No. 18-1449

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

THE STOCKBRIDGE-MUNSEE COMMUNITY,

Plaintiff-Appellee,

v.

THE HO-CHUNK NATION, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
For The Western District of Wisconsin
Case No. 3:17-cv-00249-jdp
The Honorable James D. Peterson

THE HO-CHUNK NATION'S ANSWERING BRIEF

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: **18-1449**

Short Caption: Stockbridge Munsee Community v. State of Wisconsin et al.

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Rapport and Marston, Ukiah, California

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Attorney's Printed Name: Lester J. Marston

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

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n/a

Attorney's Signature: /s/ *Jeffrey McIntyre* Date: 6/27/18

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INTRODUCTION

Plaintiff-Appellant Stockbridge-Munsee Community (SMC) filed this lawsuit to protect its share of the tribal gaming market in Wisconsin. Because no provision of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq.* (IGRA), or SMC's class III gaming compact (SMC's Compact) with the State of Wisconsin (Wisconsin) provides a mechanism for protecting a tribe's gaming market from legitimate competition by other tribes, SMC fabricated claims that Defendants-Appellees, the Ho-Chunk Nation (Nation), Wisconsin and Governor Walker (together, State), violated SMC's Compact and the Nation's class III gaming compact (Compact) in order to invoke the grant of federal court jurisdiction and abrogation of tribal sovereign immunity set forth in 25 U.S.C. § 2710(d)(7)(A)(ii) (Section (d)(7)(A)(ii)).

The District Court for the Western District of Wisconsin (District Court), provided with numerous reasons to dismiss SMC's claims, ruled that they were brought long after the statute of limitations on SMC's claims had run. Aa011-012. In its Opening Brief, SMC asks this Court to overturn the District Court's judgment because, it asserts, neither statutes of limitations nor the doctrine of laches bar its claims. In the course of making its arguments, SMC undermines the foundation of its lawsuit by impermissibly changing its factual allegations and the legal theories underlying its claims.

Contrary to SMC's assertions, the applicable federal statutes of limitations and the doctrine of laches unquestionably bar SMC's claims. And, more fundamentally, the District Court should not have entertained SMC's claims in the first place, because Congress did not vest the district courts with jurisdiction over one tribe's suit against another. For all of the reasons stated herein, SMC must be prohibited from abusing the jurisdictional grant in Section (d)(7)(A)(ii) in an attempt to suppress legitimate business competition. The District Court's decision must be affirmed.

JURISDICTIONAL STATEMENT

For the reasons discussed more fully in Sections I-II of this brief, SMC's jurisdictional statement is neither complete nor correct. While SMC claims that the District Court had jurisdiction over its claims against the Nation under Section (d)(7)(A)(ii), the Nation contends that that Section does not vest district courts with jurisdiction over one Indian tribe's suit against another and does not abrogate tribal sovereign immunity for the purposes of such a suit. As such, the District Court lacked jurisdiction over SMC's suit against the Nation.

The Nation also contends that the District Court lacked jurisdiction over SMC's claims because the IGRA does not vest the district courts with jurisdiction over: (1) a suit to enjoin gaming being conducted on lands not eligible for gaming, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. ____, 134 S. Ct. 2024 (2014) (*Bay Mills*); and (2) a suit where the complaint fails to demonstrate that a tribal-state gaming compact has been violated.

The United States Court of Appeals for the Seventh Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 as an appeal of a final decision of the District Court. The order and judgments of the District Court are the Order, Aa001/Ab0371, entered on October 25, 2017 and the final Judgment, Aa001/Ab0606, entered on February 6, 2018 by the Honorable James D. Peterson.

SMC states in its Jurisdictional Statement that the Opinion and Order, Aa013/Ab0592, entered on February 2, 2018 is also on appeal. Opening Brief (OB) 1. However, because SMC does not offer any argument regarding that order in its Opening Brief, that order is not on appeal and SMC has waived the opportunity to challenge that order.

SMC filed a timely Notice of Appeal, Ab0607, on February 27, 2018.

ISSUES PRESENTED

1. Does the IGRA vest district courts with jurisdiction over one Indian tribe's suit against another?
2. Does the IGRA vest district courts with jurisdiction over a suit to enjoin gaming being conducted on Indian lands that are not eligible for gaming?
3. Does the IGRA vest the district courts with jurisdiction over a suit where the complaint fails to demonstrate that a tribal-state gaming compact has been violated?
4. Does the federal statute of limitations or laches bar all of SMC's claims?

STATEMENT OF THE CASE

I. Factual Background

The Nation is a federally recognized Indian tribe in Wisconsin. Ab0040. As a result of forced removals and geographic relocations of its people by the federal government since 1837, the Nation's land, its people, its communities, and its tribal facilities are fractionalized. Ho-Chunk Nation's Supplemental Appendix (Supp. App.) 165-167. The majority of the Nation's communities are located in rural areas between 30 to 60 miles from major Wisconsin cities. Supp.App.165. The Nation's land base held in trust by the federal government consists of a loose archipelago of parcels that are scattered throughout 14 counties in Wisconsin. Supp.App.167. As of March 2017, the Nation had a total population of 7,720 members, 5,443 of which live in 21 counties in Wisconsin. Supp.App.168. Under the Nation's Constitution, it must care for all of its enrolled tribal members, whether or not a member lives on trust land. *Id.*

In 1969, the Native American Church (Church) conveyed a parcel of land near Wittenberg, Wisconsin, to the United States to hold in trust for the Nation (the Wittenberg Parcel). Ab0044; Supp.App.192. The deed conveyed the land "subject to Housing construction which must commence within 5 years from date of approval of this deed or the land will revert to

the grantor." Ab0044. Although the parties dispute whether housing construction began within five years, *see* Ab0044; Supp.App.7, the record shows that the Nation satisfied the condition by constructing the Potch Chee Nunk building. Supp.App.193-194; Supp.App.162.

In 1986, the Assistant Secretary of the Interior (Assistant Secretary) proclaimed the Wittenberg Parcel a formal Indian reservation (Proclamation), meaning the ownership and boundaries of the parcel cannot be altered except by a subsequent act of Congress. 25 U.S.C. § 398(d); 51 Fed. Reg. 41669-02 (Nov. 18, 1986); Supp.App.193. Then, to clear up any confusion regarding the Nation's satisfaction of the housing condition in the 1969 deed, the Church, by resolution, removed "the condition and reversionary clause relating to construction of housing on the [Wittenberg Parcel]." Ab0044; Supp.App.7; Supp.App.193. The Church also executed a quitclaim deed conveying "all right, title and interest, it may have under the reversionary clause in" the Wittenberg Parcel to the United States in trust for the Nation. Ab0045; Supp.App.7.

Two years after the issuance of the Proclamation, Congress passed the IGRA which "creates a framework for regulating gaming activity on Indian lands," *Bay Mills*, 134 S. Ct. at 2028. In accordance with the IGRA, the Nation began conducting gaming on its lands in Wisconsin. To conduct "class III gaming" under the IGRA, (including casino games and slot machines), a tribe must enter into a tribal-state compact with the appropriate state. § 2703(6)–(8), 2710(d)(1).

In 1992, the Nation and the State executed the Compact, allowing the Nation to conduct class III gaming in several Wisconsin counties. Ab0044-0045; Supp.App.7; Supp.App.65. A decade later in 2003, the Nation and the State negotiated an amended compact. Ab0045; Supp.App.7-8; Supp.App.65. Among other things, the amendment changed the compact's "Ancillary Facility" provision to permit the Nation to conduct class III gaming on the Wittenberg Parcel. Supp.App.65-66. Under the 2003 amendment, "Ancillary Facility" means a facility

"where fifty percent or more of the lot coverage of the trust property upon which the facility is located, is used for a Primary Business Purpose other than gaming." Ab0045; Supp.App.8; Supp.App.65-66. The Wittenberg Parcel totals 10 acres, or 435,600 square feet. Supp.App.149-150.

Since 2008, the Nation has been operating various businesses on the Wittenberg Parcel. Supp.App. 148-149; *see also* Ab0045, Supp.App.8. From 2008 through 2016, these businesses included a class III gaming facility with approximately 12,166 square feet of gaming floor area and approximately 8,576 square feet of non-gaming floor area. Supp.App.148-149. The Nation has also operated a gas station and convenience store consisting of approximately 3,992 square feet of non-gaming floor area. Supp.App.149.

In late 2016, the Nation began expanding its facilities on the Wittenberg Parcel to increase the gaming floor area and to add, among other things, a new hotel and restaurant. Supp.App.149-150. When completed, the Wittenberg Parcel will feature 25,313 square feet of gaming floor area and 34,098 square feet of non-gaming floor area, in addition to several thousand square feet of undeveloped land. *Id.* At the time SMC began this lawsuit, the Nation had completed a significant portion of the expansion project, including roughly 80% of the structural steel for the gaming facility. Supp.App.150.

