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 OPENING BRIEF AND SHORT APPENDIX (ORAL ARGUMENT REQUESTED)

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

BRIAN 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

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1449

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

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[✔] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Stockbridge-Munsee Community

(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:

Scott Crowell-Crowell Law Office-Tribal Advocacy Group

Bryan Newland-Fletcher, PLLC

Bridget Swanke-Senior Counsel for Stockbridge Munsee Community-REVISED INFORMATION

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Scott Crowell Date: May 21, 2018

Attorney's Printed Name: Scott Crowell

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

Address: 1487 W. State Route 89A, Ste. 8

Sedona, AZ 86336

Phone Number: (425) 802-5369 Fax Number: (509) 235-5017

E-Mail Address: scottcrowell@hotmail.com

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N/A

Attorney's Signature: s/ Bryan Newland Date: May 21, 2018

Attorney's Printed Name: Bryan Newland

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

Address: 909 Abbott Road, Suite F
East Lansing, MI 48823

Phone Number: (517) 862-5570 Fax Number: ____

E-Mail Address: bnewland@fletcherlawpllc.com

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Scott Crowell-Crowell Law Office-Tribal Advocacy Group

Bryan Newland-Fletcher, PLLC

Bridget Swanke-Senior Counsel for Stockbridge Munsee Community

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Bridget Swanke Date: May 21, 2018

Attorney's Printed Name: Bridget Swanke

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

Address: P.O. Box 70, N8476 Moh He Con Nuck Road
Bowler, WI 54416

Phone Number: (715) 793-4868 Fax Number: ____

E-Mail Address: bridget.swanke@mohican-nsn.gov

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Oral argument is requested because this case presents important and complicated issues and the decisional process would be significantly aided by oral argument.

Dated: May 21, 2018

s/ Scott D. Crowell
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

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I. JURISDICTIONAL STATEMENT

The United States District Court for the Western District of Wisconsin ("District Court") has jurisdiction over the claims of Plaintiff/Appellant Stockbridge-Munsee Community, a federally-recognized Indian tribe ("SMC") against Defendant/Appellee, The Ho-Chunk Nation, ("Ho-Chunk") under 25 U.S.C. § 2710(d)(7)(A), as SMC's Complaint brought by an Indian tribe to enjoin class III gaming in violation of a gaming compact that is in effect. The District Court has jurisdiction over SMC's claims against Defendants/Appellees State of Wisconsin and Scott Walker in his official capacity as Governor (collectively referred to as "State") under 25 U.S.C. §§ 1361 and 1362, as the claim brought by SMC is a claim brought by an Indian tribe arising under federal law, including the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701, *et seq*., and the District Court has jurisdiction under 28 U.S.C. § 2201, as SMC also sought declaratory relief.

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 orders and judgments of the District Court are the Order (Dkt. 67, Aa001/Ab0371)[1] entered on October 25, 2017, the Opinion and Order (Dkt. 88, Aa013/Ab0592) entered on February 2, 2018 and the final Judgment (Dkt. 89, Aa001/Ab0606) entered on February 6, 2018 by the Honorable James D. Peterson. SMC filed a timely Notice of Appeal (Dkt. 90, Ab0607) on February 27, 2018.

[1] All record citations are to pages of the Appendix A. ("Aa_ "), Appendix B. ("Ab_"), or, for materials not within the Appendices A and B, the district court docket number ("Dkt.#_").

II. STATEMENT OF THE ISSUES

A. Whether the District Court erred in applying a six-year statute of limitations for breach of contract in dismissing SMC's claims against Ho-Chunk.

B. Whether the District Court erred in applying a six-year statute of limitations for breach of contract in dismissing SMC's claims against the State.

