UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

THE STOCKBRIDGE-MUNSEE COMMUNITY,

Plaintiff,

v.

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

Case No. 17-cv-249

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT HO-CHUNK NATION'S MOTION FOR JUDGMENT ON PLEADINGS

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INTRODUCTION

The Stockbridge-Munsee Community's ("SMC") claims are barred by the Ho-Chunk Nation ("Nation") and the State of Wisconsin's sovereign immunity. Neither the Nation nor the State has waived its immunity for the purposes of SMC's claims and the Indian Gaming Regulatory Act, 25 U.S.C. § 2710 *et seq.* ("IGRA") does not abrogate that immunity. SMC's claims against the Nation must also be dismissed for failure to join an indispensable party, the State, because the State cannot be joined as a result of its sovereign immunity. SMC's claims that the Nation is conducting gaming in violation of its Class III gaming compact ("Compact") are also barred by the federal statute of limitations applicable to claims brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA") and the State of Wisconsin's statute of limitations applicable to breach of contract claims. As a result of the forgoing, all of SMC's claims fail as a matter of law and, therefore, the Nation respectfully requests that the Court grant this motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) and dismiss the case.

I.
THE STANDARD FOR GRANTING A RULE 12(C) MOTION FOR JUDGMENT ON THE PLEADINGS.

A "motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) is subject to the same standard as a Rule 12(b)(6) motion to dismiss." *Katz-Crank v. Haskett*, 843 F.3d 641, 646 (7th Cir. 2016), citing *United States v. Wood*, 925 F.2d 1580, 1581 (7th Cir. 1991). "To survive a Rule 12(b)(6) motion, the complaint must 'state a claim for relief that is plausible on its face.'" *Id.*, citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "We accept the allegations in the complaint as true unless they are 'threadbare recitals of a cause

of action's elements, supported by mere conclusory statements.'" *Id*., citing *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

A motion for judgment on the pleadings may be granted when "the moving party clearly establishes that no material issue of fact remains to be resolved and that he or she is entitled to judgment as a matter of law." *Nat'l Fid. Life Ins. Co. v. Karaganis*, 811 F.2d 357, 358 (7th Cir. 1987), citing *Flora v. Home Fed. Savings & Loan Ass'n*, 685 F.2d 209, 211 (7th Cir. 1982). While the Court "must view the facts in the light most favorable to the nonmoving party," *id*., citing *Republic Steel Corp. v. Pennsylvania Eng'g Corp*., 785 F.2d 174, 177 n.2 (7th Cir. 1986), the Court "…is not bound by the nonmoving party's legal characterizations of the facts." *Id*.

With respect to sovereign immunity, "a federal district court 'has leeway to choose among threshold grounds for denying audience to a case on the merits.'" *Bruguier v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, No. 16-cv-604-jdp, 2017 U.S. Dist. LEXIS 23678, at *4-5 (W.D. Wis. Feb. 21, 2017), quoting *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 821 (7th Cir. 2016). Because "this circuit has clearly held that the question of sovereign immunity is not a jurisdictional one," *Meyers v. Oneida Tribe of Indians of Wis*., 836 F.3d 818, 822 (7th Cir. 2016), courts in the Seventh Circuit often address a motion to dismiss based on sovereign immunity as a motion to dismiss for failure to state a cause of action. *Id.* at 820; *accord Bruguier v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 2017 U.S. Dist. LEXIS 23678, *5 (W.D. Wis. 2017).

II.
THERE IS NO WAIVER NOR ABROGATION OF TRIBAL OR STATE SOVEREIGN IMMUNITY THAT PERMITS SMC'S CLAIMS TO PROCEED AND, THEREFORE, SMC'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION.

The initial question that the Court must address is whether SMC's claims are barred by

the Nation's and/or the State's sovereign immunity. In order to make that determination, the Court must analyze the Nation's and the State's sovereign immunity and determine whether that immunity is waived or abrogated by the provisions of the IGRA for the purposes of SMC's claims. As more fully set forth below, SMC's complaint must be dismissed and judgment entered in favor of the Nation because: (1) neither the Nation nor the State have waived their sovereign immunity for the purposes of SMC's claims against the Nation; and (2) the limited abrogation of immunity in Section 2710(d)(7)(A)(ii) of the IGRA is not applicable to this action because SMC's claims fail to establish the elements required to invoke that abrogation.

A. The Nation And The State Enjoy Sovereign Immunity From Unconsented Suit And Cannot Be Sued In The Absence Of Consent Or Abrogation.

In evaluating the Nation's assertion of sovereign immunity, the Court must begin with the uncontroversial, two-century-old concept, which the United States Supreme Court has "time and again treated" as "settled law," that Indian tribes have inherent sovereign authority. *Michigan v. Bay Mills Indian Community*, 572 U.S. __,134 S. Ct. 2024, 2030-31 (2014)("*Bay Mills*"). More could be said of the history and philosophy behind this sovereignty as the Court described it in *Bay Mills*, but the upshot is that Indian tribes possess "common-law immunity from suit traditionally enjoyed by sovereign powers," and "unless and until Congress acts, the tribes retain their historic sovereign authority." *Id*. This is true even for a tribe's on and off reservation commercial activities. *Id*. at 2031.

The Supreme Court has instructed time and time again that if it is Congress' intent to abrogate tribal immunity, it must clearly and unequivocally express that purpose in "explicit legislation." *Kescoli v. Babbitt*, 101 F. 3d 1304, 1310 (9th Cir. 1996). *See also*, *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla*., 532 U.S. 411, 418 (2001); *United States v. Dion*, 476 U.S. 734, 738–39 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58(1978). The list

of cases could continue at length. Furthermore, any ambiguity contained in a federal statute purporting to abrogate a tribe's immunity from suit must be interpreted in favor of sovereign immunity. *Dolan v. United States Postal Serv.*, 546 U.S. 481, 498 (2006); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–44 (1980)["Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence."].

Moreover, while a tribe may wave its immunity from suit, any such waiver cannot be implied but must be unequivocally expressed. *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assoc.*, 86 F. 3d 659-60 (7th Cir. 1996). "There is a strong presumption against waivers of sovereign immunity." *Demontiney v. United States,* 255 F. 3d 801, 811 (9th Cir. 2001).

Thus, absent a waiver of the Nation's immunity from suit or an abrogation of that immunity by Congress, any suit brought against the Nation by SMC is barred. *Wisconsin v. Ho-Chunk Nation*, 512 F. 3d 921, 928 (7th Cir. 2008)["[S]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."].

Similarly, the State also enjoys the protection of sovereign immunity from suit. The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

In *Seminole Tribe v. Fla.*, 517 U.S. 44, 54 (1996)(internal citations omitted), the Supreme Court concisely described the fundamental aspects of the Eleventh Amendment:

> "[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Blatchford* v. *Native*

> *Village of Noatak*, 501 U.S. 775, 779 (1991). That presupposition, first observed over a century ago in *Hans* v. *Louisiana*, 134 U.S. 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that "'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,'" *id.*, at 13 (emphasis deleted), quoting The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton). See also *Puerto Rico Aqueduct and Sewer Authority*, *supra*, at 146 ("The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity"). For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." *Hans*, *supra*, at 15.

Thus, as was the case with the Nation, unless the State has waived it sovereign immunity, or Congress has abrogated that sovereign immunity, SMC's claims against the State are barred.

B. Neither The Nation Nor The State Has Waived Sovereign Immunity With Regard To Any Claim Raised By SMC.

The only waiver of the Nation's sovereign immunity that is potentially relevant to SMC's claims is the waiver set forth in the Nation's Compact. That waiver expressly states that it is only granted to the State: "This waiver does not extend to other claims brought to enforce other obligations that do not arise under the Compact, as amended, **or to claims brought by parties other than the State and the Nation**." Ho-Chunk Nation's Request for Judicial Notice ("Request"), Exhibit C thereto, Second Amendment to the Wisconsin Winnebago Tribe, Now Known as the Ho-Chunk Nation, and the State of Wisconsin Gaming Compact of 1992, Section XXIV(B) (Emphasis added). Thus, the Nation has not waived its immunity in favor of SMC such that any of SMC's claims against the Nation could proceed.

With respect to the State, the only potentially relevant waiver of the State's sovereign immunity is set forth in Section XXII(E)(2)(b) (Paragraph 12 of the Second Amendment) of SMC's Compact: "The Tribe and State consent to claims for declaratory relief and injunctive relief, including injunctive relief pending the outcome of arbitration proceedings, for any

violation of this Compact." ECF # 5-2, p. 17. SMC, however, alleges that the State has violated Section XXXII.B[1] (Paragraph 17 of the Second Amendment to SMC's Compact) and Section XX.C.

Section XXXII.B relates to protection of SMC's gaming market from gaming by another tribe if that tribe conducts gaming within a 70 mile radius of SMC's casino on land taken into trust for gaming purposes pursuant to 25 U.S.C. §2719 (b)(1)(A).[2] In order for the State's waiver to apply, SMC's claim that the Nation is violating its Compact by conducting gaming on the Wittenberg Parcel would have to be encompassed by Section XXXII.B of SMC's compact. SMC's claim is unquestionably not encompassed by Section XXXII.B.

SMC does not allege that the Wittenberg Parcel was taken into trust pursuant to 25 U.S.C. §2719(b)(1)(A) or make any reference to that provision of the IGRA in its Complaint. SMC does not allege that the Nation ever requested that the United States take the land into trust pursuant to 25 U.S.C. §2719(b)(1)(A). SMC does not allege that the Governor of Wisconsin was ever asked to concur in a decision by the Secretary of the Interior to take the land into trust, as required by §2719(b)(1)(A). Instead, the Court record reveals that the Wittenberg Parcel was taken into trust in 1969. *See* ECF # 5-3, Deed from the Native America Church to the United States in Trust for the Wisconsin Winnebago Tribe, Exhibit 3 to the Complaint ("Deed"); Request, Exhibit A thereto, Letter from Diane K. Rosen, Superintendent, Great Lakes Agency, Bureau of Indian Affairs, to Michael McClure, Division of Gaming, Wisconsin Department of

[1] SMC has alleged: "The State's and the Governor's refusal to enforce the terms of the Ho-Chunk Compact, including the land restrictions in IGRA, constitutes a violation of Section XXXII.B. of the Stockbridge Compact." Complaint, p. 11, ¶ 53.

[2] 25 U.S.C. §2719(b)(1)(A) is one of the exceptions to the IGRA's prohibition on gaming on land taken into trust after the date of the enactment of the IGRA (October 17, 1988), 25 U.S.C. §2719(a). The IGRA authorizes gaming on newly acquired, off-reservation lands if "the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination."

Administration ("July 25, 2008 Letter"). The Court record also reveals that the Wittenberg Parcel was proclaimed to be part of the Nation's reservation lands in 1986. Request, Exhibit B thereto, "Wisconsin Winnebago Tribe; Establishment of Reservation", 51 Fed. Reg. 41669-41671 (November 18, 1986) ("Proclamation"). The Nation had no need to have the land taken into trust pursuant to §2719(b)(1)(A).

