No. 18-1449

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

STOCKBRIDGE-MUNSEE COMMUNITY,
a federally-recognized Indian Tribe,

Plaintiff-Appellant,

v.

STATE OF WISCONSIN; and SCOTT WALKER, in his official capacity as the Governor of Wisconsin; and THE HO-CHUNK NATION, a federally recognized Indian tribe,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
JAMES D. PETERSON, DISTRICT JUDGE
CASE No.: 17-cv-249-JDP

STOCKBRIDGE-MUNSEE COMMUNITY'S REPLY BRIEF

SCOTT CROWELL
Crowell Law Office-
Tribal Advocacy Group
1487 W State Route 89A, Suite 8
Sedona, AZ 86336
Telephone: (425) 802-5369
scottcrowell@clotag.net

BRYAN NEWLAND
Fletcher Law PLLC
P.O. Box 74
Brimley, MI 49715
Telephone: (517) 862-5570
bnewland@fletcherlawplllc.com

BRIDGET SWANKE
Senior Counsel
Stockbridge-Munsee Community
P.O. Box 70, N8476 Moh He Con Nuck Road,
Bowler, WI 54416
Telephone: (715) 793-4868
bridget.swanke@mohican-nsn.gov

Attorneys for Plaintiff/Appellant
Stockbridge-Munsee Community

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Congress did not intend, and this Court cannot interpret, 25 U.S.C. § 2710(d)(7)(A)(ii) in a manner that allows for the claims of Plaintiff-Appellant Stockbridge-Munsee Community ("SMC") to be dismissed as untimely. To affirm the lower court is to approve of current illegal gaming on Indian lands. SMC, in its Opening Brief, sets out that this litigation is about Congress intending to have Indian tribes use the federal courts to ensure that gaming on other tribes' Indian lands is conducted lawfully and in conformance with the other tribe's tribal-state compact in effect.

Defendant-Appellee Ho-Chunk Nation ("Ho-Chunk") and Defendant-Appellees State of Wisconsin and Scott Walker (collectively referred to as "State") are trying to frame this litigation as simply a commercial contractual dispute, subject to standard state laws governing commercial contracts. Framing this litigation in such a manner legitimizes Ho-Chunk's and the State's profit motives: for Ho-Chunk, the pecuniary (and political) motive of its elected tribal officials to increase gaming revenues for direct distribution to tribal members, and for the State, the motive to protect and increase the large amount of revenue Ho-Chunk provides to the State treasury. Framing this litigation in this manner is also wrong. Fortunately, Congress had the foresight to provide remedies to ensure that lawful gaming could be enforced in circumstances such as those found here, where Ho-Chunk's and the State's financial interests in expanded gaming compromise and

directly interfere with their responsibility to ensure that gaming on Ho-Chunk Indian lands is lawful.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO CONSIDER SMC'S CLAIMS AGAINST HO-CHUNK.

A. Congress, In Establishing A Federal Cause Of Action In 25 U.S.C. § 2710(d)(7)(A)(ii), Did Not Intend For State Statutes Of Limitations To Be Borrowed And Applied.

The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2719 *et seq*. ("IGRA") provides that:

> 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[.]

25 U.S.C. § 2710(d)(7)(A)(ii).

A court's effort to construe the meaning of a statute begins with the language of the statute itself. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) ("In statutory construction, we begin with the language of the statute.); and, *Northcutt v. General Motors Hourly-Rate Pension*, 467 F.3d 1031, 1035 (7th Cir. 2006)("…we must begin our inquiry with the language of the statute."). Where the language of a statute is clear, and addresses the issue at hand, the court's inquiry is finished. *Id*.

The Sixth Circuit has explained all of the elements required for a claim to fall within IGRA's grant of jurisdiction under 25 U.S.C. § 2710(d)(7)(A)(ii):

> § 2710(d)(7)(A)(ii) supplies federal jurisdiction only where all of the following are true: (1) ***the plaintiff is a State or an Indian tribe***; (2) the cause of action seeks to enjoin a class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal–State compact; and (5) the Tribal–State compact is in effect.

Michigan v. Bay Mills Indian Community, 695 F.3d 406 (6th Cir. 2012); aff'd, 134 S. Ct. 2024 (2014)(emphasis added). SMC's claims against Ho-Chunk meet all of these requirements.

SMC is a federally-recognized Indian tribe. SMC's Complaint and the Proposed First Amended Complaint ("PFAC") allege that Ho-Chunk is operating the Wittenberg Casino in violation of Ho-Chunk's class III gaming compact (the "Ho-Chunk Compact"), and that Ho-Chunk's unlawful gaming activities are occurring on Indian lands. SMC's Complaint and PFAC seek to enjoin that unlawful gaming. *Id*., Dkt. 5 at 13-16(Ab0049-052) ; Dkt. 75-1 at 14-16(Ab0444-446) and 20(Ab0450).

SMC sets forth in its Opening Brief at 15-22 that claims for injunctive relief are, by their very nature, not barred by statutes of limitations. Congress' express limitation of the remedy to prospective equitable relief under 25 U.S.C. § 2710(d)(7)(A)(ii) is itself dispositive proof that Congress did not intend for courts

to borrow state statutes of limitations. An analogous situation was addressed by the United States Supreme Court in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485-86 (1996):

> Unlike CERCLA, RCRA[1] contains no statute of limitations. . . . RCRA permits citizen suits against persons responsible for "waste which may present an imminent and substantial endangerment to health or the environment" does not authorize a suit based upon an allegation that the contaminated site posed such an endangerment at some time in the past. The meaning of this timing restriction is plain: An endangerment can only be "imminent" if it "threaten[s] to occur immediately.

Id. at 485-86. *See also Village of Riverdale v. 138th Street Joint Venture*, 527 F. Supp. 2d 760 (N.D. Ill. 2007), where the court, in applying *Meghrig,* reasoned:

> RCRA contains its own inherent timing provision because it only authorizes suit to protect against activities that may present an imminent and substantial endangerment to health or the environment. This Court has already held that Riverdale has stated a legally cognizable claim under the RCRA and thus Riverdale satisfies the timing provision implicit in the elements of the cause of action provided in the statute.

Id. at 768. Similarly, IGRA allows only for prospective equitable relief; thus SMC satisfied the timing provision implicit in the elements of the cause of action.

[1] Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq*.

B. Ho-Chunk's Arguments That § 2710(d)(7)(A)(ii) Does Not Provide The District Court Jurisdiction To Hear SMC's Claims Regardless Of Timeliness Are Unavailing.

Ho-Chunk has used its brief essentially to mount a cross-appeal of the District Court's decision not to address on all of Ho-Chunk's arguments when it issued its ruling.[2] Ho-Chunk argues that the District Court lacked jurisdiction over SMC's claims because, *inter alia*, IGRA does not authorize one tribe to sue another tribe to enjoin violations of the other tribe's gaming compact. HCNAB at 10-15[3]. Ho-Chunk stretches and distorts IGRA's language in an effort to argue that the statute means something other than what it says. SMC's action falls within IGRA's plain language establishing jurisdiction at 25 U.S.C. § 2710(d)(7)(A)(ii). The inquiry need not proceed any further.

Ho-Chunk attempts to argue that the reference to "***a*** State or Indian tribe" in § 2710(d)(7)(A)(ii)(emphasis added) somehow refers to "***the*** Indian tribe" in § 2710(d)(3)(A)(emphasis added). HCNAB at 12. Ho-Chunk then attempts to stitch these two subsections to a separate section of IGRA, codified at 18 U.S.C. § 1166 assimilating state gaming laws into federal criminal law. *Id*. at 14. Ho-Chunk

[2] *See* Opening Brief at 10, n.8. SMC acknowledges that Ho-Chunk may reintroduce lack of subject matter jurisdiction as a defense on appeal. *See United States v. Kincaid*, 571 F.3d 648, 653 (7th Cir. 2009).

