UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

THE STOCKBRIDGE-MUNSEE COMMUNITY,

a federally recognized Indian tribe,

Plaintiff,

v.

STATE OF WISCONSIN,

and

SCOTT WALKER, in his official capacity

as the Governor of Wisconsin,

and

THE HO-CHUNK NATION,

a federally recognized Indian tribe,

Defendants.

STOCKBRIDGE-MUNSEE COMMUNITY REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

17-cv-249

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Plaintiff STOCKBRIDGE MUNSEE COMMUNITY ("SMC"), pursuant to Fed. R. Civ. P. 65(a), submits this Reply in support of its motion for this Court for a Preliminary Injunction (SMC Motion for Preliminary Injunction, Doc. 7) ("Motion") that enjoins Defendant HO-CHUNK NATION[1] ("Ho-Chunk" or "HCN") from allowing any gaming activities on lands within the external boundaries of Shawano County, Wisconsin, beyond such gaming activities, both in the context of numbers of games and forms of gaming, actually in operation on April 18, 2017, pending resolution of the instant litigation. The State of Wisconsin and Governor Walker ("State") filed State Defendants' Brief In Opposition To Plaintiff's Motion For A Preliminary Injunction ("State Opp. Br.") (State Opp. Br., Doc. 27) that addresses "only one factor in the preliminary injunction analysis, the likelihood of success on the merits" (State Opp. Br., Doc. 27 at 4). The Ho-Chunk filed its Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction ("HCN Opp. Br.") (HCN Opp. Br., Doc. 37) and related declarations and exhibits (Docs. 31-36). As addressed in this Reply Brief, the arguments raised do not defeat the appropriateness of the issuance of the proposed preliminary injunction.

I. OVERVIEW

Ho-Chunk has undertaken a massive expansion of its existing gaming facility in Shawano County (the "Wittenberg Casino") in clear violation of its tribal-state gaming compact. Ho-Chunk's expanded gaming operations would lead to a devastating loss of critical government revenue for SMC that will result in the loss of jobs and essential government services provided to members of the Stockbridge-Munsee Community and the surrounding community. To preserve the status quo during the course of this litigation, and to protect itself from suffering irreparable

[1] The Ho-Chunk Nation was formerly known as the Wisconsin Winnebago Tribe.

harm, SMC has requested the entry of a preliminary injunction to prevent Ho-Chunk from expanding its unlawful gaming activities at the Wittenberg Casino.

SMC's motion satisfies all of the required elements for the issuance of a preliminary injunction. There is a substantial likelihood that SMC will prevail in its claim that Ho-Chunk's gaming activities at the Wittenberg Parcel violate the terms of its tribal-state gaming compact, and the State and Governor Scott Walker (the "Governor") must take action to prevent Ho-Chunk from operating the Wittenberg casino in violation of its compact and federal law. SMC is unable to obtain remedies at law for the Defendants' actions; but, even if it were, those remedies would be inadequate. The balance of hardships overwhelmingly favors SMC in this case, and the issuance of a preliminary injunction will result in no significant harm for Ho-Chunk. Finally, a preliminary injunction will advance the public interest.

As explained below, the Defendants' arguments that SMC will not prevail on the merits of its claim do not hold up under examination. In particular, Ho-Chunk's voluminous brief raises a wide range of arguments that simply have no bearing on SMC's claims. SMC is likely to prevail upon the merits of its claims.

II. ARGUMENT

A. Absent Preliminary Injunctive Relief, SMC Will Suffer Irreparable Harm in the Interim Prior to a Final Resolution.

In its Memorandum ("SMC Br.") (SMC Br., Doc. 8 at 12-15), SMC establishes that if the announced expansion of Ho-Chunk's Wittenberg Casino is allowed to occur, it will result in a devastating blow to SMC and its gaming operations, which will lose from machine gaming revenue alone $22 million per year currently earmarked for essential governmental services. This constitutes a seventy-four percent (74%) drop in gaming profits for SMC to fund essential governmental services and programs. Gaming revenues also create a source of strength and

stability for all of SMC's economic development activity. The expansion of Ho Chunk's Wittenberg facility would cause measurable, immediate and irreparable harm to SMC, including layoffs at tribal government, SMC gaming and other commercial enterprises, and reductions in governmental services. SMC provides extensive analysis as to how the harm would result in the crippling of SMC's governmental operations and its economy. The irreparable harm is established by an independent objective study, SMC's operational history and the Declaration of SMC's President, which identifies in detail how the lost gaming revenue directly imposes serious negative impacts on SMC. (SMC Statement of Facts, Doc. 10 at 3, ¶¶ 7-11, *id*. at 12-14 ¶¶ 48-57).

Ho-Chunk provides no evidence whatsoever to dispute SMC's showing of irreparable harm. Instead, Ho-Chunk makes disparaging statements, "questionable reliability", (HCN Opp. Br. Doc. 37 at 1); "failed to demonstrate", *Id.* at 1; "that statement is on its face, false, if not absurd," (*Id.* at 43) without any specific dispute or demonstration of contrary evidence. Those conclusory statements stand in stark contrast to the formal study and detailed analysis provided by SMC. Ho-Chunk argues that the harm to be suffered by SMC is insufficiently "speculative." (HCN Opp. Br., Doc. 37 at 3 and 5), but provides no reasoning to defeat the straightforward cause and effect analysis set forth by SMC. (SMC Statement of Facts, Doc. 10 at 3 ¶¶ 7-11, *id*. at 12-14 ¶¶ 48-57).

Ho-Chunk submits a declaration that it will not complete the existing construction to house the announced expansion until November 2017 and argues, therefore, the preliminary injunction should be denied. (HCN Opp. Br., Doc. 37 at 43). SMC seeks to preserve the status quo through the issuance of the injunction. Even if Ho-Chunk's attestations of a November 2017 expansion date were reliable, SMC meets the requisite showing: The movant need not establish

an actual injury or the certainty of an injury occurring; it is enough to show a strong threat of irreparable injury before trial. 11C Wright & A. Miller, *Federal Practice and Procedure* § 2948 at 437-38 (1973). The latest Federal Court Management Statistics published by the Administrative Office of the U.S. Courts[2] show that, in 2016, in the Western District of Wisconsin the median time to trial was 20.1 months. The November 2017 targeted opening is a mere five months from now.

Even if taken at face value, Ho-Chunk's expansion will occur in a mere twenty weeks. Under Ho-Chunk's view of the law, it could expand gaming activities at the Wittenberg facility tomorrow and SMC's harm would be futuristic and speculative. The Declarations show that Ho-Chunk has already altered its expansion plans to include an additional thirty-nine slot machines in the expansion over the 272 additional slots originally announced for a total of 311 additional slot machines. *See* (Robert Mudd Declaration, Doc. 33, 2-3 ¶ 4). This is demonstrative of the fluidity of the situation, the status quo of which can only be preserved by the issuance of the preliminary injunction.

While suggesting that SMC's harm is delayed, Ho-Chunk argues that it will suffer "immediate" harm if the preliminary injunction is granted, (HCN Opp. Br., Doc. 37 at 45-46), citing the Declaration of its President, Wilfred Cleveland (Doc. 35). Ho-Chunk cites the Cleveland Declaration in its entirety without identifying or explaining anywhere as to how the impact will be "immediate" for Ho-Chunk, but not for SMC. Both Nations are functioning and sophisticated governments that operate based on long-range planning and annual budgets, hence, SMC is forced to address the impacts now as it plans for ongoing governmental operations. Accordingly, by Ho-Chunk's own analysis, the impact is "immediate," (HCN Opp. Br., Doc. 37

[2] http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2016.pdf

at 5; *see also* Robert Mudd Declaration, Doc. 33 at 3-4, ¶ 7), but on both tribal governments. The stark contrast confronted by the two tribes regarding those impacts is discussed below in the context of balancing the hardships.

Ho-Chunk contends that SMC is not currently suffering irreparable harm because it is not seeking to enjoin the existing gaming operations, which SMC alleges are also illegal in violation of IGRA and the Compacts. (HCN Opp. Br., Doc. 37 at 4), "Thus, SMC is not taking the position that it is currently suffering irreparable harm"). That is simply not correct. SMC seeks to preserve the status quo, and prevent the suffering of additional and irreparable harm resulting from the proposed expansion. It is a non-sequitur for Ho-Chunk to conclude that the motion is evidence that SMC is not being harmed by the existing operation. Finally, Ho-Chunk concludes its analysis by arguing a "denial of the motion will preserve the status quo that SMC is seeking to alter through its motion." *Id.* at 4, but that too is a non-sequitur – only the granting of the preliminary injunction preserves the status quo.

Ho-Chunk includes a footnote challenging SMC's contention that the loss of employees and its customer base and good will constitute irreparable harm, asserting the cases cited by SMC, *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), are distinguishable because they involved imminent business insolvency and the infringement of intellectual property rights. (HCN Opp. Br., Doc. 37 at 5, n. 1). Those are distinctions without a difference. Just as the violations of law at issue in those cases caused the loss of employees and its customer base and good will of the plaintiffs in those cases, Ho-Chunk's violation of IGRA and the Compacts cause SMC to incur similar losses here. Ho-Chunk further argues that such losses are not irreparable because "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." (HCN Opp. Br., Doc. 37 at 7). It is true the same harm could occur for other lawful reasons; but, this case involves the impacts of illegal activities. What matters is that SMC will suffer harm in this instance as a result of HCN's violations of IGRA and the Compacts. Indeed, denial of the preliminary injunction increases SMCs vulnerability to those general risks, further justifying the need for granting the preliminary injunction.