SMC also argues that the State violated Section XX.C of its compact as a result of allowing the Nation to conduct gaming on the Wittenberg Parcel. Section XX.C states: "If the Tribe has reason to believe that the Department of Justice or the Department are exercising authority under this Section in an arbitrary or capricious manner, it may invoke the Dispute Resolution procedures in Section XXII." SMC's claim is based on the State's decision to bring an enforcement action against SMC for engaging in off-reservation gaming in 1998. "The State took action to enforce the terms of the Stockbridge Compact, as well as IGRA's prohibition against tribal gaming on lands acquired in trust after October 17, 1988, in 1998 when [SMC] began conducting limited class III gaming activities on lands it acquired in trust in 1995 that were believed to be within [SMC's] reservation." Complaint, p. 12, ¶ 61. SMC appears to argue that, since the State sued SMC in 1998, the State has to take a similar action against the Nation conducting class III gaming on the Wittenberg Parcel.[3] Of course, such an action has nothing to do with how the State enforces SMC's compact, it would relate to the enforcement of the Nation's compact. The failure to sue the Nation is clearly not a violation of Section XX and would not fall within the State's waiver of its sovereign immunity. Manifestly, the waiver of the

[3] To the extent that SMC intends that its complaint can be interpreted to state a claim that the State's interpretation of the term "Ancillary Facility" in the Nation's compact is somehow a violation of Section XX.C., such an interpretation cannot be taken seriously. Again, Section XXII does not relate to the enforcement or interpretation of a different tribe's compact, only to the enforcement of SMC's compact.

State's sovereign immunity contained in SMC's compact does not apply to SMC's claim alleging that the Wittenberg Parcel does not qualify as Indian lands under the IGRA.

Furthermore, the waiver of the State's sovereign immunity in the SMC compact also does not extend to a claim based on an interpretation of the definition of an "ancillary facility" in the Nation's Compact. Nothing in SMC's compact waives the State's sovereign immunity with regard to the interpretation of another tribe's compact. In searching for a provision of its compact that was violated, SMC asserts: "The State and the Governor have refused to initiate the dispute resolution procedures in the Ho-Chunk Compact or take other actions to prevent Ho-Chunk from operating the Wittenberg Casino in violation of the Ho-Chunk Compact's restrictions applicable to Ancillary Facilities." Complaint, p. 11, ¶ 52. SMC then appears to cite to Section XXXII.B as the provision of SMC's compact that is being violated by the Nation's gaming activities. Compact, p. 11, ¶ 53. Section XXXII.B has even less to do with the "the Ho-Chunk Compact's restrictions applicable to Ancillary Facilities" than it does with the status of the Wittenberg Parcel. There is no connection between the meaning of the term "Ancillary Facilities" and gaming on land taken into trust pursuant to 25 U.S.C. §2719(b)(1)(A). SMC's assertion that Section XXXII.B provides a basis for its claim that the State's interpretation of the term "Ancillary Facilities" in the Nation's Compact violates SMC's is frivolous.[4] The State's waiver of its sovereign immunity, therefore, does not apply to the claim.

Accordingly, neither the Nation's waiver of sovereign immunity in favor of the State in the Nation's Compact, nor the State's waiver in favor of SMC in SMC's compact, encompass SMC's claims that the Nation is conducting gaming in violation of its Compact. There has been, therefore, no applicable waiver of sovereign immunity such that SMC's claims can proceed.

[4] To the degree that SMC would argue that it is not basing this claim on Section XXXII.B, then SMC has not identified any violation of its compact that relates to its claim.

Thus, unless Congress abrogated the Nation's sovereign immunity from suit in the IGRA with respect to SMC's causes of action—which it did not—all of SMC's claims are barred by sovereign immunity and this case must be dismissed.

C. While The IGRA Contains A Narrow Abrogation Of Sovereign Immunity, That Abrogation Is Inapplicable Here Because The Elements Necessary To Invoke That Abrogation Are Not Met In This Case.

"Congress adopted IGRA in response to this Court's decision in *California v. Cabazon Band of Mission Indians* . . . which held that States lacked any regulatory authority over gaming on Indian lands. . . ." *Bay Mills*, 134 S. Ct. at 2034. Congress's primary purpose in enacting the IGRA was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," while granting states limited authority to regulate Class III gaming in order to allow states to protect their interest in ensuring that organized crime is not involved in the tribal gaming activities and that the games are being played fairly. 25 U.S.C. § 2702 (1)-(2). In order to achieve these purposes, Congress established three "classes" of gaming that may be conducted on Indian lands: Class I (ceremonial and social games); Class II (bingo, games similar to bingo, and non-banked card games if not prohibited by state law); and Class III (all other forms of gaming that are not Class I or Class II gaming, including slot machines of any kind). 25 U.S.C. § 2703 (6)-(8).

Under the IGRA, a tribe has the right to engage in Class III gaming on its Indian lands if: (1) the tribe enacts a gaming ordinance that authorizes Class III gaming, which must be approved by the Chair of the National Indian Gaming Commission ("NIGC"); (2) the state in which the tribe's Indian lands are located permits any person, organization, or entity to play the games that

the tribe is seeking to play; and (3) the tribe negotiates and enters into a tribal-state compact that authorizes Class III gaming. 25 U.S.C. § 2710 (d)(3).

Congress chose to grant states a limited role in the regulation of tribal gaming through the mechanism of tribal-state gaming compacts. "The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact. In no instance, does S 555 contemplate the extension of State jurisdiction or the application of State laws for any other purpose." S. REP. NO. 100-446, p 6, 1988 U.S.C.A.A.N. 3071, 3076. In negotiating a compact with a tribe, a state is limited to negotiating over only those subjects that are specifically enumerated in the IGRA and that are directly related to the gaming activities. 25 U.S.C. § 2710 (d)(3)(C); *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1028-1029, n.9 (9th Cir. 2010).

In the IGRA, Congress granted federal courts jurisdiction to allow a tribe to sue a state when a state refused to negotiate compact terms in good faith and to allow both parties to the compact to enforce those terms of a compact that are directly related to the gaming activities. The IGRA provides for enforcement of class III gaming compacts through 25 U.S.C. § 2710 (d)(7)(A)(ii): "The United States district courts shall have jurisdiction over-- . . . (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under **paragraph (3)** that is in effect, . . ." (emphasis added).

The Supreme Court has ruled, however, that state sovereign immunity was not abrogated by Section 2710(d)(7). "We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power,

and therefore § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued." *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996).

With respect to Indian tribes, the Supreme Court has concluded that Section 2710(d)(7)(A)(ii) constitutes a limited cause of action to enforce a compact against a tribe and is a Congressional abrogation of tribal sovereign immunity. *Bay Mills*, 134 S. Ct. at 2032; *Kiowa*, 523 U.S. at 758. A federal court can address an IGRA-based claim against a tribe, however, only if the claim falls within the narrow scope of the cause of action created by, and abrogation of tribal sovereign immunity effectuated by, Section 2710(d)(7)(A)(ii).

> Indeed, the statutory abrogation does not even cover all suits to enjoin gaming on Indian lands. . . . Section 2710(d)(7)(A)(ii), recall, allows a State to sue a tribe not for all "class III gaming activity located on Indian lands" . . . , but only for such gaming as is "conducted in violation of any Tribal-State compact . . . that is in effect." Accordingly, if a tribe opens a casino on Indian lands before negotiating a compact, the surrounding State cannot sue; only the Federal Government can enforce the law. See 18 U.S.C. §1166(d). To be precise, then, IGRA's authorization of suit mirrors not the full problem *Cabazon* created (a vacuum of state authority over gaming in Indian country) but, more particularly, Congress's "carefully crafted" compact-based solution to that difficulty. *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 73-74, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). Michigan's binary challenge—if a State can sue to stop gaming in Indian country, why not off?—fails out of the starting gate. **In fact, a State *cannot* sue to enjoin all gaming in Indian country; that gaming must, in addition, violate an agreement that the State and tribe have mutually entered.**

Bay Mills, 134 S. Ct. at 2032, fn 6. (emphasis added).

Thus, to invoke the limited abrogation of tribal sovereign immunity contained in Section 2710(d)(7)(A)(ii), a claim must challenge: (1) a class III gaming activity; (2) that is located on Indian lands; (3) that is conducted in violation of a Tribal-State compact entered into under paragraph 3; and (4) the compact must be in effect. Unless all of these elements are established, Section 2710(d)(7)(A)(ii) does not abrogate tribal sovereign immunity such that a suit against a sovereign tribe can proceed.

Here, as more fully demonstrated below, the Nation's immunity is not abrogated by Section 2710(d)(7)(A)(ii) in this case because: (1) SMC cannot, as a matter of law, establish that the Nation's class III gaming at the Wittenberg Casino is conducted in violation of the Nation's Compact since the Wittenberg Parcel is "Indian Land" under the IGRA and gaming on the parcel is not prohibited by 25 U.S.C. §2719; (2) SMC has failed to assert the basic facts necessary to show that the Nation is conducting gaming at the Wittenberg Casino in violation of its Compact; (3) by claiming that the Wittenberg Parcel is not eligible for class III gaming, SMC is actually arguing that the parcel is not "Indian Lands" under the IGRA, and therefore, the abrogation of tribal sovereign immunity set forth in Section 2710(d)(7)(A)(ii) does not apply to SMC's claim; (4) the abrogation in Section 2710(d)(7)(A)(ii) only applies in cases where the alleged compact violation relates to one of the seven items in 25 U.S.C. § 2710(d)(3)(C)(i-vii), which SMC's claims do not; and (5) accepting SMC's position that Section 2710(d)(7)(A)(ii) allows any tribe to sue any other tribe—anywhere in the country and without any applicable statutes of limitation—interprets the IGRA in a manner that produces an absurd result and violates Congress's intent of a **limited** abrogation of tribal sovereign immunity. For these reasons, the Nation's sovereign immunity is not abrogated by Section 2710(d)(7)(A)(ii) and it bars all of SMC's causes of action. This case, therefore, must be dismissed for failure to state a cause of action.

1. By Claiming That The Wittenberg Parcel is Not Eligible For Class III Gaming, SMC Is Arguing that the parcel is not "Indian Lands" under the IGRA, and therefore, the abrogation of tribal sovereign immunity set forth in 2710(d)(7)(A)(ii) does not apply to SMC's Claim.

SMC's claim that the Nation is violating its Compact with the State is premised entirely on the incorrect assumption that the Wittenberg Parcel was not held in trust by the United States prior to the enactment of the IGRA and such gaming, therefore, is impermissible under 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." This argument, that gaming on the Wittenberg is prohibited by 25 U.S.C. §2719 and, therefore is in violation of the Nation's Compact, fails as a matter of law because, regardless of when the Wittenberg Parcel was taken into trust, the Wittenberg Parcel is within the limits of the Nation's Reservation.

Under the IGRA, if a tribe has an ordinance authorizing class III gaming, is located in a state that permits such gaming, and conducts the gaming in conformance with a Tribal-State compact, such class III gaming "**shall be lawful on Indian lands…"** 25 U.S.C. § 2710(d)(1) (emphasis added). The IGRA defines "Indian lands" as **"**(A) **all lands within the limits of any Indian reservation**; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4). The IGRA does not differentiate between the status of title of the land in 25 U.S.C. § 2703(4). Regardless of who owns title to the land, if land upon which a tribe wishes to conduct class III gaming is within the limits of an Indian reservation, such gaming shall be lawful—full stop.

Here, it is uncontested that the Wittenberg Parcel is "within the limits" of the Nation's Reservation. In 1986, the Assistant Secretary–Indian Affairs, under the authority of the Indian Reorganization Act, 25 U.S.C. §§ 476, 477 ("IRA"),[5] established the boundaries of the Nation's Reservation and specifically proclaimed the Wittenberg Parcel as part of the Nation's Reservation lands. *See* ECF# 36-3, Federal Register Notice, "Wisconsin Winnebago Tribe; Establishment of

[5] 25 U.S.C. § 467 ["The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by [the IRA], or to add such lands to existing reservations."].