The Nation plans to use increased revenue from the expansion project to address unique obstacles facing its members. *See generally* Supp.App.165-183. Because the Nation's lands and population are highly dispersed and fractionalized across Wisconsin, Illinois, and Minnesota, obstacles arise that cannot be effectively addressed through conventional tribal government programs and services based on membership demography that is categorized as either on or off reservation. Supp.App.167-168. Those obstacles, in turn, increase the costs and the difficulty of

providing government services and programs. Supp.App.167-169.[1] Additional revenue from Wittenberg will help the Nation better meet its members' employment, education, healthcare, elder care, public safety, and infrastructure needs. *See generally* Supp.App.169-182. Although it has not happened thus far, enjoining the operation of some or all of the Nation's Wittenberg class III gaming would result in substantial losses of over $38,000 per day. Supp.App.150-151.

II. Procedural History

SMC sued the Nation, alleging that the Nation's class III gaming on the Wittenberg Parcel violates the Nation's Compact and the IGRA in two ways. First, according to SMC, the Wittenberg Parcel was acquired in trust after October 17, 1988, and is thus ineligible for gaming under 25 U.S.C. § 2719(a)(1). Second, because the gaming operations on the Wittenberg Parcel do not meet the definition of an "Ancillary Facility," the Nation is conducting gaming in violation of its Compact. Ab0049-0051.

When it filed its Complaint, SMC also moved for a preliminary injunction. Ab0053. While the District Court was considering that motion, the Nation answered, asserting the affirmative defenses of sovereign immunity, statute of limitations, and laches, among others. Supp.App.1-15. Not long after, the Nation moved for judgment on the pleadings. Ab0229.

On October 25, 2017, the District Court granted the Nation's motion, denied SMC's motion for preliminary injunction as moot, and dismissed the Nation from the lawsuit. Aa001-012. SMC then moved for leave to file an amended complaint. Ab0428. On February 2, 2018, the District Court denied SMC's motion for leave and confirmed that it was dismissing SMC's

[1] The obstacles arising from dispersion and fractionalization also explain the Nation's decision to provide its members with per capita payments from its tribal gaming revenues. Supp.App.182. The Nation's laws allow for the allocation of tribal gaming revenues. *Id.* The Nation allocates 78.26% to provide for the General Welfare of the Nation or its members. *Id.* The Nation's dispersed members may use the payments to pay for needed services. *Id.* Per capita payments are, in many cases, the only way to ensure that tribal members are able to obtain services. *Id.*

claims with prejudice. Aa013-026. It then entered judgment against SMC on February 6, 2018. Aa027.

SUMMARY OF ARGUMENT

In this brief, the Nation demonstrates that 25 U.S.C. § 2710(d)(7)(A)(ii) did not vest the District Court with jurisdiction over SMC's claims against the Nation. First, 25 U.S.C. § 2710(d)(7)(A)(ii) does not vest the district courts with jurisdiction over one tribe's suit against another. On its face, 25 U.S.C. § 2710(d)(7)(A)(ii) appears to grant the district courts with jurisdiction over any cause of action initiated by an Indian tribe to enjoin a class III gaming activity "conducted in violation of *any* Tribal-State compact entered into under paragraph (3) [25 U.S.C. 2710(d)(3)]." (Emphasis added.) A closer examination of the IGRA and its legislative history, however, demonstrates that 25 U.S.C. § 2710(d)(7)(A)(ii) did not vest the district courts with jurisdiction over one tribe's suit against another alleging that the defendant tribe is in violation of its compact. The language of Section 2710(d)(3) reveals that only Indian tribes that exercise jurisdiction over the Indian lands where the alleged illegal gaming takes place have the right to invoke the district court's jurisdiction under the IGRA. Furthermore, there is no support in the legislative history of the IGRA indicating that Congress sought to give third party tribes regulatory authority over the gaming activates of other tribes. Rather, in 25 U.S.C. § 2710(d)(7)(A)(ii), Congress sought to create a federal forum for states to sue tribes when a compact is violated, and for Indian tribes exercising jurisdiction over the Indian lands where alleged illegal class III gaming is located to enjoin the illegal activity. This latter grant of jurisdiction was necessary because, at the time the IGRA was enacted, many tribes had licensed individual Indians, management companies, and other entities to offer gaming on tribal land. Thus, there is no basis to conclude that 25 U.S.C. § 2710(d)(7)(A)(ii) vests the district courts

with jurisdiction over SMC's suit against the Nation or abrogates the Nation's sovereign immunity for that purpose.

Additionally, in order to maintain an action under 25 U.S.C. § 2710(d)(7)(A)(ii), the complaint must state that the unlawful class III gaming activity is "located on Indian lands." 25 U.S.C. § 2710(d)(7)(A)(ii); *Bay Mills* at 2032. Here, SMC asserts that the Wittenberg Parcel is not eligible for gaming under 25 U.S.C. § 2719 because it was acquired in trust after 1988. Ab0049. SMC is therefore asserting that the Wittenberg Parcel is not "Indian lands" under IGRA and the District Court lacked jurisdiction over SMC's claim regarding the eligibility of the Parcel for gaming. SMC has also not demonstrated that the Nation's gaming on the Wittenberg Parcel is "conducted in violation" of the Nation's compact as required by Section (d)(7)(A)(ii). Gaming on the Wittenberg Parcel does not violate the Nation's compact because: (1) the Assistant Secretary proclaimed the Wittenberg Parcel as part of the Nation's reservation in 1986, and that act alone makes class III gaming on the Parcel lawful regardless of the trust status of the land; and (2) both the Nation and the State agree that the Nation's gaming (and expanded gaming) conforms with the definition of "Ancillary Facility" set forth in the Compact, and SMC has no right (or plausible legal theory) to challenge the meaning of "Ancillary Facility" in the Nation's Compact.

Beyond the jurisdictional issues, SMC's claims are also barred by the federal statute of limitations. When a federal statute does not contain a statute of limitations, federal courts are required to borrow a limitation period from the most analogous state statute of limitations and apply that time period as a federal statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 266-267 (1985). The most analogous statute of limitations in this case is Wisconsin's statute of limitations for breach of contract actions, Wis. Stat. § 893.43, because tribal-state compacts are contracts between tribes and states and the courts routinely treat tribal-state compact suits as breach of

contract actions. *Cachil Dehe Band of Wintun Indians v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010); *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006).

SMC, furthermore, cannot demonstrate that, as a sovereign Indian tribe, it is not subject to federal statutes of limitation, since federal statutes of limitations are frequently found to bar untimely claims filed by Indian tribes. *See, e.g.*, *Menominee Indian Tribe v. United States*, 136 S. Ct. 750, 757 (2016). Nor can SMC avoid the application of a limitations period on the basis that it is requesting injunctive relief. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284 (1988). And, even if laches, rather than a statute of limitations, were applied to evaluate the timeliness of SMC's claims, the claims would be barred because SMC's conduct evidences an unreasonable lack of diligence and the Nation would be severely prejudiced if SMC's claims were permitted to proceed in spite of SMC's unexcused delay. The Nation also demonstrates that SMC's claims are barred by the statute of limitations applicable to the Administrative Procedure Act, 5 U.S.C. §§ 701-706, because, in order to challenge the eligibility of the Wittenberg Parcel for gaming, SMC was required, but failed, to bring an action against the United States challenging the trust and reservation status of the land. *Big Lagoon Rancheria v. California*, 789 F.3d 947 (9th Cir. 2015).

Finally, the Nation demonstrates in that SMC waived a number of arguments, which cannot now be revived, including, but not limited to: that the IGRA preempts the application of a statute of limitations; that the District Court erred by denying SMC's motion for leave to file an amended complaint; and that the Nation's gaming on the Wittenberg Parcel constitutes an continuing violation of SMC's rights. *Williams v. Dieball*, 724 F.3d 957, 961 (7th Cir. 2013); *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012).

STANDARD OF REVIEW

This Court reviews a grant of a motion for judgment on the pleadings *de novo*, *Armada (Singapore) PTE Ltd. v. Amcol Int'l Corp.*, 885 F.3d 1090, 1092 (7th Cir. 2018), and also reviews decisions regarding issues of federal subject matter jurisdiction and tribal sovereign immunity *de novo*. *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 929 (7th Cir. 2008).

SMC argues that the denial of its motion for leave to amend should be reviewed *de novo*, rather than for an abuse of discretion, because the "basis for denial [was] futility." OB 12. This distinction is irrelevant because, although SMC mentions that it is appealing the District Court's denial of its motion for leave, SMC never develops an argument in support of its appeal, which results in a waiver of that argument. *Estate of Moreland v. Dieter*, 395 F.3d 747, 759 (7th Cir. 2005).

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION OVER SMC'S CLAIMS

A. 25 U.S.C. § 2710(d)(7)(A)(ii) Does Not Grant District Courts Jurisdiction over Claims Brought by One Indian Tribe Against Another Tribe to Enjoin Violations of the Defendant Tribe's Compact.