Ho-Chunk suggests that protection against competition is not a protectable interest, citing *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941 (7th Cir. 2000) (HCN Opp. Br., Doc. 37 at 6). The Sokaogon Tribe filed a lawsuit against the Department of Interior ("DOI") under the Administrative Procedures Act challenging its decision to not have certain land, intended for gaming, to be taken into trust. The St. Croix Tribe sought to intervene. In denying intervention, the court noted that the Indian Gaming Regulatory Act, 25 U.S.C 2701 *et seq*. ("IGRA") does not guarantee a tribe's gaming to be free from competition of a nearby tribe, such that St. Croix did not have the right to intervene. The case never stated that a Tribe should not be protected from illegal gaming. There was no contention in *Sokaogon* that the land would not qualify for gaming under IGRA, nor was there a compact in place that restricted the size and scope of the gaming facilities at issue. SMC is seeking compliance with IGRA and the Compacts – neither was at issue in *Sokaogon.* The *Sokaogon* citation is inapplicable and its use disingenuous.

B. SMC Has No Remedy at Law.

SMC establishes that its limitations to prospective equitable relief resulting from the State's Eleventh Amendment immunity and Ho-Chunk's tribal sovereign immunity leave it with no adequate remedy at law (SMC Br., Doc. 8 at 15-16). SMC further establishes that, even if

money damages were available, the devastating impact would still be so severe that a money damage award would still result in irreparable harm. (SMC Br., Doc. 8 at 16-17). Ho-Chunk counters that money damages are available because SMC's compact includes provisions that relieve SMC of its obligations to pay revenue-sharing to the State. (HCN Opp. Br., Doc. 37 at 6-7). Ho-Chunk correctly notes that SMC is pursuing exactly that remedy in its claims against the State (*Id.* at 7), but a relief of approximately $1 million per year does not come close to being an adequate remedy for the loss of $22 million per year as a result of Ho-Chunk's violations of IGRA and the Compacts. Moreover, the provision in SMC's compact allowing it to seek a reduction in revenue sharing payments is not a limitation on remedies available to SMC. Stockbridge-Munsee Gaming Compact, Section XXII(G). Ho-Chunk's arguments that SMC has adequate remedies at law are unavailing.

Ho-Chunk suggests that SMC has an adequate remedy at law because if it prevails, it will then be in a position to proceed with planning and budgeting without competition from Ho-Chunk's Wittenberg facility. Even in the non-Indian context, SMC cited three cases for the proposition that where monetary damages are possible, courts will still find irreparable harm in situations similar to those currently facing SMC, where the consequences of losses are extremely serious and devastating. *See Doran v. Salem Inn, Inc*., 422 U.S. 922, 932, 95 S. Ct. 2561 (1975); *Commodity Futures Trading Comm'n v. British American Commodity Options Corp*., 434 U.S. 1316, 1322, 98 S. Ct. 10 (1977); *Tri-State Gen. & Transmission Ass'n. v. Shoshone River Power, Inc*., 805 F.2d 351, 356 (10th Cir. 1986). Ho-Chunk attempts to distinguish those cases by asserting that the plaintiffs therein would not have been able to recover without the preliminary injunction even if they ultimately prevailed on the merits. (HCN Opp. Br., Doc. 37 at 7-8). Certainly, in the event SMC prevails in the litigation, while having suffered irreparable harm

while this litigation was pending, it will seek to get back to the place it was before HCN's announcement. Whether it would succeed in that hypothetical depends on the amount of permanent damage suffered by its programs and infrastructure within the tribal government and to its labor pool, and customer base within its business operations. The fact that SMC would have no choice but to try to rebuild does not justify the imposition of irreparable harm, Ho-Chunk's disingenuous efforts to describe the case-law as such notwithstanding.

SMC meets the standard regarding irreparable harm; even if SMC suffers and then recovers, the lost revenue will be lost forever, the reductions in governmental services will not place a member in housing that was never built, or save a life that was lost due to reductions in health care, or pay the bills of employees who lost their job. Ho-Chunk's efforts to add into the criteria a new standard that the moving party must suffer fatal wounds during the pendency of the lawsuit in order for a preliminary injunction to issue should be rejected. That position is certainly not supported by Ho-Chunk's incorrect efforts to defeat the case law cited by SMC. In *Doran*, the Court reasoned the possibility of bankruptcy to be sufficient to establish the "irreparable harm" element of preliminary injunction analysis. 422 U.S. at 931 ("substantial losses and *perhaps* even bankruptcy", emphasis added). Similarly, in *Commodity Futures*, the Court reasoned the potential of a fatal blow to be sufficient to establish the "irreparable harm" element of preliminary injunction analysis. 434 U.S. 1316, ("*potentially* fatal" emphasis added). In neither case does the Supreme Court's analysis suggest that the harm must be fatal to be irreparable. In the cited reference to *Tri-State Gen*., the Tenth Circuit recognized that the difficulty to collect a money damages award constitutes sufficient "irreparable harm." There, an award of money damages was an available remedy, but there was also the real possibility that the Plaintiff could not collect on a money judgment. 805 F.2d at 356. In contrast, here, money

damages are not an option, much less an ability to collect on a money judgment, therefore, SMC clearly exceeds the threshold showing of irreparable harm.

C. SMC Will Prevail on the Merits.

1. IGRA abrogates Ho-Chunk's immunity from suit to allow SMC's claims to proceed.

IGRA abrogates Ho-Chunk's sovereign immunity from suit in this case. Both Defendants rely on a misreading of IGRA, the opinions in the *Bay Mills* litigation, and prior opinions in this circuit to argue that Ho-Chunk's sovereign immunity bars SMC's suit for injunctive relief against Ho-Chunk. As explained below, federal law clearly permits SMC's suit against Ho-Chunk to proceed.

a. The State and Ho-Chunk misread IGRA and the *Bay Mills* case regarding suits to enjoin gaming on Indian lands.

Congress approved a limited abrogation of tribal sovereign immunity when it enacted IGRA. *See* 25 U.S.C. § 2710(d)(7)(A)(ii) (vesting United States district courts with jurisdiction over claims brought by one Indian tribe against another to enjoin gaming on Indian lands conducted in violation of a tribal-state gaming compact). Ho-Chunk's gaming compact prohibits Ho-Chunk from conducting gaming activities on lands that are not eligible for gaming under IGRA. *See* Ho-Chunk Compact § IV(B) (Doc. 9-10 at 11-12).[3] SMC is an Indian tribe that is seeking to enjoin HCN's gaming activities conducted on Indian lands in violation of the Ho-Chunk Compact. Therefore, SMC's claims clearly fall within IGRA's abrogation of Ho-Chunk's sovereign immunity.

[3] The Ho-Chunk Compact explicitly incorporates IGRA's restrictions on the ability of a tribe to conduct gaming on lands acquired in trust after 1988. *See* Ho-Chunk Compact at § III(J)(2) (Doc. 9-10 at 11) (stating that Ho-Chunk may only conduct gaming activities on lands acquired after October 17, 1988 where the lands "meet the requirements of section 20 of the [IGRA].").

Both the State and Ho-Chunk argue that SMC's complaint falls outside of IGRA's abrogation of Ho-Chunk's immunity because SMC is alleging that the Wittenberg Casino is operating on lands that are not eligible for gaming. (State Opp. Br., Doc. 27 at 11; HCN Opp. Br., Doc. 37 at 12-14). Simply stated, this argument is wrong. Even a cursory glance at IGRA, and the *Bay Mills* case will reveal the fatal flaw in the Defendants' argument.

IGRA allows one tribe to sue another tribe to enjoin gaming on "Indian lands" where that gaming occurs in violation of a tribal-state gaming compact. *See* 25 U.S.C. § 2710(d)(7)(A)(ii).[4] IGRA defines the term "Indian lands" as follows:

> (4) The term "Indian lands" means—
>
> **(A)** all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4). Nevertheless, IGRA does not allow a tribe to operate a gaming facility on any parcel of land that qualifies as "Indian lands." IGRA explicitly prohibits tribes from operating gaming facilities on Indian lands that are acquired after October 17, 1988. *See* 25 U.S.C. § 2719 ("Except as provided in subsection (b), gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988…"). It is quite common for an Indian tribe to possess lands that qualify as

[4] Despite Ho-Chunk's claims to the contrary, IGRA's plain language allows such claims. *See Id*. (granting jurisdiction over "any cause of action initiated by a State or Indian tribe"); *also see Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, n. 2 (7th Cir. 2008) (*Ho-Chunk II*) ("…regardless of the reason Congress included Indian tribes in this section, courts have applied [Section 2710] so as to permit a suit brought by a tribe to enjoin class III gaming conducted in violation of a Tribal-State compact.").

"Indian lands" (e.g. trust or restricted lands) that are not eligible for gaming because they were acquired after October 17, 1988. That is the reason Congress crafted narrow exceptions to IGRA's post-1988 prohibition. *See* 25 U.S.C. § 2719(b). Those exceptions allow tribes to conduct gaming on Indian lands acquired after October 17, 1988 in limited circumstances not applicable to Ho-Chunk.

The State and Ho-Chunk rely on opinions issued in the *Bay Mills* litigation to support their argument.[5] But, in *Bay Mills*, the Plaintiffs argued that the Tribe's lands did not even qualify as "Indian lands" under 25 U.S.C. § 2703(4) of IGRA. *See Michigan v. Bay Mills Indian Community*, 695 F.3d 406, 412 (6th Cir. 2012) ("Here, the plaintiffs allege that…title to the property is not held in trust by the United States[.]"), *aff'd* by *Michigan v. Bay Mills Indian Community*, 572 U.S. ___; 134 S. Ct. 2024 (2014). In the view of the Sixth Circuit Court of Appeals, this was the critical fact that brought the Plaintiffs' claims outside of IGRA's abrogation of tribal sovereign immunity. *See Id*. at 413 ("The federal courts lack jurisdiction, therefore, to adjudicate the plaintiffs' § 2710(d)(7)(A)(ii) claims to the extent those claims are based on an allegation that the Vanderbilt casino is not on Indian lands.").

