The Committee concluded that the compact process is a viable mechanism for settling various matters between two equal sovereigns.” Senate Report 100-446, p. 13 (1988). (Emphasis added.)

In negotiating a compact with a tribe, a state is limited to negotiating over only those subjects that are specifically enumerated in the IGRA and that are directly related to the gaming activities. 25 U.S.C. §2710(d)(3)(C); *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1028-1029, n.9 (9th Cir. 2010). The IGRA also provides for enforcement of class III gaming compacts, 25 U.S.C. § 2710(d)(7)(A)(ii). Section

2710(d)(7)(A)(ii) and the cases interpreting that provision are central to the question of whether the Court can assert jurisdiction over SMC's claims.

Section 2710(d)(7)(A)(ii) states:

> 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, . . .
> (Emphasis added).

Section 2710(d)(7)(A)(ii) has been interpreted to constitute a limited Congressional abrogation of tribal sovereign immunity. *Bay Mills*, 134 S. Ct. at 2032; *Kiowa*, 523 U.S. at 758.

Thus, while a federal court has jurisdiction over an IGRA based claim pursuant to 28 U.S.C. § 1331, any such claim would have to fall within the cause of action created by, and abrogation of tribal sovereign immunity effectuated by, Section 2710(d)(7)(A)(ii).

C. Stockbridge-Munsee's Claim That The Ho-Chunk Nation Is Violating Its Compact By Conducting Gaming On Lands That Do Not Qualify As Indian Lands Does Not Fall Within Section 2710(d)(7)(A)(ii) Waiver Of Immunity.[3]

SMC broadly asserts that Section 2710(d)(7)(A)(ii) abrogates the Nation's sovereign immunity without analysis of the court decisions that have interpreted that abrogation. That is, at best, a significant oversight.

In *Bay Mills*, the State of Michigan attempted to halt off-reservation gaming by the Bay Mills Indian Community by filing suit pursuant to Section 2710(d)(7)(A)(ii), asserting that the

[3] In making this argument to the Court, the Nation does not concede that Section 2710(d)(7)(A)(ii) constitutes a cause of action or abrogation of tribal sovereign immunity for a lawsuit filed by one tribe alleging that another tribe is conducting gaming in violating of the defendant tribe's class III gaming compact. That issue has only been directly addressed by one district court, which concluded that the Section 2710(d)(7)(A)(ii) does authorize such a suit. *Bay Mills Indian Community v. Little Traverse Bay Bands of Odawa Indians*, 1999 U.S. Dist. LEXIS 20314, * 10-11(W.D. Mich. 1999). The Nation believes that the court's interpretation of the IGRA in that case is mistaken and inconsistent with Congress's intent in enacting the IGRA. Because the case law relating to the limitations on the abrogation of tribal sovereign immunity effected by the IGRA so clearly compel a conclusion that SMC's claim relating to the Nation's gaming on land that does not constitute Indian lands for the purpose of the IGRA is barred, the Nation will leave for another day the broader issue of whether Section 2710(d)(7)(A)(ii) permits one tribe to sue another to enforce the provisions of a compact.

gaming was being conducted in violation of the tribe's gaming compact. The Supreme Court ruled unequivocally that the abrogation of tribal sovereign immunity arising from Section 2710(d)(7)(A)(ii) does not encompass claims that a tribe is conducting gaming in violation of its compact because the gaming is being conducted on land that does not qualify as "Indian lands":

> IGRA partially abrogates tribal sovereign immunity in §2710(d)(7)(A)(ii)—but this case, viewed most naturally, falls outside that term's ambit. The provision, as noted above, authorizes a State to sue a tribe to "enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." . . . . A key phrase in that abrogation is "on Indian lands"—three words reflecting IGRA's overall scope (and repeated some two dozen times in the statute). A State's suit to enjoin gaming activity on Indian lands (assuming other requirements are met, see n. 6, infra) falls within §2710(d)(7)(A)(ii); a similar suit to stop gaming activity off Indian lands does not. And that creates a fundamental problem for Michigan. After all, the very premise of this suit—the reason Michigan thinks Bay Mills is acting unlawfully—is that the Vanderbilt casino is outside Indian lands. . . . By dint of that theory, a suit to enjoin gaming in Vanderbilt is correspondingly outside §2710(d)(7)(A)(ii)'s abrogation of immunity.

Bay Mills, 134 S. Ct. at 2032.

Similarly, in *Oklahoma v. Hobia*, 775 F.3d 1204 (10th Cir. 2014) ("*Hobia*"), the Tenth Circuit, citing *Bay Mills*, reversed a decision by the district court to issue an injunction in favor of the State of Oklahoma that prohibited Kialegee Tribal Town and a federally chartered tribal corporation from constructing or operating a class III gaming facility on a parcel of land that was neither owned nor governed by the Tribal Town. In doing so, the court reversed the district court's conclusion that Section 2710(d)(7)(A)(ii) provided a cause of action and an abrogation of tribal sovereign immunity applicable to Oklahoma's claim that the tribe was conducting gaming in violation of its gaming compact.

> [A]ny federal cause of action brought pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) of the Indian Gaming Regulatory Act (IGRA) to enjoin class III gaming activity must allege and ultimately establish that the gaming "is located on Indian lands." 25 U.S.C. § 2710(d)(7)(A)(ii). If, as here, the complaint alleges that the challenged class III gaming activity is occurring somewhere other than on "Indian

> lands" as defined in IGRA, the action fails to state a valid claim for relief under § 2710(d)(7)(A)(ii) and must be dismissed.

Hobia, at 1205-06.[4]

Both the *Bay Mills* and *Hobia* decisions are directly on point in this case. SMC claims that the Nation is violating its compact by gaming on the Wittenberg Parcel because that land does not qualify as "Indian lands" under the IGRA. The "very premise of this suit" is that the Project is outside Indian lands. "By dint of that theory, a suit to enjoin gaming on the" Wittenberg Parcel "is correspondingly outside §2710(d)(7)(A)(ii)'s abrogation of immunity," *Bay Mills*, 134 S. Ct. at 2032, and SMC's claim, therefore, fails to state a valid claim for relief, *Hobia*, at 1205-06.

The conclusion that Section 2710(d)(7)(A)(ii) does not provide a cause of action or abrogate the Nation's sovereign immunity with regard to SMC's claim relating to the Wittenberg Parcel is further bolstered by the Seventh Circuit's decision in *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (2008). In that case, the State of Wisconsin moved to enjoin the Nation's class III gaming due to alleged violations of the Nation's Compact, pursuant to § 2710(d)(7)(A)(ii). In addressing whether the State's claims fell within § 2710(d)(7)(A)(ii)'s cause of action and abrogation of the Nation's sovereign immunity, the court concluded that "a proper interpretation of § 2710(d)(7)(A)(ii) is not that federal jurisdiction exists over a suit to enjoin class III gaming whenever *any* clause in a Tribal-State compact is violated, but rather that jurisdiction exists only when the alleged violation relates to a compact provision agreed upon pursuant to the IGRA negotiation process." *Id.* at 933. The Seventh Circuit explained,

> [S]o long as the alleged compact violation relates to one of these seven items [25 U.S.C. § 2710(d)(3)(C)(i-vii)], a federal court has jurisdiction over a suit by a state to enjoin a class III gaming activity. Limiting the scope of 25 U.S.C. § 2710(d)(7)(A)(ii) to alleged violations of the seven items enumerated in 25 U.S.C.

[4] The Tenth Circuit remanded the case with instructions that the complaint be dismissed.

> § 2710(d)(3)(C)(i-vii) also serves to align jurisdiction under this section with the IGRA's purposes. Unlike the Nation's proposal, this interpretation does not focus solely upon state interests. However, by limiting 25 U.S.C. § 2710(d)(7)(A)(ii)'s applicability to alleged violations of those items which Congress determined tribes and states may negotiate over under 25 U.S.C. § 2710(d)(3)(C)(i-vii), this interpretation also ensures that jurisdiction is not conferred for alleged violations of provisions ancillary to the IGRA's purposes.

Id. at 934.

The seven items that are proper subjects of negotiation enunciated in 25 U.S.C. § 2710(d)(3)(C) states:

> Any Tribal-State compact negotiated under sub-paragraph (A) may include provisions relating to--
> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
> (v) remedies for breach of contract;
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
> (vii) any other subjects that are directly related to the operation of gaming activities.

None of the listed topics of negotiations can be interpreted to encompass negotiations concerning the "Indian land" status of a tribe's lands. This is so because the existence of eligible tribal trust lands are a precondition to a state's obligation to engage in compact negotiations. "Under § 2710(d)(3)(A), it is clear that the State does not have an obligation to negotiate with an Indian tribe until the tribe has Indian lands." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616, 618 (6th Cir. 2002). *Accord Big Lagoon Rancheria v. California*, 789 F.3d 947, 950 (9th Cir. 2015) ["[G]aming is confined to 'Indian lands' and negotiations are begun by a tribe with jurisdiction over such lands."]. *See also N. Fork*

Rancheria of Mono Indians of Cal. v. California, 2016 U.S. Dist. LEXIS 83270 (E.D. Cal. June 27, 2016).