It is well settled that federal courts are courts of limited jurisdiction and possess only that power authorized by Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.*

Here, SMC asserts the District Court had jurisdiction over its claims pursuant to Section (d)(7)(A)(ii). Ab0040. That section, however, only grants district courts jurisdiction over:

> [A]ny 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 . . .

Id. (emphasis added).

When Section (d)(7)(A)(ii) is read together with the other provisions of the IGRA, it is clear that the section did not grant *any* Indian tribe in the United States the right to sue any other compacted tribe in the federal courts. Rather, Section (d)(7)(A)(ii) only granted those Indian tribes exercising jurisdiction over the Indian lands where the alleged illegal class III gaming was occurring the right to sue in the district court to enjoin the illegal activity.

When interpreting IGRA, courts use their "traditional tools of statutory construction." *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257 (9th Cir. 1994). Interpretation of a statute begins with the statute's language, and its plain meaning should be conclusive except where the literal application of a statute produces a result demonstrably at odds with the intention of its drafters. *Id*. However, "[s]tautory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989). Thus, "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). In all cases, the federal 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).

At first glance, the literal reading of Section (d)(7)(A)(ii) might seem to authorize any Indian tribe to sue any other Indian tribe to enjoin violations of the defendant tribe's compact. *Bay Mills Indian Cmty. v. Little Traverse Bay Band of Odawa Indians*, 1999 U.S. Dist. LEXIS 20314 (W.D. Mich. Aug. 30, 1999). The language of Section (d)(7)(A)(ii), however, makes it clear that a tribe can only sue to enjoin violations of a compact entered into under Section 2710(d)(3). *Wisconsin v. Ho-Chunk Nation*, 512 F.3d at 934.

Paragraph (3) provides that only an "Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted" can request "the State in which such lands are located" to enter into negotiations to conclude a Tribal-State compact. 25 U.S.C. § 2710(d)(3)(A). Paragraph (3) further provides that any "State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of *the* Indian tribe . . ." 25 U.S.C. § 2710(d)(3)(B) (emphasis added). "The" Indian tribe to which § 2710(d)(3)(B) refers is the Indian tribe "having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted," and no other. Thus, "the" Indian tribe to which Section (d)(7)(A)(ii) refers, pursuant to Paragraph (3) of § 2710(d), is an Indian tribe that has both "jurisdiction over the Indian lands upon which a class III gaming activity is being conducted" and that has entered "into a Tribal-State compact governing [such] gaming activities."

This interpretation of Section (d)(7)(A)(ii) is consistent with other provisions of the IGRA. Section 2710(d)(2)(A) states that if the Indian tribe intends to authorize "*any person or entity* to engage in a class III gaming activity on the Indian lands of the Indian tribe," the tribe must adopt an ordinance or resolution that meets the requirements of Section (b). *Id*. (emphasis added). IGRA's Congressional "Findings," state that "numerous Indian tribes have become engaged in *or have licensed gaming activities on Indian lands* as a means of generating tribal governmental revenue." 25 U.S.C. § 2701(1) (emphasis added).

These two provisions demonstrate why Congress authorized Indian tribes to bring an action in the district courts to enjoin a class III gaming activity that was being conducted in violation of the tribe's compact. It is because, under the IGRA, the tribes could license a management company or some other "person or entity" to engage in gaming on their Indian lands under their gaming ordinance and compact. If those other persons or entities violated the compact, Congress wanted the compact tribes to have a remedy in the district courts to enjoin the

illegal activity. *See* S. REP. No. 100-446, at 10-13, 15 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071 (S. Rep).

This interpretation of Section (d)(7)(A)(ii) is also bolstered by the fact that Congress granted the National Indian Gaming Commission (NIGC) jurisdiction to bring civil actions to enjoin compact violations and granted the Justice Department exclusive criminal jurisdiction to prosecute persons for engaging in gaming without a compact. *See* 25 U.S.C § 2713(b)(1) and 18 U.S.C. § 1166(a).

Section 2713 (b)(1) grants the NIGC broad authority to order the temporary or permanent "closure of an Indian game for substantial violations of the provisions of this chapter, of regulations prescribed by the Commission pursuant to this chapter, or of tribal regulations, ordinances, or resolutions approved under" 25 U.S.C. §§ 2710 or 2712.[2] Pursuant to this authority, the NIGC has adopted comprehensive regulations (Regulations) designed to ensure that the provisions of the IGRA and compacts are not violated. 25 C.F.R. §§ 573.1-573.5. When the NIGC has reason to believe a violation of the IGRA or a compact has occurred, the Regulations authorize it to request voluntary compliance, to demand that corrective measures be implemented, and to temporarily and permanently close all or part of an Indian gaming operation until the violations have been corrected. *Id*. The NIGC has also adopted civil fine regulations (Fine Regulations) that authorize the NIGC to levy civil fines and penalties on tribes and management companies that violate the IGRA or the provisions of a compact. 25 C.F.R. §§ 575.1-575.7. Both the Regulations and Fine Regulations contain provisions establishing a settlement process by which the NIGC can settle enforcement actions. 25 C.F.R. §§ 573.1 and 575.6.

[2] The chapter referred to in Section 2713 is Chapter 29 of Title 25 of the United States Code that encompasses all of the provisions of the IGRA, including those pertaining to Tribal-State compacts.

SMC's interpretation of Section (d)(7)(A)(ii) would conflict with the provisions of 25 U.S.C. § 2713, the Regulations, and the Fine Regulations in a number of ways. First, it would usurp the authority of the NIGC to enforce the IGRA and the provisions of gaming compacts, and vest that authority in every single Indian tribe throughout the United States. Second, SMC's interpretation creates the potential for subjecting a tribe to two simultaneous enforcement actions, one initiated by the NIGC and a second by another Indian tribe. Third, an action brought by another Indian tribe could interfere with the ability of the NIGC to settle a violation under its Regulations. Finally, SMC's interpretation of Section (d)(7)(A)(ii) could lead to conflicting decisions between an enforcement action brought by the NIGC and a federal court addressing claims filed pursuant to Section (d)(7)(A)(ii) by the other tribe.

In addition, 18 U.S.C. § 1166(a) assimilates all state gaming laws, including regulatory laws, into federal law and vests "exclusive jurisdiction" in the United States to enforce those laws. As a result, Indian gaming, tribal or otherwise, which is not conducted in accordance with state law is a federal crime unless it is conducted in accordance with the IGRA. *Sycuan Band of Mission Indians v. Roache*, 54 F. 3d 535 (9th Cir. 1994).

Reading § 2713 and § 1166(a) together with the provisions of Section 2710, it is apparent that Section (d)(7)(A)(ii) only authorizes tribes: (1) having jurisdiction over the Indian lands where the illegal gaming activities are taking place, and (2) that are parties to a compact that regulates that gaming, to file suit in the district court to enjoin violations of a compact, regardless of whether those violations are committed by a management company or any "person or entity" authorized to conduct gaming on the tribe's Indian lands pursuant to either 25 U.S.C. § 2711 or § 2710 (b)(4)(B) of the IGRA.[3]

[3] The legislative history of the IGRA also supports the Nation's interpretation of Section (d)(7)(A)(ii). S. Rep at 12-15. Congress made it clear that the compacting process was between

Section (d)(7)(A)(ii) did not grant the District Court jurisdiction over SMC's claims against the Nation because SMC is not a party to the Nation's Compact and does not exercise any jurisdiction over the Indian lands where the alleged illegal gaming is occurring.

B. 25 U.S.C. § 2710(d)(7)(A)(ii) Does Not Grant the District Court Jurisdiction over SMC's Claims Because SMC Is, in Effect, Asserting that the Nation Is Conducting Gaming Off of the Nation's Indian Lands.

IGRA's grant of jurisdiction to the district court that is at issue in this case is limited to violations of a compact that occur on "Indian lands." 25 U.S.C. § 2710(d)(7)(A)(ii). SMC asserts that the trust lands upon which the Nation's Wittenberg Casino is located went out of trust in 1974 and did not go back into trust until after October 17, 1988. Ab0049. As a result, SMC argues, "Ho-Chunk's class III gaming activities on the Wittenberg Parcel constitute a violation of IGRA's prohibition against tribal gaming activities on lands acquired in trust after October 17, 1988," citing 25 U.S.C. § 2719(a). *Id*.

SMC claims that the Nation is violating its Compact by conducting gaming on land upon which gaming cannot be conducted pursuant to the IGRA. SMC claims, in effect, that the lands upon which the Wittenberg Casino is located are not "Indian lands" as defined by the IGRA. If the lands upon which the Wittenberg Casino is located are not "Indian lands," as that term is used in the IGRA, however, the District Court lacked jurisdiction over SMC's claim.

In *Bay Mills*, 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 held that the district court did not have jurisdiction under Section

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two sovereigns, the state where the gaming was to be conducted and the Indian tribe having jurisdiction over the lands where the gaming was to be conducted. The Senate Report does not mention allowing any Indian tribe, not a party to the compact, to file suit to enjoin any gaming activity conducted in violation of the compact.