Stockbridge does not and will not assert in this litigation that the Wittenberg Parcel is not "Indian lands." In fact, Stockbridge has explicitly alleged that the Wittenberg Parcel was reacquired by Ho-Chunk and placed into trust status in 1993. *See* Compl., (Doc. 5 at 9), ¶ 37. This fact would bring the Wittenberg Parcel within IGRA's definition of "Indian lands" because

[5] Ho-Chunk also relies on *Oklahoma v. Hobia*, 775 F.3d 1204 (10th Cir. 2014) in making this argument. (HCN Opp. Br., Doc. 37 at 14). In *Hobia*, as in *Bay Mills*, the parcel of land in question was not held in trust for the benefit of the Tribe seeking to conduct gaming and was therefore not "Indian lands" under IGRA. *See Hobia*, 775 F.3d at 1207 ("The Property is not held in trust by the United States for the Tribe or for the benefit of any enrolled member of the Tribe.").

title to the parcel is "held in trust by the United States for the benefit of [an] Indian tribe…." 25 U.S.C. § 2703(4). The fact that the Wittenberg Parcel was placed into trust status ***after*** October 17, 1988 makes the parcel ineligible for gaming under 25 U.S.C. § 2719 of IGRA (the parcel does not qualify within one of the exceptions), and therefore ineligible for gaming under § IV(B) of the Ho-Chunk Compact (Doc. 9-10 at 3-4).

In *Michigan v. Bay Mills*, 695 F.3d 406 (2012) the Court of Appeals noted that the abrogation of tribal sovereign immunity would apply in relation to trust land acquired after 1988.

> The plaintiffs argue that the Vanderbilt casino's operation violates 25 U.S.C. § 2719, which provides that "gaming regulated by this chapter shall not be conducted on lands *acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988,"* subject to certain exceptions that do not apply here. (Emphasis added.) ***Thus, for the casino's operation to violate § 2719 — and for federal jurisdiction to exist as to this claim — the casino's operations must be conducted on lands so acquired by the Secretary***.

Bay Mills, 695 F.3d at 413(emphasis added).

IGRA permits one tribe to sue another to "enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under [IGRA]." 25 U.S.C. § 2710(d)(7)(A)(ii). SMC has alleged that Ho-Chunk is conducting gaming activities on Indian lands, in violation of 25 U.S.C § 2719 and, thereby, the Ho-Chunk Compact. Therefore, SMC's complaint against Ho-Chunk clearly falls within IGRA's limited abrogation of Ho-Chunk's sovereign immunity.

b. IGRA allows SMC to sue Ho-Chunk to enjoin gaming on lands not eligible for gaming under its compact.

Ho-Chunk asserts, separately, that SMC's Complaint falls outside IGRA's abrogation of tribal sovereign immunity because SMC is not seeking to enjoin activities that IGRA allows to

be addressed in tribal-state gaming compacts (HCN Opp. Br., Doc. 37 at 14-15). As with its earlier argument, Ho-Chunk's assertion here falls apart quickly upon examination.

To support this argument, Ho-Chunk urges this Court to read the Seventh Circuit's opinion in *Ho-Chunk II* too broadly, while reading IGRA so narrowly that it would defeat the purpose of its tribal-state compact requirements.

The Court in *Ho-Chunk II* analyzed whether IGRA's abrogation of tribal immunity allowed suits to enforce revenue sharing provisions in a tribal-state gaming compact. *Ho-Chunk II*, 512 F.3d at 931-32. IGRA sets forth a list of seven different subjects that may be addressed in the terms of a tribal-state gaming compact:

> (C) Any Tribal-State compact negotiated under subparagraph (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.

25 U.S.C. § 2710(d)(3)(C)(i-vii).

The *Ho-Chunk II* Court included a lengthy discussion about whether revenue sharing is even a permissible subject of compact negotiations under IGRA. *See* 512 F.3d at 932 ("…the legitimacy of these revenue-sharing provisions is far from a settled issue."). The Court avoided the question of whether revenue sharing is permissible. Instead, the Court held that, while Congress abrogated tribal immunity for suits to enjoin violations of gaming compact provisions that are permissible under IGRA, revenue sharing agreements "[do] not appear to have been contemplated by Congress as being one of the matters tribes and the states may negotiate over under IGRA."[6] *Id.* at 933.

Nothing in the Court's holding in *Ho-Chunk II* diminishes the ability of SMC to seek to enjoin Ho-Chunk from violating the terms of its compact that are permissible subjects of negotiation under IGRA. In fact, the Court in *Ho-Chunk II* said as much: "so long as the alleged compact violation ***relates to*** one of these seven items [in 25 U.S.C § 2710(d)(3)(C)], a federal court has jurisdiction over a suit by a state to enjoin a class III gaming activity." *Ho-Chunk II*, 512 F.3d at 934 (emphasis added).

This Court has already held that the location of Ho-Chunk's gaming facilities is a proper subject for inclusion in a gaming compact under IGRA. *See Wisconsin Winnebago Nation v. Thompson*, 824 F.Supp. 167, 171 (W.D. Wis. 1993) ("The language of [IGRA] itself contains the

[6] The Secretary of the Interior has expressly approved dozens of tribal-state gaming compacts that include revenue-sharing provisions, but has explained that tribal revenue sharing must be accompanied by valuable consideration provided by the State. *See*, *e.g.,* Letter from Assistant Secretary of the Interior Kevin Washburn to Massachusetts Governor Deval Patrick at 11 (October 12, 2012) (disapproving tribal state gaming compact) available on the official web page of DOI's Office of Indian Gaming at: https://www.indianaffairs.gov/cs/groups/webteam/documents/text/idc1-028222.pdf . The Ninth Circuit Court of Appeals has adopted this standard. *See Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010); cert denied 131 S. Ct. 3055 (June 27, 2011).

catch-all category in 25 U.S.C. § 2710(d)(3)(C)(vii) that could easily include site selection as a consideration…"). This is consistent with the views of nearly every court that has examined the question of which subjects may be addressed in a tribal-state gaming compact. *See In re Gaming Related Cases*, 331 F.3d 1094, 1109 (9th Cir. 2003) ("The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc.") (quoting S. REP. 100-446 (1988)); and *Chemehuevi Indian Tribe v. Brown*, Case No. 5:16-cv-01347-JFW-MRW, Opinion at 8 (C.D. Ca. March 30, 2017) ("… if Congress intended the permissible topics set forth in Section 2710(d)(3)(C)(vi) and (vii) to be more narrowly construed, it would not have utilized the broad language it did in those sections.").

The Ho-Chunk Compact's restrictions on the location of Ho-Chunk's gaming facilities – including the Wittenberg Casino – are proper subjects of bargaining under 25 U.S.C § 2710(d)(3)(C). Even under Ho-Chunk's theory, SMC's claims squarely address compact provisions that are permitted by IGRA. Therefore, IGRA permits SMC's suit against Ho-Chunk in this court.

2. State Eleventh Amendment immunity does not bar the SMC's claims.

Although the State, consistent with the express language of the compacts, does not assert that it is immune from this lawsuit, Ho-Chunk takes it upon itself to assert that the State's waiver of Eleventh Amendment immunity "does not encompass" the SMC's claim that the Wittenberg Parcel does not qualify as "Indian lands" under IGRA or its claim the Wittenberg Casino does not constitute an "ancillary facility" as defined in the Ho-Chunk compact (HCN Opp. Br., Doc. 37 at 17). Ho-Chunk argues that, absent such a waiver, SMC cannot secure complete relief because the State would not be bound by the Court's judgment in this case.

a. The State waives its Eleventh Amendment immunity in the Compact.

The State waives its Eleventh Amendment immunity as to SMC's claims against it in the SMC Compact, Section XXII(E)(2) (Doc. 5-2 at 16). The ability to secure complete relief does not require a waiver of the State's Eleventh Amendment immunity as to SMC's claims against Ho-Chunk. The State will be bound by the Court's judgment as to SMC's claims against it, which includes the allegations that by allowing Ho-Chunk to proceed with violations of IGRA and its Compact, the State is in violation of its Compact with SMC.

b. State sovereign immunity does not bar the SMC's claims against the Governor or Wisconsin State officials under *Ex parte Young*, therefore no waiver of immunity is necessary.

Ho-Chunk devotes a significant portion of its own brief to raising defenses on behalf of the State that the State has declined to assert for itself. Ho-Chunk claims that the State's waiver of sovereign immunity "does not encompass" the SMC's claim that the Wittenberg Parcel does not qualify as "Indian lands" under IGRA or its claim the Wittenberg Casino does not constitute an "ancillary facility" as defined in the Ho-Chunk compact. (HCN Opp. Br., Doc. 37 at 17). Ho-Chunk argues that, absent such a waiver, SMC cannot secure complete relief because the State would not be bound by the Court's judgment in this case. As explained above, that is not necessary here. Moreover, a waiver of sovereign immunity by the State would also be unnecessary because the SMC seeks prospective injunctive relief against the Governor under *Ex parte Young,* 209 U.S. 123 (1908).

Although states generally enjoy sovereign immunity from suit, the Supreme Court has recognized "several well-established exceptions to the Eleventh Amendment bar on suing states in federal court." *McDonough Assocs., Inc. v. Grunloh*, 722 F.3d 1043, 1049-50 (7th Cir. 2013). First, a state may waive immunity by consenting to a suit in federal court. Another exception

allows "suits against state officials seeking prospective equitable relief for ongoing violations of federal law" under the doctrine established in *Ex Parte Young*. *Indiana Protection & Advocacy Svcs. v. Indiana Family & Social Svcs. Admin*, 603 F.3d 365, 371 (7th Cir. 2010) (*quoting Marie O. v. Edga*r, 131 F.3d 610, 615 (7th Cir.1997)); *see also McDonough Assocs., Inc. v. Grunloh*, 722 F.3d 1043, 1049-50 (7th Cir. 2013) ("[t]he *Ex parte Young* exception allows the lower federal courts to enforce federal law against the states themselves, so that plaintiffs asserting federal rights against the states have recourse to federal courts . . . ") (emphasis added).