Reservation," 51 Fed. Reg. 41669-41671 (Nov. 18, 1986), Exhibit 3 to the Declaration of Michael P. Murphy in Opposition to the Plaintiff's Motion for Preliminary Injunction. Thus, under the plain wording of the IGRA, class III gaming on the Wittenberg Parcel is lawful, regardless of whether the land passed out of trust and was not taken back into trust until after the enactment of the IGRA.

The fact that the Nation's class III gaming on the Wittenberg Parcel is occurring within the limits of the Nation's Reservation—and is therefore lawful—is further demonstrated by an examination of 25 U.S.C. § 2719's prohibition on gaming on lands acquired in trust after 1988. Section 2719(a) states, in relevant part:

> Prohibition on lands acquired in trust by Secretary. Except as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act [enacted Oct. 17, 1988] **unless**--
> (1) **such lands are located within** or contiguous to the boundaries of **the reservation of the Indian tribe on the date of enactment of this Act** [enacted Oct. 17, 1988]; . . .

(Emphasis added).

Thus, under this provision of the IGRA, gaming on lands that are taken into trust after October 17, 1988 is not prohibited so long as those lands were within the boundaries of a reservation on October 17, 1988.[6]

Here, the Court record contains uncontroverted and uncontrovertable evidence that, on October 17, 1988, the Wittenberg Parcel was within the boundaries of the Nation's reservation. ECF# 36-3, Federal Register Notice, "Wisconsin Winnebago Tribe; Establishment of Reservation," 51 Fed. Reg. 41669-41671 (Nov. 18, 1986), Exhibit 3 to the Declaration of Michael P. Murphy in Opposition to the Plaintiff's Motion for Preliminary Injunction. SMC's spurious assertion that the Wittenberg Parcel was not taken into trust until after the enactment of

[6] 25 U.S.C. §2719 is intended to limit the expansion of "off-reservation" gaming.

the IGRA is, thus, irrelevant. Even if the land was taken into trust after 1988, it is nevertheless located "within…the boundaries of the" Nation's reservation "on the date of enactment of the" IGRA. 25 U.S.C. § 2719(a). The Wittenberg Parcel was included in the 1986 proclamation establishing the Nation's reservation. Since the Wittenberg Parcel was proclaimed to be within the Nation's reservation boundaries two years before the IGRA was enacted, class III gaming on the parcel is clearly not prohibited by Section 2719(a). *See* Section 2719(a)(1).[7]

Thus, the Wittenberg Parcel constitutes Indian lands upon which the Nation is authorized to conduct gaming—the Section 2719(a) prohibition does not apply to the Wittenberg Parcel because it is land within the limits of the Nation's Reservation. The Nation, therefore, is not conducting gaming in violation of its Compact. SMC has failed to state a cause of action pursuant to Section 2710(d)(7)(A)(ii) and the Nation's sovereign immunity has not been abrogated by Section 2710(d)(7)(A)(ii).

2. SMC Has Failed To Assert The Basic Facts Necessary To Show That The Nation Is Conducting Gaming At The Wittenberg Casino In Violation Of Its Compact.

SMC has failed to allege that the Wittenberg Parcel was not in trust on October 17, 1988. SMC has merely asserted a legal conclusion—that the land was not in trust on October 17, 1988, because title to the land automatically reverted to the Native American Church pursuant to Wisconsin law. "Title to the Wittenberg Parcel reverted to the Native American Church by operation of law, when Ho-Chunk did not satisfy the requirements in the 1969 Deed." Complaint, p. 12, ¶ 66. By failing to allege a fact essential to its claim, SMC has failed to state a

[7] See, NIGC website: "IGRA requires that Indian gaming occurs on Indian lands. Indian lands include land within the boundaries of a reservation as well as land held in trust or restricted status by the United States on behalf of a tribe or individual, over which a tribe has jurisdiction and exercises governmental power. **This would include fee lands that are within the boundaries of the reservation.** Tribes operating gaming facilities off of Indian lands are subject to the laws of the state where the facility is located." https://www.nigc.gov/commission/faqs-detail/does-gaming-have-to-take-place-on-either-reservations-or-land-held-in-trust (emphasis added).

cause of action based on the claim that gaming on the Wittenberg Parcel is being conducted in violation of the Nation's Compact. SMC's legal conclusion is, furthermore, in conflict with uncontroverted evidence before the Court. *See* Request, Exhibits A and B thereto. It is clear from the July 25, 2008 Letter and the Proclamation that the Wittenberg Parcel has been continuously held in trust for the Nation since 1969. Gaming on the parcel, therefore, is not prohibited by Section 2719(a). For this reason, SMC has failed to state a cause of action that the Nation is conducting gaming on the Wittenberg Parcel in violation of its Compact and SMC's claim does not fall within Section 2719(d)(7)(A)(ii)'s abrogation of tribal sovereign immunity.

3. By Claiming That The Wittenberg Parcel Is Not Eligible For Class III Gaming, SMC Is Arguing That The Parcel Is Not "Indian Lands" Under The IGRA—Which, After *Bay Mills*, Is Clearly A Necessary Element Of A Claim Under Section 2710(d)(7)(A)(ii).

SMC's claim that *Bay Mills* does not bar its claims in this case is fatally flawed. SMC is arguing, in effect, that the IGRA creates two types of "Indian lands," as that term is used in the IGRA: one type of Indian lands upon which gaming is authorized under the IGRA, and one upon which gaming is not authorized. No court has ever interpreted the IGRA is this way. SMC's interpretation of the term "Indian lands" is in conflict with the purpose of the phrase "Indian lands" in the IGRA, a common sense understanding of the relationship between Sections 2710 and 2719 and the Supreme Court's interpretation of the term set forth in the *Bay Mills* case.

In *Bay Mills*, the State of Michigan attempted to halt off-reservation gaming by the Bay Mills Indian Community by filing suit pursuant to Section 2710(d)(7)(A)(ii). Michigan asserted that Bay Mills was conducting gaming in violation of its gaming compact, because it was conducting gaming on land that did not qualify as "Indian lands." The Supreme Court concluded that the abrogation of tribal sovereign immunity arising from Section 2710(d)(7)(A)(ii) did not encompass the State of Michigan's claim:

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

Bay Mills, 134 S. Ct. at 2032.

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

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

Hobia, at 1205-06.[8]

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

Both the *Bay Mills* and *Hobia* decisions are directly on point in this case. As was the case in both *Bay Mills* and *Hobia*, the "very premise of this suit" is that the Nation is violating its Compact by conducting gaming on land upon which gaming is not authorized under the IGRA. "By dint of that theory, a suit to enjoin gaming on the" Wittenberg Parcel "is correspondingly outside § 2710(d)(7)(A)(ii)'s abrogation of immunity," *Bay Mills*, 134 S. Ct. at 2032. *Accord, Hobia*, at 1205-06.

The failure of SMC's argument is revealed when it is juxtaposed with the structure and purpose of the IGRA. The starting point for the Supreme Court's analysis in *Bay Mills* was the context of the enactment of the IGRA:

> Congress adopted IGRA in response to this Court's decision in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 221-222, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987), which held that States lacked any regulatory authority over gaming on Indian lands. ***Cabazon*** **left fully intact a State's regulatory power over tribal gaming outside Indian territory**—which, as we will soon show, is capacious. . . . So the problem Congress set out to address in IGRA (*Cabazon*'s ouster of state authority) arose in Indian lands alone. And the solution Congress devised, naturally enough, reflected that fact. See, *e.g., Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 58, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) ("[T]he Act grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands"). **Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else.** Small surprise that IGRA's abrogation of tribal immunity does that as well.

Bay Mills, 134 S. Ct. at 1086-87 (emphasis added).

This passage reveals a number of points that are essential to the understanding of the meaning of the term "Indian lands" as it was used in the IGRA. First, the fundamental distinction arising from the *Cabazon* decision, and embodied in the IGRA, is the distinction between those lands upon which tribal gaming is authorized and those lands upon which gaming is not authorized. "Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else." *Id.* Second, if tribal gaming is

conducted on land upon which tribal gaming is not authorized, the IGRA does not apply: "the problem Congress set out to address in IGRA (*Cabazon*'s ouster of state authority) arose in Indian lands alone." *Id.* Third, where gaming is conducted on land upon which tribal gaming is not authorized under the IGRA, the state within which the land is located can apply state law to regulate the gaming. "*Cabazon* left fully intact a State's regulatory power over tribal gaming outside Indian territory—which, as we will soon show, is capacious." *Id.*

Under SMC's interpretation, the use of the term "Indian lands" is not to distinguish between land upon which tribal gaming is authorized and land upon which it is not authorized, but, rather, to merely identify Indian trust land. There is no justification for such an interpretation. The purpose of defining "Indian lands" in the IGRA was to identify the lands upon which gaming is authorized and subject to regulation under the IGRA.[9]

The untenable nature of SMC's interpretation is further revealed when it is applied to the structure and purpose of Section 2710. That section sets forth the conditions under which tribes are authorized to conduct class III gaming pursuant to the IGRA:

> Class III gaming activities shall be lawful on Indian lands only if such activities are—
> (A) authorized by an ordinance or resolution that—
> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
> (ii) meets the requirements of subsection (b), and
> (iii) is approved by the Chairman,
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

Section 2710(d)(1) (emphasis added).

[9] This interpretation is bolstered by the inclusion in Section 2703(4) of "all lands within the limits of any Indian reservation," which is not restricted to trust lands, and by Section 2719(a)(1) which provides that the prohibition does not apply if "such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of this Act…." See also, footnote 7, *supra*.

This provision conflicts with SMC's interpretation for a number of reasons. First, the possession of Indian lands is the most fundamental condition identified in Section 2710 in order for tribes to be authorized to conduct gaming. The possession of Indian lands is a precondition to the gaming, without which the other requirements are insufficient to authorize tribal gaming. The possession of eligible tribal trust or reservation lands is, in fact, a precondition to a state's obligation to engage in compact negotiations. "Under § 2710(d)(3)(A), it is clear that the State does not have an obligation to negotiate with an Indian tribe until the tribe has Indian lands." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616, 618 (6th Cir. 2002). *Accord Big Lagoon Rancheria v. California*, 789 F.3d 947, 950 (9th Cir. 2015) ["[G]aming is confined to 'Indian lands' and negotiations are begun by a tribe with jurisdiction over such lands."]. *See also N. Fork Rancheria of Mono Indians of Cal. v. California*, 2016 U.S. Dist. LEXIS 83270 (E.D. Cal. June 27, 2016).

Furthermore, conspicuously absent from this list of conditions required in order to lawfully conduct gaming on Indian lands is any reference to Section 2719. Given that it is an exclusive list of the conditions necessary to lawfully conduct gaming under the IGRA ("Class III gaming activities shall be lawful on Indian lands **only if** such activities are. . ."), it would be inconsistent with the very purpose of the provision to leave out an essential condition that would preclude application of the authorization established by the provision.

Yet, that is precisely what SMC's interpretation requires. Under SMC's interpretation, the authorization to conduct gaming on Indian lands (and Indian lands only), provided for in Section 2710(d)(1) is not actually an authorization. Despite the strictness and specificity of the conditions imposed by Section 2710(d)(1) in order for tribes to conduct Class III gaming ("Class III gaming activities shall be lawful on Indian lands **only if** such activities are . . ."), SMC

maintains that the authorization is subject to a further, unstated, condition—that the Indian lands are not subject to the Section 2719(a) prohibition.