(d)(7)(A)(ii), because the abrogation of tribal sovereign immunity arising from Section (d)(7)(A)(ii) did not encompass Michigan's claim.

> A State's suit to enjoin gaming activity on Indian lands . . . 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 at 2032 (internal citations omitted).

As was the case in *Bay Mills*, 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" grant of jurisdiction to the district courts. *Bay Mills* at 2032.

SMC can be expected to argue that it does not assert that the Wittenberg Parcel is not "Indian lands." Rather, SMC will likely claim, because the Parcel was returned to trust status after October 17, 1988, it constitutes "Indian lands" upon which gaming is prohibited. SMC's argument is, in effect, that the IGRA creates two types of "Indian lands," one type of Indian lands upon which gaming is authorized, and one upon which gaming is not authorized. That interpretation is inconsistent with the structure and purpose of the IGRA.

The fundamental distinction arising from *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), and embodied in the IGRA, is between those lands upon which tribal gaming is authorized and those lands upon which tribal 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." *Bay Mills* at 2034. 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.*

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.[4]

Under SMC's interpretation, the authorization to conduct gaming on Indian lands provided for in Section 2710(d)(1) is not actually an authorization. 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 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. Lands subject to the Section 2719(a) prohibition do not fall within the term "Indian lands."[5]

Because SMC's claim is, in effect, that the Nation is gaming on land that does not qualify as "Indian lands," SMC's claim does not fall with Section 2710(d)(7)(A)(ii)'s grant of jurisdiction.

C. The District Court Lacked Jurisdiction over SMC's Claims because SMC Cannot Allege the Necessary Facts to State a Claim for a Violation of the Nation's Compact.

SMC asserts that the Nation is violating its Compact in two ways: (1) the Nation is prohibited from conducting gaming on the Wittenberg Parcel because the land was taken into

[4] The possession of eligible tribal trust or reservation lands is, in fact, 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 616, 618 (6th Cir. 2002). *Accord Big Lagoon Rancheria v. California*, 789 F.3d at 950.

[5] This is why Section 2719 does not use the term "Indian lands."

trust after October 17, 1988, Ab0049; and (2) the Wittenberg Casino is not an "ancillary facility" as defined in the Compact. Both of those claims fail on their face. Ab0050-0051.

SMC claims that the Nation is operating the Wittenberg Casino in violation of the Ho-Chunk Compact because it violates the § 2719 prohibition against gaming on lands acquired in trust after October 17, 1988. Ab0049.

25 U.S.C. § 2719(a) provides:

> Except as provided in subsection (b), gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, *unless*—
> (1) *such lands are located within or contiguous to the boundaries of the reservation* of the Indian tribe on October 17, 1988;

(Emphasis added.)

Under § 2719, therefore, gaming is prohibited on land acquired by the Secretary in trust for a tribe after October 17, 1988 only if the land was outside of the boundaries of the tribe's reservation on October 17, 1988. If the land that is taken into trust after October 17, 1988 is within the boundaries of the tribe's reservation, then the land does not fall within the scope of § 2719's prohibition.

The Wittenberg Parcel was unquestionably within the boundaries of the Nation's reservation on October 17, 1988, because, on November 18, 1986, it was proclaimed to be part of the Nation's reservation by the Assistant Secretary pursuant to Section 5110 of the Indian Reorganization Act. Federal Register Notice, "Wisconsin Winnebago Tribe; Establishment of Reservation," 51 Fed. Reg. 41669-41671 (Nov. 18, 1986); Supp.App.193. Even if it is assumed that SMC's legal conclusion that the Wittenberg Parcel was not in trust in 1988 is correct, its claim that § 2719 prohibits gaming on the Wittenberg Parcel still fails. The prohibition in § 2719 does not apply to the Wittenberg Parcel because the parcel is within the boundaries of the Nation's reservation as established by the Proclamation. The Nation is undeniably permitted to

conduct gaming on the Wittenberg Parcel.[6] Because SMC's claim that the Nation is violating its Compact by conducting gaming on land that is not eligible for gaming fails on its face, the District Court did not have jurisdiction over the claim.

SMC's claim that the Nation's Wittenberg Casino is not an "Ancillary Facility" as that term is defined in the Nation's Compact with the State, Ab0050-0051, also fails on its face.

First, the Nation's Compact defines the term "Ancillary Facility" as a gaming facility "where fifty percent or more of the lot coverage of the trust property upon which the facility is located, is used for a Primary Business Purpose other than gaming." Ab0045; Supp.App.8; Supp.App.65-66. SMC's claim is not based on an allegation that the Wittenberg Facility does not meet this definition. Rather, SMC asserts that the Wittenberg Facility's operations are in violation of the Nation's Compact based on its interpretation of the definition of "Primary Business Purpose." Ab0050-0051. By failing to allege that the Wittenberg Facility's operations do not meet the definition of "Ancillary Facility" in the Nation's Compact, SMC failed to properly allege that the Nation is conducting gaming in violation of its Compact. As a result, the District Court lacked jurisdiction over SMC's second claim.

Second, SMC is not a party to the Nation's Compact. SMC has no rights under the Nation's Compact, and the Nation has no obligation to SMC under its Compact. *Becker v. Crispell-Snyder, Inc.*, 316 Wis. 2d 359, 366 (Ct. App. 2009). The only parties that have enforceable rights under the Nation's Compact are the Nation and the State. Those two sovereigns reached an agreement on what would constitute an "ancillary facility" and memorialized that agreement in their class III gaming Compact. Supp.App.134-135. Both of those parties have stated that the Wittenberg Casino, as currently conducted by the Nation on the

[6] As discussed below, SMC did not include a claim challenging the validity of the Proclamation, nor could it do so, as such a claim would be barred by the statute of limitations applicable to claims filed pursuant to the Administrative Procedure Act.

Wittenberg Parcel meets the definition of an "Ancillary Facility" as those two sovereigns defined the term in their Compact. *Id. See also* Ab0148-0149 (State specifically denying allegation that the Wittenberg Casino violates the "Ancillary Facility" provision of the Nation's Compact). The Nation and State's understanding of the terms of their agreement is binding not only on the parties, but on this Court. *Zweck v. D. P. Way Corp.*, 70 Wis. 2d 426, 435 (1975). It is irrelevant how SMC interprets the Nation's Compact.

Since the Wittenberg Casino is an "Ancillary Facility" as defined by the Compact, the operation of the Wittenberg Casino by the Nation is not a violation of the Compact and therefore, the District Court lacked jurisdiction over SMC claim that the Wittenberg Casino was not an "Ancillary Facility."

II. THE NATION'S SOVEREIGN IMMUNITY FROM UNCONSENTED SUIT BARS SMC CLAIMS IN THIS CASE

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978). Moreover, "sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation." *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 757 F.2d 1047, n. 6 (9th Cir. 1985) (internal citations omitted); *Rehner v. Rice*, 678 F.2d 1340, 1351, *rev'd on other grounds*, 463 U.S. 713 (1983).

In this case, there is no doubt that the Nation enjoys sovereign immunity from suit.[7] Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or

[7] Generally, inclusion of an Indian tribe on the Federal Register list of federally recognized tribes is sufficient to establish a tribe's entitlement to sovereign immunity. *Larimer v. Konocti Vista Casino Resort, Marina & RV Park*, 814 F. Supp. 2d 952, 955 (N.D. Cal. 2011). The Nation is included on the list of federally recognized tribes promulgated by the Bureau of Indian Affairs, Department of the Interior, 81 Fed. Reg. 5019 (Jan. 29, 2016).

congressional abrogation. *Ho-Chunk*, 512 F.3d at 934-935. SMC has not alleged that the Nation has waived its sovereign immunity with regard to its claims.

The Supreme Court has ruled that Section (d)(7)(A)(ii) constitutes a limited abrogation of tribal sovereign immunity. *Bay Mills*, 134 S. Ct. 2024. As shown above, SMC's claims do not fall within Section (d)(7)(A)(ii)'s grant of jurisdiction. Because Section (d)(7)(A)(ii) did not grant the District Court jurisdiction over SMC's claims, the Nation's sovereign immunity was also not abrogated by Section (d)(7)(A)(ii). Because Section (d)(7)(A)(ii) did not abrogate the Nation's immunity and the Nation has never waived its immunity in favor of SMC, the Nation's sovereign immunity bars all of SMC's claims against the Nation. *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).

III. SMC's CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

A. The District Court Did Not Apply State Law to SMC, the District Court Borrowed a Limitations Period From Wisconsin's Most Analogous Statute of Limitations and Applied that Limitations Period as Federal Law.

In challenging the District Court's dismissal of its claims, SMC argues that, as a sovereign tribal government, it is immune from state statutes of limitation, that state law does not apply to Indian tribes, and that the IGRA preempts application of the Wisconsin statute of limitations for breach of contract. *See* OB 17, 25, 28, 29. Those arguments are based on the false premise that the District Court applied state law in ruling that SMC's claims against the Nation are barred. The District Court did not apply state law to SMC or its claims. Rather, following decades of Supreme Court precedent, the District Court borrowed Wisconsin's most analogous statute of limitations and applied it to SMC and its claims as a federal statute of limitations.