In *Ex parte Young,* the Plaintiff sought to enjoin both the Minnesota Railroad and Warehouse Commission and the State Attorney General, Edward T. Young, from enforcing acts that reduced the maximum rates that railroads could charge passengers and to ship commodities. *Ex Parte Young*, 209 U.S. 123, 129-131 (1908). The plaintiffs alleged that enforcement of rate reductions by the Commission and the Attorney General violated due process and equal protection rights guaranteed by the United States Constitution. *Id.* at 129-30. The Supreme Court held that the state's Eleventh Amendment immunity did not bar the plaintiffs' suit because, the Court explained, when a state official (in that case, the Attorney General) violate the federal Constitution, that official acts outside the scope of his or her authority and is no longer entitled to the state's immunity from suit. *Id*. at 155-56. The Court reasoned that "the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity.'" *Id*. at 159. The *Ex Parte Young* Court explained that when a state official violates the federal Constitution, he is "stripped of his official or representative character" and thus also of any immunity defense. *Id.* at 159-160. In these kinds of cases, "the officer is simply prohibited from doing an act which he had no legal right to do." *Id*. at 159.

Although *Ex parte Young* dealt with an official's conduct that violated the federal Constitution, the exception also applies to suits to enforce federal statutes.[7] A court applying the *Ex parte Young* doctrine "need only conduct a `straightforward inquiry' into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L.Ed.2d 871 (2002), *quoting Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997) (O'Connor, J., concurring in part and concurring in judgment); *see also MCI Telecomm.*, 222 F.3d at 345 ("[w]hile the relief granted under *Ex parte Young* may only be prospective, proof for the claim necessitating relief can be based on historical facts, and most often will be") (quoting *Entergy, Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir. 2000)).

In this case, SMC alleges that the Governor is participating in a violation of federal law because the Wittenberg Parcel was placed into trust status ***after*** October 17, 1988, which makes the parcel ineligible for gaming under 25 U.S.C. § 2719 of IGRA, and therefore ineligible under § IV(B) of the Ho-Chunk Compact. SMC seeks a declaration that the Wittenberg Parcel does not quality for gaming and an injunction prohibiting gaming on the Parcel. In addition, SMC seeks a finding that the Defendants' (including the Governor's) interpretation of "ancillary facility" violates the Compact and therefore violates IGRA, which only permits Indian gaming to

[7] *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156 n. 6, 98 S. Ct. 988, 55 L. Ed. 2d 179 (1978) (holding that *Ex parte Young* allowed suit in federal court against named state official for violating federal statute); *see also Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983) (*Ex parte Young* authorized suit against state officials challenging state statute as preempted by federal statute); *MCI Telecomm. Corp. v. Illionois Bell Telephone Co.*, 222 F.3d 345 (2000) (applying *Ex parte Young* to suit against state officials under federal Telecommunications Act).

be conducted pursuant to the terms of a Compact. SMC's Complaint presents two separate ongoing violations of federal law and seeks only prospective, equitable relief, restraining officials of the State of Wisconsin from acting in contravention of federal law. Accordingly, SMC satisfies the straightforward inquiry and *Ex parte Young*'s exception to state sovereign immunity applies here.

3. Even if the Court finds that State itself did not waive its immunity from suit, the State of Wisconsin is not a necessary and indispensable party that warrants dismissal under Rule 19.

Notwithstanding the fact that the State's immunity does not bar SMC's suit to enjoin the Governor from violating IGRA, Ho-Chunk contends that the State is a necessary and indispensable party that cannot be joined because the State has not waived its immunity from suit. For all the reasons stated above, the State's consent to suit is not necessary to sustain SMC's claims under *Ex parte Young*.[8] In addition, Ho-Chunk has not met its burden to show that the State is both a necessary and indispensable party with respect to either of SMC's claims. *See* Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 1609 (3d ed. 2001) (burden of proof rests on the party raising Rule 19 defense to "show that the person who was not joined is needed for a just adjudication"). It's also worth noting that only the Ho-Chunk Nation – not the State or its officials – argue that the SMC's complaint must be dismissed in the State's absence under Rule 19.

[8] *See also* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stanford L. Rev. 1201, 1219 (May 2001) (some defend the doctrine of governmental sovereign immunity by "claim[ing] that government liability is unnecessary because there are adequate alternatives. Most notably individual government officers can be sued, particularly for injunctive relief, rendering suits against government entities unnecessary").

a. Ho-Chunk has not met its burden to show that the State itself is a necessary party under Rule 19.

Ho-Chunk never specifies what they believe the State's interest is, or how the State's ability to protect any alleged interest would be impaired if the instant litigation moves forward in its absence. Instead, Ho-Chunk assumes what they are required to prove under Rule 19, claiming the State has "an interest relating to the subject of this action and [is] so situated that disposition of this action in . . . the State's absence will, as a practical matter, impair or impede their ability to protect that interest." (HCN Opp. Br., Doc. 37 at 17). Ho-Chunk cites and discusses a few cases (the majority of which are non-binding on this Court) regarding the interests of parties to contracts .A couple of the cases discuss the interests and one that discusses the interest of states in suits to strike or invalidate compact provisions but neither of those cases included *Ex Parte Young* claims (in one case the claims were precluded and, in the other, the plaintiff failed to bring them). In any event, those cases are easily distinguished from this litigation.

In *Hall v. Tribal Development Corp*., 49 F. 3d 1208 (7th Cir. 1995) the Court of Appeals for the Seventh Circuit found that the Menominee Indian Tribe of Wisconsin ("MITW") was a necessary and indispensable party whose absence necessitated dismissal in a *qui tam* action to invalidate a lease contract for goods and services between MITW and Tribal Development Corporation. 100 F.3d 476, 477 (7th Cir. 1996). The *Hall* plaintiffs sought rescission of contracts to which MITW was a party, refunds of monies paid thereunder and recovery of civil penalties and forfeiture of all equipment leased or sold to MITW. I*d.* at 477-78. The Court found that MITW clearly had an interest because a judicial declaration to invalidate the contract necessarily would impact them. *Id*. at 479. Over the plaintiff's objection, the Court found that MITW's was necessary because its interests were not so aligned with the United States' (which was a party to the suit) interests to alleviate any concern for MITW's ability to protect its interests. *Id*. at 479.

Unlike the *Hall* plaintiffs' request that the court invalidate the lease, SMC does not seek to invalidate the Compact, only to compel the Governor and state officials acting on his behalf, to comply with the federal law when enforcing the Compact. Moreover, in this case, Governor Walker (who is a party to this suit) is certainly well positioned to protect any interest the State may have in enforcement of the terms of the Compact.[9] Indeed, the Governor's interests should be directly aligned with those of the State of Wisconsin, since he is the State Officer that is ultimately responsible for enforcing the terms of the Compact on behalf of the State. *See* Wis. Stat. § 14035 ("the governor may, on behalf of this state, enter into any compact that has been negotiated under 25 USC 2710 (d)."); and, Wis. Stat. § 569.02(4)(explaining that the Wisconsin Department of Administration "Assist[s] the governor in determining the types of gaming that may be conducted on Indian lands and in entering into Indian gaming compacts."). As such, the presence of the Governor in this suit should alleviate Rule 19(a)'s concern for the protection of the State's interests.

The instant case is also distinguishable from *Clinton v. Babbitt*, 180 F. 3d 1081 (9th Cir. 1999). In *Clinton*, the plaintiffs sued the Secretary of Interior to invalidate a major settlement agreement between the United States and the Hopi and Navajo Tribes (ratified by Congress as the Navaho-Hopi Land Dispute Settlement Act of 1996, Pub. L. 104-301, Oct. 11, 1996, 110

[9] *See generally MasterCard Int'l, Inc. v. Visa Int'l Service Ass'n, Inc.*, 471 F.3d 377, 387 (2d Cir. 2006) ("[i]t is not enough under Rule 19(a)(2)(i) for a third party to have an interest, even a very strong interest, in the litigation. Nor is it enough for a third party to be adversely affected by the outcome of the litigation. Rather, necessary parties under Rule 19(a)(2)(i) are only those parties whose ability to protect their interests would be impaired because of that party's absence from the litigation") (emphasis in original). In other words, to be necessary and indispensable a party must have interests that they are unable to protect if the case goes forward without them.

Stat. 3649 ("1996 Settlement Act")).[10] Under the terms of the agreement, among other things, Hopi agreed that certain members of the Navajo Nation would be permitted to stay on land owned by the Hopi Tribe pursuant to 75 year leases (the standard terms of which were fixed). The *Clinton* plaintiffs (prospective Navajo lessees under the agreement) claimed the terms of the proposed leases violated the equal protection clause of the Fifth Amendment. *Id*. at 1086. The plaintiffs sought declaratory judgments invalidating the 1996 Settlement Act and its implementation and an injunction prohibiting the Secretary of Interior from approving the leases under the 1996 Act. *Id.* The plaintiffs only the Secretary of Interior, and did not include the Hopi Tribe or any of it's officials. *Id*. The Court held that the Hopi Tribe was a necessary party because the Court found it could "not adjudicate an attack *on the terms* of a negotiated agreement" without jurisdiction over the parties to the Settlement Agreement. *Id* at 1088 (emphasis added). Also, Hopi Tribe had a legally protected interest in the jurisdiction over its lands (the subject of the leases) and granting relief would deprive the Hopi Tribe of the benefits of the 1996 Settlement Act, including substantial compensation of over $25 million, which was conditioned on the Secretary's approval of the leases. *Id.* at 1088-89.