[3] The Ho-Chunk Nation's Answering Brief, (Doc. 24) is referred to as "HCNAB". The Resubmitted Restricted Response Brief of State of Wisconsin and Scott Walker (Doc. 22) is referred to as "STATERB ". SMC's Corrected and Resubmitted Opening Brief (Doc. 18) is referred to as "Opening Brief"

concludes its effort by taking these separate statutory provisions, and tying them to an assumption that Congress must have intended IGRA's grant of jurisdiction to allow only lawsuits against non-tribal entities operating gaming facilities on tribal lands. HCNAB at 12.

The question is not nearly as complicated as Ho-Chunk argues. IGRA's language is abundantly clear: federal courts have jurisdiction over claims brought by a state or Indian tribe to enjoin unlawful gaming. 25 U.S.C. § 2710(d)(7)(A)(ii).

The only other federal court to examine this question has rejected the same arguments Ho-Chunk is raising here. *See Bay Mills Indian Community v. Little Traverse Bay Bands of Odawa Indians*, unpublished opinion in File No. 5:99-CV-88, 1999 U.S. Dist. LEXIS 20314 (W.D. Mich. 1999)("*Little Traverse*"):[4]

> There is nothing in the language of § 2710(d)(7)(A)(ii) that renders it ambiguous. 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.

[4] *Little Traverse,* issued in 1999, is not binding on this Court. Ho-Chunk has cited to the court's opinion in *Little Traverse* in its brief. SMC does not object to Ho-Chunk's citation to the *Little Traverse* decision, and asks this Court to consider the reasoning in that opinion to the extent it has persuasive value. Westlaw citation unavailable.

> Whether or not the 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.

IGRA's language clearly authorizes one tribe to file an action against another tribe to enjoin gaming in violation of the other tribe's class III gaming compact.[5]

C. SMC's Complaint And PFAC Properly Allege (And Appellees Do Not Dispute) That The Gaming Activity At Issue Is Occurring On "Indian Lands".

Ho-Chunk argues that even if IGRA authorizes suits by one tribe against another, SMC's suit does not fall within this grant of jurisdiction because SMC has alleged Ho-Chunk is operating the Wittenberg Casino on lands that are not eligible for gaming. HCNAB at 15-17. Once again, Ho-Chunk has stretched IGRA's statutory language beyond its breaking point.

IGRA authorizes SMC to bring its suit against Ho-Chunk to enjoin gaming in violation of the Ho-Chunk Compact, so long as the gaming activity is occurring on "Indian lands." 25 U.S.C. § 2710(d)(7)(A)(ii); *Bay Mills*, 695 F.3d at 412. IGRA provides a statutory definition for the term "Indian lands," which includes lands "held in trust by the United States for the benefit of any Indian tribe…." 25

[5] SMC does not argue that IGRA's grant of jurisdiction means that any tribe may file any suit against another tribe at any time. A plaintiff tribe must establish Article III justiciability and establish that it has standing to bring such a claim.

U.S.C. § 2703(4). SMC has not alleged or argued that the land upon which the Wittenberg Casino is constructed (the "Wittenberg Parcel") is not held in trust for the benefit of Ho-Chunk. To the contrary, SMC has expressly alleged that the Wittenberg Parcel is held in trust for Ho-Chunk. Dkt. 5 at 13(Ab0049); Dkt 75-1 at 14(Ab0444). SMC only argues that Ho-Chunk may not conduct gaming activities on the Wittenberg Parcel because IGRA and the Ho-Chunk Compact prohibit it.

In enacting IGRA, Congress made it clear that certain trust lands would not be eligible for gaming activities. 25 U.S.C. § 2719(a)("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***…")(emphasis added). It is not incongruent for SMC to assert that the Wittenberg Parcel is located on land held in trust for Ho-Chunk, but that the land is ineligible for gaming because it was acquired after October 17, 1988.

Ho-Chunk is once again attempting to make IGRA's language more complicated than it is, by attempting to find an unwritten exemption to the definition of "Indian lands" in § 2719, and stitching it together with other sections of IGRA authorizing gaming on Indian lands. HCNAB at 16-17. But IGRA's language is easy to understand: "Indian lands" include lands held in trust for the benefit of Indian tribes, but tribes may not conduct gaming on lands acquired in

trust after October 17, 1988 unless those lands qualify within certain narrow exceptions not at issue here. 25 U.S.C. §§ 2703(4), 2719.

Ho-Chunk's *de facto* cross-appeal, if correct, requires an absurd remand. In order to prevail on its jurisdictional challenge, Ho-Chunk would have to establish that the Wittenberg Parcel does not constitute Indian lands. Such a finding would deprive the District Court of jurisdiction to hear SMC's claims, but the real-world effect would be to establish the clear illegality of all gaming offered on the Wittenberg Parcel. SMC would support such a remand to be able to establish the merits of its claim that the Wittenberg Parcel is now in trust, but ineligible for gaming.

SMC's facts as pled in the Complaint and PFAC control for purposes of this appeal. SMC's claims clearly satisfy the requirements for federal jurisdiction because SMC has alleged that the Wittenberg Casino is located on Indian lands.[6]

[6] Ho-Chunk's reliance on the Supreme Court's opinion in *Bay Mills* is misplaced. In that case, the plaintiff explicitly alleged that the tribe's parcel was not held in trust, and did not satisfy IGRA's definition of "Indian lands." *See Bay Mills*, 695 F.3d at 412 (explaining that the state alleged the gaming parcel was not held in trust, or subject to a restraint on alienation, within IGRA's definition of "Indian lands"). That is the critical distinction from this case, where SMC has always asserted that the Wittenberg Casino is located on trust land, but that the land was acquired in trust after October 17, 1988.

II. SMC'S CLAIMS AGAINST HO-CHUNK ARE NOT BARRED BY ANY STATUTE OF LIMITATIONS.

A. Nothing In Federal Law Required The District Court To Apply Wisconsin's Statute Of Limitations To SMC's Claims; The District Court's Application Of State Law To SMC's Claims Violates Federal Law.

The District Court erred in concluding that IGRA's abrogation of Ho-Chunk's sovereign immunity from a claim under 25 U.S.C. § 2710(d)(7)(A)(ii) is also an abrogation of SMC's sovereign immunity from the application of Wisconsin's statutes of limitations. As a sovereign tribe, SMC (and Ho-Chunk) is vested with inherent immunity from state statutes of limitations. *Block v. North Dakota Board of University and School Lands*, 461 U.S. 273, 284-85 (1983). Because of that immunity, any abrogation of that immunity must be narrowly construed "in light of the traditional rule exempting proceedings brought by a sovereign from any time bar." *BP America Production Co. v. Burton*, 549 U.S. 84, 100 (2006). Moreover, SMC's status as a sovereign tribe generally places it beyond the direct application of Wisconsin state law (in the absence of Congressional permission for Wisconsin to extend its jurisdiction over SMC). *See Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 732 F.3d 837, 839 (7th Cir. 2013)("Federal preemption of state law in the field of Indian affairs has persisted as a major doctrine in the Supreme Court's modern Indian law jurisprudence."); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221 (1987)("Even

to the extent that the State and county seek to regulate [Indian gaming] short of prohibition, the laws are preempted.").

On its own, either of these two principles should have prevented the District Court's application of the Wisconsin statute of limitations to bar SMC's claims against Ho-Chunk. When paired together, these doctrines clearly show the extent of the District Court's error in relying upon Congressional silence to abrogate SMC's sovereign status through the application of state law.

Congress expressly authorized one tribe to seek an injunction against another tribe in the federal courts for conducting gaming activities in violation of the other tribe's class III gaming compact. 25 U.S.C. § 2710(d)(7)(a)(ii). But, in doing so, Congress did not establish a statute of limitations for such claims.