When Congress does not include a statute of limitations for a federal cause of action, "a void which is commonplace in federal statutory law," *Bd. of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980), "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. at 266-267 (emphasis added). *See DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983) ("[W]e do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to 'borrow' the most suitable statute or other rule of timeliness from some other source.").

"Congress has come to rely on this longstanding practice of the federal courts." *Kingvision Pay Per View, Ltd. v. Wilson*, 83 F. Supp. 2d 914, 917 (W.D. Tenn. 2000). Recognizing this reliance, the Supreme Court has held that, "[g]iven our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147 (1987).

The foregoing also rebuts SMC's assertion that "25 U.S.C. § 2710(d)(7)(A) does not include or reference any statute of limitations" and, therefore, "Congress did not impose a statute of limitations on these types of claims, and did not state or suggest that such claims would be subject to procedural limitations found in state laws. . . ." OB 13. Congress, understanding the practice of borrowing time periods from analogous state statutes, long intended by its silence that the courts borrow the most closely analogous statute of limitations from state law and apply it as federal law. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. at 158. In situations where Congress does not include a statute of limitations, it does not, as SMC has claimed, intend "that there be no time limit on actions at all . . . ." *Id.* That interpretation runs afoul of decades of Supreme Court precedent governing the process by which federal courts borrow time limitations from analogous state statutes of limitations and apply those time periods as federal statutes of limitation.

As discussed in more detail below, SMC has presented no legal authority supporting the proposition that Indian tribes are generally immune from the effect of federal statutes of

limitation. And, in fact, the opposite is true. *See Menominee Indian Tribe v. United States*, 136 S. Ct. at 757; *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988). Thus, SMC's claims against the Nation are barred by a federal statute of limitations—the time period for which was simply borrowed from an analogous state law.

The District Court correctly concluded that all of SMC's claims against the Nation are time-barred.

B. SMC's Status as Sovereign Does Not Preclude Enforcement of the Statute of Limitations in this Case.

SMC argues that its claims are not barred by the statute of limitations because statutes of limitations are not enforceable against a sovereign, citing *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938). OB 15. SMC offers no analysis of the *Guaranty Trust* decision. Rather, SMC merely cites to language from *Guaranty Trust*: "[T]he implied immunity of the domestic 'sovereign,' state or national, has been universally deemed to be an exception to local statutes of limitations where the government, state or national, is not expressly included[.]" *Id*.

SMC does not cite to a single relevant case in which a federal or state statute of limitations was found inapplicable to the claims of an Indian tribe because it is a sovereign. This is telling. Statutes of limitations have, in fact, been found to bar tribal claims in a variety of contexts. "[S]tatutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government." *Hopland Band of Pomo Indians v. United States*, 855 F.2d at 1576. *See Menominee Indian Tribe*, 136 S. Ct. 750 (six-year statute of limitations contained within the Contract Disputes Act barred claims brought by Indian tribe and were not equitably tolled); *San Carlos Apache Tribe v. United States*, 639 F.3d 1346 (Fed. Cir. 2011); *United States v. Mottaz*, 476 U.S. 834 (1986); *Menominee Tribe of Indians v. United States*, 726 F.2d 718 (Fed. Cir 1984); *Capoeman v. United*

States, 440 F.2d 1002, 1007-08 (1971); *Otoe-Missouria Tribe of Okla. v. United States HUD*, 2014 U.S. Dist. LEXIS 94768, at *18 (W.D. Okla. Feb. 13, 2014) ("Accordingly, all of the Tribe's claims . . . are barred by the applicable statute of limitations, 28 U.S.C. § 1658 . . . ."). To the degree that federal courts have not enforced statutes of limitations against Indian tribes, the Supreme Court has found that those cases were exceptions to the requirement that statutes of limitations apply to tribal claims. Those decisions relate exclusively to claims relating to tribal real property rights arising from treaties, violations of the Non-Intercourse Act, and unextinguished tribal interests in land. *See, e.g.*, *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240-241 (1985). This exception is consistent with federal statutory law, which prevents the application of state law to tribal interests in land. 28 U.S.C. § 1360(b); 25 U.S.C. § 233.

SMC's lone cite to case law involving an Indian tribe is *Bd. of City Comm'rs v. United States*, 308 U.S. 343, 351 (1939). OB 15. That case is inapposite. *Jackson County* involved a claim for recovery of taxes paid by an individual Indian brought by the United States, not a claim brought by an Indian tribe, and the statute of limitations at issue in that case was a state statute of limitations. The fact that the United States is not subject to state statutes of limitations is of no relevance to this case.

Equally important, the *Guaranty Trust* case makes clear why an Indian tribe cannot assert that a federal statute of limitations does not apply to its claims against another Indian tribe in a federal court. At issue in *Guaranty Trust* was a claim by the Soviet government for money deposited in an American bank by the Russian government before the Russian Revolution. The United States was assigned the Soviet government's interest in the deposited funds. The Court, having stated the basic doctrine concerning the application of statutes of limitations against domestic sovereigns, ruled that the statute of limitations barred the Soviet government's claim, despite the fact that the United States, as assignee, brought the claim.

The *Guaranty Trust* court emphasized that the exemption of sovereigns from statutes of limitations applied to a "domestic 'sovereign' state or national." *Guaranty Trust*, 304 U.S. at 133. The Court then addressed "[w]hether the benefit of the rule should be extended to a foreign sovereign suing in a state or federal court . . . . " *Id.* The *Guaranty Trust* court concluded that a foreign sovereign is not entitled to be exempted from statutes of limitations. "It is true that upon the principle of comity foreign sovereigns and their public property are held not to be amenable to suit in our courts without their consent. . . . But very different considerations apply where the foreign sovereign avails itself of the privilege, likewise extended by comity, of suing in our courts." *Id.* at 134. The difference between plaintiffs and defendants in this context is significant: "By voluntarily appearing in the role of suitor [the foreign sovereign] abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act." *Id. Accord*, *United States v. Bankers Ins. Co*., 245 F.3d 315, 319-320 (4th Cir. 2001) ("Sovereign immunity is not a sword, but a shield; and as a shield it means simply that 'the United States cannot be sued at all without the consent of Congress.' . . . Sovereign immunity does not permit the Government to sue a third party and then pick and choose the judicial constraints and contractual obligations with which it will abide.").

The *Guaranty Trust* Court went on to explain that rules such as statutes of limitation, "which must be assumed to be founded on principles of justice applicable to individuals, are to be relaxed only in response to some persuasive demand of public policy generated by the nature of the suitor or of the claim which it asserts." *Id.* at 135.

> We are unable to discern in the case where a foreign sovereign, by suit, seeks justice according to the law of the forum, any of the considerations of public policy which support the application of the rule *nullum tempus* to a domestic sovereign. The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of

> litigation after the lapse of a reasonable time. It has long been regarded by this Court and by the courts of New York as a meritorious defense, in itself serving a public interest. . . . Denial of its protection against the demand of the domestic sovereign in the interest of the domestic community of which the debtor is a part could hardly be thought to argue for a like surrender of the local interest in favor of a foreign sovereign and the community which it represents. We cannot say that the public interest of the forum goes so far.

Id. at 135-136 (citations omitted).

In the context of whether an Indian tribe is immune from the application of statute of limitations in federal court, an Indian tribe is not the domestic sovereign, since Indian tribes' jurisdictional reach does not extend beyond the borders of its Indian lands. While the status of Indian tribes within the legal system of the United States is unique and does not parallel in every regard that of foreign governments bringing claims in federal courts, in this case, the considerations raised in the *Guaranty Trust* case apply to SMC's effort to evade the enforcement of the applicable statutes of limitations. SMC, moreover, is not a defendant in this action, where common law and considerations of comity allow for the recognition and enforcement of tribal sovereign immunity from suit.[8]

In claiming that the Wittenberg Parcel does not qualify as Indian lands upon which the Nation is permitted to engage in gaming, SMC is challenging at least two actions on the part of the federal government: the alleged failure of the United States to take the parcel out of trust in 1974 and the Proclamation that added the Wittenberg Parcel to the Nation's reservation lands in 1986. Both of those challenges would have to be made through a suit filed against the United States pursuant to the APA. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 220 (2012) (A challenge to the federal government's decision to take

[8] SMC's argument is also inconsistent with its assertion that the IGRA waived the Nation's tribal sovereign immunity in this case. If Congress waived the Nation's immunity under the circumstances of this case, an assertion with which the Nation disagrees, it waived SMC's immunity as well.

land into trust is "a garden-variety APA claim."). APA actions must be brought within six years of the final agency action being challenged. 28 U.S.C. § 2401(a). That the party challenging such decisions is a sovereign has not been found to be grounds for tolling the statute of limitations: "California's arguments that the BIA does not properly hold the eleven-acre parcel in trust for Big Lagoon Rancheria fail, both because the state has failed to file the appropriate APA action and because such an APA challenge would be time-barred." *Big Lagoon Rancheria*, 789 F.3d at 954.