These decisions leave no room for an interpretation that Section 2710(d)(7)(A)(ii) abrogates the Nation's sovereign immunity with regard to SMC's claim that the Nation is gaming on land taken into trust after 1988 or that the claim falls within the cause of action created by that provision. Upon the filing of a motion to dismiss by the Nation, the Court will be compelled to dismiss that claim against the Nation.

The fact that SMC's claim relating to the Nation's lands will have to be dismissed will have further repercussions. While it is clear that the State has not waived its sovereign immunity with regard to this claim,[5] even if SMC's Compact can be interpreted otherwise, the claim would have to be dismissed because the Nation would be a necessary and indispensable party with regard to any litigation over whether its Wittenberg Parcel is Indian lands. The Nation, however, it cannot be joined as a result of the Nation's sovereign immunity. *Lac du Flambeau v. Norton*, 422 F. 3d 490 (7th Cir. 2005).

2. Stockbridge Munsee's Claims Are Barred Because They Require The Joinder Of Necessary Parties That Cannot Be Joined Because They Enjoy Sovereign Immunity.

The absence of an effective waiver or abrogation of the defendants' sovereign immunity applicable to SMC's claims leads to a secondary basis for dismissal of SMC's claims: the inability to join parties who are necessary to the litigation. Fed. R. Civ. P. Rule 19.

[5] The provision of SMC's compact that SMC alleges the State has violated: Paragraph XXXII.B, (Paragraph 17 of the Second Amendment to SMC's Compact) relates to protection of SMC's gaming market from gaming by another tribe if that tribe conducts gaming within a 70 mile radius of SMC's casino on land taken into trust for gaming purposes pursuant to 25 U.S.C. §2719(b)(1)(A). SMC does not allege that the Wittenberg Parcel was taken into trust pursuant to 25 U.S.C. §2719(b)(1)(A). SMC's claim does not state a claim for violation of Paragraph XXXII.B and the waiver of the State's sovereign immunity contained in SMC's Compact does not apply to SMC's claim alleging that the Wittenberg Parcel does not qualify as Indian lands under the IGRA. The State's waiver in SMC's Compact also does not, by its terms, encompass claims that another tribe is violating that tribe's compact.

Rule 19(a) of the Federal Rules of Civil Procedure provides that:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

SMC seeks a declaration that the Nation is conducting gaming in violation of its Compact because the Wittenberg Parcel does not qualify as "Indian lands" under the IGRA and because the Project does not constitute an "ancillary facility" as defined in the Nation's Compact and seeks injunctive relief based on those conclusions. However, because the Congressional abrogation of the Nation's sovereign immunity does not extend to the issue of whether the Wittenberg Parcel qualifies as "Indian lands" and because the State's waiver of its sovereign immunity does not encompass either of SMC's claims, any order issued by this Court relating to SMC's claims would not bind the Nation with regard to the issue of the status of the Wittenberg Parcel or to the State with regard to either claim. Any such order would, thus, fail to accord complete relief to SMC. Rule 19(A). *See also Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999) ["[A] district court cannot adjudicate an attack on the terms of a negotiated agreement without jurisdiction over the parties to that agreement."]; *Accord Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975); *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) ("*Confederated Tribes v. Lujan*").

The Nation and the State also have an interest relating to the subject of this action and are so situated that the disposition of this action in the Nation's and the State's absence will, as practical matter, impair or impede their ability to protect that interest. "No procedural principle

is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable. *Lomayaktewa v. Hathaway*, 520 F.2d at 1325. *Accord United States ex rel. Hall v. Tribal Development Corporation*, 100 F.3d 476 (7th Cir. 1996) ("*Hall*"); *Enterprise Management Consultants v. United States*, 883 F.2d 890 (10th Cir. 1989) ("*Enterprise Management")*; *Broussard v. Columbia Gulf Transmission Company*, 398 F.2d 885 (5th Cir. 1968).

The question of whether an Indian tribe that is a party to a gaming compact is a required party to litigation challenging all or part of that compact was directly addressed by the Ninth Circuit Court of Appeals in *American Greyhound Racing v. Hull*, 305 F.3d 1015 (9th Cir. 2002). In that case, racetrack owners and operators challenged the renewal of gaming compacts between the State of Arizona and a number of Indian tribes by suing the Governor of Arizona. The Ninth Circuit, in reversing the district court's grant of an injunction prohibiting the Governor from executing amended compacts, concluded: "The interests of the tribes in their compacts are impaired and, not being parties, the tribes cannot defend those interests." *Id*. at 1023. The Court further stated: "Here, the interest of the tribes arises from terms in bargained contracts, and the interest is substantial." *Id*.

Federal courts have also concluded that states are required parties for the purposes of addressing challenges to provisions of a gaming compact to which it is a party. In *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49 (D.D.C.1999), the district court addressed the question of whether the State of New Mexico was a required party to litigation challenging the Secretary of the Interior's approval, by operation of law, of gaming compacts between the plaintiff Indian

tribes and the State of New Mexico. There the Court concluded: "There is no real dispute that the State of New Mexico is a necessary party under Rule 19 (a)(2)(i),[6] . . . ." *Id.* at 52.

More generally, federal courts have consistently found that Indian tribes that are parties to gaming-related contracts have a sufficient interest, under Rule 19(a), to qualify as necessary parties to litigation involving those contracts. In *Hall, supra*, the Seventh Circuit found that a non-party tribe, which was a party to the gaming equipment leases and sales agreements that were the subject of the lawsuit, had a sufficient interest to qualify as a necessary party for the purposes of Rule 19(a), stating:

> A judicial declaration as to the validity of a contract necessarily affects, "as a practical matter," the interests of both parties to the contract. As a party to the lease contracts at issue here, the Tribe has a commercial stake in the outcome of this litigation. It therefore would appear beyond dispute that the Tribe is a necessary party under Rule 19(a).

Hall, 100 F.3d at 479. *Accord Enterprise Management at 894* ["The Tribe's interest in the validity of this contract, to which it is a party, would be directly affected by the relief [plaintiff] seeks."].

The Tenth Circuit in *Enterprise Management* also pointed out another significant interest that would be imperiled by the litigation of claims relating to a contract to which a tribe is a party if the tribe cannot be joined: "In addition to the effect this action would have on the Tribe's interest in the contract, the suit would also effectively abrogate the Tribe's sovereign immunity by adjudicating its interest in that contract without consent." *Enterprise Management*, at 894.

Even more generally, federal courts have consistently found that Indian tribes are necessary parties to litigation challenging contracts to which the tribes are parties, regardless of

[6] Rule 19 was modified in 2007 and the rule's paragraph and subparagraph identifications were changed. The substance of the rule was not changed. "The language of Rule 19 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only." 2007 Advisory Committee Notes to Rule 19.

whether or not the contracts relate to gaming. *See for example*, *Clinton v. Babbitt*, 180 F.3d at 1088-89 [challenge to leases to land], *Kescoli v. Babbitt*, 101 F.3d 1304, 1309-10 (9th Cir. 1996) [challenge to settlement agreement relating to conditions for issuing a mining permit under the terms of a lease with the tribe].

Since both the Nation and the State qualify as required parties to this litigation, the Court must address whether, in light of the absence of a waiver or abrogation of the Nation's sovereign immunity with regard to SMC's claim that the Wittenberg Parcel does not constitute "Indian land" and the absence of an abrogation or waiver of the State's sovereign immunity with regard to either of SMC's claims, SMC's claims must be dismissed, pursuant to Rule 19(b).

Rule 19(b) of the Federal Rules of Civil Procedure requires that:

> If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by:
> (A) protective provisions in the judgment;
> (B) shaping the relief; or
> (C) other measures;
> (3) whether a judgment rendered in the person's absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Unquestionably, under the Rule 19(b) criteria, SMC's complaint would have to be dismissed. The reasons for this were concisely stated by this court in a strikingly similar case, *Lac Du Flambeau Band v. Norton*, 327 F. Supp. 2d 995 (W.D. Wis. 2004). In that case, the Lac du Flambeau Band of Lake Superior Chippewa Indians and the Bad River Band of Lake Superior Chippewa Indians sued the Secretary of the Interior and the U.S. Department of the Interior, seeking an order invalidating a provision of an amended gaming contract between the State of

Wisconsin and the Ho-Chunk Nation because that provision, plaintiff tribes alleged, would have had a detrimental effect on their gaming revenues. The Court dismissed the plaintiff tribes' complaint on a number of grounds, including the failure to join the State and the Nation:

> Any judgment touching on the validity of the compact would be prejudicial to the Nation and to the state because of their strong interests as parties to the compact at issue. I can imagine no way by which the prejudice to these two entities can be lessened or avoided and plaintiffs have suggested none. Any judgment entered without the Nation's and the state's participation would be of no value, because the only issue to be decided is the one for which the state and the Nation are indispensable. It is true that plaintiffs will have no remedy if the action is dismissed for nonjoinder. In this case, that is not a significant problem; I have found that plaintiffs have no viable cause of action against defendants. However, the outcome would be no different if plaintiffs had a stronger case. The principle of sovereign immunity overrides plaintiffs' interests in suing. Therefore, I conclude that plaintiffs cannot proceed on their suit because they have failed to join indispensable parties.