The far more logical interpretation of the purpose and effect of Section 2719 is that lands subject to the Section 2719(a) prohibition do not fall within the term "Indian lands." The term "Indian lands" encompasses reservation lands and lands held in trust for a tribe as of the date of enactment of the IGRA—land upon which tribal gaming may be lawfully conducted pursuant to the IGRA. In contrast, lands subject to the Section 2719(a) prohibition are "off-reservation" lands. This is evident from the fact that Section 2719 does not include the term "Indian lands." Rather, Section 2719 uses language that distinguishes the lands subject to Section 2719 from Indian lands. *See, e.g.,* "gaming regulated by this Act shall not be conducted **on lands** acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act," Section 2719(a) (emphasis added); "such lands" Section 2719(a)(1), Section 2719(a)(2)(A), Section 2719(a)(2)(B); "newly acquired lands" Section 2719(b)(1)(A); "lands" Section 2719(b)(1)(B).[10]

Courts have, furthermore, consistently referred to land that is subject to Section 2719 as "off-reservation" lands or "after acquired lands," not "Indian lands." *See, e.g., Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650, 653 (7th Cir. 2004); *South Dakota v. United States*, DOI, 423 F.3d 790, 803, fn. 11 (8th Cir. 2005).

This distinction is evident in the *Bay Mills* decision. The Court analyzed the Section 2710(d)(7)(A)(ii) abrogation in terms of a contrast between tribal lands upon which gaming was

[10] Section 2719's prohibition of gaming on lands acquired in trust after 1988 is intended to limit the proliferation of "off-reservation" gaming—that is, where land outside of existing reservations is purchased in fee by a tribe, title to which is then transferred to the United States in trust for the tribe, but the land nevertheless remains outside of the tribe's existing reservation. With regard to land that is already within the boundaries of an existing reservation, it does not matter if the land is taken into trust by the United States—gaming on all land within the limits of an Indian reservation is lawful.

permitted and "off-reservation" land. "[A] State lacks the ability to sue a tribe for illegal gaming when that activity occurs off the reservation. But a State, on its own lands, has many other powers over tribal gaming that it does not possess (absent consent) in Indian territory." *Bay Mills*, 134 S. Ct. at 2034. "A State's suit to enjoin gaming activity *on* Indian lands (assuming other requirements are met, . . .) falls within §2710(d)(7)(A)(ii); a similar suit to stop gaming activity *off* Indian lands does not." *Id.*, 134 S. Ct. at 2032 (emphasis original).

This interpretation is further supported by the *Bay Mills* Court's emphasis on the long-standing requirement that waivers and abrogations of tribal sovereign immunity be unequivocally stated:

> This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that (in Michigan's words) Congress "must have intended" something broader. . . . **And still less do we have that warrant when the consequence would be to expand an abrogation of immunity, because (as explained earlier) "Congress must 'unequivocally' express [its] purpose" to subject a tribe to litigation**.

Bay Mills, 134 S. Ct. at 2034 (emphasis added), citing *C & L Enterprises*, 532 U.S., at 418.

In emphasizing the need to narrowly interpret the abrogation, the *Bay Mills* court made a point of emphasizing that the abrogation of tribal sovereign immunity would not apply where other Section 2710 requirements are absent:

> Indeed, the statutory abrogation does not even cover all suits to enjoin gaming on Indian lands, thus refuting the very premise of Michigan's argument-from-anomaly. Section 2710(d)(7)(A)(ii), recall, allows a State to sue a tribe not for all "class III gaming activity located on Indian lands" (as Michigan suggests), but only for such gaming as is "conducted in violation of any Tribal-State compact . . . that is in effect." Accordingly, if a tribe opens a casino on Indian lands before negotiating a compact, the surrounding State cannot sue; only the Federal Government can enforce the law. See 18 U.S.C. §1166(d). To be precise, then, IGRA's authorization of suit mirrors not the full problem *Cabazon* created (a vacuum of state authority over gaming in Indian country) but, more particularly, Congress's "carefully crafted" compact-based solution to that difficulty. *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 73-74, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

Bay Mills, 134 S. Ct. at 2032, fn 6.

Changing the interpretation of the meaning of "Indian lands" as SMC argues would expand IGRA's abrogation of tribal sovereign immunity to encompass certain lands upon which gaming is not authorized. That would conflict with the fundamental premise of the *Bay Mills* decision. Expanding the reach of Section 2710(d)(7)(A)(ii) abrogation based on an interpretation of "Indian lands" that conflicts with the context and purpose of the IGRA, in order to allow a tribe to protect its market share, is unwarranted and potentially destructive to Indian gaming nationwide.

In light of the foregoing it is clear that, because SMC is challenging the Wittenberg Parcel's eligibility for class III gaming activities, it is actually challenging the Parcel's status as Indian land under the IGRA. Because SMC is doing so, its claims do not meet the elements required to invoke the abrogation in Section 2710(d)(7)(A)(ii). As a result, SMC's claims are barred by the Nation's sovereign immunity and this case must be dismissed.

4. The Abrogation In Section 2710(d)(7)(A)(ii) Only Applies In Cases Where The Alleged Compact Violation Relates To One Of The Seven Items In 25 U.S.C. § 2710(D)(3)(C)(I-Vii), Which SMC's Claims Do Not.

SMC asserts that the district court has jurisdiction to enjoin the Nation from conducting gaming on the Wittenberg Parcel because the parcel is subject to the § 2719 prohibition. Unfortunately for SMC, whether a parcel of property is subject to the § 2719 prohibition is not a proper subject of negotiation under the IGRA over which the district has been granted jurisdiction to enjoin.

In *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (7th Cir. 2008), the State of Wisconsin moved to enjoin the Nation's class III gaming due to alleged violations of the Nation's Compact, pursuant to § 2710(d)(7)(A)(ii). In addressing whether the State's claims fell within §

2710(d)(7)(A)(ii)'s cause of action and abrogation of the Nation's sovereign immunity, the court concluded that "a proper interpretation of § 2710(d)(7)(A)(ii) is not that federal jurisdiction exists over a suit to enjoin class III gaming whenever *any* clause in a Tribal-State compact is violated, but rather that jurisdiction exists only when the alleged violation relates to a compact provision agreed upon pursuant to the IGRA negotiation process." *Id.* at 933. The Seventh Circuit explained:

> [S]o long as the alleged compact violation relates to one of these seven items [25 U.S.C. § 2710(d)(3)(C)(i-vii)], a federal court has jurisdiction over a suit by a state to enjoin a class III gaming activity. Limiting the scope of 25 U.S.C. § 2710(d)(7)(A)(ii) to alleged violations of the seven items enumerated in 25 U.S.C. § 2710(d)(3)(C)(i-vii) also serves to align jurisdiction under this section with the IGRA's purposes. Unlike the Nation's proposal, this interpretation does not focus solely upon state interests. However, by limiting 25 U.S.C. § 2710(d)(7)(A)(ii)'s applicability to alleged violations of those items which Congress determined tribes and states may negotiate over under 25 U.S.C. § 2710(d)(3)(C)(i-vii), this interpretation also ensures that jurisdiction is not conferred for alleged violations of provisions ancillary to the IGRA's purposes.

Id. at 934.

> The proper subjects of negotiation identified in 25 U.S.C. § 2710(d)(3)(C) are:
>
> Any Tribal-State compact negotiated under sub-paragraph (A) may include provisions relating to--
> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
> (v) remedies for breach of contract;
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
> (vii) any other subjects that are directly related to the operation of gaming activities.

None of the listed topics of negotiation can be interpreted to encompass negotiations concerning whether the § 2719 prohibition applies to a tribe's lands. This is so, as was demonstrated above, because the existence of eligible tribal trust lands is a precondition to a state's obligation to engage in compact negotiations. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d at 618; *Big Lagoon Rancheria v. California*, 789 F.3d at 950; *N. Fork Rancheria of Mono Indians of Cal. v. California*, 2016 U.S. Dist. LEXIS 83270 (E.D. Cal. June 27, 2016).

The foregoing analysis leaves no room for an interpretation that Section 2710(d)(7)(A)(ii) abrogates the Nation's sovereign immunity with regard to SMC's claim that the Nation is gaming on land taken into trust after 1988 or that the claim falls within the cause of action created by that provision.

5. SMC's Claims Reveal Why Section 2710(d)(7)(A)(ii) Should Not Be Interpreted To Authorize One Tribe to Sue Another.

The manifest lack of merit of SMC's claims underscores the fact that the claims before the Court have nothing to do with violations of the Nation's gaming compact. Rather, SMC is cynically using the IGRA's enforcement provisions as a weapon to protect its market share from a competitor and to pressure the State to assist it in that effort. Accepting SMC's position that Section 2710(d)(7)(A)(ii) allows any tribe to sue any other tribe—anywhere in the country and without any applicable statutes of limitation—interprets the IGRA in a manner that produces an absurd result contrary to Congress's intent in enacting the IGRA. SMC's lawsuit, therefore, calls into question the interpretation that Section 2710(d)(7)(A)(ii) authorizes tribes to sue other tribes for allegedly conducting gaming in violation of the defendant tribe's compact.

The issue of whether Section 2710(d)(7)(A)(ii) is properly interpreted to authorize suits by one tribe against another has not been analyzed in detail by any federal court. It has only been

directly addressed by one district court, which concluded that the Section 2710(d)(7)(A)(ii) does authorize such a suit. *Bay Mills Indian Community v. Little Traverse Bay Bands of Odawa Indians*, 1999 U.S. Dist. LEXIS 20314 (W.D. Mich. 1999) ("*Little Traverse Bay*"):

> The statute clearly confers on Indian tribes the authority to file suit in district court to enjoin a class III gaming activity located on Indian lands and conducted in violation of "any" Tribal-State compact. The statute does not limit jurisdiction to violations of the compact to which the suing tribe is a party. The statute allows suit for violation of "any" Tribal-State compact, not "its" Tribal-State compact. Whether or not this Court agrees with such a broad grant of jurisdiction is not relevant. The Court is bound to apply the laws as set forth by Congress.

Id., at *11.

The Nation believes that the *Little Traverse Bay* court's interpretation of the IGRA is mistaken and inconsistent with Congress's intent in enacting the IGRA.

Section 2710(d)(7)(A)(ii) constitutes the enforcement mechanism for tribal-state Class III gaming compacts. The compacting requirement was created by Congress to allow states some say in the regulation of tribal gaming on tribal land within each state's boarders. "[T]he Act grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. at 58. Each compact is an agreement between two parties, a state and a tribe, to regulate gaming on the tribe's reservation and trust lands, because, as was discussed above, under *Cabazon*, a state had no civil/regulatory authority within those lands before the IGRA was enacted.

> The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact. In no instance, does S 555 contemplate the extension of State jurisdiction or the application of State laws for any other purpose. Further, it is the Committee's intention that to the extent tribal governments elect to relinquish rights in a tribal-State compact that they might have otherwise reserved, **the relinquishment of such rights shall be specific to the tribe so making the election and shall not be construed to extend to other tribes, or as a general abrogation of other reserved rights or of tribe sovereignty**.

S. Rep. No. 100-446, p 6, 1988 U.S.C.A.A.N. at 3076 (emphasis added).

> After lengthy hearings, negotiationis and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises . . . The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply. The Committee balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The Committee concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns.