C. Whether the District Court erred in denying SMC's motion for leave to file its proposed first amended complaint.

III. STATEMENT OF THE CASE

This is a case of first impression for statutory interpretation regarding whether a statute of limitations is applicable to an action by a tribal government under an explicit provision in IGRA, 25 U.S.C. § 2710(d)(7)(A), seeking prospective injunctive relief to require another tribal government to bring its ongoing gaming activities into compliance with statutory and compact requirements. If a statute of limitations is applicable, the question remains as to which statute of limitations applies to such an action. The District Court erred in finding that a statute of limitations applies at all and it erred in finding that, if a statute of limitations does apply, it is either Wisconsin's six-year statute of limitations for actions sounding in breach of contract or the six-year statute of limitations for actions under the Administrative Procedures Act ("APA") challenging a federal action.

Allowing the District Court's decision to stand will countenance illegal gaming on Indian lands. The consequences of the District Court's decision are devastating to SMC's lawful gaming operation on its own Indian lands. But, SMC's filing of this litigation is more than just the protection of its own interests. Congress expressly vested tribes with the right to use the federal courts to ensure that gaming conducted on Indian lands is lawful. 25 U.S.C. § 2710(d)(7)(A).

Lawful gaming on Indian lands is the key to achieving the goals established by Congress in the passage of IGRA, and to enable Indian tribes to achieve tribal economic development, self-sufficiency and strong tribal government. 25 U.S.C. § 2702(1). The District Court's decision not only fails to manifest Congress' intent, it undermines Congress' intent.

A. Factual Background[2]:

Ho-Chunk is currently in the process of a major expansion of its gaming facility in Wittenberg, which is located in Shawano County, Wisconsin (the "Wittenberg Casino"). Ho-Chunk is transforming the Wittenberg Casino from a modest facility offering approximately 500 gaming machines and limited amenities into a full-blown casino resort. (Dkt. 10 at 8-9 ¶¶ 31-33, Ab0015-16, ¶¶ 31-33). That expansion, which violates both IGRA and the terms of Ho-Chunk's class III gaming compact (the "Ho-Chunk Compact"), will devastate SMC's primary source of government revenues, inflicting catastrophic consequences upon SMC and its members. (Dkt. 5 at 3 ¶¶ 2-3, Ab0039 at ¶¶ 2-3).

Both SMC and Ho-Chunk are federally-recognized Indian tribes. Federal Register /Vol. 82, No. 10 / Tuesday, January 17, 2017 at 4915-18. Both have tribal-state gaming compacts with the State, and both tribes operate gaming facilities pursuant to those compacts. (Dkt. 10 at 2 ¶¶ 2-3, at 6-7, ¶¶ 23, 25; Ab0109-10, ¶¶ 2-3 and Ab1013-14, ¶¶ 23, 25). But, the material similarities end there.

In reliance on the protections included in the SMC gaming compact with the State (the "SMC Compact"), SMC secured $48 million in financing and invested cash in the amount of $110 million, for a total of $158 million to modernize its only class III gaming facility – the

[2] As discussed below, because of the posture of this appeal with SMC's claims being dismissed as untimely, all of SMC's factual allegations made herein are based upon the Complaint (Dkt. 5, Ab0037) and the Proposed First Amended Complaint (Dkt. 75-1, Ab0431) and must be considered to be true.

North Star Casino Resort – which is located on SMC's trust land in Shawano County and offers 1,200 gaming machines and 16 table games. (Dkt. 10 at 2, ¶ 5, Ab0109, ¶ 5).

SMC's North Star Casino Resort employs more than 460 people, including 56 SMC tribal members. (Dkt. 10 at 3, ¶ 6, Ab110, ¶ 6). The North Star Casino Resort is the single largest source of revenue for SMC's government. Revenues from the North Star Casino Resort constitute more than ninety-five percent (95%) of the tribal government's non-grant funding and 86% of SMC's funding[3]. (Dkt. 10 at 3, ¶ 7, Ab0110, ¶ 7). SMC's government provides essential government services to tribal members, including educational support programs; emergency medical services; public utilities and works programs; medical, dental, and wellness programs; natural resource conservation and protection; and other services. (Dkt. 10 at 4, ¶ 13, Ab0111, ¶ 13).