Unlike the *Clinton* plaintiffs, who sought to invalidate the 1996 Settlement Act and block the Secretary from signing the leases, SMC does not seek to invalidate either its own or the Ho-Chunk's compact or to strike or alter any of its terms. Indeed, SMC is not attacking "the terms" of the Compact at all. Moreover, SMC has also sued the State and Ho-Chunk to block the

[10] The settlement agreement was the result of multiple Congressional acts impacting the Hopi Tribe, the Navajo Nation and the United States and protracted litigation. The agreement resolved the litigation and was ratified by the Hopi Tribe, the Navajo Nation, the Secretaries of the U.S. Departments of Interior and Agriculture and the Associate Attorney General of the United States. *See Clinton*, 180 F.3d 1081, 1084-1088 (9thCir. 1999).

illegal conduct at issue; whereas the *Clinton* plaintiffs only sued the Secretary, not the Hopi Tribe or its officials. In this litigation, the State will have the ability to protect its interest.

Ho-Chunk also cites *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975) in which the court ruled that the Hopi Tribe was necessary and indispensable in an action brought by a group of Hopi spiritual leaders to cancel a lease between the Hopi Tribe, as lessor, and the Peabody Coal Company, as assignee of the original lease.

Along the same line, in contrast with the plaintiffs in *Lomayaktewa*, SMC is not asking this Court to cancel or set aside the Ho-Chunk Compact. In fact, SMC doesn't challenge the validity of the Ho-Chunk Compact or any of the provisions contained therein. Instead, SMC seeks a declaration that the State's interpretation that gaming is permitted on the Wittenberg Parcel is contrary to federal law, a finding that the interpretation of "ancillary facility" violates IGRA because it is not permitted under the Compact and an injunction that would require the State comply with controlling federal law.

It's also relevant that the State's interest in illegal actions sanctioned by State officials interpreting Compact terms in a manner that conflicts with federal law bears no resemblance to the Hopi Tribe's interests in either *Clinton* or *Lomayaktewa*. In fact, ultra vires actions—*i.e.*, unconstitutional or illegal actions of state officials—are not even considered the work of the sovereign. *Larson v. Domestic & Foreign Comm. Corp.*, 337 U.S. 682, 689 (1949).

Ho-Chunk also purportedly relies on *Sandia v. Babbitt*, 47 F. Supp. 2d 49 (D.D.C. 1999) ("*Sandia*") for the proposition that states are required parties for addressing challenges to provisions of a gaming compact to which it is a party. (HCN Opp. Br., Doc. 37 at 18). However, *Sandia* does not stand for such a sweeping proposition. In *Sandia*, the District Court for the District of Columbia "reluctantly" found that the State of New Mexico was an

indispensable party to the Sandia and Isleta Pueblos' suit against the United States government. 47 F. Supp. 2d 49 (D.D.C. 1999). In that case, the Pueblos where faced with shutting down their gaming operations or agreeing to compacts dictated by the State of New Mexico ("NM") that included revenue sharing and regulatory provisions with which they vehemently disagreed. *Id*. at 51. The Pueblos reluctantly entered into the compacts with express reservations regarding the provisions they opposed, and asked NM to renegotiate those provisions (but made all payments under the revenue sharing provisions). *Id*. NM refused to negotiate new revenue sharing provisions with the Pueblos, despite the Department of Interior's and the Pueblos urging. *Id*. The Pueblos could not sue NM to compel negotiation because the Supreme Court ruling in *Seminole Tribe v. Flori*da[11] prohibited *Ex parte Young* claims to compel good faith negotiations under IGRA. *Id*. at 50-51. Therefore, the Pueblos initiated a lawsuit against the United States. The Court acknowledged that there was "no real dispute" among the parties that NM was a necessary party and "no question" that NM could not be joined under *Ex parte Young* (as a result of the ruling in *Seminole*). *Id*. at 52.

Ho-Chunk not only overstates the holding of *Sandia* but, as a general matter, its reliance on *Sandia* is misplaced. In *Sandia*, the Pueblos could not bring *Ex parte Young* claims to force the Governor to negotiate compact provisions (due to the *Seminole Tribe* decision). In the instant litigation, SMC can and did sue Governor Walker under *Ex parte Young*. That fact alone

11 *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that the State's Eleventh Amendment immunity blocked a suit to force good faith negotiations under IGRA and the doctrine of *Ex parte Young* may not be used to enforce § 2710(d)(3) of IGRA against a state official" because "Congress has prescribed a detailed remedial scheme . . . [and the] intricate procedures set forth in § 2710(d)(7) show that Congress intended not only to define, but also significantly to limit, the duty imposed by § 2710(d)(3)" and also to limit the means available to enforce those provisions). The good faith negotiation under IGRA is not at issue in this litigation.

significantly distinguishes SMC's case from *Sandia*, where the Court found the absence of NM as a party precluded it from protecting a number of interests that the NM had in the revenue sharing provisions that the Pueblos sought to invalidate. In this case, Governor Walker is well positioned to protect any interest, however limited, that the State may have in actions taken under the Compact that contravene federal law.[12]

4. Even if the State itself is found to be necessary, Ho-Chunk has not met its burden to show that equity and good conscience weigh in favor of dismissal in the State's absence.

Even if this Court were to find that the State itself is a "necessary" party but cannot be joined, the State is not an indispensable party without which the case must be dismissed. Courts consider four factors to determine "whether in equity and good conscience the action should proceed among the parties before it or should be dismissed." Fed. R. Civ. P. 19(b). The four factors are as follows: (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 prejudice can be avoided by shaping relief or 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 non-joinder. *Id*.

A judgment rendered in the State's absence will not prejudice the State because the requested relief does not compel the State itself to take any action. Indeed, the SMC is seeking declaratory and injunctive relief with respect to the conduct of State officials under the doctrine of *Ex parte Young*. As explained above, *Ex parte Young* set forth an exception to the Eleventh

[12] Indeed, the *Sandia* Court recognized that "[t]he prejudice to the State from [a decision to strike or modify the revenue sharing provisions that were inconsistent with IGRA] would be simply that the State would be required to comply with the law. It should go without saying that the State's interest in the continuing effectiveness of compact provisions that violate federal law must be small, if not altogether insignificant." 47 F. Supp. 2d at 54.

Amendment immunity traditionally enjoyed by states and provides plaintiffs with recourse against state officials whose conduct violates the federal Constitution or a federal statute. The theory underlying the *Young* doctrine is that conduct by state officers that violate a federal statute is considered *ultra vires* and, therefore, is not protected by state sovereign immunity. If the Court grants the SMC's requested relief, the outcome and actions required of the Defendants will be the same whether or not the State itself is present. Since the relief that SMC seeks is fashioned as declaratory and injunctive relief to prohibit State actors from sanctioning conduct that violates IGRA in carrying out the Ho-Chunk Compact, the judgment should not prejudice the State but would require the Governor and state officials to comply with federal law when acting under the Compact (which, as a matter of law, they are already required to do). For the same reasons, the judgment would be adequate even in the State's absence because SMC can be afforded complete relief under the *Ex parte Young* claims against the Governor.

Nevertheless, Ho-Chunk argues this Court should dismiss SMC's complaint, in its entirety, because, they claim, the State itself is a necessary and indispensable party that cannot be joined as a result of its Eleventh Amendment immunity. Dismissing SMC's complaint under Ho-Chunk's theory would not only leave SMC with no remedy, but also would effectively read the *Ex parte Young* exception out of existence in this case. In other words, if this Court dismisses SMC's Complaint based on a finding that the State itself must but cannot be joined because of Eleventh Amendment immunity, SMC's *Ex parte Young* claims would also be dismissed. It defies reason that the State's Eleventh Amendment immunity could, as a practical matter, bar claims brought under *Ex parte Young*'s well-established exception to a state's Eleventh Amendment immunity. This Court should not permit such an absurd result and should

reject Ho-Chunk's argument that the State itself is a necessary and indispensable party that requires dismissal under Rule 19.[13]

5. Nothing in federal or state law invalidated the reversion of the Wittenberg Parcel to the Native American Church.

The 1969 Deed included an agreement between Ho-Chunk and the Native American Church regarding the use of the Wittenberg Parcel. In consideration of the conveyance, Ho-Chunk agreed to develop housing on the property within five years of the acquisition. In the event that it failed to begin housing development on the property within five years, Ho-Chunk agreed that the property would revert back to the Native American Church.[14] Ho-Chunk failed to develop housing on the Wittenberg Parcel within five years, and title to the property reverted back to the Native American Church by operation of law in accordance with the 1969 Deed.

a. Federal law does not preempt or otherwise invalidate the express terms of the 1969 Deed.

The State and Ho-Chunk each assert that federal law preempts the application of state law, with respect to Indian lands; and, that federal law destroyed the reversionary interest the Native American Church kept for itself when it originally conveyed the Wittenberg Parcel. *See* (State Opp. Br., Doc. 27. at 10; and HCN Opp. Br., Doc. 37 at 31). Under the Defendants'

[13] If this Court decides that the State itself is protected by sovereign immunity, this Court should dismiss the State but find that equity and good conscience mandate that this case proceed with the remaining parties to the litigation.

[14] Ho-Chunk asserts in its brief that it complied with the 1969 Deed's requirement to "commence" housing construction within five years of acquiring the Wittenberg Parcel by virtue of Ho-Chunk's construction of a church on a separate parcel of land. (HCN Opp. Br., Doc. 37 at 29-30). Even if such construction took place, it would not have satisfied the terms of the 1969 Deed because it involved neither housing nor the Wittenberg Parcel itself (1969 Deed, Doc. 5-3). In fact, the Native American Church resolution authorizing the sale of the Wittenberg Parcel to Ho-Chunk expressly stated that the Wittenberg Parcel was intended to be used for "Low Rent, Mutual-help or H.I.P. housing…." *Id*. Ho-Chunk has tacitly acknowledgment in its own brief that the Wittenberg Parcel was never used for housing in accordance with the 1969 Deed.

theory, the Federal Government's acquisition of ***any*** interest in property in trust on behalf of an Indian tribe would result in federal ownership of absolute fee title to the property, free of any restrictions, encumbrances, or future interests. This theory simply does not accord with the basic rules of property law and federal Indian law. The basic rules of property law clearly state that the purchaser of property only acquires the interest in property that the grantor has actually conveyed. *See, eg*., *William Jones and Sylvester Marsh, Plaintiffs In Error v. William Johnston*, 59 U.S. 150, 155 (1855) (stating that a grantee only acquires the property described in a deed). Where a purchaser of property acquires a partial interest in fee title, or fee title to encumbrances or conditions, the purchaser cannot then claim absolute and unencumbered fee title – even if the purchaser is the United States.