Id., p. 13.

> The Committee does view the concession to any implicit tribal agreement to the application of State law for class III gaming as unique and does not consider such agreement to be precedent for any other incursion of State law onto Indian lands.

Id., p. 14.

Congress, thus, made its intention clear that the compacts would not be used to expand state jurisdiction over tribes beyond limited regulatory authority over Class III gaming and that tribes would have a primary control over the amount of jurisdiction that they surrender in exchange for the right to conduct gaming. The purpose of the enforcement provisions of the compacts is to allow the parties to each compact, one state and one tribe, to enforce the provisions of that compact. The Senate Report does not include any statement or even an implication that Congress intended to grant tribes the power to influence, let alone restrict or enjoin, gaming conducted by other tribes.[11] As the Senate Report makes clear, any rights relinquished in a gaming compact "shall be specific to the tribe so making the election and shall

[11] The *Little Taverse Bay* court acknowledged that the Little Traverse Bay tribe had identified the inherent absurdity of the conclusion that Section 2710(d)(7)(A)(ii) authorizes any tribe to sue any other tribe: "LTBB contends that such an interpretation of the statute would enable tribes to roam throughout the country, without regard to state lines or reservation boundaries, looking for other tribes to sue for allegedly violating the terms of compacts to which the bounty-hunting tribes are not parties, and in which such tribes have no interest." *Little Traverse Bay*, 1999 U.S. Dist. LEXIS at *11.

not be construed to extend to other tribes." S. REP. NO. 100-446, p 6, 1988 U.S.C.A.A.N. at 3076.

This interpretation is bolstered by the *Bay Mills* Court's discussion of the fact that the State of Michigan had means other than the abrogation set forth in Section 2710(d)(7)(A)(ii) for stopping or regulating off-reservation tribal gaming:

> if a State really wants to sue a tribe for gaming outside Indian lands, the State need only bargain for a waiver of immunity. Under IGRA, a State and tribe negotiating a compact "may include . . . remedies for breach of contract," 25 U.S.C. §2710(d)(3)(C)(v)—including a provision allowing the State to bring an action against the tribe in the circumstances presented here. States have more than enough leverage to obtain such terms because a tribe cannot conduct class III gaming on its lands without a compact, see §2710(d)(1)(C), and cannot sue to enforce a State's duty to negotiate a compact in good faith, see *Seminole Tribe*, 517 U.S., at 47, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (holding a State immune from such suits).

Bay Mills, 134 S. Ct at 2035.

But none of this is true with regard to a suit brought by one tribe against another. Tribes do not engage in compact negotiations with one another and, specifically, do not engage in negotiations with other tribes over waivers of sovereign immunity with regard to enforcement of compacts. Any grant of authority to regulate gaming arises from compacts negotiated between states and individual tribes. "The Committee concluded that the compact process is a viable mechanism for setting various matters *between two equal sovereigns*." S. Rep. No. 100-446, p. 13, 1988 U.S.C.A.A.N. at 3083. Any authority to enforce any provision of a compact against a gaming tribe arises from a gaming compact that the tribe had the right to negotiate. "The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact." S. Rep. No. 100-446, p 6, 1988 U.S.C.A.A.N. at 3076. Congress focused on tribes having control over whatever regulatory jurisdiction they relinquish. Congress

was at pains to express its intention to restrict any relinquishment of tribal regulatory authority to those matters that each tribe concludes it is willing to relinquish. Against the background of tribes having no authority or mechanism to negotiate the method and extent of enforcement of another tribe's compact, the notion that Congress intended to allow one tribe to sue another tribe to enjoin the defendant tribe's gaming is absurd.

Despite Congress' clear intent to limit the abrogation of tribal sovereign immunity in the IGRA, the *Little Traverse Bay* court concluded that Section 2710(d)(7)(A)(ii)'s abrogation is unambiguous and can only be interpreted as an open ended abrogation that would allow any tribe to sue any other tribe for any alleged violation of the defendant tribe's compact. However, an equally straightforward interpretation of that provision would be that Congress intended that states be able to sue tribes to enforce the provisions of the compacts that the state entered into with individual tribes and that tribes have a mechanism for enjoining gaming conducted by individuals and entities (permitted under 25 U.S.C. § 2710(b)(4)(B))[12] or management companies (see 25 U.S.C. § 2711), where an individual, entity, or a management company is conducting gaming in violation of the tribe's compact. *See, e.g., In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2008) (holding that district court erred in dismissing IGRA claim by some tribal members under § 2710(d)(7)(A)(ii), which sought to enjoin gaming operating by other tribal members).[13] This interpretation would explain the

[12] See S. REP. NO. 100-446, at 7, 8, 12-13, and 18, *reprinted at* 1988 U.S.C.C.A.N. at 3077-78, 3082-82, 3087.

[13] In *Wisconsin v. Ho-Chunk Nation*, *supra*, the Court stated, "At oral argument, the Nation contended that Congress included Indian tribes as a party able to seek an injunction under 25 U.S.C. § 2710(d)(7)(A)(ii) because at the time the IGRA was enacted, the Act grandfathered in certain tribes that had licensed their gaming operations to individual Indians, and Congress wanted to ensure that the tribal governments had a means of enjoining any illegal gaming activity conducted by these individuals. We note that such an interpretation is not evident from the plain text of the provision and that the Nation has not provided any specific citation to the legislative history to support its view." *Id.*, 512 F. 3d at 931, n.2. However, the issue of the Congressional purpose of including Indian tribes as a party able to seek an injunction under 25 U.S.C. § 2710(d)(7)(A)(ii) was only raised at oral argument and the Court's observation was made without affording the Nation the opportunity to brief the issue. As the foregoing analysis reveals, IGRA's legislative history reveals that Congress was well aware of the gaming by individuals, entities, and management

inclusion of the phrase "any cause of action initiated by a State or Indian tribe" in the abrogation while restricting the authorization to sue to the parties that would normally be permitted to sue in any other contractual situation: the parties to the contract. Given the unequivocal language of the IGRA granting regulatory authority over tribal gaming exclusively to the parties to each compact, which is to be enforced by the individual parties to the individual compacts, and the absolute absence in the legislative history of the IGRA of any mention of tribal authority to regulate gaming conducted by other tribes, this interpretation is entirely consistent with the intent of Congress. It is far more consistent with Congress' manifest intent than the interpretation offered by SMC. As was discussed in Section II(C) above, it is also far more consistent with the requirements of Section 2710. Those provisions create a process for granting states authority over tribal gaming exclusively through the compacting process between each individual tribe and each individual state within which each tribe's lands are located.

SMC's and the *Little Traverse Bay* court's interpretation must also be considered in light of the inevitable consequences of their interpretation. It would allow any state to sue any tribe for any alleged violation of any compact. A state would not need to be a party to the compact at issue and the land on which the tribal gaming is being conducted would not have to be located within its borders. Had it not been for the *Seminole* decision, SMC's interpretation would authorize any tribe to sue any state, not just the state in which the tribe's lands are located, for what the tribe alleges are violations of another tribe's compact. Subject to Article III standing requirements, it would allow any tribe to sue any other tribe for any alleged violation of the

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companies other than compacted tribes and made provision for the regulation of that gaming. In the footnote, furthermore, the Seventh Circuit, cited to *In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig*., which supports the conclusion that the inclusion of a tribal cause of action to enjoin gaming conducted in violation of a compact applies to tribes seeking to enjoin such gaming on their own land and in violation of the tribe's own compact.

defendant tribe's compact, regardless of the location of the tribes or the presence or absence of any relationship or contact between the tribes.

Such a result cannot be squared with the structure of the IGRA and its focus on the compacts being a grant of regulatory authority from each individual tribe to each individual state. Authorizing the State of California to challenge implementation of the Nation's compact with the State of Wisconsin or the Morongo Band of Mission Indians in California to sue the Mohegan Tribe in Connecticut would undermine Congress's decision, after years of hearings and consideration, to create a structure for the regulation of tribal gaming based on gaming compacts negotiated between individual tribes and individual states as "a viable mechanism for setting various matters between two equal sovereigns." S. REP. No. 100-446, p. 13, 1988 U.S.C.A.A.N. at 3083.

If SMC's interpretation is accepted, furthermore, it would allow tribes to intrude on the functions of the federal government. In this case, SMC is effectively challenging the finding of the Department of the Interior that the Wittenberg Parcel has been held in trust by the United States since 1969. SMC is asking the Court to usurp the Department's authority by styling the objection to the DOI's conclusion as a violation of the IGRA that can be challenged through a lawsuit against another tribe pursuant to 2710(d)(7)(A)(ii), rather than a lawsuit against the United States alleging a violation of the Administrative Procedure Act.[14] There is no basis in any provision of the IGRA or its legislative history to support an interpretation that Congress intended that tribes be granted an abrogation of all other tribes' sovereign immunity in order to allow them to challenge the status of the land upon which other tribes are gaming.

Moreover, by asserting that gaming is prohibited on the Wittenberg Parcel pursuant to Section 2719, SMC is challenging the parcel's status as Reservation land, not just its status as

[14] See Section IV(A), below.

trust land. The Wittenberg parcel was declared to be reservation land in 1986. Federal Register Notice, ECF #36-3.[15] In order for SMC's claims to be heard, this Court would have to reach the legal conclusion that the land is not reservation land, a determination the Court has no authority to make. Only Congress can diminish the boundaries of an Indian reservation. 25 U.S.C. § 398d.

SMC and the *Little Traverse Bay* court's interpretation also violates § 2710(d)(3)(c) of the IGRA that sets forth the seven subjects of negotiation. Section 2710(d)(3)(c)'s subsections are the only subjects that a tribe is required to negotiate over with a state to give the state the regulatory jurisdiction over the gaming that the *Cabazon* decision denied. Notably absent from the seven subjects is any requirement that a tribe negotiates with another Indian tribe or state to grant it the authority to regulate the gaming subject to the compact. It is totally absurd and irrational to conclude that Congress would go to such great lengths to limit the regulatory authority of a compacting state to the seven subjects of negotiations set forth in 2710(d)(3)(c) and then grant to any tribe or state anywhere in the United States the authority to enforce the provisions of the compact.

In addition, interpreting the IGRA to allow any state or tribe anywhere in the United States, which are not parties to the compact, to file suit to enjoin an alleged violation of the Compact would place additional burdens upon the parties to the compact that Congress never intended. Knowing that it could get sued by any tribe or state for an alleged violation of its compact, a state may demand, for example, that a tribe indemnify it from any such suit or post a bond to ensure the faithful performance of the provision of the compact to minimize the state's or tribes' exposure to these third party type lawsuits.

[15] In order to be declared to be reservation land, the parcel had to have been trust land at the time of the declaration. See Section IV(A).

In essence, SMC's interpretation of the IGRA makes every state and Indian tribe in the United States a third party beneficiary of every compact entered into under the IGRA with the absolute right to bring an action to enforce what the suing tribe or state perceives as a violation of the compact. Such an interpretation could lead to a flurry of lawsuits brought solely for the sake of harassment or a quick money settlement, a result that clearly Congress never intended.

SMC's interpretation of the grant of jurisdiction to the United States District Courts literally allows any tribe or state in the United States to highjack the authority granted to the National Indian Gaming Commissions ("NIGC") by Congress. Title 25 of the United States Code Section 2713 provides:

> The Chairman shall have the power to order temporary closure of an Indian game for substantial violation of the provision of this chapter, of violations prescribed by the Commission pursuant to this chapter, or of tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this tittle.