SMC directs an overwhelming majority of its gaming revenue to fund tribal government and economic development, and makes a nominal per-capita distribution to its membership of approximately five hundred dollars per year. (Dkt. 10 at 3-4, ¶ 12, Ab0110-11, ¶ 12). In sharp contrast to SMC, Ho-Chunk derives sufficient revenue from its gaming operations such that it is able to make substantial per-capita payments to its tribal members, reportedly $12,000 per member per year or more than $90 million per year. (Dkt. 10 at 10 ¶ 39, Ab0117, ¶ 39). Ho-Chunk's own gaming ordinance allows for up to 78.26% of its total gaming revenue to be distributed to individual tribal members as per-capita payments. (*Id*., ¶ 40, Ab0117, ¶ 40). IGRA provides that an Indian tribe may distribute gaming revenues directly to tribal members as "per-capita payments," if it submits to, and the Department of the Interior (the "Department") approves, a tribal revenue allocation plan. 25 U.S.C. §§ 2710(b)(3) and 2710(d)(1)(A)(ii). The

[3] Grant funds and funds secured through contracts under Pub.L. No. 93-638, codified at 25 U.S.C. §§ 5301 *et seq*., are committed funds that can only be used for specific purposes. SMC's discretion in the use of these funds, accordingly, is extremely limited.

Department will not allow a tribe to make per capita payments unless it can show that it generates sufficient gaming revenues to fund tribal government operations and programs. 25 C.F.R. § 290.12(b)(1).

In other words, what is at stake in this appeal is the ability of SMC's tribal government to function at the most basic levels versus the ability of Ho-Chunk to increase the amount of money it distributes to its members as per-capita payments.

Ho-Chunk presently operates six casinos across the State of Wisconsin – far more than any other Wisconsin tribe. (Dkt. 10 at 10, ¶ 37, Ab0017, ¶ 37). As discussed in greater detail below, several Wisconsin Indian gaming compacts distinguish "Gaming Facilities," where gaming is the primary business purpose, from "Ancillary Facilities," where gaming is not the primary business purpose. (Dkt. 8 at 21, Ab0082). The Ho-Chunk Compact allows Ho-Chunk to operate four full-scale class III casino resorts across Wisconsin, none of which can be located in Shawano County. (Dkt. 52 at 3, Ab0196). In addition, the Ho-Chunk Compact allows Ho-Chunk to operate a limited number of Ancillary Facilities, including one Ancillary Facility in Shawano County, where Wittenberg is located. (*Id*. at 4, Ab00197). Ho-Chunk also operates a large class II[4] gaming facility in Madison, Wisconsin, and has submitted an application to the Department for approval of a fifth full-scale class III casino in Beloit, Wisconsin. (Dkt. 10 at 10, ¶ 37, Ab0117, ¶ 37). These Ho-Chunk facilities offer a total of 5,151 gaming machines and 96 table games – more than 40 percent of the total gaming machines in the State. (*Id*., ¶ 38, Ab0117, ¶ 38). The Wittenberg Casino, which opened in 2008, operated approximately 502 gaming machines when this suit was filed (Dkt. 10 at 8, ¶¶ 30-31, Ab0115, ¶¶ 30-31), but has now

[4] Class II gaming includes machine gaming that is programmed based on the game of bingo, and that competes with slot machines with the use of electronic aids to widen player participation. *See* 25 C.F.R. § 502.7. Class II gaming, which is governed by IGRA with oversight by the National Indian Gaming Commission, must be played on eligible Indian lands under IGRA, but does not require a class III compact.

expanded the gaming floor to allow nearly 800 gaming machines. (Dkt. 10 at 9, ¶ 33, Ab0116, ¶ 33).