The Bureau of Indian Affairs ("BIA") itself has acknowledged that it can acquire trust title to land that is subject to the property interests of third parties. The BIA's Fee-to-Trust Handbook sets forth the standard procedures used by the BIA when acquiring trust title for Indian tribes[15]. The Fee-to-Trust Handbook contains a sample deed of conveyance that allows it to accept trust title to lands, and that deed includes a provision making the trust acquisition "[s]ubject to the covenants, easements, and restrictions of record[.]" *Id*. at 85.

The California Court of Appeals has examined whether federal law preempts or invalidates property interests established under state law when land is later acquired in trust on behalf of an Indian tribe. *See Friends of East Willits Valley v. County of Mendocino*, 101 Cal. App. 4th 191; 123 Cal. Rptr. 2d 708 (Cal. App. 2002). In that case, an Indian tribe challenged the application of conservation easements to its trust lands pursuant to a California state law

[15] BIA Fee-to-Trust Handbook Version IV (June 28, 2016) available at: https//www.indianaffairs.gov/cs/groups/xraca/documents/text/idc1-024504.pdf.

known as the "Williamson Act,", which were established before the land was placed into trust. The tribe argued that federal law preempted the application of conservation easements under the Williamson Act to its trust lands. The Court held that federal law did not preempt the application of California property law, and explained:

> However, the federal preemption of involuntary restrictions on tribal land use is not at issue here. The issue is not whether the state or County can regulate the Ranch in the future; it is, instead, whether the Ranch remains subject to voluntarily accepted contractual restrictions. ***While section 1360 may limit [state] regulation, nothing in its language invalidates contractual commitments made before the passage of land into trust***. Indeed, the Tribe and County expressly contemplated that the Ranch would be accepted into trust, and nevertheless entered into an agreement to restrict development after this was accomplished. We hold that federal law does not void prior restrictions on land agreed to before the land passed into trust.[16]

Friends of East Willits Valley, 101 Cal. App. 4th at 201 (emphasis added). This is precisely the issue in this case.

Ho-Chunk and the Native American Church agreed in 1969 that the Wittenberg Parcel was to be used for housing, and both parties contemplated that the land would be held in trust by the United States. The BIA put its stamp of approval on that agreement when it prepared the deed of conveyance and accepted the Wittenberg Parcel into trust subject to the Native American Church's reversionary interest. Nothing in federal law – not even the Non-Intercourse Act – preempted or invalidated the Native American Church's express reservation of a future interest before the land was placed into trust status.

But, even if the Non-Intercourse Act were to apply to the Wittenberg Parcel, the land still reverted back to the Native American Church after Ho-Chunk failed to develop housing on the

[16] In this quotation, "Section 1360" refers to the Public Law 280, which authorized certain states to assume limited civil and criminal jurisdiction over Indian tribes.

property within five years of its acquisition because the Federal Government approved the Native American Church's reversionary interest.

Under the Non-Intercourse Act, title to Indian lands can be transferred or conveyed where the federal government consents to the transfer. *See, e.g.*, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) ("...Indian title is a matter of federal law and can be extinguished only with federal consent…"); and *Epps v. Andrus*, 611 F.2d 915, 917 (1st Cir. 1979) (stating that an Indian tribe must demonstrate that the United States did not consent to the alienation of Indian land in order to show a violation of the Non-Intercourse Act).[17] Moreover, Indian land can and does pass out of trust status on a frequent basis. The United States has explained that it may remove Indian lands from trust status. *See* Brief of United States in *Stand Up for California! v. United States*, No. 1:12-cv-02039-BAH at n. 20 (January 18, 2013) (explaining instances where land has passed out of trust status). The State has even acknowledged this fact, in describing a recent decision of the United States Supreme Court: "In 2012, however, the Supreme Court ruled

[17] The federal consent requirement highlights the original purpose of the Non-Intercourse Act, which was to consolidate federal control over Indian affairs and bring order to the process of acquiring lands from Indian tribes. *See* William C. Canby, Jr., *American Indian Law in a Nutshell* at 15 (6th Ed. 2015). At the time of its enactment in 1790, the newly-created United States was actively seeking to acquire additional Indian lands. Direct purchase of Indian lands by individuals, territories, and states led to competing claims of title. *See, e.g.*, *Johnson v. M'Intosh*, 21 U.S. 543 (1823). The Non-Intercourse Act's land provisions were not enacted to protect Indian tribes from losing their lands. To the contrary, the Non-Intercourse Act was adopted to invest the Federal Government with the exclusive ability to control how Indian tribes would lose their lands. As historian Francis Paul Prucha has explained: "The [Non-Intercourse Acts] sought to provide an answer to the charge that the treaties made with the tribes on the frontier, which guaranteed their rights to the territory behind the boundary lines, were not respected by the United States. The laws were not primarily 'Indian' laws, for they touched the Indians only indirectly. The legislation was, rather, directed against the lawless whites on the frontier and sought to restrain them from violating the sacred treaties." Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* at 92 (Univ. Neb. Press 1984).

that the Quiet Title Act did not prevent challenges after the land is already in trust, ***even if those challenges would result in the land coming out of trust***." Secretary of Administration Mike Huebsch, *The Proposed Kenosha Casino* at 12 (January 22, 2015) (emphasis added) (citing *Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak*, 567 U.S. ___; 132 S. Ct. 2199 (2012))("DOA Report"), attached to the Declaration of Scott Crowell as Exhibit "A". .

In this case, the BIA prepared the very deed by which the Native American Church reserved its reversionary interest in the Wittenberg Parcel, and it did so in the anticipation that the land would be placed into trust status pursuant to the Indian Reorganization Act. 1969 Deed, *See* Compl., Doc. 5-3). Shortly thereafter, on October 3, 1969, the Area Director for the BIA "approved" the deed "pursuant to authority delegated by Secretarial Order No. 2508 of January 11, 1949," and placed title to the Wittenberg Parcel in trust status. *Id*. The BIA's preparation of the deed containing the Native American Church's reversionary interest, its subsequent approval of that deed, and its recording of the deed in trust status can only be understood as federal consent to its terms. Therefore, even under the Non-Intercourse Act, the Wittenberg Parcel passed out of trust status and back to the Native American Church when Ho-Chunk failed to construct housing on the property within five years.[18]

[18] In its brief, the State asserts that "[t]he inclusion of a future interest does not affect the trust status of the property," and relies upon *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999) for this proposition. In *Roberts*, a criminal defendant argued that the United States lacked criminal jurisdiction over a parcel of trust land because of the existence of a contingent reversionary interest on the parcel. *See Id*. at 1130. The Court did not hold that tribal trust lands can never be made subject to a future interest. Instead, the Court merely noted that the land remained subject to federal criminal jurisdiction at the time the crime occurred. *See Id*. at 1135.

b. A reversion of property occurs automatically under Wisconsin state law.

In its answer brief, Ho-Chunk asserts that "a long line of Wisconsin cases" hold that a reversion does not occur by operation of law. (HCN Opp. Br. at 34). The State does not go so far in its own brief, and for good reason: the cases cited by Ho-Chunk predate controlling precedent on this issue in Wisconsin and are distinct from the facts in this case.

Ho-Chunk principally relies on the case of *Koonz v. Joint School District*, 256 Wis. 456 (1950) to support its argument on this point. But, the deed in *Koonz* did not establish a future interest. The Court noted at the outset of its opinion, "There is no evidence to show that any indication was given prior to the commencement of this action of an intention on the part of the grantor to claim a forfeiture of the premises for breach of the condition subsequent other than the letter of plaintiff's counsel to the defendant under date of August 10, 1948." *Id*. at 460. The Court also explained that the school district did not abandon the property, which would trigger any future interest that could exist. *See Id*. at 462 ("In the present case the school board, by its official action, evinced its intention to use the property within the meaning of the term 'school purposes.'"). The other cases Ho-Chunk relies upon on this point are referenced in the Court's opinion in *Koonz* as having been cited by a lower court in that litigation.

A decade after *Koonz*, the Wisconsin Supreme Court decided *Saletri v. Clark*, 13 Wis. 2d 325 (Wis. 1961), which squarely addressed whether a reversion of title occurs by operation of law. The Court in *Saletri* held:

> Our own conclusion follows that of the Delaware and Minnesota courts in the *Addy* and *Consolidated School District* cases, supra. When the school district in the case before us discontinued the prescribed use ***title in fee immediately reverted to Oconto Land Company***. If, as we suppose the fact to be, the [grantor] corporation had been dissolved, it was sufficiently alive to be a repository of title, as in *Addy* and *Errett* v. *Short*, supra. The title

> was property, which the record does not show has been alienated. Sec. 180.768, Stats., in brief provides that when a corporation is dissolved and any of its property has been omitted from the final distribution the title of such property shall vest in the directors as trustees for distribution to the persons beneficially entitled to it, and under conditions and by procedures specified in that statute a designated circuit court may appoint one or more trustees with the powers and duties of disposal prescribed by the statute. (emphasis added)

Id. at 331. The original deed at issue in *Saletri* contains language nearly identical to the language in the 1969 Deed here: "whenever the above described land is discontinued to be used for school purposes it shall revert back to the Oconto Land Company or its assigns." *Id*. at 327.