1. SMC's inherent sovereign immunity from Wisconsin's statute of limitations (for federal law claims) remains intact.

Ho-Chunk argues that Congress's silence on the timeliness of such claims automatically requires courts to apply state statutes of limitations to tribal claims. *See* HCNAB at 22. Ho-Chunk cites to several cases highlighting the common practice of federal courts applying state statutes of limitations to lawsuits brought under federal law, where federal law does not provide a clear statute of limitations. *Id*. SMC does not contest the fact that federal courts frequently apply state statutes of limitations in such instances. Nevertheless, Ho-Chunk is wrong to assume that this practice applies with equal force to federal claims brought by sovereigns.

The United States has consistently adhered to the common law principle that sovereign governments are immune from the operation of statutes of limitations. *See Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 132 (1938)(explaining that the sovereign is exempt from the operation of statutes of limitations"); and, *United States v. Central Soya, Inc*., 697 F.2d 165, 166 (7th Cir. 1982)("The doctrine remains viable in modern law because it supports the policy judgment that the public should not suffer because of the negligence of the officers and agents upon which the Government must necessarily rely."). In *Guaranty Trust*, the Supreme Court noted that this principle is "equally applicable to all governments." 304 U.S. at 132 (quoting *United States v. Hoar*, 26 F.Cas. 329, 330 (C.C. D. Mass. 1821)(on writ of error from United States District Court). This immunity is a close relative of a sovereign's immunity from unconsented suit. *See* Joseph Mack, *Nullum Tempus: Governmental Immunity to Statutes of Limitation, Laches, and Statutes of Repose*, 73 Def. Couns. J. 180, 185 (April 2006)("*Nullum tempus* originally derived from the same common law principals that drove sovereign immunity."); and, *In re Fort Totten Metrorail Cases Arising Out of the Events of June 22, 2009*, 895 F.Supp.2d 48, 59 (D. D.C., 2012)("Of particular relevance here, *nullum tempus* immunity is generally considered a type of sovereign immunity.").

While there is scant federal case law applying this doctrine to suits brought by Indian tribes, there is no reason to believe that this inherent attribute of sovereignty would not have been vested in sovereign tribes. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978)("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."); *Bay Mills*, 134 S. Ct. at 2030 (describing sovereign immunity as an "inherent" attribute of tribal sovereignty). Nor has there been any Congressional enactment to broadly strip Indian tribes of this attribute of their sovereignty. It is therefore reasonable to assert that this common law immunity applies to Indian tribes with as much force as it does to other sovereign governments.

Ho-Chunk takes great pains to argue that the *Guaranty Trust* case is evidence that this principle does not apply to Indian tribes, noting that the Supreme Court limited this principle to domestic sovereigns, and not foreign governments. HCNAB at 25. According to Ho-Chunk, "an Indian tribe is not a domestic sovereign[.]" *Id*. at 26.

Of course, Ho-Chunk's argument stands against the entire body of federal Indian law, which has classified Indian tribes as "domestic dependent nations" subject to the plenary powers of Congress (and not the states) since the earliest cases of the Supreme Court. *See, eg*., *Cherokee Nation v. Georgia*, 30 U.S. 1,

(1831)("[Indian tribes] may, more correctly, perhaps, be denominated domestic dependent nations."); and, *Bay Mills*, 134 S. Ct. at 2030 ("Indian tribes are domestic dependent nations that exercise inherent sovereign authority."). In *Cherokee Nation*, the Supreme Court expressly rejected the tribe's effort to bring a suit in the federal courts as a foreign sovereign. 30 U.S. at 20 ("…an Indian tribe or nation within the United States is not a foreign state….").

Ho-Chunk also cites to cases where tribal claims against the United States have been barred by federal statutes of limitations in an attempt to show that Indian tribes can be subjected to statutes of limitations. *See* HCNAB at 23-24. These cases do little to advance Ho-Chunk's argument here, because they involve tribal claims against the United States that were barred by express statutes of limitations adopted by Congress. Congress clearly has the authority to abrogate tribal immunities, and to subject Indian tribes to statutes of limitations. *Bay Mills*, 134 S. Ct. at 2039 ("…Congress can abrogate that immunity as and to the extent it wishes."). But, Congress must do so expressly. *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 824 (7th Cir. 2016)("The Supreme Court has instructed time and again that if it is Congress' intent to abrogate tribal immunity, it must clearly and unequivocally express that purpose."). Any ambiguities must be resolved in favor of retaining sovereign immunity. *Id*.

Congress did not subject SMC to Wisconsin's statute of limitations for claims brought by an Indian tribe under IGRA. IGRA authorizes suits by "a State or Indian tribe" to enjoin tribal gaming in violation of a class III gaming compact. 25 U.S.C. § 2710(d)(7)(A)(ii). It does not authorize such suits by private entities or individuals – only sovereigns may bring these types of claims. The District Court inferred the absence of a federal statute of limitations on these claims to mean that state statutes of limitation must apply. But this inference runs afoul of the centuries-old common law principle that sovereign governments are not barred by statutes of limitations. As with sovereign immunity from suit, this immunity cannot be abrogated through inference. *Meyers,* 836 F.3d at 826-27("…whether an Indian tribe can claim immunity from suit. The answer to this question must be 'yes' unless Congress has told us in no uncertain terms that it is 'no.'"). While Congress often legislates with the understanding that state statutes of limitations would apply to federal claims brought by private litigants, it also legislates with the understanding that the immunities of sovereign governments cannot be abrogated by silence. *See Id*. at 827("Congress has demonstrated that it knows how to unequivocally abrogate immunity for Indian Tribes.").

Congress did not include any express language abrogating the common law immunity of sovereign states and tribes from statutes of limitations when it

authorized claims under IGRA to enjoin unlawful gaming. It was inappropriate for the District Court to manufacture such an abrogation in this case.

Even if SMC is not generally immune from the application of state statutes of limitations, the federal courts are not automatically required to apply state statutes of limitations. Rather, the courts' job is to apply the most appropriate time limitation. *See DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). The Court should not apply a state statute of limitations if it is inconsistent with federal policy. *See Oneida*, 470 U.S. at 240 ("…the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim, provided that the application of the state statute would not be inconsistent with underlying federal policies"); and, *DelCostello*, 462 U.S. at 161 ("[T]he Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind…").[7]

[7] Ho-Chunk attempts to distinguish *Oneida* on the grounds that the Court was examining application of state statutes of limitations to tribal lands. HCNAB at 24. According to Ho-Chunk, federal statutory law "prevents the application of state law to tribal interests in land." *Id*. As SMC has explained, federal courts have consistently held that IGRA preempts the application of state law to tribes. *See* Opening Brief at 24-30. Ho-Chunk cites 25 U.S.C. § 1360(b) in support of its argument. That statute expressly precludes the application of state law to tribal interests in land. Similarly, IGRA – at § 2710(d)(3)(C) – expressly provides for

As SMC explained in its opening brief, the application of Wisconsin state law to SMC's rights and remedies under IGRA is wholly inconsistent with IGRA. IGRA was crafted to balance state and tribal interests, and any application of state law to tribes was intended to result from mutual consent rather than unilateral imposition. *See* 25 U.S.C. § 2710(d); and, S. Rep. No. 100-446, 100th Cong., 2d Sess. 2 at 13-14 (explaining the justification for creating class III gaming compacts under IGRA)(1988). In light of the traditional notions regarding sovereign immunity, the traditional notions of federal preemption of the application of state laws to tribes (discussed below), and the intent to balance state and tribal interests in IGRA, it is difficult to conceive that Congress would have intended for Wisconsin's statute of limitations to apply directly to SMC with nary a word.