On August 16, 2016, Ho-Chunk issued a press release announcing plans to expand the Wittenberg Casino as part of a $153 million investment in its casinos. The press release outlined plans to install a total of nearly 800 slot machines and 10 table games at the Wittenberg Casino, and to construct an 86-room hotel, restaurant and bar, and a high-limit gaming area. (*Id*.). This expansion will deal a devastating blow to SMC and its gaming operations. SMC is estimated to lose $22 million per year from gaming machine revenue alone, which represents a thirty-seven percent (37%) drop from its current net win. (Dkt. 10 at 12-13, ¶ 48, Ab0119-20, ¶ 48). Because many costs associated with financing and operating SMC's facility are fixed, the loss will equate to a 74% decline in revenue for SMC's essential governmental programs. Such a loss will have a devastating impact on SMC's ability to fund those government programs, and will result in a major loss of jobs at both the gaming facility and tribal governmental operations, depriving SMC of the very objectives of self-sufficiency and strong tribal government Congress envisioned when it enacted IGRA. 25 U.S.C. §§ 2701(4) and 2702(1). (Dkt. 10 at 13, ¶ 50, Ab0120, ¶ 50).

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. (Dkt. 9 at 9, ¶ 46). But Ho-Chunk's expanded Wittenberg Casino does threaten SMC's ability to fund its government and there is no doubt that the Wittenberg Casino violated the "Ancillary Facility" restrictions at the time SMC filed its Complaint in 2017. (Dkt. 8 at 21-30, Ab0082-91). Moreover, the land on which the Wittenberg Casino is located was not properly in trust status as of the passage of IGRA in 1988, rendering it

ineligible for gaming. *See* Ho-Chunk Compact at § III(J)(2) (Dkt. 9-10 at 11) (stating that Ho-Chunk may only conduct gaming activities on lands acquired after October 17, 1988 where the lands "meet the requirements of section 20 of the [IGRA]."); 25 U.S.C. § 2719. (Dkt. 5 at 13, ¶¶ 68-71, Ab0049, ¶¶ 68-71).

The crux of this appeal is whether SMC's tolerance of the limited gaming operation at the Wittenberg Casino, which opened in 2008, now prevents SMC from securing prospective equitable relief to require Ho-Chunk (and/or to require the State to require Ho-Chunk) to comply with IGRA and the Ho-Chunk Compact, which governs the gaming activity at the Wittenberg Casino.

B. Procedural Background:

On April 19, 2017, SMC filed its initial Complaint in the matter, Stockbridge-Munsee Community Complaint For Enforcement Of Class III Gaming Compact And Declaratory And Injunctive Relief (Dkt. 5, Ab0037) against both Ho-Chunk and the State. Counts 4 and 5 of the initial Complaint are directed against Ho-Chunk, seeking compliance both with the Ho Chunk Compact's requirement to only game only on eligible Indian lands, and compliance with the Ho-Chunk Compact's requirement to operate only an Ancillary Facility in Shawano County. (Dkt. 5 at 13-15, ¶¶ 65-81, Ab0049-51, ¶¶ 65-81).

Counts 1 through 3 of the Complaint are directed at the State based upon the State's obligation under the SMC Compact, alleging that the State has breached its obligations to SMC in three critical respects. (Dkt. 5 at 10-13, ¶¶ 48-64, Ab0046-49, ¶¶ 48-64). First, the State extracted "revenue sharing" from SMC, which can only be lawful under IGRA if the State offers real market protection for SMC by allowing only tribally-operated Ancillary Facilities and no private gaming facilities in Shawano County. Accordingly, the State has an obligation to provide

SMC with the intended benefit of the bargain. (Dkt. 5 at 12, ¶¶ 57-58, Ab0048, ¶¶ 57-58). Second, if the State fails to enforce the Ho-Chunk Compact restrictions on Ancillary Facilities, then the "revenue sharing" paid by SMC to the State is an illegal tax, such that the State should be directed to disgorge the unlawful tax proceeds back to SMC, and SMC should be excused from paying the illegal tax going forward. (Dkt. 5 at 11, ¶ 53, Ab0047, ¶ 53). *See* Section XXXII.B Second Amendment SMC Compact (Dkt. 9-3 at 20). Third, the State's double standard in having brought an enforcement action against SMC for gaming on a parcel that is no longer part of the SMC Reservation[5], while doing nothing in the face of Ho-Chunk's compact violations, is a breach of the SMC's Compact's restriction against arbitrary enforcement.[6] (Dkt. 5 at 13, ¶ 64, Ab0049, ¶ 64).