Koonz does not stand for the proposition that a grantor must take some affirmative action to reclaim title to property upon the occurrence of a condition subsequent. Even if it did, the Court's opinion in *Saletri* makes it manifestly clear that a reversion of title occurs automatically under Wisconsin law.[19]

As a final word, the fact that title to the Wittenberg Parcel reverted automatically to the Native American Church in 1974 would explain the BIA's mistake in proclaiming the property as a reservation in 1986, and informing the State in 2008 that the BIA's records show the property as being held in trust "since it was acquired in 1969." *See* (HCN Opp. Br., Doc. 37 at 23). The BIA's records would not have reflected the reversion of title back to the Native

[19] Ho-Chunk quotes *Schulenberg v. Harriman*, 88 U.S. 44 (1874) in making the argument that SMC cannot assert the Native American Church's interests under the 1969 Deed. (Doc. 37 at 33). SMC is not seeking to assert or take advantage of the Native American Church's property interests in the Wittenberg Parcel. Rather, SMC's claims against Ho-Chunk are based, in part, on the fact that the Wittenberg Parcel was not in trust status on October 17, 1988, as IGRA requires. The automatic reversion of title to the Wittenberg Parcel is merely evidence of that fact. The Supreme Court recognized a similar distinction in *Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012), where a plaintiff's challenge to the status of Indian lands were not barred by sovereign immunity under the Federal Quiet Title Act because the plaintiff was not asserting a title interest in the property.

American Church because it occurred automatically, without the recordation of any documents with the BIA. Nevertheless, under the law described in *Saletri*, the title reverted to the Native American Church in 1974 immediately upon Ho-Chunk's failure to build housing on the Wittenberg Parcel within five years of acquiring the property.

6. The Defendants' interpretation of their tribal-state gaming compact defies the plain language of the agreement, and a common-sense understanding of their intent.

The Defendants ask this court to interpret the Ho-Chunk Compact in a manner that would effectively nullify their agreement to distinguish between "Gaming Facilities" and "Ancillary Facilities." The Defendants' interpretation is contrary to the plain language of the Ho-Chunk Compact, and is inconsistent with the State's own approach to gaming compact negotiations.

a. The Ho-Chunk Compact does not permit Ho-Chunk to operate a "Gaming Facility" in Shawano County.

The State has advanced a brazen argument in its answer brief by claiming that the terms "gaming facility" and "ancillary facility" are not mutually exclusive, as they are defined in the Ho-Chunk Compact. (State Opp. Br., Doc. 27. at 18). According to the State, "even if one piece of the Wittenberg [Parcel] generates a majority of its revenue from gaming – ***the criterion for a 'gaming facility***' – it can still qualify as an 'ancillary facility.'" *Id*. (emphasis added). Thus, the State has effectively acknowledged that the Wittenberg Casino would qualify as a "Gaming Facility" under the Ho-Chunk Compact. Nevertheless, the State argues that Ho-Chunk may operate a Gaming Facility in Shawano County because a Gaming Facility and an Ancillary Facility can mean the same thing. This argument defies common sense, the plain language of the Ho-Chunk Compact, the State's general policy on Indian gaming, and the State's and Ho-Chunk's public characterization of the definition at the time it was negotiated.

The Second Amendment to the Ho-Chunk Compact established the permissible scope of Ho-Chunk's gaming operations. That amendment added a new subsection titled, "Location of Gaming Facilities." (Ho-Chunk Compact, Second Amendment, Doc. 9-13 at 3, ¶ 5). That subsection included distinct definitions for the terms "Gaming Facility" and "Ancillary Facility," and defined a Gaming Facility as a "facility whose Primary Business Purpose is gaming[.]"[20] *Id*. Under the Second Amendment to its compact, Ho-Chunk may operate a single "Gaming Facility" in each of four counties: Jackson County, Sauk County, Wood County, and Dane County. *Id*.

The Ho-Chunk Compact does not authorize Ho-Chunk to operate a Gaming Facility in Shawano County. Yet, the State argues in its brief that the Wittenberg Casino may constitute both a "Gaming Facility" and an "Ancillary Facility" at the same time:

> [SMC's] argument assumes that "gaming facilities" and "ancillary facilities" are mutually exclusive, but Section XVI.E. does not define them as such.

State Opp. Br., Doc. 27 at 18. Under this theory, each of Ho-Chunk's Ancillary Facilities will include within it a "Gaming Facility," as that term is defined by the Ho-Chunk Compact. This is because the physical space in which gaming occurs will always have gaming as its Primary Business Purpose, as that term is defined in the Ho-Chunk Compact.

The Defendants' argument stretches logic beyond its breaking point. The Ho-Chunk Compact explicitly permits Ho-Chunk to operate a total of four "Gaming Facilities" in four separate counties; none of which include Shawano County, where the Wittenberg Casino is located. *See* Ho-Chunk Compact, Second Amendment, Doc. 9-13 at 3, ¶ 5 ("…the Class III

[20] The term "Primary Business Purpose" is defined in the Ho-Chunk Compact to mean the "business generating more than 50 percent of the net revenue of the facility." Ho-Chunk Compact at § III(H), (Doc. 9-10 at 11.).

games authorized under this Compact may be conducted with one Gaming Facility located in each of the following Counties: Jackson, Sauk, Wood and Dane.").

b. The Defendants' interpretation is inconsistent with the State's general policy approach to tribal gaming.

The Defendants obviously prefer that SMC's views on the Ho-Chunk Compact not be accorded any weight, and they both argue that SMC may not challenge the Defendants' interpretation of the Ho-Chunk Compact. (*See* State Opp. Br., Doc. 27 at 14) ("…[the parties'] agreed-upon interpretation cannot be challenged by a non-party to the agreement."); and (HCN Opp. Br., Doc. 37 at 41) ("Because the parties to the contract 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."). If only it were so simple.

As a preliminary matter, the language of IGRA itself explicitly states that one Indian tribe may sue another to enjoin its gaming activities where those activities are "conducted in violation of any Tribal-State compact entered into under [IGRA]." 25 U.S.C. § 2710(d)(7)(A)(ii). It therefore stands to reason that this language allows a plaintiff Indian tribe to challenge the manner in which a defendant Indian tribe and State have interpreted their tribal-state gaming compact.

The State has previously highlighted the fact that its class III gaming compacts with each of the eleven federally recognized Indian tribes in Wisconsin are interconnected, and that each tribe is affected by the interpretation of other agreements. *See* DOA Report at 14 (explaining that one tribal gaming proposal would impact the legal rights of other Wisconsin tribes under their gaming compacts). In fact, the State's class III gaming compacts with numerous tribes contain a clause allowing one tribe to amend its gaming compact to include advantageous provisions included in another tribal-state gaming compact. *See, e.g.,* Oneida Nation Compact, First

Amendment at ¶ 5 (allowing the Tribe to incorporate the terms of another tribe's gaming compact where they are "more favorable"); and Stockbridge-Munsee Compact, First Amendment, Doc. 9-2 at 5, ¶ 4.[21]

These clauses reflect the fact that the State enters into each gaming compact according to a statewide policy; and, that tribal-state gaming compacts in the State are interrelated to a significant extent. These clauses allow the State to be assured that its obligations under tribal-state gaming compacts are generally consistent across the board. And, as this case itself demonstrates, the implementation of one agreement affects the implementation of another, and the State's interests are consistently represented in each of its tribal-state gaming compacts.

The State and Ho-Chunk are both correct in noting that tribal-state gaming compacts are typically interpreted according to principles of contract interpretation. *See* (State Opp. Br. at 16; and, Br. at 40). Nevertheless, the basic rules of commercial contracting do not govern with absolute force.

For example, in a private commercial setting, the parties to an agreement are able to amend their agreements at will, or modify their course of dealings in a manner that reflects a new interpretation of their contract. This is not so in the context of tribal-state gaming compacts. Federal law prescribes the rights, responsibilities, and requirements of tribal-state gaming compacts. Under IGRA, amendments to tribal-state gaming compacts must be submitted to the Secretary of the Interior for approval. *See* 25 C.F.R. § 293.4(b) ("All amendments, regardless of whether they are substantive or technical amendments, are subject to approval by the

[21] The First Amendment to the Oneida Nation's tribal-state gaming compact available at: http://doa.wi.gov/Documents/DOG/Indian%20Gaming/Compacts/ONE_First_Amendment_with_MOUs.pdf.

Secretary."). The submission of a tribal-state gaming compact to the Secretary of the Interior is a matter of public record, and is often the source of public and political controversy. *See, e.g.*, Cary Spivak, *Bureau of Indian Affairs rejects deal for state to cover Potawatomi losses*, Milwaukee Journal Sentinel (January 9, 2015).

The Defendants have advanced a new interpretation of the Ho-Chunk Compact that was developed more than a decade after the fact. As SMC explained in its brief in support of its motion, contemporaneous amendments to other tribal-state gaming compacts in Wisconsin are evidence of a clear policy approach on the part of the State to establish two different types of tribal gaming facilities: primary facilities, and smaller, ancillary gaming facilities. The State negotiated four separate compact amendments in 2003, and each contains distinctions between primary gaming facilities and smaller ancillary or secondary gaming facilities. *See* SMC Br., Doc. 8 at 27-29. The State's lead compact negotiator affirmed that these amendments were meant to "lock in current practice" at that time of tribes operating convenience stores with slot machines. *Id*. at 27. The attorney for the State's Department of Administration affirmed that the amendment would "not expand gambling in the state," according to a newspaper article published at the time Ho-Chunk and the State agreed upon the amendment's terms. *See* Wittenberg Article, Doc. 9-15.

Fourteen years later, the State and Ho-Chunk now contend that the State intended to agree to a distinction between primary and ancillary gaming facilities that was more advantageous to Ho-Chunk than it was willing to offer three other tribes at the same time. Such an argument is inconsistent with the State's contemporaneous description of the primary/ancillary facility distinction at the time the Ho-Chunk Compact was amended. Moreover, the State's conferral of this special advantage on Ho-Chunk in 2003 would make little

sense from a practical standpoint: other tribal-state compacts amended at the same time included a similar distinction between primary and ancillary facilities, and also included clauses allowing them to be amended to match more favorable terms found in other tribal-state compacts. It seems unlikely that the State would have agreed to eliminate the distinction between an ancillary facility and a primary facility for Ho-Chunk while at the same time reaching agreements with three other tribes to preserve that distinction, if those other three tribes could have immediately amended their compacts once again to include the more favorable terms extended to Ho-Chunk.