Allowing SMC to go forward with its untimely claims could disrupt the United States' beneficial ownership interest in the Wittenberg Parcel and nullify the reservation status of that Parcel. Those results would not be in the interest of the United States. *See* 25 U.S.C. § 398(d). There would also be no public interest justification for allowing SMC's untimely claims to go forward against another sovereign, the Nation, threatening its beneficial interest in its tribal lands and its sovereign interest in controlling the use of its tribal lands.

With regard to the statute of limitations applicable to breach of contract, which applies to both of SMC's claims, SMC is seeking to protect its market share against a competing Indian tribe, an interest that is not protected under the IGRA or any other federal statute. "That interest [the profitability of a tribal casino], however, does not resemble any that the law normally protects. . . . Although the IGRA requires the Secretary to consider the economic impact of proposed gaming facilities on the surrounding communities, it is hard to find anything in that provision that suggests an affirmative right for nearby tribes to be free from economic competition." *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000). In its effort to protect that unprotectable interest, SMC seeks to alter the trust status of the Wittenberg Parcel, a status that goes back nearly 50 years, to revoke its reservation status, which goes back 32 years, and to prohibit the Nation from conducting gaming on that parcel, which the

Nation has been doing for 10 years, and in which the Nation has invested a significant amount of money and effort. *See generally* Supp.App.148-151. Clearly, it would not be in the interest of the United States, or any consideration of public policy, to allow those claims to be brought long after the statute of limitations has run. All of the considerations that are the basis for imposing statutes of limitations—protecting defendants from false or fraudulent claims that might be difficult to disprove if not brought until after relevant evidence has been lost or destroyed and witnesses have become unavailable; the interest in certainty and finality in the administration of defendants' affairs, especially in commercial transactions; to allow peace of mind; to avoid disrupting settled expectations; and to reduce uncertainty about the future—weigh against SMC's attempt to avoid the enforcement of the statute of limitations.

C. That SMC's Claims Seek, Among Other Things, Injunctive Relief Does Not Exempt Them from Statutes of Limitation and/or Laches.

SMC asserts that, because it is seeking injunctive relief, statutes of limitation do not apply to its claims. OB 18. SMC further asserts that the Nation and the State should have, but failed to, plead the defense of laches, so its claims are not barred by laches, either. OB 22. SMC's arguments are meritless and they have the unintended effect of undermining SMC's claims.

First, as the cases cited by SMC in its Opening Brief reveal, to the extent that courts have found that statutes of limitations do not apply to claims for equitable relief, those decisions address situations in which equitable claims are the *exclusive* claims at issue. "[W]here the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable. . . . " *Russell v. Todd*, 309 U.S. 280, 289 (1940). Where both equitable claims and claims at law are at issue, statutes of limitations do apply. "[W]hen the jurisdiction of the federal court is concurrent with that at law, or the suit is

brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations." *Id.*

As was discussed above, in order to support its claim that the Nation is violating its Compact based on the trust status of the Wittenberg Parcel, SMC would have to bring an action pursuant to the APA challenging both the United States continuously holding the parcel in trust for the Nation since 1969, *see* Exhibit A to Dkt #28-1, and the 1986 Proclamation that the Parcel is Ho-Chunk reservation land. Supp.App.193. *Big Lagoon Rancheria*, 789 F.3d 947. A challenge to the Parcel's trust and reservation status based on the APA is clearly an action at law and it is subject to a federal statute of limitation, 28 U.S.C. § 2401(a). Given that the only way that SMC could challenge the status of the Wittenberg Parcel was through claims brought pursuant to the APA, an action at law, it is clear that SMC's claims are not exclusively equitable and the APA statute of limitations applies to those claims.

Even if the claims arising from the APA are put aside, SMC is not seeking exclusively equitable relief. In its prayer for relief, SMC seeks declaratory as well as injunctive relief. Ab0051-0052. "Actions for declaratory judgments are neither legal nor equitable, and courts have therefore had to look to the kind of action that would have been brought had Congress not provided the declaratory judgment remedy." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. at 284. Here, SMC's claims are based on alleged violations of the Compact, which are breach of contract claims. Breach of contract claims are generally considered actions at law subject to statutes of limitation, as the District Court's decision illustrates. *See DelCostello*, 462 U.S. at 158. The District Court correctly ruled that SMC's claims are barred by the statute of limitations applicable to breach of contract claims, regardless of the fact that SMC seeks injunctive relief.

SMC next asserts that "[l]aches, rather than statute of limitations, is the appropriate defense to challenge the timeliness of claims for equitable relief," but then insists that "the doctrine of laches would not bar its claims." OB 22.

SMC's laches argument begins with the false assertion that "[t]he Appellees in this case have never asserted the equitable defense of laches." OB 22. Both the Nation and the State asserted laches as an affirmative defense in their answers. Supp.App.14; Ab0185-0186. Additionally, the District Court record reveals that SMC was aware of the State's assertion of laches as a defense—SMC filed a motion to strike the State's affirmative defenses, including the State's assertion of laches. *See* Dkt #48, Dkt #49. Finally, the Nation argued before the District Court that, to the extent laches applied, "[t]he Nation clearly meets the requirements for the application of laches" because SMC unreasonably delayed and the Nation would be prejudiced. Ab0215.

SMC also attempts to distort the standard for the application of laches. Citing *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1978 (2014), SMC asserts that "[e]quitable remedies, such as the prospective injunctive relief sought here, may be foreclosed at the litigation's outset due to a delay in commencing suit only in 'extraordinary circumstances,' such as the need to prevent unjust hardship on innocent third parties. . . . No such extraordinary circumstances are present here." OB 22. SMC's characterization of the ruling in *Petrella* is misleading. The *Petrella* court addressed the question of whether the doctrine of laches could bar a claim that was brought *within* the statute of limitations period for the claim. The *Petrella* court concluded that, in the highly unusual context of that case, the application of laches would require "extraordinary circumstances," since the claims were otherwise timely under the applicable statute of limitations. *Id.* at 1978.

The correct standard for the application of laches is far less restrictive:

> The equitable doctrine of laches is derived from the maxim that those who sleep on their rights, lose them. Laches addresses delay in the pursuit of a right when a party must assert that right in order to benefit from it. For laches to apply in a particular case, the party asserting the defense must demonstrate: (1) an unreasonable lack of diligence by the party against whom the defense is asserted and (2) prejudice arising therefrom.

Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 820 (1999); *Russell v. Todd*, 309 U.S. 280, 287 (1940); *McKnight v. Taylor*, 42 U.S. (1 How.) 161 (1843). Thus, under the correct standard for the application of laches, "extraordinary circumstances" are not required.

The existence of the first element of laches is not open to debate because SMC admits that it failed to take any action to assert its claims for at least nine years: "SMC's tolerance of a Wittenberg facility that did not materially threaten SMC's ability to generate sufficient revenues to fund tribal governmental revenue is excusable." OB 22. This statement is an unqualified admission that SMC sat on its rights from the time the Nation opened its Wittenberg gaming facility until SMC filed this lawsuit. In *tolerating* the Wittenberg facility, because it did not deem the gaming at the Wittenberg facility to be sufficiently damaging to SMC's interests, SMC consciously decided not to take any action. It did so despite its knowledge of the existence and nature of the gaming operations on the Wittenberg Parcel and the provisions of the Nation's Compact pursuant to which the gaming was being conducted: "*Although SMC had reason to believe that the Wittenberg Casino violated IGRA and the Ho-Chunk Compact since Ho-Chunk opened in 2008*, the initial gaming activities at the Wittenberg Casino did not pose an ominous threat to SMC's ability to fund its government through its own gaming operation." OB 6. (emphasis added.)

In its Complaint, SMC alleges that "Ho-Chunk's class III gaming activities on the Wittenberg Parcel constitute a violation of IGRA's prohibition against tribal gaming activities on lands acquired in trust after October 17, 1988." Ab0049. Whether the specific number of

machines in operation at the Wittenberg facility "materially threaten SMC's ability to generate sufficient revenues to fund tribal governmental revenue" is irrelevant to the question of whether the Wittenberg Parcel was in trust on October 17, 1988. Either class III gaming on the parcel is prohibited by the IGRA and is a violation of the Nation's compact or it is not. If SMC's allegations are accepted as true, its claim would date back to, at the latest, the time that class III gaming was first conducted at the Wittenberg facility, in 2008.[9] Ab0045. SMC's "tolerance" of gaming that it believed to be conducted in violation of the IGRA and the Compact constitutes a conscious decision not to take action for at least nine years. SMC's delay was not reasonable or excusable.