Id. at 1001.

Precisely the same analysis applies in this case. SMC's suit must be dismissed for failure to join the Nation and the State pursuant to Rule 19.

3. SMC's Claims Are Barred By The Applicable Statutes Of Limitation.

Under every conceivable analysis of the relevant statutes of limitation, both of SMC's claims are time-barred.

A . SMC's Claim That The Nation Has Violated IGRA's Prohibition On Gaming On After 1988 Acquired Lands Is Time-Barred.

SMC asserts that class III gaming is not permitted on the Wittenberg Parcel because, although title to the Parcel was initially conveyed to the United States in trust for the Nation through the 1969 deed, it reverted back to the Native American Church in 1974, after the Nation allegedly failed to construct housing on the Parcel. Memorandum, p. 18. SMC then claims that title to the Wittenberg Parcel was conveyed once again to the United States in trust for the

Nation by the 1993 quitclaim deed,[7] after the enactment of the IGRA, and is, thus, not Indian land that is eligible for gaming, pursuant to 25 U.S.C. §2719(a). *Id*. at p. 21.

The Supreme Court has explained that "a challenge to the BIA's 'decision to take land into trust' is 'a garden-variety [Administrative Procedure Act, 25 U.S.C. § 701, et seq. ("APA")] claim.'" *Big Lagoon Rancheria v. California*, 789 F.3d 947, 953 (9th Cir. 2015), *citing Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 220 (2012), *citing* 5 U.S.C. § 706(2)(A) and (C). Thus, the "proper vehicle" for SMC to challenge whether the Wittenberg Parcel remained in trust in 1974 "is a petition for review pursuant to the APA, and that is the typical method employed in prior litigation challenging entrustment decisions." *Id*., *citing Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. at 224-226 [allowing an APA challenge to the government's decision to take land into trust for the benefit of an Indian tribe under 25 U.S.C. § 465].

SMC has not asserted a cause of action under the APA in this case, nor has it joined the United States, the Secretary of the Interior, nor any other federal government official. That is because any such cause of action would be time-barred. 28 U.S.C. § 2401(a) creates a general six-year statute of limitations for actions brought against the United States. 28 U.S.C. § 2401(a) ["Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."]. 28 U.S.C. § 2401 clearly "applies to actions brought under the APA." *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991). The failure to sue a federal

[7] As will be discussed in Section (4)(B), below, such a sequence of events—title to the parcel going in and out of trust—is extremely unlikely and could not occur unless specific actions were taken by the federal government. SMC offers no evidence demonstrating that such actions were taken.

agency within the limitations period can operate to deprive the reviewing court of jurisdiction. *See Soriano v. United States*, 352 U.S. 270, 273 (1957).

SMC's fundamental claim, that title to the Wittenberg Parcel was somehow transferred out of trust in 1974, had to be addressed through an APA action brought within six years of the government's failure to recognize or act upon the reversion to title to the Native American Church. Any such claim was barred by the statute of limitations in 1980 and cannot be revived by these proceedings. SMC cannot "use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions.'" *Big Lagoon Rancheria v. California*, 789 F.3d at 953. *See also Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1292 (11th Cir. 2015) [Six year statute of limitations barred Alabama's challenge to Secretary's land into trust determinations].

The requirement that a party challenge the taking of land into trust by the United States pursuant to the APA takes on further significance in this case because, on November 18, 1986, the United States, acting through the Department of the Interior and pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 476, 477 ("IRA"), established the boundaries of the Nation's reservation and specifically proclaimed the Wittenberg Parcel as part of the Nation's reservation lands, [8] pursuant to 25 U.S.C. § 467, ["The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by [the IRA], or to add such lands to existing reservations."]. *See* Federal Register Notice, "Wisconsin Winnebago Tribe; Establishment of Reservation," 51 Fed. Reg. 41669-41671 (Nov. 18, 1986),

[8] SMC appears to have intentionally left this critical fact out of its statement of facts. SMC also appears to be deliberately withholding an important document from the Court. SMC references and discusses a 2008 letter drafted by the Superintendent of the BIA Great Lakes Agency Office in Ashland, Wisconsin wherein the BIA determined that the Wittenberg Parcel was eligible for gaming because it had been in trust continuously since 1969. Memorandum, p. 18, fn. 8. SMC, which clearly possesses a copy of the letter, did not provide a copy of the letter to the Court.

Exhibit 3 to the Declaration of Michael P. Murphy in Opposition to the Plaintiff's Motion for Preliminary Injunction, p. 3, ¶ 7.

Crucially, "[w]hat is clear from the plain language of § 467 is that only land that Congress or the Secretary has **already** deemed Indian country--by, for example, indefinitely extending allotments, § 462; restoring former reservation land in the public domain to tribal use, § 463; **or acquiring land in trust for tribes**, § 465—may become reservation land." *Citizens Against Casino Gambling v. Hogen*, 2008 U.S. Dist. LEXIS 52395, at *148-49 (W.D.N.Y. 2008) (Emphasis added). The BIA's guidelines further establish that "[r]eservation proclamations can only be issued for **completed** trust acquisitions made pursuant to an authority conferred by the IRA." *Acquisition of Title to Land Held in Fee or Restricted Fee Status*, Release # 16-47, Version IV (rev. 1) ("Fee-to-Trust Handbook"), issued June 28, 2016, Section 3.4 (Emphasis added). Accordingly, in order for the United States to proclaim the Wittenberg Parcel as an addition to the Nation's reservation, as it did on November 18, 1986, title to the land had to be held in trust by the United States for the Nation on that date. [9]

Under SMC's theory, however, on November 18, 1986, the Wittenberg Parcel was owned by the Native American Church, rather than by the United States in trust for the Nation. SMC's claim, taken to its logical conclusion, is that the Parcel was unlawfully proclaimed as an Indian reservation in 1986. Any challenge to the United States' actions at the time the Wittenberg Parcel was proclaimed to be part of the Nation's reservation, again, would have required the filing of a claim pursuant to the APA. Again, SMC took no action to challenge that decision. As is the case with a challenge to the original federal agency action taking the Wittenberg Parcel into trust in

[9] Additionally, when proclaiming land as a reservation under the IRA, "the Secretary still must follow the specified notice and comment requirements and determine that it is not inappropriate for the land to be subject to the Nonintercourse Act before adding that land to an existing . . . reservation." *Citizens Against Casino Gambling v. Hogen*, 2008 U.S. Dist. LEXIS at *149.

1969, and the alleged failure to recognize the automatic loss of trust status in 1974, it is too late now to challenge the trust status of the land in 1986, or the federal government's proclamation that the Wittenberg Parcel is reservation land. The time period to do so expired in 1992, six years after the reservation proclamation was issued.

SMC can be expected to assert that its claim qualifies for an exception to the six-year statute of limitations by arguing that the statute of limitations did not start running on the date that the federal government allegedly failed to recognize that title to the land had gone out of trust in 1974, or on the date of the proclamation of reservation lands in 1986, because SMC "could have had no idea" that the proclamation "would affect them [by leading to tribal gaming nearby.]" *N. Cty. Cmty. All., Inc. v. Salazar*, 573 F.3d 738, 743 (9th Cir. 2009), *quoting Artichoke Joe's California Grand Casino v. Norton*, 278 F. Supp. 2d 1084, 1183 (E.D. Cal., 2009) (alterations in original). *But see, Poarch Band of Creek Indians v. Hildreth*, 656 F. App'x 934, 943-44 (11th Cir. 2016)[refusing to carve out an exception to the six-year statute of limitations where it was clear that the plaintiff knew of the Secretary's action and could have brought a timely APA challenge]. If SMC were to offer such an argument, it would, nevertheless, fail.

The latest conceivable date that SMC could have become aware that the federal government's continued recognition of the trust status of the Wittenberg Parcel after 1974 or the proclamation of the Parcel's reservation status in 1986 would affect SMC would have been the date on which the Nation began gaming on the Wittenberg Parcel in 2008. Even if it were assumed that the six-year statute of limitations did not start to run until that date, the statute of limitations period would have expired in 2014.[10] Thus, even under the most generous reading of

[10] In addition to the time-bar that prohibits SMC's challenge to the 1969 trust transfer, based on the alleged failure to recognize the automatic transfer out of trust in 1974, and its challenge to the 1986 proclamation, SMC failed to

the Indian gaming cases dealing with challenges to the status of Indian lands, SMC had to bring its claims, regarding whether the Nation's Wittenberg Parcel was in trust prior to the enactment of the IGRA, within six years of the date that the Nation began gaming on the Parcel in 2008, nearly a decade ago. Rather than bring such a claim within the six-year timeframe, a period within which SMC was certainly aware that the Nation was conducting gaming on the Parcel, SMC sat on its claims.

SMC cannot demonstrate a likelihood of success on the merits, because its claim that the Wittenberg Parcel was not held in trust by the United States in 1988 is time barred.

B. SMC's Claim That The Nation's Current Class III Gaming On The Wittenberg Parcel Violates The Nation's Compact Is Barred By The Wisconsin Statute Of Limitations For Breach Of Contract.