2. Federal law preempts the application of Wisconsin's laws to SMC.

Appellees did not respond directly to SMC's explanation of why federal law preempts the application of Wisconsin's laws to SMC's claims under IGRA. Nevertheless, it is important to reiterate this point here, because it strikes at the heart of SMC's sovereign powers.

The sovereignty of Indian tribes like SMC is inherent: it exists to the extent that it has not been abrogated. This sovereignty is distinct from the sovereignty of

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tribes and states to negotiate over the extent to which state laws will apply to tribes under IGRA.

the states. There are circumstances where Congress has subjected tribes to the application of state laws. *See, e.g*. Pub. L. 83-280 (subjecting Indian tribes to state criminal jurisdiction in certain states). *See also White Mountain Apache Tribe v. Backer*, 448 U.S. 136 (1980). In the enactent of IGRA, however, Congress intended to completely preempt the application of state laws in matters regarding Indian gaming. *See Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 545 (8th Cir. 1996) ("The legislative history indicates that Congress did not intend to transfer any jurisdictional or regulatory power to the states by means of IGRA unless a tribe consented to such a transfer in a tribal-state compact."); *Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226, 1232 (10th Cir. 2017)(noting that IGRA preempts state regulation of Indian gaming activities occurring on-reservation); and, *Tamiami Partners, Ltd. By and Through Tamiami Development Corp. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1033 (11th Cir. 1995)("The statute affirms tribal sovereignty by noting that 'unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.'")(quoting S. Rep. No. 100-446, 100th Cong., 2d Sess. 2 (1988)).

SMC's claims to enjoin Ho-Chunk's unlawful gaming activities on the Wittenberg Parcel are expressly authorized by IGRA. *See* 25 U.S.C. §

2710(d)(7)(a)(ii). There is no indication that Congress intended for IGRA to only partially preempt the application of state law, or that Congress intended for state laws to govern certain claims under IGRA. Instead, Congress intended for the application of state public policy to tribal gaming to be the subject of negotiations between two sovereigns – tribes and states. *See* 25 U.S.C. § 2710(d).

Perhaps recognizing the infirmity in its argument, Ho-Chunk claims that state statutes of limitations become federal law when borrowed by federal courts. HCNAB at 21-22. Ho-Chunk rests its argument on this point on a statement made in passing in *Wilson v. Garcia*, 471 U.S. 261 (1985). Nothing in the *Wilson* case expands upon, or explains, how a law enacted by a state legislature becomes federal law.

In the context of Indian law, this is a meaningless distinction. SMC is a sovereign tribe, and is not subject to the whims of Wisconsin's legislature – except where Congress has said so.[8] Congress has not expressed its intent to limit SMC's

[8] The District Court order applying state statutes of limitations produces the absurd result of having many tribes subject to the vagaries of multiple state legislatures because their tribal lands and gaming operations are in multiple states, examples include: (i) Fort Mojave Indian Tribe: gaming compacts with California, Nevada and Arizona; (ii) Navajo Nation: gaming compacts with Arizona and New Mexico; (iii) Quechan Indian Tribe: gaming compacts with Arizona and California; and (iv) Colorado River Indian Tribes: gaming compacts with California and Arizona. *See* official webpage of Department of the Interior, https://www.indianaffairs.gov/as-ia/oig/gaming-compacts

rights under 25 U.S.C. § 2710(d)(7)(a)(ii) to the policy desires of Wisconsin's legislators.

3. The doctrines of sovereign immunity from statutes of limitations, and federal preemption, should have prevented the application of Wisconsin's statute of limitations to SMC's claims.

Reliance on state law to limit the application and enforcement of class III compact terms would be inconsistent with the purpose of IGRA, which is to establish a national regime for the regulation and operation of Indian gaming through the negotiation of sovereign interests. *See* 25 U.S.C. §§ 2702, 2710. Allowing states to unilaterally diminish the immunity of sovereigns from statutes of limitations, and dictate the terms of enforcement of rights under IGRA, would place tribes and the federal courts at the mercy of state legislators. The Supreme Court recognized the problems inherent in this view long ago:

> "There are thirty-eight States in the Union. The limitations in like cases may be different in each State, and they may be changed at pleasure, from time to time. The government of the Union would in this respect be at the mercy of the States."

United States v. Thompson, 98 U.S. 486, 491 (1878). The Supreme Court also explained that Congress must make the decision to allow states to override the immunities of other sovereigns, and limit their ability to bring claims in the federal courts. *See Id*. at 490 ("The States can exercise no power over [the federal courts] or their proceedings, except so far as Congress shall allow.").

Either of the doctrines explained above should have barred the District Court's application of Wisconsin's statute of limitations to SMC's claims. Considering both doctrines together, it is readily apparent how far the District Court reached to hold that SMC's claims were barred by Wisconsin's statute of limitations. This was in error.

B. Laches Is The Appropriate Time Limitation To Apply To SMC's Claims Against Ho-Chunk.

SMCs Opening Brief at 22-24 establishes that the affirmative defense of laches, rather than application of a statute of limitations, is the appropriate paradigm to assess the timeliness of SMC's claims. While Ho-Chunk embraces laches, contending that the District Court should be affirmed because it allegedly established the defense, the State fails to provide any response to SMC's analysis.

Ho-Chunk attempts to manufacture a disagreement with SMC regarding the standard to assess whether a claim is barred by laches, but then sets forth the same standard advocated by SMC. Both SMC and Ho-Chunk agree that "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." Opening Brief at 23; HCNAB at 31. Ho-Chunk points out that one of the several cases cited by SMC, *Petrella v. Metro-Goldwyn-Mayer*, *Inc*., 134 S. Ct. 1962 (2014), can be distinguished because the claims at issue therein would have been timely if the appropriate statute of

limitations, rather than laches, applied. HCNAB at 30. That distinction is correct but not relevant. The "extraordinary circumstance" that the *Petralla* court says must be present for laches to apply is the "prejudice arising" from the plaintiff's delay. *Petrella* at 1977-78.

SMC acknowledges that Ho-Chunk and the State raised laches as affirmative defenses in their respective Answers to SMC's Complaint and PFAC. However, neither Ho-Chunk nor the State presented laches as the basis for granting judgment on the pleadings, and Judge Peterson did not address laches in his orders dismissing SMC's claims.

Ho Chunk argues "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." HCN brief at 9 (emphasis added). Ho-Chunk made no such showing, and the District Court made no factual findings that the elements of a laches defense have been established here. Ho-Chunk's arguments support SMC's position that the matter should be remanded, so that laches can be addressed after greater development of the factual record before the District Court.

While Ho-Chunk asserts, without analysis, that the elements of laches have been established, SMC sets out that it was reasonable for SMC to initially refrain from bringing an action against Ho-Chunk because the Wittenberg Casino was being operated as a small operation, which may or may not have complied with the Ho-Chunk Compact's "Ancillary Facility" requirement. SMC took action quickly when Ho-Chunk announced that it would convert the small facility into a full-blown casino resort (Dkt. 9 at 7(Ab102), ¶ 32). Moreover, SMC put Ho-Chunk on notice of its position regarding the expansion before Ho-Chunk embarked on any major capital investment (Dkt. 9 at 7(Ab102), ¶ 34). Ho-Chunk was in the position of being able to avoid expenditures until the issues in this litigation were resolved. Accordingly, any prejudice suffered by Ho-Chunk was self-inflicted.

Laches being the appropriate defense to ascertain the timeliness of SMC's claims, the case should be remanded where the evidence (after discovery) can be presented to the District Court. There is a dispute as to both reasonableness and delay. Such factual issues cannot be properly resolved at this Appeals Court.