Similarly, the increase in the number of class III gaming devices operated at the facility from approximately 500 to approximately 800 did not engender SMC's claim that the gaming at the Wittenberg facility violated the definition of "Ancillary Facility" in the Compact. In its Complaint, SMC alleges that the operation of 502 machines violates that definition as much as the operation of approximately 800 machines:

> Ho-Chunk's *present gaming activities on the Wittenberg Parcel squarely fit the definition of a Gaming Facility* under the Ho-Chunk Compact, which is not allowed in Shawano County. . . .
>
> Ho-Chunk's additional gaming activities on the Wittenberg Parcel at the expanded Wittenberg Casino *will continue to define the Primary Business Purpose of the facility* because gaming activities are certain to continue to generate more than fifty percent (50%) of the net revenue of the facility.

Ab0051 (emphasis added). *See* Ab0103-0105.

These allegations make it clear that SMC knowingly slept on any right it had to initiate an action based on the definition of "Ancillary Facility" for at least nine years. Again, that is not reasonable.

[9] Arguably, SMC's claim dates back to 2003, when the Nation and the State entered into, and the Assistant Secretary approved, the Second Amendment to the Compact, which authorized class III gaming on the Wittenberg Parcel.

With regard to the second element of laches, there is no question that SMC's delay in bringing the claims would prejudice the Nation. The Nation and the State entered into the Second Amendment to its Compact in 2003, which authorized the Nation to conduct class III gaming in Shawano County and amended the definition of "Ancillary Facility" in the Nation's Compact. Ab0045; Supp.App.7-8; Supp.App.65. Those amendments to the Compact were based on the Nation's and the State's understanding that the operation of class III gaming on the Wittenberg Parcel was permitted under the IGRA and the Compact. Supp.App.134-135; Supp.App.64-66. In 2008, the Nation constructed the Wittenberg Facility at great cost. Ab0045, ¶ 41. The Nation has operated the facility since 2008. *Id*. Based on the success of the Wittenberg Facility and the amended definition of Ancillary Facility in the Second Amendment to the Nation's Compact, the Nation invested significant sums in the planning and construction of the expanded Wittenberg Facility. Dkt# 33, pp. 1-2, ¶ 2.

If SMC had brought its claims nine years ago, those claims would have been resolved before the Nation had built and operated the facility and made decisions based on the expectation that it would derive revenues from gaming on the Wittenberg Parcel. Furthermore, since SMC's claims challenge the trust and reservation status of the Wittenberg Parcel, those claims prejudice the Nation by interfering with the Nation's ownership and use of its lands. If SMC had prevailed on those claims, the Nation's planning for economic development, including the conduct and expansion of gaming at the Wittenberg facility, investment in and construction of non-gaming facilities on the Wittenberg Parcel, and the hiring of employees for both gaming and non-gaming activities on the Wittenberg Parcel, might have been significantly different. SMC's claims might have also directly impacted the Nation's allocation of tribal revenue for tribal programs and services. If SMC is permitted to challenge the Nation's right to conduct gaming on the parcel and the scope of that gaming, as permitted by the Second Amendment to the Nation's Compact, nine

years after its claims arose, the Nation could experience significant economic and governmental disruption that would not have occurred if SMC had asserted its claims in a timely fashion. Thus, the Nation meets the second prong in the laches analysis.[10]

Finally, the cases cited by SMC reveal that application of statutes of limitation and laches are closely related means of addressing untimely claims, not mechanisms that can be played against one another for the purpose of relieving litigants of the obligation to bring their claims in a timely fashion. Revealingly, federal courts' practice of borrowing state statutes of limitation where no federal statute of limitations applies arises from the application of the doctrine of laches and the question of whether statutes of limitation can be applied to equitable claims:

> In federal courts of equity the doctrine of laches was early supplemented by the rule that when the question is of lapse of time barring relief in equity, such courts, even though not regarding themselves as bound by state statutes of limitations, will nevertheless, when consonant with equitable principles, adopt and apply as their own, the local statute of limitations applicable to the equitable causes of action in the judicial district in which the case is heard.

Russell, 309 U.S. at 288.

The *Hot Wax* court also made it clear that, even where laches applies, statutes of limitations should be a guide to the application of laches: "Rather than refusing to apply laches when plaintiffs bring claims within the analogous state statute of limitations as [Plaintiff] Hot Wax suggests, courts have used this analogous limitations period as a baseline for determining whether a presumption of laches exists." *Hot Wax*, 191 F.3d at 821, (citing *Tandy Corp. v. Malone & Hyde, Inc*., 769 F.2d 362, 365 (6th Cir. 1985) ("Under equitable principles the statute of limitations applicable to analogous actions at law is used to create a 'presumption of laches.' This principle 'presumes' that an action is barred if not brought within the period of the statute of limitations and is alive if brought within the period.")).

[10] SMC does not argue in its Opening Brief that the doctrine of laches cannot be asserted against a sovereign Indian tribe. Thus, SMC has waived that argument and cannot assert it on reply.

SMC's claims are barred by both the applicable statutes of limitation and laches. The District Court's dismissal of SMC's claims must be upheld.

1. SMC's Change in Its Claims Has a Number of Other Consequences for Its Appeal.

There are two other highly significant consequences of SMC's fundamental alteration of its claims in an attempt to avoid the application of statutes of limitation. First, SMC's new claims are in direct and irreconcilable conflict with the allegations in SMC's complaint and the sworn affidavits filed in support of its motion for a preliminary injunction. *See, e.g.*, Ab0051, ¶¶ 79, 80; Ab0103-0104, ¶¶ 40, 42, 44. In its order denying SMC's motion for leave to amend its complaint, the District Court ruled that SMC was not permitted to change its claims in precisely the way that it is attempting to in its Opening Brief: "The Stockbridge-Munsee alleged in their April 19 complaint that the Wittenberg casino was operating and would continue to operate as a gaming facility. They expressed no doubt about these allegations at the time." Aa019. The District Court contrasted the allegations in the Complaint with those in the proposed amended complaint: "Now the Stockbridge-Munsee want to assert allegations directly contrary to [SMC President Shannon] Holsey's sworn testimony and the allegations that they previously certified had evidentiary support: that as of April 2017, the Wittenberg casino was *not* operating as a gaming facility." Aa020. On that basis, the District Court denied SMC's motion for leave to amend its complaint because it would violate Fed. R. Civ. P. 8(d): "The Stockbridge-Munsee do not offer any valid explanation—such as new evidence—that would account for this about-face. [Fed. R. Civ. P.] Rule 8(d) does not allow 'inconsistent factual allegations . . . made not because of uncertainty concerning the facts, but to avoid the legal effect of facts that were known from the beginning.' . . . It appears that the Stockbridge-Munsee are attempting just that." Aa020-021.

As a result of the District Court's ruling, the facts that SMC asserts as the basis for its argument in the Opening Brief that its claims are not barred by laches are not in the Court record. Those factual assertions and any argument based on those factual assertions, therefore, must be struck. *Gross v. Town of Cicero*, 619 F.3d 697, 703, 708 (7th Cir. 2010) ("Beyond striking Gross's statement of facts, we strike any of the parties' factual assertions, in any section of their briefs, that lack direct citation to easily identifiable support in the record.")

Second, SMC's admission that it decided to tolerate gaming at the Wittenberg Facility waives the argument that the gaming at the Wittenberg Casino constitutes a continuing violation of SMC's rights. *See Turley v. Rednour*, 729 F.3d 645, 654–55 (7th Cir. 2013) (Easterbrook, J., concurring). If SMC suffered no injury until the date that the number of games in operation at the Wittenberg Facility was increased to approximately 800, there is no basis for claiming that a continuing violation dating back to the commencement of gaming operations at the Wittenberg Facility was occurring at the time that the Complaint was filed and that, therefore, the statute of limitations was tolled.[11]

D. Wisconsin's Statute of Limitations for Breach of Contract Actions Is the Most Analogous State Statute of Limitations.

In ruling that SMC's claims against the Nation were time-barred, the District Court correctly found that, "when a federal law does not contain an express statute of limitations, federal courts must borrow the most suitable statute or other rule of timeliness from some other source. [The Supreme Court has] generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law." Aa006 (citing *DelCostello*, 462 U.S. at 158). Applying these principles to SMC's causes of action, the District

[11] Although a number of cases cited by SMC touch upon the concept of ongoing violations, the Opening Brief did not include an explicit argument that the Nation's conduct constitutes an ongoing violation of SMC's rights. For that reason as well, SMC has waived that argument. *El-Gharabli v. Immigration & Naturalization Serv.*, 796 F.2d 935, 940 (7th Cir. 1986).

Court found that a six-year statute of limitations applied, based on Wisconsin's statute of limitations for breach of contract actions, Wis. Stat. § 893.43, and the Administrative Procedure Act. Aa007.

In its Opening Brief, SMC argues that the District Court erred because "[t]he most analogous Wisconsin statute of limitations . . . is the Wisconsin statute of limitations applicable to claims of public nuisance for illegal gambling." OB 30.[12] SMC's contention is meritless.