At the time the initial Complaint was filed, SMC also filed its Motion for Preliminary Injunction and supporting pleadings (Dkts. 7-10, Ab0053-0108). On July 10, 2017, the District Court directed SMC and Ho-Chunk to file supplemental pleadings to address the applicability of the continuing violations doctrine to extend any applicable statute of limitations (Dkt. 46, Ab0157), which SMC and Ho-Chunk each submitted on July 24, 2017 (Dkt. 52, Ab0194 and Dkt. 54, Ab0209). On October 12, 2017, SMC sought leave to provide supplemental information in support of its motion for preliminary injunction (Dkt. 63, Ab0356).

The State filed its Answer and Counterclaim on June 26, 2017 (Dkt. 43, Ab0123), and Amended Answer on July 14, 2017 (Dkt. 50, Ab0159). The Counterclaim alleges that SMC is in

[5] Indeed, the consequences of the State's enforcement action went beyond merely a cessation of class III gaming activities on the disputed location and resulted in litigation holding that the SMC Reservation had been dimimished and disestablished before a smaller reservation was resestablished under the Indian Reorganiation Act. *Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009).

[6] Of course, the State's inaction against Ho-Chunk and the much larger extraction of revenue sharing from Ho-Chunk is motivation for the State to refrain from exercising its enforcement authority under the Ho-Chunk Compact because the State's financial interest in Ho-Chunk gaming is greater than its interest to see that all gaming in the State is conducted lawfully. The State is, indeed, complicit in Ho-Chunk's non-compliant gaming.

breach of the SMC Compact because it has informed the State that it will not make "revenue sharing" tax payments to the State so long as the Wittenberg expansion is allowed to proceed. (Dkt. 50 at 33, ¶ 23, Ab0191, ¶ 23). The Court dismissed the Counterclaim without prejudice when it issued its February 2, 2018 Order (Dkt. 88, Aa013/Ab0592), *inter alia* dismissing SMC's claims against the State.

On August 25, 2017, Ho-Chunk filed its Motion for Judgment on the Pleadings and supporting pleadings (Dkts. 56-58, Ab0229-Ab0298), arguing, *inter alia*, that SMC's claims are untimely as they were not filed within six years of the initial opening of the Wittenberg facility in 2008.

On October 25, 2017, the District Court entered an Order (Dkt. 67, Aa001/Ab0371) granting Ho-Chunk's Motion for Judgment on the Pleadings because it found that Wisconsin's six-year statute of limitations for breach of contract actions applied, rendering SMC's claims untimely, and denying all other pending motions, including SMC's motion for preliminary injunction, as moot. Further, the District Court ordered SMC and the State to submit briefing as to why SMC's claims against the State should not also be dismissed as untimely. (Dkt. 67, Aa001/Ab0371).

On November 29, 2017, SMC and the State each filed responsive briefs and supporting pleadings (Dkts. 71-74 , Ab0383-0425). SMC also filed its Motion for Leave to File a Proposed First Amended Complaint and supporting pleadings on November 29, 2017 (Dkts. 73-77, Ab0420-0465). On December 13, 2017, both Ho-Chunk and the State responded in opposition (Dkts. 80-81, Ab0468-0492)[7]. SMC filed its reply in support of leave to file its Proposed First Amended Complaint (Dkt. 84, Ab0547) ("PFAC"). The PFAC included a new count against both

[7] Ho-Chunk also sought sanctions against SMC (Dkts. 82-83, Ab0537-0538). On January 3, 2018, SMC filed its opposition to Ho-Chunk's Motion for Sanctions (Dkt. 85 , Ab0579). As part of its February 2, 2018 Order (Dkt. 88, Aa013/Ab0592), the District Court denied Ho-Chunk's Motion for Sanctions.