C. Ho-Chunk's And The State's Theory Would Allow States And Tribes To Conspire To Undermine IGRA's Compact Regime.

IGRA was a carefully crafted compromise to balance state and tribal interests related to gaming on Indian lands. The fulcrum of this balance was the tribal-state gaming compact, which is a prerequisite to tribes conducting gaming on their lands. *See* 25 U.S.C. § 2710(d)(1)(stating that class III gaming is allowed on

Indian lands only if it is authorized by a class III gaming compact); and, S. Rep. No. 100-446, 100th Cong., 2d Sess. 2, at 13 (1988)("…the use of compacts between tribes and states is the best mechanism to assure the interests of both sovereign entities are met"). IGRA prescribed the issues and subjects that may be included in a tribal-state gaming compact. *See* 25 U.S.C. § 2710(d)(3)-(4). IGRA was not intended to provide a means by which states could extract tribal governmental revenue away from tribal coffers into state coffers. *Rincon Band v. Schwarzenegger,* 602 F.3d. 1019, 1029-30 (9th Cir. 2010). To ensure that tribes and states stayed within IGRA's bounds when negotiating class III gaming compacts, Congress required that each agreement be submitted to the Secretary of the Interior for review and approval. 25 U.S.C. § 2710(d)(8); *see also* 25 C.F.R. § 293.4; *see, e..g.,* Letter from Assistant Secretary of the Interior to Habematolel Pomo of Upper Lake (August 17, 2010)(denying approval of class III gaming compact for unlawful revenue sharing terms).[9]

Tribal-state gaming compacts are not run-of-the-mill commercial agreements that may be freely executed and amended by the parties at any time, and which may address any topic of concern to the parties. Class III gaming compacts are a creation of Congress intended to govern class III gaming activities on Indian lands, and their general terms are prescribed by IGRA.

[9] Disapproval letters are available on the official website of the Department of the Interior, https://www.indianaffairs.gov/as-ia/oig/gaming-compacts.

Notwithstanding IGRA's clear terms, the State and Ho-Chunk attempt to characterize the Ho-Chunk Compact as an ordinary commercial contract with no relevance outside their relationship. STATERB at 32 (describing the Ho-Chunk Compact as "a voluntary contractual agreement between a state and a tribe"); and, HCNAB at 20 (arguing that the Ho-Chunk Compact is a private agreement between Ho-Chunk and the State). In fact, Ho-Chunk goes so far as to assert that "the Nation and the State's understanding of the terms of their agreement is binding not only on the parties, ***but on this Court***." *Id*. (emphasis added). This view may be true in the context of private, commercial contracts, but it is not true here. In fact, the State's and Ho-Chunk's view would undermine IGRA's compact process altogether.

Appellees contend that SMC's position is based in financial interests, and therefore, the applicability of IGRA must be treated as contractual in nature. However, as has been shown, this approach is inconsistent with the law. It also ignores the fact that the positions advocated by Ho-Chunk and the State are driven by their own profit motives. Ho-Chunk has a profit motive to develop as many gaming facilities as possible on its lands spread throughout Wisconsin. Ho-Chunk's elected leadership has a political motive to increase gaming revenues so that it can increase the size of the payments it makes to individual tribal members. The State has a profit motive to allow Ho-Chunk to develop more gaming

facilities, as the State receives a sizable portion of Ho-Chunk's gaming revenues (*see* Second Amendment to Ho-Chunk Compact, Dkt 9-13 at ¶ 12), even though IGRA forbids a state tax on tribal gaming revenue. 25 U.S.C. § 2710(d)(7)(B)(iii). The State and Ho-Chunk are arguing that they may change their "understanding of the terms of their agreement" to allow gaming on lands that are not eligible for gaming under IGRA. The State would also argue that it has the ability to forebear enforcement of certain compact provisions in exchange for increased revenue sharing payments; in fact, it has effectively said as much in its brief. STATERB at 29 ("…there is nothing in the language of IGRA that requires the State to take affirmative action to stop the Ho-Chunk's gaming activity."). The State and Ho-Chunk argue that they can do all of this without reducing their new understanding to compact terms for review by the Secretary of the Interior under IGRA.

An ordinary commercial contract between private parties may be modified or amended through repeated waiver of specific terms, acquiescence, or course of dealing. The parties to a private contract dictate the terms of their relationship. But that is not the case in the realm of tribal-state gaming compacts under IGRA.

It is easy to see the mischief that could result if tribes and states were free to change their understanding of existing class III gaming compacts in the manner Appellees propose here. States could engage in selective enforcement of key terms based upon which tribes offerred the greatest percentage of revenue sharing.

Tribes could agree to forebear certain activities, such as the pursuit of land claims, in exchange for a state's agreement to accept less revenue-sharing payments. States could agree to waive limitations on the size, number, and location of class III gaming facilities in exchange for tribal consent to state jurisdiction over matters unrelated to gaming. Moreover, states could leverage tribes against each other through selective enforcement of compact terms. All of these actions would be prohibited by IGRA, but would evade secretarial review and thereby IGRA enforcement under the State's and Ho-Chunk's theory.

The potential for this type of mischief is one of the reasons Congress required the parties to submit gaming compacts (and amendments) to the Secretary of the Interior for review and approval. S. Rep. No. 100-446, 100th Cong., 2d Sess. 2 at 14 (1988) (describing the reasoning behind class III gaming compacts, and stating "the Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands."). It is also a justification for allowing one tribe to bring a compact enforcement action against another under 25 U.S.C. § 2710(d)(7)(a)(ii).

D. SMC Is Immune From The Application Of Wisconsin's Statutes Of Limitations.

As explained above, SMC is generally immune from Wisconsin's statutes of limitations when bringing claims arising under IGRA. The State raises additional arguments in relation to this immunity, which warrant special response here.

In its Opening Brief at 26-27, SMC explained the mischief and gamesmanship that would result if state legislatures were authorized to limit the scope of tribal rights and remedies under IGRA. This is the same type of mischief Justice Story envisioned when he rejected the application of state statutes of limitations against the United States two centuries ago:

> it is not to be presumed, that congress could intend to sanction an usurpation of power by a state to regulate and control the rights of the United States. The mischiefs, too, of such a construction, would be very great. The public rights, revenue, and property would be subject to the arbitrary limitations of the states; and the limitations are so various in these states, that the government would hold their rights by a very different tenure in each.

United States v. Hoar, 26 F.Cas. 329, 331 (C.C. Mass. 1821) (on writ of error from United States District Court). It was on this basis that the court rejected the application of a state statute of limitations to claims brought by the federal government. The state legislature lacked the authority to impose such limitations, and if it were granted this power, it would usurp the powers of the United States.

The Wisconsin legislature similarly lacks any direct authority over SMC's rights under IGRA, and it lacks the authority to modify the scope of IGRA itself. Notwithstanding this lack of authority, the District Court's decision hands the Wisconsin legislature a powerful tool to usurp the powers of the United States to disestablish the national regulatory scheme for Indian gaming and replace it with a state-by-state patchwork. The Wisconsin legislature may establish impossibly short windows within which tribes can bring suits to vindicate their rights under IGRA, while eliminating any time limitations on the State's own ability to bring such a suit. Tellingly, the State did not respond to SMC's argument in its Opening Brief that the State could create such an asymmetry in enforcement rights.

The Supreme Court has explained that if a state legislature had the authority to bind the United States to statutes of limitations, it would also have the authority to abrogate the United States' immunity from suit in that state, since both immunities "rest upon the same foundation." *United States v. Thompson*, 98 U.S. 486, 490-91 (1878). The State has no authority to abrogate SMC's sovereign immunity from suit; only SMC and Congress have that power.