25 U.S.C. § 2713(b)(1)

The Commission also has the authority to make the Chairman's temporary order a permanent order. 25 U.S.C § 2713 (b)(1). The violations that the Commission has the authority to enjoin on either a temporary or permanent basis are violations of "the provisions of this chapter," which include all the provisions of the IGRA.[16] This includes the authority to enjoin not only gaming being conducted on lands not eligible for gaming under Section 2719 but also gaming being conducted in violation of the provisions of any Tribal-State Compact. 25 U.S.C. § 2710(d)(1)(c) ("Class III gaming activities are - . . . (c) conducted in conformance with a Tribal-State Compact entered into by the Indian tribe and the State under paragraph (3) that is in effect"). Thus, Congress gave the NIGC the exclusive authority to enforce the provisions of the

[16] The IGRA is codified in Chapter 29 of Title 25 of the United States Code which includes Section 2701 through 2721.

IGRA, including but not limited to, enjoining, through temporary and permanent closure orders, violations of the provisions of a Tribal-State compact.[17]

The NIGC has been in existence since 1988. During that time, it has developed highly specialized expertise in the area of Indian gaming. Because of its grant of jurisdiction and decades of experience regulating gaming facilities, it is uniquely qualified to make determinations, like the ones before this Court, pertaining to violations of the IGRA. SMC's interpretations of the grant of jurisdiction to the United States District Courts would usurp that function by circumventing the NIGC process for determining whether a tribe has violated the IGRA or its Compact.

Congress established the NIGC as the administrative agency with the authority to enforce the IGRA and compacts entered into pursuant to the IGRA. SMC's interpretation would frustrate the administrative process established by Congress for IGRA and compact compliance. When reviewed in conjunction with the other provisions of the IGRA, it is clear that Congress never intended to give any tribe or state located anywhere within the United States the authority to enforce the provisions of a compact to which they are not parties.

It is a well settled rule of statutory construction that a provision of a statute is not interpreted in isolation, but is interpreted in light of the entire statutory scheme of which it is a part. *U.S. v. Berkos,* 543 F.3d 392, 396 (7th Cir. 2008) ("the language and design of the statute as a whole may also provide guidance in determining the plain meaning"). It is also a fundamental tenant of statutory interpretation that "[t]he plain meaning of legislation should be conclusive, except in … rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters., Inc.*,

[17] Congress also authorized a state, as a party to a compact, to be able to negotiate over "remedies for breach of contract," 25 U.S.C. § 2710(d)(3)(c)(v), but did not grant to a compacting state the authority to enforce the provisions of the IGRA.

489 U.S. 235, 242 (1989) (internal quotation marks and citation omitted). Indeed, the presumption that the plain language of the statute expresses congressional intent is rebutted when, as here, a contrary legislative intent is clearly expressed. *Ardestani v. I.N.S.*, 502 U.S. 129, 135-6 (1991). In those cases, courts are obligated "to construe statutes sensibly and avoid constructions which yield absurd or unjust results." *United States v. McKie*, 112 F.3d 626, 631 (3d Cir. 1997).

Contrary to SMC's and the *Little Traverse Bay* court's expansive view of the abrogation of tribal sovereign immunity based on the language "any Tribal-State compact" in section 2710(d)(7)(A)(ii), furthermore, there is a "plain meaning" interpretation of "any Tribal-State compact" that is consistent with Congress's intent to restrict as much as possible the abrogation of tribal sovereign immunity in enacting the IGRA.

When "any" is used as an adjective, as it is here, the word can mean "one, some, every or all without specification." American Heritage College Dictionary (3d ed. 1993). The Supreme Court has said that "'any' can and does mean different things depending upon the setting." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132-33 (2004). In using the language "any Tribal-State compact entered under paragraph (3) that is in effect," Congress could have merely contemplated that a tribe and a state might have more than one gaming compact or a series of gaming compacts that address different enumerated subjects as the parties' relationship and the tribe's activities evolved over time. There is no federal or state "template" for a gaming compact or a requirement that a tribe and a state have a single gaming compact – in 1988 or now. Given the intent and purpose of the IGRA, Congress certainly did not intend that section 2710(d)(7)(A)(ii)

be used as a weapon by a tribe against a different tribe to regulate or limit competition in the gaming market.[18]

As the foregoing makes clear, SMC's interpretation of Section 2710(d)(7)(A)(ii) leads to an absurd result that is at odds with other variances of the same section, § 2710, of the IGRA. Given the availability of a reasonable interpretation that is consistent with the structure, purpose, and legislative history of the IGRA, SMC's interpretation should be rejected and the Nation's interpretation adopted by the Court.

For all of these reasons, there has been no waiver of sovereign immunity by the Nation or the State that would allow SMC's claims to proceed and nothing in the IGRA abrogates that immunity for the purposes of this action. As a result, SMC has failed to state a cause of action and the Nation is entitled to judgment as a matter of law on all of SMC's claims.

III.
SMC'S CLAIMS ARE BARRED BECAUSE THEY REQUIRE THE JOINDER OF NECESSARY PARTIES THAT CANNOT BE JOINED BECAUSE THEY ENJOY SOVEREIGN IMMUNITY FROM SUIT.

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

Under Rule 19, the Court must engage in a two-step analysis. First, the Court must determine whether a party is "required"

> (1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

[18] Alternatively, "any" as used in "any Tribal-State compact" could be deemed ambiguous given the flexible and contextually-dependent meaning of the word.

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

Fed. R. Civ. P. Rule 19.

If a party is found to be required, but cannot be joined, the Court must determine whether the absent party is indispensable and, therefore, whether the matter must be dismissed:

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

Fed. R. Civ. P. Rule 19; *see Lac Du Flambeau Band v. Norton*, 327 F. Supp. 2d 995, 1001 (W.D. Wis. 2004) ("*Lac Du Flambeau*").

SMC seeks a declaration that the Nation is conducting gaming in violation of its Compact because the Wittenberg Parcel does not qualify as "Indian lands" under the IGRA and because the Project does not constitute an "ancillary facility" as defined in the Nation's Compact, and seeks injunctive relief based on those conclusions. However, because the Congressional abrogation of the Nation's sovereign immunity does not extend to the issue of whether the Wittenberg Parcel qualifies as "Indian lands," and because the State's waiver of its sovereign immunity does not encompass either of SMC's claims, any order issued by this Court relating to

SMC's claims would not: (1) bind the Nation with regard to the issue of the status of the Wittenberg Parcel; or (2) bind the State with regard to either SMC's Indian lands claim or its ancillary facility claim. Any such order would, thus, fail to accord complete relief to SMC. Rule 19 (A). *See also Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999) ["[A] district court cannot adjudicate an attack on the terms of a negotiated agreement without jurisdiction over the parties to that agreement."]; *Accord Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975) ("*Lomayaktewa*"); *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) ("*Confederated Tribes v. Lujan*").

The Nation and the State also have an interest relating to the subject of this action and are so situated that the disposition of this action in the Nation's and the State's absence will, as practical matter, impair or impede their ability to protect that interest. "No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Lomayaktewa*, 520 F.2d at 1325. *Accord United States ex rel. Hall v. Tribal Development Corporation*, 100 F.3d 476 (7th Cir. 1996) ("*Hall*"); *Enterprise Management Consultants v. United States*, 883 F.2d 890 (10th Cir. 1989) ("*Enterprise Management")*; *Broussard v. Columbia Gulf Transmission Company*, 398 F.2d 885 (5th Cir. 1968).

The question of whether an Indian tribe that is a party to a gaming compact is a required party to litigation challenging all or part of that compact was directly addressed by the Ninth Circuit Court of Appeals in *American Greyhound Racing v. Hull*, 305 F.3d 1015 (9th Cir. 2002). In that case, racetrack owners and operators challenged the renewal of gaming compacts between the State of Arizona and a number of Indian tribes by suing the Governor of Arizona. The Ninth Circuit, in reversing the district court's grant of an injunction prohibiting the Governor from

executing amended compacts, concluded: "The interests of the tribes in their compacts are impaired and, not being parties, the tribes cannot defend those interests." *Id*. at 1023. The Court further stated: "Here, the interest of the tribes arises from terms in bargained contracts, and the interest is substantial." *Id*.

Federal courts have also concluded that states are required parties for the purposes of addressing challenges to provisions of a gaming compact to which it is a party. In *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49 (D.D.C.1999), the district court addressed the question of whether the State of New Mexico was a required party to litigation challenging the Secretary of the Interior's approval, by operation of law, of gaming compacts between the plaintiff Indian tribes and the State of New Mexico. There the Court concluded: "There is no real dispute that the State of New Mexico is a necessary party under Rule 19 (a)(2)(i),[19] . . . ." *Id*. at 52.

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

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

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

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

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

Even more generally, federal courts have consistently found that Indian tribes are necessary parties to litigation challenging contracts to which the tribes are parties, regardless of whether or not the contracts relate to gaming. *See for example*, *Clinton v. Babbitt*, 180 F.3d at 1088-89 [challenge to leases to land], *Kescoli v. Babbitt*, 101 F.3d 1304, 1309-10 (9th Cir. 1996) [challenge to settlement agreement relating to conditions for issuing a mining permit under the terms of a lease with the tribe].

For similar reasons, the United States is also a necessary party to these proceedings. The issue of the time period in which the United States held the Wittenberg Parcel in trust for the Nation, including whether the United States lost its title to the parcel as a result of an automatic reversion under Wisconsin law, clearly gives the United States a significant interest in these proceedings that would be imperiled by the litigation of claims without the United States being joined as a party. *See*, Quiet Title Act, 28 U.S.C. § 2409a. That interest is amplified by SMC's challenge to the reservation status of the parcel, since SMC's claim that the land went out of trust includes the time period in which the land was proclaimed reservation land. SMC's claims effectively challenges the validity of that proclamation. In order to challenge that proclamation,

to the degree that SMC had any remedy,[20] it would have had to file suit against the Secretary of the Interior under the APA within six years from the date that the proclamation was published in the Federal Register. Thus, the *Lac Du Flambeau* analysis would also apply to the joinder of the United States, since the prejudice to the United States of potential loss or alienation of its interest in the Wittenberg Parcel and the reservation status of the Wittenberg Parcel cannot be lessened or avoided, and no determination of the interests of the United States in the parcel would be of any value without the participation of the United States, and the interests of the United State cannot be protected by other parties.

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

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

[20] 25 U.S.C. § 398d states, "Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress."

would have had a detrimental effect on their gaming revenues. The Court dismissed the plaintiff tribes' complaint on a number of grounds, including the failure to join the State and the Nation:

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

Id. at 1001.

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

A. SMC Cannot Avoid The Requirement That The State Be Joined Because Ex Parte Young Does Not Apply To SMC's Claims Against The Governor.

In support of its application for a preliminary injunction, SMC argued that the Court can adjudicate its claims because the exception to a state's Eleventh Amendment immunity set forth in *Ex parte Young* applies to SMC's claims against the Governor. That argument fails, for two reasons. First, the Supreme Court, in *Seminole Indian Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), ruled that *Ex parte Young* does not apply to claims raised pursuant to the IGRA. Second, even if the Supreme Court's ruling in *Seminole* is read narrowly, SMC's claims in this case do not fall within the exception carved out by *Ex parte Young*.