Ho-Chunk and the State, pleaded in the alternative for fraudulent concealment of intent to create amendments to the Ho-Chunk Compact that deprive SMC of the intended benefits of its compact (Dkt. 75-1 at 17-19, Ab0447-449), and a new count, also pleaded in the alternative, that Ho-Chunk's expansion of the Wittenberg Casino will render it in violation of the Gaming Facility/Ancillary Facility restrictions in the Ho-Chunk Compact. (Dkt. 75-1 at 16-17, Ab0446-447). The PFAC also includes a new allegation, clarifying that Ho-Chunk's illegal gambling house is a public nuisance. (Dkt. 75-1 at 20, ¶ 6, Ab0450, ¶ 6).

On February 2, 2018, the District Court issued an Order dismissing SMC's claims against the State, denying SMC's Motion for Leave to File First Amended Complaint, denying Ho-Chunk's Motion for Sanctions and dismissing all other pending motions as moot (Dkt. 88, Aa013/Ab0592). Judgment was entered on February 6, 2018 (Dkt. 89, Ab0606) and SMC filed a timely Notice of Appeal on February 27, 2018 (Dkt. 90, Ab0607).[8]

IV. SUMMARY OF ARGUMENT

Congress expressly authorized Indian Tribes, including SMC, to use the federal courts to enforce compliance with Tribal-State Compacts for gaming on Indian lands. This case is precisely such a lawsuit. Rather than advance Congress' intent in the passage of IGRA, the District Court erred by dismissing this lawsuit based on an implied six-year statute of limitations that is not found in the text of IGRA, and which runs afoul of Congress' intent. As set forth in greater detail below, and in the pleadings submitted to the District Court, there is no statute of limitations for such claims, which are limited in remedies to only prospective, equitable relief.

[8] Ho-Chunk did file a cross-appeal from the same decisions at issue here, Dkt. 95, docketed with this Court on March 14, 2018 as Case # 18-1567. On March 16, 2018, this Court issued an order to show cause why the cross-appeal should not be dismissed for lack of appellate jurisdiction. Dkt. 2 in matter 18-1567. On March 28, Ho-Chunk responded by moving to dismiss the cross appeal, Dkt. 6 in matter 18-1567, which cross appeal was dismissed on March 29, 2018. Dkt. 7 in matter 18-1567.

Allowing such lawsuits to proceed is consistent with traditional actions by sovereign governments, including Indian tribes, seeking prospective equitable relief to ensure compliance with applicable laws. Allowing such lawsuits to proceed is consistent with traditional jurisprudence on timeliness of such lawsuits, which is based on the doctrine of laches, and not on statutes of limitations. SMC's circumstances clearly fall outside the narrow elements for laches to bar SMC's claims as untimely. Moreover, allowing such lawsuits to proceed without regard to any statute of limitations that are based in the state laws of Wisconsin runs afoul of Congress' clear intent that IGRA occupy the field and completely preempt state law regarding gaming on Indian lands.

Even if the District Court was correct that it should look to analogous Wisconsin state law, it erred in looking to either Wisconsin's six year statute of limitations for actions sounding in breach of contract, or to the APA's six-year statute to challenge a federal final agency action. The APA is not state law, and the Wisconsin state law regarding public nuisance lawsuits brought by sovereigns is far more analogous to the circumstances here.

The overarching policy, established by Congress in the enactment of IGRA, is straightforward. Gaming on Indian lands must be done in compliance with applicable laws, and Indian tribes are expressly authorized to use the federal courts to ensure such compliance. The District Court's decision creates the opposite result, and sanctions illegal gaming on Indian lands.

V. STANDARD OF REVIEW

A *de novo* standard of review applies to all issues regarding this appeal. At issue here are the District Court's Orders granting Ho-Chunk's Motion for Judgment on the Pleadings, and denying SMC's Motion for Leave to File its Proposed First Amended Complaint, and the District Court's Order, *sua sponte*[9], to dismiss SMC's claims against the State as barred by a six-year statute of limitations.