There is no reason why the State should be vested with the authority to waive SMC's sovereign immunity from statutes of limitations, as the State argues in its brief (STATERB at 22-25), without so much as a word from Congress. The State cites several cases in support of this argument, including *N.J. Educ. Facilities*

Auth. v. Gruzen P'ship, 592 A.2d 559 (N.J. 1991), and *City of Colo. Springs v. Timberlane Assocs.*, 824 P.2d 776 (Colo. 1992). New Jersey and Colorado are outliers when it comes to the application of sovereign immunity from statutes of limitation. The Connecticut Supreme Court noted in 2012 that New Jersey and Colorado were the only two states that had abolished this doctrine through judicial ruling, and that there were only two other states that had abolished the doctrine through legislative enactment. *State v. Lombardo Bros. Mason Contractors, Inc*., 307 Conn. 412, n.21 (Conn., 2012)("In fact, we are aware of only four states in which *nullum tempus* has been abolished.").

Nor is there any basis in the State's argument that SMC waived its immunity from statutes of limitations by virtue of its waiver of immunity from suit. STATERB at 22. Other jurisdictions have found that a limited waiver of sovereign immunity does not also waive immunity from statutes of limitations. *See Dept. of Transp. v. Sullivan*, 527 N.E.2d 798, 800 (Ohio 1988); *City of Shelbyville v. Shelbyville Restorium, Inc*., 451 N.E.2d 874, 875-76 (Ill. 1983); *Dept. of Transp. v. J.W. Bishop & Co.*, 439 A.2d 101, 104 (Pa. 1981)(rejecting appellees' argument that abrogation of immunity from suit also abrogated immunity from statute of limitations).

Under longstanding precedent, waivers of sovereign immunity are to be narrowly construed. *Pershing Div. of Donaldson, Lufkin & Jenrette Securities*

Corp. v. United States, 22 F.3d 741, 743 (7th Cir. 1994)("Absent explicit language to the contrary, a waiver of sovereign immunity must be narrowly construed."). If there is a doubt about the existence of a waiver, the courts resolve the question in favor of the sovereign. *In re Equip. Acquisition Res., Inc*., 742 F.3d 743, 750 (7th Cir. 2014)(describing the judicial presumption "that when it comes to sovereign immunity ties go to the government."). There is no reason these principles should not apply to SMC in this instance. There has been no waiver, or Congressional abrogation, of SMC's immunity from Wisconsin's statute of limitations for purposes of claims arising under IGRA.

The State also argues that SMC cannot be immune from Wisconsin's statutes of limitations here, because SMC is pursuing a "proprietary" claim. STATERB at 26-28. In making this argument, the State casts SMC's suit as an effort to prevent "business competition." *Id*. The State does not cite any authority binding on this court for either proposition. Courts that have limited sovereign immunity from statutes of limitations in this manner have often done so when considering suits brought by non-sovereign municipal agencies. *See* Joseph Mack, *Nullum Tempus: Governmental Immunity to Statutes of Limitation, Laches, and Statutes of Repose*, 73 Def. Couns. J. 180, 188 (April 2006).

The State cites *Okla. City Mun. Improvement Auth. v. HTB, Inc.*, 769 P.2d 131 (Okla. 1989) in support of its argument here. But the court in *HTB, Inc*. held

that "every reasonable presumption" should be applied to favor immunity from time limitations, and that the municipal agency's suit was not barred on the basis of a proprietary interest because its authority to bring the suit "emanate[d] from a pervasive statutory scheme." 769 P.2d at 134-35. SMC's claims in this case likewise emanate from the pervasive statutory scheme regulating Indian gaming. Moreover, the Supreme Court has rejected the same argument in the analogous context of the scope of tribal sovereign immunity to commercial transactions for commercial activity off of Indian lands. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*., 523 U.S. 751, 760 (1998). To the extent the Court would apply the public/private claim distinction in this instance, it should find, as the Oklahoma Supreme Court did, that SMC's claims are public claims because they emanate from a pervasive statutory scheme.

SMC's single gaming facility is not simply a commercial business used to generate private profits, rather, it is the primary source of revenue for SMC's tribal government (Dkt. 5 at 6(Ab0042), ¶ 25; Dkt. 75-1 at 7(Ab0437), ¶ 26). The use of gaming revenues to support government operations is the primary policy justification that Congress espoused when it adopted IGRA. *See* 25 U.S.C. § 2702(1)("The purpose of this chapter is – (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting…strong tribal governments[.]"). IGRA mandates that tribes have sole proprietary interests in the

gaming establishments on their lands in order to advance IGRA's purpose. 25 U.S.C. § 2710(b)(2)(A). SMC's claim is brought to ensure that the State is fulfilling the terms of its intergovernmental gaming compact, and to protect its governmental revenues. This is clearly a governmental purpose consistent with IGRA's overriding policy. Moreover, SMC's claims emanate from the pervasive statutory scheme adopted by Congress to regulate Indian gaming. Even if the Court attempted to apply the public-proprietary limitation argued by the State to SMC's immunity from statutes of limitations, the rationale simply does not fit, because the rights SMC seeks to enforce are governmental or public as defined by federal statute.

E. Wisconsin State Law Cannot Be Used To Bar SMC's Claims Against The State.

The State argues that the District Court properly relied upon Wisconsin's statute of limitations for contract suits to bar SMC's claims. The State relies upon the notion that a federal court borrowing a state statute of limitations is not applying state law, but is rather adopting state law as federal law. STATERB at 34-35. This is a meaningless distinction, because the sovereign source of the law is Wisconsin's legislature.

As explained above, IGRA generally preempts the application of Wisconsin's laws to SMC's rights and remedies under IGRA. In enacting IGRA,

Congress was clear that tribes and states were to negotiate the limited extent to which state laws would apply to tribes. *See* 25 U.S.C. § 2710(d)(3)(C).

SMC's class III gaming compact contains no mention of a time limitation under which either party can bring a suit to enforce the terms of the agreement. There is nothing in IGRA to suggest that the State's laws would fill in any gaps in SMC's compact. Nor is there language in IGRA stating or suggesting that state procedural laws would supersede the application of tribal laws establishing time limitations and procedures for certain claims. In fact, IGRA counsels against such an asymmetry. *See Bay Mills*, 134 S. Ct. at 2042 (Sotamayor, J. concurring)("To the extent Tribes are barred from suing in tribal courts, it would be anomalous to permit suits against Tribes in state courts."). It would be anomalous for states to have the power to limit the application and enforcement of compact terms where tribes lack that power.

The State's theory would confer a significant advantage upon the State in the enforcement of class III gaming compacts. For example, the State could amend its statute of limitations for contract claims after it has entered into a class III gaming compact. A subsequent shortening of state statutes of limitation after reaching a class III gaming compact would defeat the expectations of the parties in entering into an agreement. This power would be especially useful if the State anticipated an enforcement action like the one brought by SMC here.

The balance of IGRA points to negotiated sovereign interests between tribes and states. IGRA does not suggest that state laws apply in the absence of negotiated terms. The Court should not confer the State with the leverage it seeks here.

F. Even If Wisconsin's Statute Of Limitations Applies To SMC, The Appropriate Standard Is The Time Period Allowed For Claims To Enjoin A Public Nuisance.

In its Opening Brief at 30-32, SMC reasons that if the District Court was correct to borrow a statute of limitations found in Wisconsin state law, it still erred because the most analogous Wisconsin statute of limitations applicable to SMC's claims is the statute of limitations applicable to a public nuisance for illegal gambling. SMC, a sovereign government, is seeking prospective equitable relief to abate the ongoing harm of illegal gaming activity at Ho-Chunk's Wittenberg Casino. Under Wisconsin state law, if a nuisance is ongoing and capable of abatement, an action to enjoin the activity is not barred by the statute of limitations, but, if the nuisance is permanent, an action must be brought within the applicable statute of limitations period. [10]

[10] While Ho-Chunk includes a footnote that accuses SMC of providing no authority that this is Wisconsin state law (HCNAB at 37, n.12), the State not only acknowledges the law, it repeats the same citation: *Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 588 N.W.2d 278, 280–81 (Ct. App. 1998). STATERB at 36; SMC's Opening Brief at 30.