The Defendants' new interpretation can only be understood as an attempt to substantively amend the Ho-Chunk Compact. While it may be legally and politically expedient, the parties to a tribal-state gaming compact are not free to reach a private understanding to interpret their agreement in a new manner a decade after the fact. If the State and Ho-Chunk intend to change their substantive understanding of the Ho-Chunk Compact to allow an expansion of Ho-Chunk's gaming operations, they must undertake the public process necessary to amend their agreement and all that it entails.

7. SMC's claims are not barred by any statutes of limitations.

Ho-Chunk also argues that SMC's claims are barred by statutes of limitations under both federal and state law. Federal statutes of limitations do not have any bearing on SMC's claims, because it is not necessary for SMC to challenge any final agency action of a federal agency. SMC does not challenge the Department of the Interior's decision to place the Wittenberg Parcel into trust status in 1969, and again in 1993; and, it is not necessary to challenge the Department of the Interior's subsequent proclamations or statements concerning the status of the Wittenberg Parcel in order to succeed on its claims. SMC's claims are against Ho-Chunk, the State, and the Governor for current compact noncompliance. To succeed in several of those claims, SMC must

simply demonstrate that the Wittenberg Parcel was not held in trust on October 17, 1988 in accordance with IGRA.

The Wisconsin statute of limitations for breach of contracts are also inapplicable to SMC's claims here. Simply stated, Ho-Chunk is in violation of its compact each passing day in which it operates a "Gaming Facility" on the Wittenberg Parcel. Ho-Chunk is engaging in a continuing violation of its compact, which is presently in effect.

IGRA expressly permits SMC to bring this suit against Ho-Chunk to enjoin its gaming activities in violation of its tribal-state compact. *See* 25 U.S.C. § 2710(d)(7)(A)(ii). Moreover, courts recognize the continuing violation theory in the context of assessing whether the applicable statutes of limitations have run.

The continuing violation theory provides that, where practices complained of are alleged to be continuing in nature, the timeliness of the plaintiff's claim is determined based on when the last violation occurred. This doctrine is recognized by federal courts. *See Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321 (1971). In *Zenith Radio*, the United States Supreme Court concluded in the context of a continuing conspiracy to violate the federal antitrust laws, "each time a plaintiff is injured by an act of the defendant a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." *Id.* at 338. (Cited with approval in *E-Z Roll Off, LLC v County of Oneida*, 335 Wis. 2d 720, 800 N.W.2d 421 (Wis. 2011). *See also Selan v. Kiley*, 969 F.2d 560, 564 (7th. Cir. 1992). This doctrine is also recognized by Wisconsin state courts, *Tamminen v. Aetna Casualty and Surety Co*., 109 Wis. 2d 536 (1982); *First National Bank and White Knight Commercial Funding v. Trewin*, 2017 WL 1948428, *5-6 (Wis. App. May 9, 2017); *Noonan v. Northwestern Mut. Life Ins. Co.,* 276 Wis. 2d 33, 49-50 (Wis. App. 2004); *Production Credit*

Ass'n of W. Cent. Wis. V. Vodak, 150 Wis. 2d 294, 306 (Wis. App. 1989). Moreover, Wisconsin Courts do not apply statutes of limitations to actions, such as the action here, seeking prospective equitable relief rather than money damages. *Ripp v. Hackett*, 2014 WL 12669826, *3, n.6 (Wis. App. 2014); *Suburban Motors of Grafton, Inc.*, *v. Forester*, 134 Wis. 2d 183, 187 (Wis. App. 1986).

D. Balance of Harms

SMC establishes that the balance of harms tips substantially in SMC's favor. Any harm that will be caused to Ho-Chunk by granting the preliminary injunction is substantially outweighed by the harm that SMC will suffer if the Court does not grant the preliminary injunction. The injunction, if granted, will deprive Ho-Chunk of expanded employment and increased governmental revenue pending the resolution of the litigation. As expected, Ho-Chunk attempts to quantify that harm in its opposition. (HCN Opp. Br., Doc. 37 at 43-44).

Even if Ho-Chunk's claims are taken as true, when viewed in balance to the irreparable harm that SMC will suffer if injunctive relief is not granted, that balance tips sharply in favor of SMC. Ho-Chunk does not even address, much less dispute the fact that it distributes $90 million annually in revenue directly to individual tribal members pursuant to a Revenue Allocation Plan approved by the Department of the Interior. Ho-Chunk's own ordinance allows for up to seventy-eight and twenty-six one hundreds percent (78.26%) of its total gaming revenue to be allocated to per-capita payments. *See* SMC Statement of Facts, Doc. 10 at 10, ¶¶ 39, 40. IGRA provides that an Indian tribe may make "per-capita payments" to distribute gaming revenue directly to tribal members if it submits a revenue allocation plan to the Department of the Interior (the "Department"), and the Department approves that plan. 25 U.S.C. § 2710(b)(3) and 25 U.S.C. ¶ 2710(d)(1)(A)(ii). The Department will disapprove any such plan unless there are

sufficient revenues set aside to fund tribal government operations and programs, and to provide for the general welfare of the tribe and its members. 25 C.F.R. § 290.12(b)(1). This is critical to the analysis regarding balance of hardships because it means that Ho-Chunk's essential governmental programs are already fully funded, and Ho-Chunk could incur a reduction in gaming revenue of $ 90 million per year before any of its essential governmental programs are at risk of being underfunded, as it claims. SMC, in contrast, has nominal annual "per-capita payments," and otherwise invests all of its gaming revenue back into tribal governmental programs.

Denying the injunction will cause the concrete loss of existing jobs by SMC employees. Granting the injunction will not result in the loss of employment by any existing Ho-Chunk employee. Only hypothetical, yet-to-be-hired employees will be impacted. Denying the injunction will cause a direct and immediate impact to SMC in that essential SMC governmental programs will be significantly curtailed or terminated. Granting the injunction will not cause any loss in essential Ho-Chunk governmental programs. Denying the injunction will cause a loss $12.5 million per year to SMC's government, a seventy-four percent (74%) decline in government revenue from gaming. Granting the injunction will cause Ho-Chunk to curtail expansion of one of its six gaming operations in the State, while it may continue the expansion of two of its other five other gaming operations and its pursuit of a seventh operation in Beloit, Wisconsin. The devastating impact which denial of the injunction will have upon SMC's existing revenue far outweighs the nominal or marginal impact granting the injunction will have on Ho-Chunk's anticipated future revenues and the rate of increase in its "per-capita payments."

Ho-Chunk claims it will be harmed by a work stoppage regarding its ongoing construction activities at the Wittenberg facility as a possible consequence of this Court granting

the preliminary injunction. (HCN Opp. Br., Doc. 37 at 50). The requested injunction does not seek to halt construction. It is the addition of new gaming activities that will cause irreparable harm to SMC. Any decision by Ho-Chunk to proceed with such construction is at its own peril, and with a full awareness and assumption of all the risks that Ho-Chunk will not prevail in this litigation.

E. An Injunction Will Better Advance and Enhance the Public Interest

SMC establishes that granting the injunction advances the public interest in in seeing that state and federal criminal laws were enforced (SMC Br., Doc. 8 at 32-33); *see Stockbridge-Munsee*, 67 F. Supp. 2d. at 1019-1021. Ho Chunk argues that SMC is not alleging that state and federal criminal laws have been violated, when indeed, gaming not in compliance with IGRA is subject to federal criminal penalties. 25 U.S.C. § 1166. Indeed, it similar violations of IGRA's criminal provisions were at issue in *Stockbridge-Munsee*, 67 F. Supp. 2d 990, 1019-1022 (E.D. Wis. 1999); Ho-Chunk's argument/ alleged distinction is unavailing.

Ho-Chunk then argues that SMC's proposed preliminary injunction does not go far enough because it tolerates the continued illegal activity at Ho-Chunk's Wittenberg facility up to its current levels (HCN Opp. Br., Doc. 37 at 46-47). If Ho-Chunk is informing this court that the injunction should include the cessation of existing gaming activities, SMC will not object. That point, however, does not defeat the advancement of the public interests by curtailing an expansion of the illegal activity.

F. Any Requirement for the Payment of a Bond Should be Waived or Be $1.00.

SMC establishes the legal and factual grounds for a nominal bond or waiving it altogether. (SMC Br., Doc. 8 at 33). SMC discusses the details of the opinions cited by SMC, *Habitat Educ. Center v. U.S. Forest Service*, 607 F.3d 453, 458 (7th Cir. 2010); *Allen v.*

Bartholemew County Services Dept., 185 F. Supp. 3d 1075 (S.D. Ind. 2016) (HCN Opp. Br., Doc. 37 at 33), but does not dispute that they conclude, in the Seventh Circuit, 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. Ho-Chunk argues that it is false that SMC will incur tangible harm (HCN Opp. Br., Doc. 37 at 43), but that argument is soundly addressed and defeated above.

III. CONCLUSION

As indicated in its original brief, SMC has established the five criteria necessary to enter a preliminary injunction in this case. Respectfully, this Court should enter a preliminary injunction prohibiting Ho-Chunk from offering more than 502 gaming machines (class II and class III combined), or any table games, within Shawano County pending the resolution of this litigation.

DATED: May 25, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that on May 25, 2017, I caused the **STOCKBRIDGE MUNSEE COMMUNITY REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** to be served upon counsel of record through the Court's electronic service system. To my knowledge all parties are registered for the CM/ECF system and shall be served electronically upon filing.

s/ *Scott D. Crowell*
Scott Crowell (admitted *pro hac vice*)