Generally, under 28 U.S.C. §1652, "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie R.R. v. Tompkins*, 304 U.S. 64, 78, (1938).

Tribal–State gaming compacts are contracts negotiated between Indian tribes and states pursuant to authority set forth in federal law, specifically the IGRA. Thus, while, "[g]eneral principles of federal contract law govern the Compacts, which were entered pursuant to IGRA," *Cachil Dehe Band of Wintun Indians v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010), *citing*

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challenge a number of other decisions of the federal government relating to the Nation's class III gaming on the Wittenberg Parcel that might have provided a basis for an APA based claim. For example, SMC chose not to pursue an APA action within the statute of limitations against the National Indian Gaming Commission when it approved the Nation's gaming ordinance (and its later amendments) in 1994, 1996, 1999, 2000, and 2008. SMC failed bring a timely APA claim against the Department of the Interior when it allowed the 2003 amendment to the Nation's compact—the amendment that permitted class III gaming on the Wittenberg Parcel—to become effective by operation of law. These failures, too, bar SMC's claims against the Nation here.

Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1032 (9th Cir.1989), "[i]n practical terms, [courts] rely on [state] contract law and Circuit decisions interpreting [state] law" when courts "'discern, and the parties note, no difference between [state] and federal contract law.'" *Cachil Dehe Band of Wintun Indians v. California*, 618 F.3d at 1073, *citing Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006)[employing Idaho contract law to interpret a tribal-state compact that was to be "construed in accordance with the laws of the United States."].

Thus, where there are no discernable difference between federal and state contract law—or where a specific matter is not governed by federal law—the law to be applied in a breach of compact case is the law of the state that is a party to the compact.

Here, there is not a specific statute of limitations period set forth in the IGRA governing an allegation that a Tribal–State compact has been breached. Accordingly, Wisconsin's statute of limitations governing breaches of contract is applicable in an action where a party alleges that the Nation has breached its Compact.[11] Under Wisconsin law, any "action upon any contract, obligation, or liability, express or implied, . . . shall be commenced within 6 years after the cause of action accrues or be barred." Wis. Stat. Ann. § 893.43. Thus, assuming that SMC even has standing to assert a breach of compact claim against the Nation, which it doesn't, such an action must have been filed within six years after the cause of action accrues.

SMC's breach of compact claim alleges two distinct breaches. First, SMC claims that the Nation breached its compact by conducting class III gaming on the Wittenberg Parcel because

[11] This is consistent with the long-standing tradition that the federal courts borrow the most analogous state statute of limitations unless applying state law would conflict with federal law or policy. *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 171 (1983).

the Nation's Compact only permits gaming on the Nation's "Indian Lands" and the Wittenberg Parcel, SMC asserts, is not "Indian land" upon which the Nation can game. Complaint, p. 13; ¶¶ 65-71. Second, SMC alleges that the Nation violated its Compact by operating a gaming facility that violates the ancillary facility provisions of the Nation's Compact. Complaint, pp. 14-15; ¶¶ 72-81. Both of these claims, however, arose at the time the Nation began conducting class III gaming on the site in 2008. Thus, a suit claiming that these actions constituted a breach of the Nation's Compact must have been brought, at the latest, in 2014. Accordingly, all of SMC's causes of action against the Nation relating to a breach of the Nation's Compact are time-barred and must be dismissed.

4. The Wittenberg Parcel Has Been Indian Land Since 1969 And The Nation Has Been Conducting Lawful Class III Gaming At The Wittenberg Parcel Continuously Since 2008.

As part of its attempt to derail the Nation's Wittenberg expansion Project, SMC incorrectly contends that "the Wittenberg Parcel was not acquired by Ho-Chunk until 1993, rendering it ineligible for gaming under IGRA[.]" Memorandum, p. 17. SMC's assertion ignores reality. The United States has held the Wittenberg Parcel in trust for the Nation continuously since 1969 and the Nation has been conducting Class III gaming on the Wittenberg Parcel – with SMC's knowledge – continuously since 2008. Despite this, SMC now contends that the Nation somehow lost title to the Wittenberg Parcel in 1974, due to a condition in the original 1969 deed, which conveyed the land to the Nation "subject to Housing construction which must commence within 5 years from date of approval of this deed . . . ." *Id.* at p. 11. SMC is wrong both as a matter of fact and law. First, as a matter of fact, the Nation fulfilled the condition subsequent by commencing housing construction as contemplated by the 1969 Deed. Declaration of Sheila D. Corbine In Opposition To The Plaintiff's Motion for Preliminary Injunction ("Corbine

Declaration"), p. 3; ¶ 6, Ex. A. Second, as a matter of law, even if the Nation had not satisfied the 1969 Deed's condition subsequent of commencing housing construction, the Wittenberg Parcel could not have reverted to the Native American Church Half Moon Fireplace State of Wisconsin, Inc. ("Native American Church"), as posited by SMC.

As further described below, the Wittenberg Parcel has been held in trust for the benefit of the Nation by the United States since 1969, nearly twenty years before the enactment of the IGRA. Corbine Declaration, p. 3, ¶ 6-7. What is more, the United States proclaimed the Wittenberg Parcel as the Nation's reservation land in 1986, an inconvenient fact SMC failed to provide to the Court. Declaration of Michael P. Murphy In Opposition To The Plaintiff's Motion for Preliminary Injunction ("Murphy Declaration"), p. 3, ¶ 7.

A. Contrary To Plaintiff's Assertion, The Nation Commenced Construction For Housing Within Five Years Of The 1969 Deed's Approval.

On June 28, 1969, the Nation and the Native American Church executed a deed memorializing the transfer of the Wittenberg Parcel to the Nation, and title to the Parcel was placed in the "United States of America in trust for the Wisconsin Winnebago Tribe," pursuant to the authority granted to the Secretary of the Interior under the IRA, 25 U.S.C. § 465. Murphy Declaration, p. 2, ¶ 4, Ex. 1. On October 3, 1969, the Minneapolis Area Office of the Bureau of Indian Affairs ("BIA") approved the 1969 Deed, and a quitclaim deed was recorded in the Register's Office of Shawano County, Wisconsin on October 17, 1969. Murphy Declaration, pp. 2-3, ¶ 5, Ex. 2.

A condition in the 1969 Deed required the Nation to begin construction of housing within five years of the date of the approval of 1969 Deed. Murphy Declaration, p. 3, ¶ 6. The Nation met this condition when, shortly after the 1969 Deed was signed by representatives of the Nation and Native American Church, the Nation began construction of the Potch Chee Nunk building on

land adjacent to the Wittenberg Parcel to house Native American Church members and their families during their lengthy services, which sometimes last for days.[12] Murphy Declaration, p. 3, ¶ 6. The Native American Church confirmed that the Nation fulfilled the condition in the 1969 Deed when, in 2008, Native American Church President, Kelly LaMere, attested to the Nation's fulfillment of the housing construction condition in the 1969 Deed, citing the Nation's construction of the Potch Chee Nunk building on the Wittenberg Parcel. Corbine Declaration, p. 3, ¶ 6, Ex. A. Among other things, President LaMere confirmed that "[a]fter the Deed was signed in 1969, the Tribe immediately constructed the Potch Chee Nunk building for the Native American Church use" and that the Nation "met the condition of constructing housing merely by constructing Potch Chee Nunk building for our housing needs" such that "the land never 'reverted' back to the Native American Church after signing the deed in 1969." *Id.*

President LaMere's attestation provided to the Division of Gaming of the Wisconsin Department of Administration, which had requested information from the Nation relating to the development of the now-existing Class III gaming facility located on the Wittenberg Parcel. Corbine Declaration, pp. 2-3, ¶¶ 3-7, Ex. A. Among other things, the Division of Gaming requested information regarding whether the Parcel was "Indian Lands" as that term is defined under the IGRA and therefore eligible for conducting Class III gaming on the Wittenberg Parcel. *Id.* After Ms. Corbine sent her letter confirming the "Indian Lands" status of the Wittenberg Parcel, the Nation began to conduct legal Class III gaming at the Parcel in 2008 with the approval of the State of Wisconsin in compliance with the Nation's Compact, as amended in 2003. Murphy Declaration, p. 4, ¶¶ 10-11. The Nation has been conducting Class III gaming on

[12] To clear up any confusion regarding the Nation's satisfaction of the housing condition in the 1969 Deed and the property's chain of title, the Nation and the Native American Church executed a quitclaim deed in 1993 removing the housing condition that had already been satisfied. Murphy Decl., p. 3, ¶ 8, Ex. 4. Prior to this time, and at all times since, title to the land remained in trust for the benefit of the Nation.

the Wittenberg Parcel, pursuant to its Compact, continuously since 2008. *Id.* Notably, SMC never sought to stop or enjoin the Nation from conducting Class III gaming on the Wittenberg Parcel in 2008, when the Nation began conducting Class III gaming thereon, or at any time thereafter until the filing of this lawsuit. *Id.*, p. 5 ¶ 13. As a matter of fact, the Nation – as agreed with by the Native American Church– satisfied the 1969's "housing construction" condition shortly after the deed was approved. For this reason alone, SMC's argument fails as a matter of fact.