In response, Appellees argue that SMC's claims are more analogous to an ordinary breach of contract action by asserting: (1) that SMC is motivated by its economic interest in bringing the litigation (STATERB at 37); (2) that SMC seeking to halt illegal gaming is distinguishable from a public nuisance (HCNAB at 38); and (3) that gaming under a compact is per se not a public nuisance (HCNAB at 37). These arguments fail to refute SMC's analysis, and all are unavailing.

First, the focus of the inquiry regarding the most analogous limitations period under state law should be based on the nature of the cause of action provided by Congress, and not on the motivations of the plaintiff. IGRA provides that:

> The United States District court shall have jurisdiction over. . . . 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.

25 U.S.C. § 2710(d)(7)(A)(ii). Without analysis, Ho-Chunk argues that this provision creates a breach of contract action (HCNAB at 37). The fact that the relief is limited to enjoining activity for gaming conducted in violation of a compact, rather than allowing actions for damages or compensatory relief, defeats Ho-Chunk's characterization. Neither opposition brief challenges SMC's analysis that in the context of the cause of action, the compact should be viewed more as

the statute governing the gaming activity, rather than a typical contract between business entities.

Second, SMC's motivation in bringing the lawsuit is not relevant. Wisconsin's public nuisance abatement statute allows for an action to be filed by "any person". W.S.A. § 30.294; *Gillen v. City of Neenah*, 219 Wis.2d 806, 832, 580 N.W. 2d 628, 637 (Wis. 1998). Prior to the enactment of W.S.A. § 30.294, Wisconsin law required a plaintiff bringing a public nuisance action to demonstrate that it had sustained "some special or peculiar damage different from the public at large." *Williams v. Milwaukee Industrial Exposition Ass'n.*, 79 Wis. 524, 48 N.W. 665, 667 (Wis. 1891). In other words, prior to statutorily allowing any person to bring a public nuisance abatement action, every plaintiff was required to have a motivation other than protecting public interest in order for the lawsuit to proceed. *Village of Riverdale* is instructive. There, the plaintiff sought a public nuisance abatement action under Illinois law with no pretense that it was motivated by a desire to redevelop certain land. The Court allowed the public nuisance claim to proceed:

> [A]lthough there is evidence present in the complaint and the exhibits attached thereto that Riverdale is motivated by a desire to redevelop the Location and that there is a long span of time between when Riverdale first became aware of potential harm to the environment due to the Defendant's actions and the commencement of the instant

> action, such facts may be useful in asserting an affirmative defense of laches, [11] not an argument of lack of standing.

527 F. Supp. 2d. at 764.

Third, there is no factual finding regarding the motives of SMC. The filing of the lawsuit is a governmental action taken to protect the integrity of Indian gaming in Wisconsin, a legitimate policy to be pursued by a sovereign tribal government. If motivation does matter, then the lawsuit should be remanded for discovery and factual findings regarding that motivation. Such remand would likely reveal that financial concern was only one of several policy concerns that resulted in the SMC Tribal Council's authorization of the lawsuit.

Fourth, the State argues that the actions which SMC seeks to enjoin are not the type of public nuisance actionable under Wisconsin state law. STATERB at 37-38. Yet, the State concedes that businesses offering illegal gaming in Wisconsin are a public nuisance under Wisconsin law. *Id*. at 38, (citing *State ex rel. Trampe v. Multerer*, 234 Wis. 50, 51, 58, 289 N.W. 600 (1940)). The State defeats its own argument by its own analysis.

Finally, Ho-Chunk argues that gaming pursuant to the terms of a tribal gaming compact is not a public nuisance. SMC agrees, but rejects Ho-Chunk's

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[11] As discussed above, SMC's motivation and its financial concerns are germane to the affirmative defense of laches in the instant lawsuit, which defense requires remand for development of the factual record and factual findings regarding laches.

circular reasoning. The existence of a tribal-state compact does not prevent Ho-Chunk's Wittenberg Casino from being a public nuisance. Rather, its lawful abidance by the terms of the Ho-Chunk Compact is required; hence, the case should be remaded to proceed to the merits of whether the Wittenberg Casino is being operated in compliance with the Ho-Chunk Compact.

III. SMC HAS NOT WAIVED ANY OF THE ARGUMENTS ADDRESSED IN ITS OPENING BRIEF: HO-CHUNK'S NUMEROUS ASSERTIONS OF WAIVER ARE DISINGENUOUS.

In its Response Brief, Ho-Chunk makes numerous assertions that several legal arguments have been waived by SMC (HCNAB at 34, fn.10; at 36, fn. 11; at 40). The State makes the singular argument that SMC has waived its argument that the District Court erred in denying SMC leave to file the PFAC. The assertions are wrong, and the case law cited by Ho-Chunk and the State does not support avoidance of determining if the District Court erred.

A. The District Court's Error In Denying SMC's Motion For Leave To File The PFAC Is Properly Before This Appeals Court.

Both the State (STATERB at 41-42) and Ho-Chunk (HCNAB at10) argue that SMC waived this argument. Quite the opposite is true, as the argument is properly and sufficiently set forth in the Opening Brief. Moreover, the three cases cited by Ho-Chunk and the State do not support their contention that the Court should deem the issue as waived.

In its Opening Brief at 3, SMC identifies the issue of the District Court's

error in denying SMC's motion to file the PFAC. SMC spells out the specific new factual allegations (including allegations made in the alternative) included in the PFAC. (Opening Brief at 9-10). SMC properly notes that the motion was denied as "futile," as the District Court reasoned it would still be barred by the statute of limitations defense. (Opening Brief at 12-13). The basis for denial, "futility", necessarily ties the District Court's error to its incorrect analysis regarding the statute of limitations. SMC sets forth that the facts alleged in both the initial Complaint and the PFAC should be assumed as true for purposes of this appeal. (Opening Brief at 3, n.3); *see also Finch v. Peterson*, 622 F.3d 725, 728 (7th Cir. 2010). That analysis is set forth in the SMC's Opening Brief, which is sufficiently developed to be considered by this Appeals Court, the State's and Ho Chunk's conclusory statements to the contrary notwithstanding.

In only one of the three cases cited by Appellees, *Mathis v. New York Life Ins. Co.*, 133 F.3d 546 (7th Cir. 1998), did the court arguably choose not to address the allegedly waived issue, and there the court had already ruled on the dispositive issue. In the other two cited cases, *Medley v City of Milwaukee*, 969 F.2d 312, 318 (7th Cir. 1992), and *Estate of Moreland*, 395 F.3d 747 (7th Cir. 2005), the court admonished the appellant for perfunctory and undeveloped arguments, but went forward to decide them on the merits anyway.

None of these cases support the position advanced by Appellees. The cases

admonished parties for arguments far less developed than SMC's analysis in the Opening Brief, but decided the appeals on the merits of the legal questions presented.

B. The Issue Of IGRA's Federal Preemption Of State Law, Including State Statutes Of Limitations, Is Properly Before This Appeals Court.

Ho-Chunk asserts that SMC has waived its ability to argue that federal law preempts the application of Wisconsin's statute of limitations because SMC did not raise this issue before the District Court. HCNAB at 40-41. That is simply not true. Indeed, SMC sets out the analysis in four pages of authorities and analysis under the heading "IGRA Preempts the Application of State Law, including the State Statutes of Limitation for the Regulation of Indian Gaming" Dkt. 72 at 6-10(Ab0402-406). *See also* Dkt. 84 at 22-23(Ab0575-576). Ironically, Ho-Chunk advanced in detail to the District Court a similar argument of complete federal preemption of state law by IGRA in response to SMC's argument that if a Wisconsin statute of limitations is to be borrowed by the District Court, the limitations applicable to Wisconsin public nuisance claims, rather than contract claims, are the most analogous. (Dkt. 81 at 28-29(Ab0525-526) and 32(Ab0529)). Ho-Chunk offers no analysis to support its incongruous position that the statute of limitations regarding Wisconsin public nuisance law cannot be applied, while the statute of limitations regarding Wisconsin contract law can be applied. The issue of

IGRA's preemptive force regarding Wisconsin law was presented by both SMC and Ho-Chunk to the District Court.