The cause of action created by Section (d)(7)(A)(ii), upon which all of SMC's claims necessarily rely, vests the district courts with jurisdiction over causes of action to enjoin a class III gaming activity that is "conducted in violation of any Tribal-State compact" entered into under the IGRA. The only causes of action that § 2710(d)(7)(A)(ii) creates, thus, are claims of breach of a compact.[13] Tribal–State gaming compacts are contracts negotiated between Indian tribes and states pursuant to the IGRA. A "breach of compact" claim is no different than a "breach of contract" claim.[14] That is why "[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 at 1073 (*citing Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989)), and district courts routinely treat Tribal-State compact cases as breach of contract actions. *See, e.g.*, *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d at 1098.

The court interpretations addressing compact violations as breach of contract actions, furthermore, are consistent Congress' understanding that tribal-state compacts are to be treated as contracts between tribes and states: "Any Tribal-State compact negotiated under subparagraph

[12] SMC further asserts—without citation to supporting authority—that "if a nuisance is ongoing and capable of abatement, an action to enjoin the activity is not barred by the statute of limitations . . . ." *Id.*

[13] Notably, 25 U.S.C. §2710(d)(7)(A)(2) does *not* vest the district courts with jurisdiction over (or waive tribal sovereign immunity with respect to) claims regarding violations of *the IGRA.*

[14] SMC attempts to reclassify tribal-state compacts as "statute[s] or duly-promulgated regulations," OB 32. There is no legal support for SMC's contention and SMC cites to none.

(A) may include provisions relating to—. . . remedies for *breach of contract*." 25 U.S.C. § 2710(d)(3)(C)(vii) (emphasis added).

SMC's argument that a state law public nuisance claim is more analogous than a breach of contract claim is untenable on its face. The IGRA does not create a cause of action for public nuisance claims. No court has addressed a claim brought pursuant to § 2710(d)(7)(A)(ii) as a nuisance claim. The only cause of action created by § 2710(d)(7)(A)(ii) is a breach of compact/breach of contract claim. The only issue before a court addressing such a claim is whether or not the gaming breaches the contract—not whether the gaming is a public nuisance. IGRA's jurisdictional grant cannot be applied to a state law nuisance claim. As a result, the District Court could not borrow the statute of limitations applicable to public nuisance claims.[15]

SMC also argues that the District Court erred in concluding that the APA's six-year statute of limitation could be applied to SMC's claims. OB 33-35. SMC asserts that the District Court did not have a legal basis to look to federal, rather than state, law to find a limitations period from an analogous statute. OB 33. SMC further alleges that "the APA would not serve as an analogous statute of limitations to bar SMC's claims because there is no final agency action to which SMC takes issue." OB 34.

SMC misunderstands both the Nation's argument and the District Court's conclusion. The Nation did not argue that the APA statute of limitations, 28 U.S.C. § 2401(a), could be borrowed as the statute of limitation applicable to an analogous cause of action.[16] The Nation's

[15] Because § 2710(d)(7)(A)(ii) does not encompass nuisance claims, furthermore, SMC cannot bring a state law-based public nuisance claim against the Nation. Wisconsin's public nuisance laws do not apply to the Nation and such a suit would be barred by the Nation's sovereign immunity.

[16] To the degree that the Court interprets the District Court's decision to apply the APA statute of limitation as borrowing an analogous statute, borrowing federal statutes is permissible. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. at 147-148; *DelCostello*, 462 U.S. at 171-172.

argument is that, in order to assert the claims in its complaint, SMC was required to, but did not, bring APA causes of action against the federal government challenging the actions that authorized the Nation's gaming at Wittenberg.

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 Church in 1974, after the Nation allegedly failed to construct housing on the Parcel, and it was not returned to trust status until 1993. Ab0049. On that basis, SMC claims that gaming cannot be conducted on the Wittenberg Parcel, pursuant to 25 U.S.C. § 2719(a).[17] *Id*. Likewise, SMC's claims clearly implicate the federal government's proclamation that formally added the Wittenberg Parcel to the Nation's reservation. Supp.App.193. A claim challenging the validity of the trust status of the Wittenberg Parcel in 1974 and/or the Proclamation would have had to have been brought against the appropriate federal agencies within the statute of limitation applicable to the APA. *Big Lagoon Rancheria*, 789 F.3d at 953; *Patchak*, 567 U.S. at 220 ("[A] challenge to the BIA's 'decision to take land into trust' is 'a garden-variety APA claim.'").

SMC cannot "use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions.'" *Big Lagoon Rancheria*, 789 F.3d at 953. SMC did not timely challenge the federal government's actions that authorized the Nation's gaming at

[17] The Nation is not misconstruing "SMC's claims as challenging the current trust status of the Wittenberg parcel." OB 33. The current trust status is not at issue. SMC claims that title to the parcel went out of trust in 1974 and was not returned to trust status until 1993. The United States did not change the trust status of the parcel in 1974. Dkt #28-1, Exhibit A. The parcel has been continuously held in trust since 1974. *Id*. SMC's claim based on the trust status of the parcel could only go forward if SMC challenged the federal government's failure, in 1974, to take the parcel out of trust status based on SMC's theory that title automatically reverted to the Native American Church.

the Wittenberg facility and its claims are now barred by the statute of limitations applicable to the APA.

E. SMC's Argument that the IGRA Preempts the Application of Wisconsin's Statute of Limitations for Breach of Contract Fails Because a Federal, Not State, Statute of Limitations Was Applied to SMC's Claims and Because SMC Waived This Argument in the District Court.

SMC asserts that, because the IGRA preempts the field with respect to Indian gaming, and because "SMC did not consent to be subjected to the application of Wisconsin's statutes of limitations," the District Court erred by subjecting "SMC to the laws of the State of Wisconsin without its consent, and without a clear mandate from Congress." OB 24-29. This argument is meritless.

As discussed in Section A above, the District Court did not subject SMC to a state statute. It borrowed the statute of limitations from the most analogous state claim and applied it as a federal statute of limitations. *See Wilson v. Garcia*, 471 U.S. at 266-267. SMC's argument that the IGRA preempts Wisconsin's statute of limitations for breach of contract claims makes no sense, or is simply irrelevant, because the District Court did not apply state law.

SMC's assertion that the IGRA preempts the application of Wisconsin law also fails because SMC waived this argument before the District Court and cannot, therefore, raise it here. This issue was, in fact, addressed and resolved directly by the District Court.

In its brief responding to the District Court's order directing the State and SMC to address whether SMC's claims against the State were barred by the applicable statute of limitations—a brief filed after the Nation had been dismissed from the action—SMC raised, for the first time, the argument that the Wisconsin statute of limitations for breach of contract was preempted by the IGRA. Aa0402-0406. The District Court refused to address that argument:

> One preliminary point before delving into the analysis of the claims against the state and governor. The Stockbridge-Munsee's brief reads in part like a motion

> for reconsideration. The court will not reconsider the conclusions of law it reached in its October 25 order. It gave the Stockbridge-Munsee ample opportunity to brief these issues before issuing its October 25 order. *The Stockbridge-Munsee could have raised many of the arguments they make here the first time around, and their failure to do so is not a valid reason for reconsideration. See Caisse Nationale*, 90 F.3d at 1270.

Aa0022 (emphasis added).

Among the arguments made for the first time in SMC's briefing to the District Court was the preemption argument presented here.[18] The District Court ruled that SMC had waived this argument and refused to address it.

This Court has "repeatedly stated that 'a party may not raise an issue for the first time on appeal. Consequently, a party who fails to adequately present an issue to the district court has waived the issue for purposes of appeal.'" *Williams v. Dieball*, 724 F.3d at 961 (quoting *Fednav Int'l Ltd. v. Cont'l Ins. Co*., 624 F.3d 834, 841 (7th Cir. 2010) (citations omitted)). This Court has "specifically emphasized that 'a party has waived the ability to make a specific argument for the first time on appeal when the party failed to present that specific argument to the district court, even though the issue may have been before the district court in more general terms.'" *Id*. *See Puffer v. Allstate Ins. Co*., 675 F.3d at 718.

SMC has not challenged the District Court's ruling that SMC had waived its argument based on preemption. It cannot do so in reply to this brief. *El-Gharabli v. Immigration & Naturalization Serv.*, 796 F.2d at 940. SMC's argument that the Wisconsin statute of limitations for breach of contract is preempted by the IGRA is, therefore, waived for the purposes of this appeal.

[18] Here, SMC's arguments regarding preemption, OB 25-26, 28-29, are (almost entirely) copied and pasted from the arguments SMC made in its brief regarding whether its claims against the State were also untimely.

CONCLUSION

For all of the forgoing reasons, the Nation respectfully requests that the Court affirm the dismissal of SMC's claims against the Nation.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limit of Fed. R. App. P. 32(a)(7)(B), typeface requirements of Fed R. App. P. 32(a)(5), and type style requirements of Fed. R. App. P. 32(a)(6).

This brief contains 13,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12 point Times New Roman.

DATED: June 27, 2018

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CERTIFICATE OF SERVICE

I certify on June 27, 2018, I electronically filed the foregoing THE HO-CHUNK NATION'S ANSWERING BRIEF with the clerk of the court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

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