In *Seminole*, the Supreme Court concluded that, despite Congress's clear intention to waive the states' Eleventh Amendment immunity in Section 2710(d)(7) of the IGRA, Congress had no authority to do so pursuant to the Indian Commerce Clause. *Seminole*, 517 U.S. at 58-73.

In the course of its analysis, the Supreme Court addressed whether the Seminole Tribe's claim that the Governor of Florida violated the IGRA by failing to negotiate a gaming compact in good faith fell within the *Ex parte Young* exception, and the court concluded that it did not: "The narrow exception to the Eleventh Amendment provided by the *Ex parte Young* doctrine cannot be used to enforce § 2710(d)(3)[21] because Congress enacted a remedial scheme, § 2710(d)(7), specifically designed for the enforcement of that right." *Id.* at 75-76.

In reaching this conclusion the Supreme Court stated, "If § 2710(d)(3) could be enforced in a suit under *Ex parte Young*, § 2710(d)(7) would have been superfluous; it is difficult to see why an Indian tribe would suffer through the intricate scheme of § 2710(d)(7) when more complete and more immediate relief would be available under *Ex parte Young*." *Seminole*, 517 U.S. at 75. Taken on its face, the Court's language would appear to apply to any attempt to avoid the Eleventh Amendment bar to claims arising from the IGRA pursuant to *Ex parte Young*.

Although some courts have interpreted the *Seminole* Court's analysis of *Ex parte Young* narrowly, concluding that it only applies to claims that a state has failed to negotiate in good faith, *see Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1109 n. 34 (E.D. Cal. 2002), *aff'd sub nom. Artichoke Joe's Cal. Grand Casino v. Norton,* 353 F.3d 712 (9th Cir. 2003); *Tohono O'odham Nation v. Ducey*, 130 F. Supp. 3d 1301, 1311-12 (D. Ariz. 2015), the Nation is not aware of any court that applied *Ex parte Young* to circumstances similar to those of the present case. Here, SMC is suing the State and the Governor seeking an order "Enjoin[ing] the State and the Governor from continuing to violate the Stockbridge Compact." Because SMC's asserts that the State's refusal to enforce the terms of the compact and allowing the Nation to continue to conduct gaming in violation of the Nation's compact constitutes the alleged violation of SMC's

[21] Section 2710(d)(3) relates to compact negotiations, including the State's obligation to negotiate in good faith.

compact,[22] the only way that the Court could enjoin the Governor's alleged violation of SMC's compact would be to order the Governor to stop the Nation from conducting gaming that is allegedly being conducted in violation of the Nation's compact. Putting aside the fact the Governor has no authority to prohibit the Nation from conducting gaming and the Court has no authority order the Governor to sue the Nation,[23] such a broadening of the cause of action would conflict with Congress's clear intent to limit the causes of action established under the IGRA.

> *Seminole Tribe* confirms that, even in a case involving relief sought under *Ex parte Young*, courts must determine whether Congress intended private parties to enforce the statute by private injunction or for that matter by a declaratory judgment. *Ex parte Young* by itself does not create such a cause of action. Put another way, *Ex parte Young* provides a path around sovereign immunity *if* the plaintiff already has a cause of action from somewhere else.

Mich. Corr. Org. v. Mich. Dep't of Corr., 774 F.3d 895, 905 (6th Cir. 2014).

Even if the Court concludes that the *Seminole* Court's ruling on *Ex parte Young* does not apply to this case, it is clear that SMC's claims do not qualify under the narrow exception created by *Ex Parte Young*.

> The landmark case of *Ex parte Young* created an exception to this general principle [Eleventh Amendment immunity] by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State. The theory of *Young* was that an unconstitutional statute is void and therefore does not "impart to [the official] any immunity from responsibility to the supreme authority of the United States." *Young* also held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law. We have refused to extend the reasoning of *Young*, however, to claims for retrospective relief.

Green v. Mansour, 474 U.S. 64, 68 (1985) (citation omitted).

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[22] "Neither the State nor the Governor have taken any action to enforce the terms of the Ho-Chunk Compact, or IGRA's prohibition against tribal gaming on lands acquired in trust after October 17, 1988, with respect to the Wittenberg Casino." Complaint, p. 12, ¶ 63.

[23] The State's and the Governor's refusal to enforce the Ho-Chunk Compact on a similar basis as the State's action to enforce the Stockbridge Compact is arbitrary and capricious,and constitutes a violation of Section XX.C. of the Stockbridge Compact.

In order to qualify for the *Ex Parte Young* exception, thus, the plaintiff must be seeking only prospective injunctive relief against a state official, the state official must be taking an action that is in violation of a federal statute or a provision of the United States Constitution, and the state official's actions must be compelled by a state statute that is unconstitutional or in violation of a federal statute. The Court made clear, furthermore, that "the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty." *Ex parte Young*, 209 U.S. at 158. SMC's claims meet none of these criteria.

First, SMC does not only seek prospective injunctive relief against the Governor, it also seeks declaratory relief. (*See* Stockbridge-Munsee Community Complaint for Enforcement of Class III Gaming Compact and Declaratory and Injunctive Relief ("Complaint") 15, ¶¶ 1-3, 6, ECF No. 5.) "[W]e often have found federal jurisdiction over a suit against a state official when that suit seeks **only prospective injunctive** relief in order to 'end a continuing violation of federal law.'" *Seminole*, 517 U.S. at 73, quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985) (emphasis added).

Second, SMC has failed to identify a state law that compels the Governor to take the actions that SMC alleges violate federal law: "[I]ndividuals, who, as officers of the State, **are clothed with some duty in regard to the enforcement of the laws of the State**, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Ex parte Young*, 209 U.S. at 155-56

(emphasis added). All of the issues in this case arise from the interpretation and enforcement of obligations arising from SMC's and the Nation's **compacts**. Any relevant actions of the Governor are discretionary, not ministerial, since Wisconsin law imposes very few obligations on the Governor with regard to gaming compacts. *See*, *e.g.*, Wis. Stat. §14.035["The governor may, on behalf of this state, enter into any contract that has been negotiated under 25 U.S.C. 2710(d)."]. To the extent that the Governor is taking any action that is relevant to SMC's claim, which would to amount to allowing the State to comply with the terms of the Nation's Compact, that action is not compelled by any state law, let alone a state law that is in conflict with federal law.

Third, the Governor is not the state official to whom the injunction should be addressed. "In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party." *Ex Parte Young*, 209 U.S. at 157. The regulation of gaming, to the extent that the State has day to day regulatory authority over the enforcement of Indian gaming compacts, is carried out by the Wisconsin Department of Administration, Division of Gaming, Office of Indian Gaming and Regulatory Compliance ("OIGRC"). The state official authorized to regulate Indian Gaming in Wisconsin is John Dillett, Acting Administrator, Division of Gaming.[24]

Finally, SMC fails to identify any action of the Governor that can be enjoined. In its Complaint, SMC asks the Court to "[e]njoin the State and the Governor from continuing to

[24] In its Reply Brief, SMC states, "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." (Stockbridge-Munsee Community Reply Memorandum in Support of Motion for Preliminary Injunction ("Reply") 16, ECF No. 39.) SMC did not name any State official as a defendant other than the Governor.

violate the Stockbridge Compact."[25] ECF # 5, Complaint p. 16, ¶ 6. Both of SMC's claims arise from the Nation's gaming at the Wittenberg Parcel. The Governor is not responsible for conducting gaming on the Wittenberg Parcel and has no authority to stop that gaming. The authority to issue closure orders for violations of a compact or the IGRA falls to the National Indian Gaming Commission and its Chairman. 25 U.S.C. §§ 2705-2706. There is no injunction that the Court can issue to the Governor that could stop him from allowing the Nation to conduct gaming or affirmatively compel him to stop the Nation's gaming activities.

The Governor also has no duty and no authority under federal or state law to determine whether the Wittenberg Parcel qualifies for gaming under the IGRA. The governmental entity authorized to take land into trust for Indian tribes and to determine whether and when a parcel was taken into trust is the United States Department of the Interior ("DOI"). The DOI concluded that the parcel has been continuously held in trust for the Nation since 1969. ECF# 28-1, July 25, 2008 letter from Superintendent Diane K. Rosen to Michael McClure, Exhibit 1 to the Affidavit of Michael McClure. There is no injunction that the Court could issue to the Governor that would change the DOI's determination of the status of the Wittenberg Parcel.

Finally, the Governor has no authority to stop the Nation's gaming based on a conflicting interpretation of the phrase "ancillary facility." As discussed above, the Governor has no authority to stop the Nation's gaming, let alone authority to do so based on an interpretation of the Nation's compact asserted by a tribe that is not a party to the Nation's compact, particularly an interpretation that is in conflict with the interpretation of both the Nation and the Wisconsin

[25] It should be noted that SMC's second claim, that the State and the Governor are violating the IGRA by allowing the Nation to conduct gaming at the Wittenberg Facility pursuant to the Nation's and the State's interpretation of the provisions of the Nation's Compact defining "ancillary facility," does not arise from an alleged violation of SMC's compact. It does not, therefore, fall within SMC's request for an injunction.

Department of Administration. Thus, the *Ex parte Young* exception does not apply to SMC's claims against the Governor.

For these reasons, SMC's claims against the Nation must be dismissed for failure to join an indispensable party, the State, because the State cannot be joined as a result of its sovereign immunity.

IV.

SMC'S CLAIMS ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATION.

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

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

SMC asserts that class III gaming is not permitted on the Wittenberg Parcel because, although title to the Parcel was initially conveyed to the United States in trust for the Nation through the 1969 deed, it automatically reverted back to the Native American Church in 1974, after the Nation allegedly failed to construct housing on the Parcel. Memorandum, p. 18. SMC further claims that title to the Wittenberg Parcel was conveyed once again to the United States in trust for the Nation by the 1993 quitclaim deed, after the enactment of the IGRA. On that basis, SMC claims that gaming cannot be conducted on the Wittenberg Parcel, pursuant to 25 U.S.C. §2719 (a). *Id*. at p. 21. Based on the automatic reversion/automatic return to trust status theory, SMC has argued, "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." ECF # 39, Stockbridge-Munsee Community Reply Memorandum in Support of Motion for Preliminary Injunction ("Reply"), p. 39.

Even if the issue of the trust status of the Wittenberg Parcel had relevance to SMC's claims, the Supreme Court has explained that "a challenge to the BIA's 'decision to take land into trust' is 'a garden-variety APA claim.'" *Big Lagoon Rancheria v. California*, 789 F.3d 947, 953 (9th Cir. 2015), *citing Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 220 (2012) ("*Patchak*"), *citing* 5 U.S.C. § 706 (2)(A) and (C). Thus, the "proper vehicle" for SMC to challenge whether the Wittenberg Parcel was held in trust by the United States between 1974 and 1993 "is a petition for review pursuant to the APA, and that is the typical method employed in prior litigation challenging entrustment decisions." *Id.*, *citing Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. at 224-226 [allowing an APA challenge to the government's decision to take land into trust for the benefit of an Indian tribe under 25 U.S.C. § 465].

SMC has not asserted a cause of action under the APA in this case, and, even if SMC asserted such a cause of action, it would be time-barred. 28 U.S.C. § 2401(a) creates a general six-year statute of limitations for actions brought against the United States. 28 U.S.C. § 2401(a) ["Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."]. 28 U.S.C. § 2401 clearly "applies to actions brought under the APA." *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991). The failure to sue a federal agency within the limitations period operates to deprive the reviewing court of jurisdiction. *See Soriano v. United States*, 352 U.S. 270, 273 (1957).