Perhaps Ho-Chunk believes that any submissions subsequent to the District Court's October 25, 2017 Order dismissing SMC's claims against Ho-Chunk (Dkt. 67(Ab0371)) are not arguments presented to the District Court. Such an understanding is not expressly raised by Ho-Chunk, but if raised, would be simply incorrect. All orders entered prior to entry of final judgment are interlocutory in nature and subject to change. The Court's October 25, 2017 Order (Dkt. 67(Ab0371)) dismissing SMC's claims against Ho-Chunk in this case was an interlocutory order—an intervening decision "between the commencement and the end of a suit which decide[d] some point or matter, but is not a final decision of the whole controversy." *Black's Law Dictionary* (6th ed.). It is well-established that a district court has the inherent power to reconsider interlocutory orders and re-open any part of a case before entry of final judgment. *Marconi Wireless Telephone Co. v. United States*, 320 U.S. 1, 47-48 (1943); *Mintz v. Caterpillar*, 788 F.3d 763, 769 (7th Cir. 2015); *Galvan v. Norberg*, 678 F.3d 581, 587 (7th Cir. 2012); *Acme Printing Ink, Co. v. Menard, Inc*., 891 F.Supp. 1289, 1294-95 (E.D. Wis. 1995); *Fisher v. National Railroad Passenger Corp*., 152 F.R.D. 145, 149 (S.D. Ind. 1993). Fed. R. Civ. P 54(b) expressly states "order or other form of decision is subject to revision at any time before the entry of judgment adjudicating

all the claims and the rights and liabilities of all the parties."

In the District Court's February 2, 2018 Opinion and Order, it noted that a portion of SMC's motion for leave to file the PFAC was more appropriately framed as a motion to reconsider the District Court's October 25, 2017 Order dismissing SMC's claims against Ho-Chunk, (Dkt. 88 at 3(Ab0594))[12], and reasoned that even if the arguments were properly submitted as a motion for reconsideration rather than a motion for leave to amend, the District Court would deny the motion (Dkt. 88 at 4(Ab0595)). At best, Ho-Chunk can argue that the federal preemption argument was not fully developed before the District Court until after the October 25, 2017 interlocutory order, but that falls far short of Ho-Chunk's blatantly incorrect assertion that the argument was not raised before the District Court. In a recent decision by this Appeals Court, it reversed a District Court's refusal to consider arguments raised before entry of final judgment because the District Court believed the plaintiff did not use the "right procedural hook" in presenting its arguments. *Terry v. Spencer*, 888 F.3d 890, 893-94 (7th Cir. 2018) ("Looking past the label, Terry's motion plainly sought reconsideration of the judge's nonfinal dismissal order, and district judges may reconsider interlocutory orders at any time before final judgment. Because the

[12] Contrary to Ho-Chunk's assertion (Ho-Chunk's Response Br., Dkt. 24-1 at 41), the District Court did not rule that SMC had waived the federal preemption argument. Notably, Ho-Chunk fails to cite to any part of the record to support its assertion.

judge focused solely on the motion's label rather than its substance, we cannot be sure that he appreciated his authority to revisit the interlocutory dismissal order").

The cases cited by Ho-Chunk in support of its position are all in the context where the argument was not addressed at any juncture in the proceedings below. *See Williams v. Dieball*, 724 F.3d 957, 962 (7th Cir. 2013); *Fednav Intern, Ltd. v. Continental Ins. Co.* 624 F.3d 834, 841 (7th Cir.2010); *El Gharabli v. I.N.S.,* 796 F.2d 935, 940 (7th Cir. 1986); *Puffer v. Allstate Ins. Co*., 765 F.3d 709, 718 (7th Cir. 2012). The circumstances in each of the cited cases are drastically different than the circumstances here, where the issue is clearly presented and addressed before the District Court. The federal preemption argument is properly before this Appeals Court.

C. Ho-Chunk's Additional Arguments Of Waiver Are Unavailing.

The two arguments of waiver set forth above, although wrong in their analysis, are at least developed in Ho-Chunk's Response Brief. Ho-Chunk's Response Brief additionally contains a spattering of conclusory assertions that arguments have been waived. Each is unavailing.

Contrary to Ho-Chunk's conclusory assertion (HCNAB at 41), the District Court did not rule that SMC had waived the federal preemption argument. Notably, Ho-Chunk fails to cite to any part of the record to support its assertion.

Ho-Chunk wrongly asserts that SMC's Opening Brief "does not offer any

argument regarding," the District Court's Opinion and Order of February 2, 2018 (NCNAB at 2). Such Opinion and Order is contested by SMC. The Opening Brief directly refutes the analysis set forth in the Opinion and Order, with great emphasis on its error in applying Wisconsin's six-year statute of limitations for contract claims to SMC's claims.

Similarly, Ho-Chunk wrongly asserts that SMC waived the argument that Ho-Chunk continues to breach the Ho-Chunk Compact (HCNAB at 9). SMC's Opening Brief comprehensively addresses the continuing activity and its impact on the defense that the action was untimely (Opening Brief at 8, 19-21, 30 and 35).

Finally, Ho-Chunk argues that SMC did not argue that laches is unavailable as a defense against a sovereign Indian tribe, and therefore, SMC waived the argument (HCNAB at 34, n.10). SMC makes no such argument either in its Opening Brief or in this Reply. SMC argues that laches, rather than a statute of limitations, is the appropriate context within which to determine the timeliness of SMC's claims.

Ho-Chunk's pattern of spurious and numerous assertions of waiver are an attempt to prevent this Appeals Court from addressing the merits of SMC's dispositive arguments. SMC's arguments, all appropriately at issue in this appeal, establish reversible error in the District Court's decision to dismiss SMC's claims as untimely.

CONCLUSION

To allow the District Court decision to stand is to allow illegal gaming on Indian lands to continue unabated. Congress has explicitly authorized Indian tribes to bring claims in the federal courts to enjoin class III gaming activity on Indian lands that is conducted in violation of any tribal-stategaming compact. *See* 25 U.S.C. § 2710(d)(7)(A)(ii). Congress did not impose a statute of limitations for such claims.

For the reasons set forth herein, in SMC's Opening Brief and in the filings below, Accordingly, this Appeals Court should vacate the judgment of the lower court and remand with instructions that SMC's claims are not barred by statutes of limitations, and to proceed to resolution on the merits.

Dated: July 18, 2018

s/ Scott D. Crowell
SCOTT D. CROWELL
Crowell Law Office-
Tribal Advocacy Group
1487 W. State Route 89A, Ste. 8
Sedona, AZ 86336
Telephone: (425) 802-5369
Fax: (509) 235-5017
Email: scottcrowell@hotmail.com

Bryan Newland
Fletcher, PLLC
909 Abbott Road, Suite F
East Lansing, MI 48823
Telephone: (517) 862-5570

Bridget Swanke
Wis. Bar No.: 1026157
Senior Counsel
Stockbridge-Munsee Community
P.O. Box 70, N8476 Moh He
Con Nuck Road, Bowler, WI 54416
Telephone: (715) 793-4868

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Date: July 18, 2018

s/ Scott Crowell
SCOTT D. CROWELL
Crowell Law Office-
Tribal Advocacy Group
1487 W. State Route 89A, Ste. 8
Sedona, AZ 86336
Telephone: (425) 802-5369
Fax: (509) 235-5017
Email: scottcrowell@hotmail.com

☑

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