B. Even If The Nation Had Not Constructed Housing, The Indian Nonintercourse Act, 25 U.S.C. § 177, Preempts Any "Reversion" Of Title By Operation Of State Law Contained In The Wittenberg Deed.

SMC's argument also fails as a matter of law. Even if the Nation had not satisfied the condition subsequent found in the 1969 Deed, it is clear that, under Federal *and* State law, the Wittenberg Parcel would not have reverted to the Native American Church in 1974.

Section 177 of Title 25 of the United States Code provides in relevant part: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. In fact, "[l]ands held in trust by the United States for an Indian tribe . . . may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary [of the Interior] unless the Act of Congress authorizing the sale provides that approval is unnecessary." 25 C.F.R. §155.22(b).

As explained in *Cohen's Handbook Of Federal Indian Law*:

> [t]he Nonintercourse Act (Act) applies to both voluntary and involuntary alienation, and renders void any transfer of protected land that is not in compliance with the Act or otherwise authorized by Congress. Accordingly, absent specific statutory authority, *title*

> *claims based on state law doctrines such as adverse possession, statute of limitations, laches, estoppel, or voidable title are preempted by the Act*. State laws transferring title by foreclosure for default of a mortgage, or for nonpayment of taxes or debts under a state's uniform commercial code are likewise overridden absent federal statutory authority. In addition, states have no general power of eminent domain to condemn protected tribal land without clear and specific federal authority to do so.

1-15 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 15.06 (footnotes omitted) (italics supplied). *See also Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974) ["The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States . . . ."].

For example, in *United States v. 7,405.3 Acres of Land in Macon, Clay & Swain Counties*, 97 F. 2d 417 (4th Cir. 1938), a power company claimed it had acquired title to tribal trust land by adverse possession. The Fourth Circuit Court of Appeals rejected the power company's argument and held that the Nonintercourse Act precluded alienation of the trust land by adverse possession. *Id. at.* 423. More recently, in *Oneida Indian Nation v. Oneida County*, 432 F. Supp. 2d 285, 289 (N.D.N.Y. 2006), rev'd on other grounds sub. nom., *Oneida Indian Nation of New York v. Madison County*, 665 F.3d 408 (2d Cir. 2011), a county in New York attempted to tax tribal lands held in trust by the United States. When the Oneida Nation refused to pay the property taxes, the county attempted to foreclose on the trust land for non-payment of taxes. The district court ruled that, regardless of whether the Oneida were required to pay taxes, foreclosure of the property would constitute an alienation in violation of the Nonintercourse Act and granted summary judgment in favor of the tribe. *Id.* at. 289.

It is undisputed that the land on which the Nation's Project is being built was placed into trust by the United States for the benefit of the Nation in 1969. Despite this, SMC argues, erroneously, that if the Nation did not start to construct housing on the Parcel within five years of

the conveyance to the Nation by the Native American Church, ownership of the Wittenberg Parcel automatically reverted to the Native American Church by operation of state law sometime in 1974. Memorandum, pp. 17-21. However, the Nonintercourse Act prohibits any such involuntary transfer of the ownership from the United States – the legal titleholder to the Wittenberg Parcel – to the Native American Church under a state common law principle, absent specific federal statutory authorization or Congressional approval. Moreover, the Assistant Secretary of the Interior proclaimed the Wittenberg Parcel *reservation land* of the Nation in 1986, which makes SMC's argument that the Wittenberg Parcel is non-Indian land all the more jaw-dropping. Murphy Decl., p. 3, ¶ 7; *see also* 51 Fed. Reg. 41669-02 (Nov. 18, 1986). Under the present circumstances, there could not have been, and cannot be, an *automatic* forfeiture, or any forfeiture for that matter, of the United States' legal title in, or the Nation's beneficial ownership of, the Wittenberg Parcel. Therefore, SMC's argument that illegal gaming is occurring on non-Indian lands fails at the outset.[13]

Indeed, SMC does not even have standing to assert involuntary forfeiture of the Wittenberg Parcel. Nearly 150 years ago, the United States Supreme Court stated that "[n]o one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs or successors, and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The rule equally obtains where the grant upon condition proceeds from the government." *Schulenberg v. Harriman*, 88 U.S. 44, 45 (1874)[14].

[13] A case relied on by SMC, *Saleteri v. Clark*, 13 Wis. 2d 325, 331, 108 N.W.2d 548 (Wis. 1961), is simply inapposite. Whatever might be said about the characterization of the language in the deed in *Saleteri*, *see infra*, pp. 326-328, that case did not involve land held in trust by the United States for an Indian tribe.

[14] The Wisconsin Court of Appeals recently applied the principle stated in *Schulenberg*. *See Keys v. Northern States Power Co.*, 2013 WI App 84, ¶ 30 (unpublished)("*Schulenberg*").

C. Even If Wisconsin Common Law Was Not Preempted, A Condition Annexed To A Deed Does Not Result In An Automatic Reversion Of Title To The Grantor If The Condition Is Not Met.

For the reasons set forth above, the Nation commenced the "housing construction" contemplated by the 1969 Deed "within 5 years from date of approval" of the deed. This fact alone defeats SMC's claim that the Wittenberg Parcel somehow automatically "reverted" to the Native American Church in 1969, only to be re-conveyed to the Nation in 1993 (despite all the while being held of record by the United States, in trust for the Nation). The Court may end its analysis here. However, even if the Indian Nonintercourse Act did not preempt the asserted reversion of title by operation of state law, SMC's characterization of the condition in the 1969 Deed and the claimed consequences of an alleged failure to satisfy the condition, is incorrect in light of other Wisconsin authority holding that a grantor must take some action to reclaim the subject land.

SMC's primary argument that the Wittenberg Parcel automatically "reverted back to the Native American Church by operation of law when Ho-Chunk [allegedly] failed to develop housing on the site within five years," is suspect. Memorandum, p. 18. Under a long line of Wisconsin cases, title to real property does not automatically revert to a grantor by mere virtue of a grantee's failure to satisfy a condition subsequent. Rather, "Wisconsin requir[es] re-entry or some unequivocal act on the part of the grantor to indicate his intention to claim the property as his own by virtue of his rights as a result of a breach of condition subsequent." *Koonz v. Joint Sch. Dist. No. 4, Vill. of Gresham, Shawano Cty.*, 256 Wis. 456, 459–60, 41 N.W.2d 616, 618 (1950); *see also Cobban v. N. Wisconsin State Fair Ass'n*, 212 Wis. 235, 248 N.W. 463, 464 (1933) ["If the condition subsequent were broken, that did not *ipso facto* produce a reverter of the title. The estate continued in full force until the proper step was taken to consummate the

forfeiture."]; *Mash v. Bloom*, 133 Wis. 646, 114 N.W. 457, 458 (1907) [stating, a "person entitled to the estate on condition broken may decline to take advantage of the failure to perform, in which event the estate is not defeated, because the mere failure to perform a condition subsequent like the one in question does not in and of itself divest the estate"].

On this point, Wisconsin law accords with United States Supreme Court precedent, which has long-held that "[n]o one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs or successors, and *if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired* in the grantee." *Schulenberg*, 88 U.S. at 44 (Emphasis added); *see also Keys*, 2013 WI App 84, ¶ 30 [citing *Schulenberg* for the same point of law].

The principle that a grantor must take some affirmative act to reclaim ownership of land if a condition is purportedly not met applies whether a deed provides that title to a property "shall revert" upon the failure of a future event. For example, in *Koonz*, the plaintiff conveyed an acre of land to a school district on the following condition:

> Said parcel of land thus conveyed is to be used by the school district for school purposes only, they agreeing to erect a schoolhouse thereon, and in the event that the said school district shall cease to use the said parcel of land for the purpose above named, then and in that case the said acre of land *shall revert* to the said first parties, their heirs, administrators or assigns.

256 Wis. at 457–58 (Emphasis added). Based upon this language, the trial court originally reasoned that since the "deed to the school district provided for a reversion to the grantor in the event that the district should cease to use the land for school purposes, a cessation of such use, without any further act on the part of the grantor, would result in a reversion of the title." *Id.* at 458. However, upon motion for a review of the judgment, the trial court reversed itself on rehearing, after considering – in the affirming Wisconsin Supreme Court's words – "the law of

Wisconsin requiring re-entry or some unequivocal act on the part of the grantor to indicate his intention to claim the property as his own[.]" *Id.* at 459–60.

Similarly, in *Cobban*, a deed contained a number of conditions regarding the future use of land deeded by Chippewa County to the entity that operated the Northern Wisconsin State Fair, including conditions requiring the maintenance of buildings, the continued existence of the entity, and a requirement that the entity not fail to hold the annual fair for more than two consecutive years. *Id.* at 464. In the event the entity failed to meet any of these conditions, the document provided that "this deed *shall become void, and title and right of immediate possession to said lands and appurtenances shall revert* to and become vested in the said party of the first part, its successors and assigns." *Id.* (Emphasis added). The Wisconsin Supreme Court stated that, despite the presence of language like "shall revert" and "shall become void," the "deed of the county to the association was obviously one upon condition subsequent" and, thus, was subject to "the law applicable to estates upon condition subsequent. Such estates, when created and *until defeated by re-entry*, have the same qualities and incidents as though no conditions were annexed thereto." *Id.* at 465 (Emphasis added); *see also Mash*, 114 N.W. at 458 ("No estate remained in the grantor. There remained only a possibility of reverter, which could ripen into a title only by breach of condition subsequent *and re-entry or its equivalent*." (Emphasis added).