SMC's fundamental claim, that title to the Wittenberg Parcel was somehow transferred out of trust in 1974, had to be addressed through an APA action brought within six years of the federal government's alleged failure to recognize or act upon the reversion of title to the Native

American Church. Any such claim was barred by the statute of limitations in 1980 and cannot be revived by these proceedings. SMC cannot "use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions.'" *Big Lagoon Rancheria v. California*, 789 F.3d at 953. *See also Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1292 (11th Cir. 2015) [Six year statute of limitations barred Alabama's challenge to Secretary's land into trust determinations].

Additional evidence of the failure of SMC's claim is to be found in the fact that, in order for the Wittenberg parcel to be proclaimed reservation land pursuant to 25 U.S.C. § 467,[26] the land had to have been in trust in 1986—two years prior to the enactment of the IGRA. *Citizens Against Casino Gambling v. Hogen*, 2008 U.S. Dist. LEXIS 52395, at *148-49 (W.D.N.Y. 2008). See *Acquisition of Title to Land Held in Fee or Restricted Fee Status*, Release # 16-47, Version IV (rev. 1) ("Fee-to-Trust Handbook"), issued June 28, 2016, Section 3.4, ["Reservation proclamations can only be issued for **completed** trust acquisitions made pursuant to an authority conferred by the IRA." (emphasis added).] Clearly, the DOI considered the land to have been in trust well before the IGRA was passed.

This leads to another, fatal bar to SMC's land status claim. SMC cannot challenge the trust status of the Wittenberg Parcel once it was proclaimed reservation land in 1986. Because the Section 2719 prohibition on gaming does not apply to reservation land, see Section II(C)(1) above, the only way that SMC could establish that gaming cannot be conducted on the

[26] 25 U.S.C. § 467 was recodified at 25 U.S.C. § 5110. It states, "The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations."

Wittenberg Parcel would be if SMC successfully challenged proclamation of the Ho-Chunk reservation and the trust status of the parcel as of October 17, 1988.

There is, however, no mechanism for SMC to challenge the reservation status of the Wittenberg Parcel. The Quiet Title Act has a 12 year statute of limitations that accrues "on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). That 12-year statute of limitations expired in either: (1) 1986, if based on the date SMC claims the land came out of trust by operation of state law but did not, in fact, come out of trust; or (2) 1998, if based on the date that the United States, acting through the Assistant Secretary–Indian Affairs, established the boundaries of the Nation's reservation and specifically proclaimed the Wittenberg parcel as part of the Nation's reservation lands. *See* ECF# 36-3. Now, only Congress has the authority to change or diminish the boundaries of an Indian reservation: "Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress." 25 U.S.C. § 398d. SMC has not alleged, nor submitted any evidence that Congress has taken any action to diminish the boundaries of the Nation's reservation land.

Finally, even if SMC's claim is not barred by 25 U.S.C. § 398d, the latest conceivable date that SMC could have become aware that the federal government's continued recognition of the trust status of the Wittenberg Parcel after 1974 or the proclamation of the Parcel's reservation status in 1986 would affect SMC would have been the date on which the Nation began gaming on the Wittenberg Parcel in 2008. Even if it were assumed that the six-year statute of limitations did not start to run until that date, the statute of limitations period would have expired in 2014.[27]

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

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

SMC's claim that the Wittenberg Parcel was not held in trust by the United States in 1988 is time barred. As a result, SMC cannot state a cause of action that the Nation is conducting gaming in violation of the Nation's Compact because gaming is prohibited on the Wittenberg Parcel, pursuant to 25 U.S.C. §2719(a).

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

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

Tribal–State gaming compacts are contracts negotiated between Indian tribes and states pursuant to authority set forth in federal law, specifically the IGRA. Thus, while, "[g]eneral

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

principles of federal contract law govern the Compacts, which were entered pursuant to IGRA," *Cachil Dehe Band of Wintun Indians v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010), *citing Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir.1989), "[i]n practical terms, [courts] rely on [state] contract law and Circuit decisions interpreting [state] law" when courts "'discern, and the parties note, no difference between [state] and federal contract law.'" *Cachil Dehe Band of Wintun Indians v. California*, 618 F.3d at 1073, *citing Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006) [employing Idaho contract law to interpret a tribal-state compact that was to be "construed in accordance with the laws of the United States."].

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

Here, there is no specific statute of limitations period set forth in the IGRA governing an allegation that a Tribal–State compact has been breached. Accordingly, Wisconsin's statute of limitations governing breaches of contract is applicable in an action where a party alleges that the Nation has breached its Compact.[28] Under Wisconsin law, any "action upon any contract, obligation, or liability, express or implied, . . . shall be commenced within 6 years after the cause of action accrues or be barred." Wis. Stat. Ann. § 893.43. Thus, assuming that SMC even has standing to assert a breach of compact claim against the Nation, which it does not, such an action must have been filed within six years after the cause of action accrues.

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

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

Finally, SMC argued that, because there is no statute of limitations set forth in the IGRA itself, "[t]here are no applicable statutes of limitations that bar SMC's claims against Ho-Chunk." ECF # 52-2, Stockbridge-Munsee Community Supplemental Memorandum In Support Of Motion For Preliminary Injunction, p. 7. That is demonstrably false. First, as demonstrated above, if SMC's claims are considered claims for breach of contract, the applicable statute of limitations is provided for under Wisconsin law.[29] Second, to the degree that the claim is considered a one arising from a violation of a federal statute that does not contain a statute of limitations, "a void which is commonplace in federal statutory law," *Bd. of Regents v. Tomanio*,

[29] Tribal–State gaming compacts are contracts negotiated between Indian tribes and states pursuant to authority set forth in federal law, specifically the IGRA. Thus, while, "[g]eneral principles of federal contract law govern the Compacts, which were entered pursuant to IGRA," *Cachil Dehe Band of Wintun Indians v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010), *citing Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir.1989), "[i]n practical terms, [courts] rely on [state] contract law and Circuit decisions interpreting [state] law" when courts "'discern, and the parties note, no difference between [state] and federal contract law.'" *Cachil Dehe Band of Wintun Indians v. California*, 618 F.3d at 1073, *citing Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006)[employing Idaho contract law to interpret a tribal-state compact that was to be "construed in accordance with the laws of the United States."].

446 U.S. 478, 483-84 (1980), the Supreme Court has directed that courts must apply the most analogous state statute of limitations: "When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). The Supreme Court, therefore, has held that, where a federal statute does not include a statute of limitations, "federal courts should apply 'the most appropriate or analogous state statute of limitations….'" *Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 371 (2004), *citing Goodman* v. *Lukens Steel Co.*, 482 US 656, 660 (1987). Here, where SMC is alleging that the Nation has violated its Compact (which is a contract) with the State, the most analogous State statute of limitations would be Wisconsin's six-year statute of limitations for breach of contract actions, Wis. Stat. Ann. § 893.43, which expired many years ago.

C. The Continuing Violation Doctrine Does Not Apply To SMC's Claims.

SMC has argued that any applicable statute of limitations is tolled by the continuing violations doctrine, ECF # 39, Stockbridge-Munsee Community Reply Memorandum in Support of Motion for Preliminary Injunction, pp. 40-41. That issue has been extensively briefed in the Nation's "Supplemental Brief on the Application of the Continuing-Violations Doctrine to Plaintiff's Claim for Injunctive Relief, Pursuant to the Court's Order Dated July 10, 2017," (ECF# 54), and those arguments will not be repeated here.

For these reasons, all of SMC's claims against the Nation are barred by the applicable statutes of limitation and, as a result, the Nation is entitled to judgment as a matter of law and this case must be dismissed.

V.
THE NATION IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON SMC'S CLAIM THAT THE WITTENBERG CASINO VIOLATES THE ANCILLARY FACILITY PROVISIONS OF THE NATION'S COMPACT BECAUSE SMC HAS NO LEGAL RIGHT TO CHALLENGE THE NATION AND THE STATE'S INTERPRETATION OF THE NATION'S COMPACT.

"A party wishing to enforce a contract must either be a party to that contract or a third-party beneficiary." *Becker v. Crispell-Snyder, Inc.*, 316 Wis. 2d 359, 366 (Ct. App. 2009), *citing Schilling v. Employers Mut. Cas. Co*., 212 Wis. 2d 878, 886-87 (Ct. App. 1997). "A third-party beneficiary is one who the contracting parties intended to 'directly and primarily' benefit." *Id*., *citing Winnebago Homes, Inc. v. Sheldon*, 29 Wis. 2d 692, 699 (1966). "A party proves its third-party beneficiary status by pointing to specific language in the contract establishing intent." *Id*., *citing Schilling*, 212 Wis. 2d at 886-87. "The benefit proven must be direct; an indirect benefit incidental to the primary contractual purpose is insufficient." *Id*., *citing Sussex Tool & Supply, Inc. v. Mainline Sewer & Water, Inc.*, 231 Wis. 2d 404, 409 (Ct. App. 1999).

The federal common law of contracts is in accord. "Under settled principles of federal common law, a third party may have enforceable rights under a contract if the contract was made for his direct benefit." *Holbrook v. Pitt*, 643 F.2d 1261, 1270 (7th Cir. 1981). "If the agreement was not intended to benefit the third party, however, he is viewed as an 'incidental' beneficiary, having no legally cognizable rights under the contract." *Holbrook v. Pitt*, 643 F.2d 1261, 1270 (7th Cir. 1981). *See also Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999)["Before a third party can recover under a contract, it must show that the contract was made for its direct benefit—that it is an intended beneficiary of the contract."].

Here, SMC is not a party to the Nation's Compact. Nor is SMC a third party beneficiary of the Compact, since nothing in Compact indicates any intent by the State or the Nation to

directly and primarily benefit SMC. *See also* Compact § XXIV(B)[waiver of Nation's immunity does not "extend...to claims brought by parties other than the State and the Nation."] Accordingly, SMC is not entitled to enforce any of the terms of the Compact against the Nation and its claims, therefore, fail.

Furthermore, under Wisconsin law, it is clear that, above all else, "unambiguous contract language controls contract interpretation." *Tufail v. Midwest Hosp., LLC*, 348 Wis. 2d 631, 642, 833 N.W.2d 586, 592. "Contract language is considered ambiguous if it is susceptible to more than one reasonable interpretation." *Danbeck v. American Family Mut. Ins. Co.*, 245 Wis. 2d 186, 193, 629 N.W.2d 150-154. "Whether a contract is clear or ambiguous is a matter of law for the court, but the meaning of any ambiguity is a question of fact for a jury." *Tingstol Co. v. Rainbow Sales Inc*., 218 F.3d 770, 772 (7th Cir. 2000).

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

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

the meaning of the Gaming/Ancillary Facility distinction, there is no genuine issue of material fact with respect to the meaning of that language. Paragraph 5 of the Second Amendment to the Nation's Compact requires that there be two activities on the parcel, gaming and non-gaming, and the non-gaming activities must utilize more than 50% of the parcel. So long as more than fifty percent of the lot coverage is devoted to non-gaming activities, which it is, the facility qualifies as an Ancillary Facility. The Nation is, therefore, entitled to judgment as a matter of law.

CONCLUSION

For all of the forgoing reasons, there are no material issues of fact that remain to be resolved and the Nation is entitled to judgment as a matter of law. Accordingly, the Nation respectfully requests that the Court grant this motion for judgment on the pleadings and dismiss SMC's claims against the Nation.

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Respectfully Submitted

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