Accordingly, the fact that the condition subsequent contained within the 1969 Deed stated that the Wittenberg Parcel "will revert" upon the Nation's failure to commence "Housing construction" within five years of approval of the deed is immaterial in the absence of some affirmative act by the grantor, asserting its claim to title based on a failed condition. *Mash*, 114 N.W. at 459 ["revesting of title . . . require[s] *at least* a rescission of the deed by the grantor and an assertion in some form by the grantor of his purpose to repossess himself of his former estate,

notice thereof to the grantee, and demand for possession or its equivalent."] (Emphasis added)). Indeed, "[t]he person entitled to the estate on condition broken [here, according to SMC, the Native American Church] may decline to take advantage of the failure to perform, in which event the estate is not defeated, because the mere failure to perform a condition subsequent like the one in question does not in and of itself divest the estate." *Id.* at 458. Thus, even if the Native American Church believed the Nation had failed to fulfill the 1969 Deed's "Housing construction" requirement – which it very clearly does not (*see supra;* Corbine Declaration, p. 3, ¶ 6, Ex. A) – the decision to rescind the deed remains with the Native American Church, not the SMC, or anyone else for that matter. *See Schulenberg*, 88 U.S. at 45 ["No one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs or successors"]. The Nation complied with the 1969 Deed's "housing construction" condition and, even if it had not, no reversion took place in 1974 or at any other time.

5. The Wittenberg Facility Meets the Definition of Ancillary Facility Set Forth In the Nation's Compact.

The Nation's compact provides

> [T]he Nation may conduct any of the Class III games authorized under this Compact at five Ancillary Facilities two of which are located in Jackson County and one of which is located in each of the following Counties: Sank, Monroe, and Shawano: As used herein the term Gaming Facility means a facility whose Primary Business Purpose is gaming, and the term Ancillary Facility means a facility where fifty percent or more of the lot coverage of the trust property upon which the facility is located, is used for a Primary Business Purpose other than gaming.

Paragraph 5, Second Amendment, amending Section XVI of the Nation's Compact.

There is no debate that Wittenberg is located in Shawano County. SMC's Statement of Facts, ¶ 19. SMC argues that the Wittenberg gaming facility, both currently and after

construction of the expansion Project is completed, violates the Nation's Compact, because the facility does not meet the definition of an Ancillary Facility contained in the Compact. Memorandum, p. 23.

The definition of "Ancillary facility" set forth in the Nation's Compact is clear and unambiguous. Under the Nation's Compact, an Ancillary Facility relates to lot coverage, which is, the relative space taken up by the non-gaming activities compared with the space taken up by the gaming activities. Declaration of Thomas J. Springer In Opposition To The Plaintiff's Motion For Preliminary Injunction ("Springer Declaration") p. 3, ¶ 7. The Wittenberg Parcel is approximately 10 acres, or 435,600 square feet. Mudd Declaration, p. 2, ¶ 4. The non-gaming activities currently cover 8,567.20 square feet. Mudd Declaration, p. 2, ¶ 2. The current ancillary facility covers 12,165.73 square feet. ***Id.*** After expansion of the Wittenberg facilities are completed, the non-gaming activities will cover 34,098 square feet, plus 59,411 square feet of parking lots and open space, and the gaming activities will cover 25,313 square feet. Mudd Declaration, pp. 1-2; ¶¶ 2-4. The gaming activities, thus, currently occupy less than 49% of the Wittenberg Parcel. *Id.* After the expansion Project is completed, the gaming activities will still occupy less than 49% of the Wittenberg Parcel. *Id.* In both cases, the non-gaming activities cover more than 50% of the Wittenberg Parcel. *Id.*

The history of the negotiation of Paragraph 5 of the Second Amendment reveals that the current Ancillary Facility and the expanded Ancillary Facility fulfill the Nation's and the State's intentions in negotiating Paragraph 5. Springer Declaration, pp. 2-3, ¶¶ 4-8.

The Nation and the State also agree that the parties intended that the definition of Ancillary Facility be focused on the lot coverage and not the amount of revenue generated from gaming on the Parcel. *Id.* For that reason, the Nation and the State have continually agreed that

the current gaming operations on the Wittenberg Parcel and the gaming operations on the Parcel after the expansion Project is completed meet the definition of an "Ancillary Facility." *Id.*, p. 3, ¶ 9, and Exhibit 3 thereto.

SMC, nevertheless, argues that the Wittenberg Facility does not meet the definition of an ancillary facility, based on two fundamental arguments. First, SMC argues that the definition of ancillary facility is not focused on lot coverage, but the relative revenue that is received from the non-gaming versus the gaming revenue. Second, SMC argues that the expanded Project is not an ancillary facility because it does meet the definition of gaming facility set forth in other tribes' compacts. Neither of these arguments has any merit.

The definition of Ancillary Facility in the Nation's compact is unambiguous. The defining element is lot coverage. SMC attempts to obscure the definition by conflating the term "Primary Business Purpose" and "Ancillary Facility"

> The Ho-Chunk Compact defines these two categories. A "Gaming Facility" is defined as "a facility whose ***Primary Business Purpose*** is gaming[.]" Ho-Chunk Compact, Second Amendment at ¶ 5 (emphasis added). The Ho-Chunk Compact defines the term "Primary Business Purpose" to mean "the business generating more than 50 percent of the net revenue of the facility." Ho-Chunk Compact at §III(H). In short, a "Gaming Facility" is a facility in which gambling generates a majority of the revenue. The Ho-Chunk Compact also defines the term "Ancillary Facility" to mean "a facility where fifty percent or more of the lot coverage of the trust property upon which the facility is located, is ***used for a Primary Business Purpose other than gaming***." Ho-Chunk Compact, Second Amendment at ¶ 5 (emphasis added). In other words, an "Ancillary Facility" is a facility where gambling does not generate a majority of the revenue.

Memorandum, p. 22. (Emphasis original.)

The final sentence is a non-sequitur. SMC conflates two provisions of the Compact in an attempt to muddle the meaning that the parties intended. The definition of Ancillary Facility requires that "fifty percent or more of the lot coverage of the trust property upon which the facility is located, is used for a Primary Business Purpose other than gaming." The relative

revenue from each activity is not relevant. Rather, Paragraph 5 of the Second Amendment to the Nation's Compact requires that there be two activities on the parcel, gaming and non-gaming, and the non-gaming activities must utilize more than 50% of the parcel. So long as more than fifty percent of the lot coverage is devoted to non-gaming activities, the facility qualifies as an Ancillary Facility.

Under Wisconsin law, it is clear that, above all else, "unambiguous contract language controls contract interpretation." *Tufail v. Midwest Hosp., LLC*, 348 Wis. 2d 631, 642, 833 N.W.2d 586, 592. If a contract is clear and unambiguous, a Court will not resort to extrinsic evidence as a means of construction. *See W. Towne Hotel Assocs., LLC v. CBL & Assocs. Mgmt., Inc*., 339 Wis. 2d 491, 809 N.W.2d 901 [plaintiff's "argument is flawed because it amounts to a request that we consider extrinsic evidence of the parties' intent without first demonstrating ambiguity"].

Thus, in order for a Wisconsin court to consider extrinsic evidence of intent, a party must first demonstrate that the contract language is ambiguous. "Contract language is considered ambiguous if it is susceptible to more than one reasonable interpretation." *Danbeck v. American Family Mut. Ins. Co.*, 245 Wis. 2d 186, 193, 629 N.W.2d 150-154. "Whether a contract is clear or ambiguous is a matter of law for the court, but the meaning of any ambiguity is a question of fact for a jury." *Tingstol Co. v. Rainbow Sales Inc*., 218 F.3d 770, 772 (7th Cir. 2000). Thus, SMC's citation to an alleged statement by State Administration Secretary, Mark Marotta, quoted in a 2003 newspaper article is hearsay and has no relevance in this case because the provision is not ambiguous. Memorandum, p. 27.

If contract language is unambiguous, Wisconsin courts afford "great weight" or "great force" to the practical construction given to it by the parties. *Martinson v. Brooks Equip.*

Leasing, Inc., 36 Wis. 2d 209, 219, 152 N.W.2d 849, 854 (1967). As a result, "the court will normally adopt that interpretation of the contract which the parties themselves have adopted." *Zweck v. D. P. Way Corp.*, 70 Wis. 2d 426, 435, 234 N.W.2d 921, 926 (1975) ["evidence of practical construction by the parties is highly probative of the intended meaning of those terms"]. Because the definition of "Ancillary Facility" set forth in the Second Amendment to the Compact is unambiguous, and the parties agree on its meaning, the Court is compelled to adopt the Nation's and the State's interpretation.

The parties' interpretation would not prevail even if SMC was a third party beneficiary of the Nation's Compact, which it is not. "Third-party beneficiaries usually take contracts as they find them. They get no more than the signatories provided[.]" *Cent. States, Se. & Sw. Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1151 (7th Cir. 1989). SMC's interpretation of the Nation's Compact is not relevant to its interpretation. Because the parties to the Compact agree on the meaning of the Gaming/Ancillary Facility distinction, there is no genuine issue of material fact with respect to the meaning of that language.

SMC argues that: "The limited nature of gaming at Ancillary Facilities is also consistent with similar limitations included in other class III gaming compact amendments the State negotiated the same year it agreed to amend the Ho-Chunk Compact, and the implementation of those agreements." Memorandum, p. 27. On the contrary, the definitions of "Ancillary Facility" contained in other compacts, Memorandum, pp. 27-29, are obviously irrelevant. The fact that there was a significant difference in the definition of "Ancillary Facility" in the Nation's Compact is evidence that each tribe's compact was the result of independent negotiations on the part of each tribe. The unique definition of "Ancillary Facility" in the Nation's Compact was an intended result of the Nation's planning and negotiation strategy. Springer Declaration, pp. 2-3,

¶¶ 4-8. Whatever other Wisconsin tribes agreed to is the result of their negotiation goals and strategy.[15] The contents and implementation of other tribes' compacts, therefore, cannot be used to interpret what the Nation and the State intended in negotiating the Nation's Second Amendment.

IV. The Balance Of The Harms Tips Sharply In Favor Of The Ho-Chunk Nation.

The forgoing sections of this Opposition reveal that SMC has failed to demonstrate that it will suffer any irreparable harm, that it has an adequate remedy at law, that SMC's claims will almost certainly be dismissed because they are barred by the Nation's and the State's sovereign immunity and the statute of limitations applicable to APA claims, and that SMC has little, if any, likelihood of success on the merits of its claims. Since SMC has failed to demonstrate that it meets any of the three initial elements required to support the issuance of a preliminary injunction, SMC's motion must be denied.

To the degree that the Court concludes that SMC has some likelihood of success, the Court "weighs the irreparable harm that the moving party would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008), citing *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 11-12 (7th Cir. 1992). "If the plaintiff does show some likelihood of success, the court must then determine how likely that success is, because this affects the balance of relative harms . . . . The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh

[15] SMC entered into the second amendment to its compact five months after the Nation executed its Second Amendment. Thus, SMC was fully aware of the contents of the Nation's Second Amendment. SMC had the opportunity to negotiate provisions of its own compact to address any concerns arising from the Nation's Compact, including the possibility of the Nation conducting gaming on its trust land in Shawano County—the Wittenberg Parcel—but chose not to do so.

in his favor. *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 387 (7th Cir. 1984).

The Nation, as was discussed above, believes that SMC's claims are subject to dismissal on a number of grounds, and, therefore, they have no likelihood of success. Even if it is assumed that SMC has a minimal likelihood of success on the merits, SMC will have to demonstrate that it will suffer far more harm if the injunction is not issued than the Nation or the State will suffer if it is issued.

As was explained in detail in Section I, SMC has failed to demonstrate that it will suffer any irreparable harm if the Court does not issue the injunction. SMC argues that the balance of the harms tips in SMC's direction because, "Denying the injunction will cause a direct and immediate impact to SMC in that essential SMC governmental programs will be significantly curtailed or terminated." Memorandum, p. 31. That statement is on its face, false, if not absurd. The requested injunction relates only to expanded gaming, an increase of 311 slot machines, which will not begin until November of 2017 or later. The denial of the motion will change nothing. The current status quo for SMC will not change, since the requested relief will not change the current situation. SMC has effectively admitted that it is not suffering irreparable harm at this time and it will suffer no irreparable harm in the immediate future if the injunction is not issued. As a result, there is no basis for the claim that denial of the motion will "cause a direct and immediate impact to SMC in that essential SMC governmental programs will be significantly curtailed or terminated." *Id.*

There is also no irreparable harm to balance against the harm that will be suffered by the Nation. In contrast, the harm that the Nation will suffer if the injunction is issued will be substantial and irreparable.

Issuance of an injunction would allow SMC to interfere with the Nation's jurisdiction over the Wittenberg Parcel and would allow SMC to intrude in the Nation's processes of self-government. Indian tribes are irreparably harmed by unlawful deprivations of their jurisdictional authority. *See* e.g., *Comanche Nation v. United States*, 393 F. Supp. 2d 1196, 1205-1206, 1210-1211 (W.D. Okla. 2005). Encroachment on tribal sovereignty constitutes an irreparable injury because the harm to tribal self-government is "not easily subject to valuation," and because "monetary relief might not be available because of the state's sovereign immunity." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001); see also *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001) ["Assuming that the Tribe is correct in its analysis with respect to jurisdiction, the prejudice of subjecting the Tribe to a subpoena for which the agency does not have jurisdiction results in irreparable injury vis-a-vis the Tribe's sovereignty." (Emphasis added)]; *Choctaw Nation of Oklahoma v. State of Oklahoma*, 724 F. Supp. 2d 1182, 1187 (W.D. Okla. 2010) [remedies at law are inadequate to remedy unlawful assertions of state jurisdiction in Indian Country].

There is a strong public interest in affirming federal laws that protect the integrity of the Nation's sovereign territory and its right to self-government. *Winnebago Tribe of Nebraska v. Stovall*, 205 F. Supp. 2d 1217, 1223 (2002) ["[T]he public has a significant interest in assuring the viability of tribal self-government, self-sufficiency, and self-determination."].

Here, SMC's naked attempt to interfere with the Nation's profitable use and enjoyment of its trust land is also an obstacle to the Nation's exercise of jurisdiction over the Wittenberg Parcel and an intrusion into the Nation's tribal self-government, and, as such constitutes irreparable harm. *See also Pelfresne v. Williams Bay*, 865 F.2d 877, 883 (7th Cir. 1989) ["As a general rule, interference with the enjoyment or possession of land is considered 'irreparable'

since land is viewed as a unique commodity for which monetary compensation is an inadequate substitute."]. SMC's attempt to encroach on the Nation's sovereignty by interfering with its use of land through an extraordinary judicial remedy must weigh against issuance here of a preliminary injunction.

To the degree that the Court would consider the harms identified by SMC as irreparable, the Nation would suffer the same harms, but to a greater degree, if the injunction is issued. The issuance of an injunction would affect the Nation's business reputation and customer goodwill because it would appear to validate SMC's libelous statements about the Nation and its Wittenberg expansion Project. The damage to the Nation's business reputation and customer goodwill arising from the issuance of the injunction will lead to the loss of customers, potentially permanently. An injunction would also make hiring staff for the Wittenberg Facility more difficult. Mudd Declaration, p. 4, ¶ 8. People considering employment at the Facility would be uncertain about whether they would have a job once construction is completed, and might choose to seek employment elsewhere. *Id.* They might also decide not to seek employment with the Nation as a result of loss of business reputation arising from the bad publicity manufactured by SMC, which the issuance of an injunction would bolster. *Id.*

An injunction, by interfering with the Nation's overall expansion Project, will cause a significant loss of anticipated revenues, Mudd Declaration, pp. 3-4, ¶ 7, which will compel the Nation to reallocate its resources and reassess what tribal programs can be funded. The reduction in revenue would force the Nation to scale back its plans for the use of gaming revenues, including governmental programs and services to its members, because revenues will be less predictable. And the Nation will suffer those harms immediately upon the issuance of an

injunction see, generally, Declaration of Wilfrid Cleveland In Opposition to Plaintiff's Motion for Preliminary Injunction ("Cleveland Declaration"), pp. 1-19.

Based on these facts, it is clear, the balance of the hardships weighs heavily in favor of the Nation.

V. The Issuance Of The Injunction Does Not Support The Public Interest.

SMC asserts that the issuance of a preliminary injunction is in the public interest:

> In the 1999 litigation brought by the State against SMC, the court held that it was more important to prevent SMC's gaming on lands ineligible under IGRA because of the public interest in seeing that state and federal criminal laws were enforced. *Stockbridge-Munsee*, 67 F. Supp. 2d. at 1019-1021. That line of reasoning was valid against SMC's interests in 1999. It is equally valid in support of SMC's interests in 2017.

Memorandum, p. 32.

SMC's reasoning is obviously flawed. SMC is not alleging that state and federal criminal laws have been violated or that they need to be enforced. Thus, the concerns that it alleges need to be addressed to protect the public interest do not arise in this case. Moreover, the injunction sought by SMC would be inconsistent with the public interest in enforcing state and federal criminal law. SMC alleges that the Nation's gaming at Wittenberg is **currently** in violation of the Nation's Compact, but the requested injunction does not enjoin those alleged violations of the Compact and the IGRA. If an injunction is not needed to address the current violations, there is no basis for arguing that the public interest needs to be protected from expanded gaming at the Parcel. Either the gaming is being conducted in violation of the Nation's Compact or it is not—the scale of the gaming does not change the public interest in the enforcement of state and federal criminal law.

SMC's other argument in support of the assertion that the injunction protects the public interest is that:

> The public interest in assuring the continued presence of economic development and employment, social and educational programs and benefits, and life and public safety services that result from gaming revenue generated on Indian lands

> is significant. The public also has a genuine interest in helping to ensure tribal self-government, self-sufficiency and self- determination.

Memorandum, p. 32.

SMC is forced to admit, however, "because two tribes are adverse on the issue, those public interests are impacted whether the injunction is granted or denied," but argues that "the impact on SMC is far greater than the impact on Ho-Chunk," so the injunction supports the public interest. *Id.* at p. 33. This is meritless. If the public interest is impacted either way, the public interest cannot be a basis for issuing the injunction. Moreover, as the declaration of Wilfred Cleveland makes clear, the impact of the injunction would be far greater on the Nation than SMC. Cleveland Declaration, p. 18, ¶ 49.

VI. Stockbridge-Munsee Should Be Required To Post A Bond For The Significant Damages That The Nation Will Incur If The Injunction Is Issued.

Rule 65(c) of the Federal Rules of Civil Procedure states, "The court may issue a preliminary injunction or a temporary restraining order *only if* the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."(Emphasis added.)

SMC, nevertheless, asserts that the Court should not require it to post a bond, arguing that "the district court may waive the requirement of posting a bond where the imposing party will not incur tangible harm and/or the bond will impose hardship on applicant. . . . Both grounds are present here." Memorandum, p. 33, citing *Habitat Educ. Center v. U.S. Forest Service*, 607 F.3d 453, 458 (7th Cir. 2010) ("*Habitat*") and *Allen v. Bartholemew County Services Dept*., 185 F. Supp. 3d 1075 (S.D. Ind. 2016) ("*Allen*"). SMC supports its argument with a single sentence, "Any requirement upon SMC to post a bond will have result [sic] in the immediate and direct reduction of essential governmental services." *Id.* SMC does not provide any explanation or cite to any evidence in support of this assertion, which is unquestionably untrue.[16] But even if SMC's

[16] In *Habitat*, the Seventh Circuit pointed out that, "When the security takes the form of a surety bond, the initial cost is the surety's fee." *Id.*, 607 F.3d at 456-457. Such a fee would have a negligible impact on SMC's budget.

assertion were true and SMC's providing security leads to reductions in essential governmental services, that is a result of SMC's decision to seek a preliminary injunction. It is not a hardship, it is the entirely predictable consequence of SMC's litigation strategy.

Not only is SMC's factual assertion demonstrably false, the cases cited by SMC do not support its assertion that a bond should not be required because it will impose a hardship on SMC. In *Habitat,* the Seventh Circuit rejected the plaintiff's argument that certain groups, such as nonprofit entities devoted to public goods, should be exempted from having to post injunction bonds. Instead, the court emphasized the strictness of the language of Rule 65:

> The argument flies in the face of Rule 65(c), which not only contains no such exception but also states flatly that "the court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The language of Rule 65(c) was even more emphatic before changed in 2007; it read: "no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

Habitat, 607 F.3d at 457-458.

The Seventh Circuit, furthermore, emphasized the importance of ensuring that the amount of security be sufficiently high:

> Indeed, "when setting the amount of security, district courts should err on the high side. If the district judge had set the bond at $50 million, as Abbott requested, this would not have *entitled* Abbott to that sum; Abbott still would have had to prove its loss, converting the 'soft' numbers to hard ones. An error in setting the bond too high thus is not serious. . . . [A]n error in the other direction produces irreparable injury, because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond."

Id. at 456, citing *Mead Johnson & Co. v. Abbott Laboratories*, 201 F.3d 883, 888 (7th Cir. 2000) (Emphasis original).

The Seventh Circuit also expressly rejected the imposition of a nominal bond amount, which SMC argues for here:

> In deference to the written word, Habitat suggested that it would not have objected to the district court's imposing a nominal bond, say $ 200-but in response to some pesky questioning from the bench indicated that by nominal it meant any amount more than zero and less than significant, so a bond of $1 would in its view comply with the statute. Of course the bond would cost much more to administer than $1; and what would that expenditure procure? Absolutely nothing.

Id. at 460.

SMC cites to *Habitat* for the court's acknowledgement that some courts have found that there can be circumstances in which a bond is not required. But the *Habitat* court's statement was intended to highlight that such an approach would be appropriate only in a highly unusual situation. "In seeming contradiction of the rule, a number of cases allow a district court to waive the requirement of an injunction bond. In some of these cases the court is satisfied that there's *no danger* that the opposing party *will incur any damages* from the injunction." *Id.* at 458. (Emphasis added.) Clearly that is not the case here. Here, the Nation has shown that it will suffer damages if the injunction is issued. Mudd Declaration, pp. 3-4, ¶¶ 7-8.

The *Allen* decision also underscores the fact that a waiver of the bond requirement is only appropriate where there is no basis for concluding that the party to be enjoined will suffer any damages: "In this case, the court is satisfied that *Defendants will not suffer any damages if the Policy is enjoined. Defendants made no argument to the contrary*. Therefore, Plaintiff shall not be required to post a bond." *Allen*, 185 F. Supp. 3d at 1087. (Emphasis added.)

SMC does not present any evidence or argument to support the notion that the Nation would suffer no damage if the injunction is issued. In fact, the proposed injunction will have an immediate and wide-ranging impact on the Nation that would cause the Nation significant damages.

An injunction would affect the Nation's ability to carry out its current expansion Project. An injunction would interfere in the contract between the Nation and Miron, the general contractor retained to construct the Project. Miron would be required to stop all gaming related construction work and de-mobilize men and materials from the construction site. With no future

date certain for them to return, Miron may not be able to complete the Project in the future once the injunction is vacated. Mudd Declaration, pp. 3-4, ¶ 7.

Delays in completion of the Project will also make it more difficult to retain and attract employees to work at the expanded Project since the issuance of the injunction will create doubts in new employees' minds about whether their jobs are secure. Mudd Declaration, p. 4, ¶ 8.

In addition, tribal officials responsible for the expansion of the Nation's Project estimate the potential damages arising from the issuance of an injunction to be $30,660 a day from work stoppage, $8,767 per day in loss non-gaming revenue, and $30,136 per day in lost gaming revenue. Mudd Declaration, pp. 3-4, ¶ 7.

Finally, the issuance of the injunction will directly interfere in the ability of the Nation to exercise its right of tribal self-government on its reservation lands. The Nation has enacted a gaming ordinance and determined that gaming shall take place on the Parcel pursuant to the ordinance. The injunction will directly interfere in that tribal governmental decision. There is no greater interference in the Nation's exercise of its sovereign governmental power than a court order prohibiting the application of the Nation's laws to persons and personal property on its sovereign reservation lands. Cleveland Declaration, p. 19, ¶ 49.

Should the Court conclude that the issuance of a preliminary injunction is appropriate, therefore, the Nation, therefore, urges the Court to require that SMC post a bond of at least $10,000,000.00.

SMC's argument that no security should be required must be understood in the context of SMC's broader litigation and public relations strategy. SMC is fully aware of the damage that an injunction addressing expanded gaming would have on the Nation. SMC's goal in seeking the proposed injunction is to interfere with the Wittenberg Project immediately, to punish the Nation

immediately, and to achieve a public relations victory, but it hopes to avoid liability for the damages that it will cause the Nation. In order to do so, SMC portrays the proposed injunction as an order with only a future impact, which merely preserves the status quo, and, therefore, the injunction does not require the posting of a bond.

Without a bond,[17] the Nation would have no remedy at law that would allow the Nation to receive compensation for the substantial damages that would arise from the proposed injunction. Any action for damages against SMC would be barred by SMC's sovereign immunity. *Wisconsin v. Stockbridge-Munsee Community*, 67 F. Supp. 2d 990, 1019-1020 (E.D. Wis. 1999); *Prairie Band of Potawatomi v. Pierce*, 253 F.3d 1234, 1251 (10th Cir. 2001); *Kansas Health Care Ass'n Inc. v. Kansas Dep't of Soc. and Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994).

CONCLUSION

SMC seeks an injunction prohibiting an increase in the number of slot machines to be operated by the Nation on its Wittenberg Parcel from 509 to 820—a total of 311 machines. The Nation's Project putting those machines into use by the general public will not be completed until November of this year. Thus, the status quo at the Project will not change for another six months.

It is clear that this lawsuit is all about SMC losing money for which, if it prevails in this lawsuit, it can be adequately compensated for by reducing its revenue sharing gaming payment to the State. Based on these facts, the Nation has demonstrated beyond a doubt that SMC will not suffer any irreparable harm if the court denies its motion for a preliminary injunction. In

[17] A surety can raise a defense available to the party it represents. In this case, that would include tribal sovereign immunity. *BMD Contrs., v. Fid. & Deposit Co. of Md.*, 679 F. 3d 643, 653 (7th Cir. 2012) For that reason, the Nation requests that, if the Court issues the preliminary injunction and requires that SMC post security, the Court require that SMC waive its sovereign immunity to allow the Nation to be able to enforce that security against the bonding company.

addition, the Nation has shown that SMC claims are meritless since they are barred by the Nation's and the State's sovereign immunity.

For these reasons, and the reasons stated above, the Court should deny SMC's motion for preliminary injunction.

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Respectfully Submitted,

By: /s/ Lester J. Marston

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