The Seventh Circuit reviews a District Court's decision on a motion for judgment on the pleadings pursuant to Rule 12(c) under the same *de novo* standard as a motion to dismiss under Fed. R. Civ. P. 12(b). *Landmark American Insurance Co, v. Hilger*, 838 F.3d 821, 824 (7th Cir. 2016); *Buchanan Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009); *Frey v, Bank One*, 91 F.3d 45, 46 (7th Cir. 1996) Accordingly, the motion should not be granted unless it appears beyond doubt that the plaintiff cannot prove any facts that would support its claim for relief. In evaluating the motion, a court will view the facts in the complaint in the light most favorable to the nonmoving party. *Frey*, 91 F.3d at 46; *GATX Leasing Corp. v. National Union Fire Ins. Co.*, 64 F.3d 1112, 1114 (7th Cir. 1995). Motions for Judgment on the Pleadings will be granted 'only if it appears beyond doubt that the non-moving party cannot prove any facts that would support its claim for relief.' *Landmark American*, 838 F.3d at 824; *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998).

Generally, denials of leave to amend are reviewed for abuse of discretion. *See Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d, 510, 524 (7th Cir. 2015); *Gandhi v. Sitara Capital Management*, 721 F.3d 865, 868 (7th Cir. 2013). But here, Judge Peterson denied SMC's motion for leave to amend because he concluded that allowing for the PFAC would be futile (Dkt. 88,

[9] Although the State responded to the District Court's request for pleadings on the question of whether SMC's claims against the State should be dismissed on the same grounds as the Court's dismissal of SMC's claims against Ho-Chunk, the State never moved to dismiss SMC's claims on any basis.

Aa013/Ab0592 at 5) ("All three categories of claims would be futile, so the court will deny the Stockbridge-Munsee leave to amend"). When the basis for denial is futility, as it is here, this Court applies *de novo* review of the legal basis for the futility. *Runnion*, 786 F.3d at 524; *Gandhi*,721 F.3d at 868-69; *General Electric Capital Corp. v. Lease Resolution Corp*. 128 F.3d 1074, 1085 (7th Cir. 1997); accord, *Ervin v. OS Restaurant Servs., Inc*., 632 F.3d 971, 976 (7th Cir. 2011) ("If ... the district court applies an incorrect legal rule as part of its decision, then the framework within which it has applied its discretion is flawed, and the decision must be set aside as an abuse").

VI. ARGUMENT

A. Congress expressly vested indian tribal governments with the ability to ensure that gaming on indian lands is conducted lawfully.

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-state gaming compact. *See* 25 U.S.C. § 2710(d)(7)(A)(ii). 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:

> 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).

Notably, 25 U.S.C. § 2710(d)(7)(A) does not include or reference any statute of limitations for claims for injunctive relief, nor does it imply or otherwise suggest that a statute of limitations applies to such claims.

The District Court's analysis is premised upon two faulty conclusions: first, that SMC's claims are primarily breach of contract actions, and second, that SMC is not a sovereign tribal government, but is instead similarly situated to a municipality or other state political subdivision.

SMC's claims against Ho-Chunk are not sounding in breach of contract, and SMC does not claim to be a third party contract beneficiary of the Ho-Chunk Compact. Rather Congress took extra measures to make certain that IGRA's goal "to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players" is realized. 25 U.S.C. § 2702(2). In addition to federal governmental action set by statute, *see* 25 U.S.C. § 2713, and the State's opportunity to negotiate a role in enforcement while negotiating a gaming compact, Congress expressly vested Indian tribes with the ability to bring actions. 25 U.S.C. § 2710(d)(7)(A). The District Court embraced a false paradigm by viewing the compacts as contracts and addressing SMC's claims as such.

The appropriate paradigm is to understand that Congress recognized that Indian tribes were sovereign governments, not municipalities or state political subdivisions, or private entities,when it enacted IGRA, and that Congress intended that all gaming on Indian lands be conducted in compliance with IGRA (and derivatively in compliance with tribal-state compacts). In light of this understanding, tribal-state gaming compacts should not be viewed as contracts, but instead should be viewed as statutes or federal regulations that, together with IGRA, govern gaming activities on applicable Indian lands. Affirmative defenses sounding in statutes of limitations in actions brought by a sovereign against continuing and ongoing activity in violation

of the law, where the relief sought is prospective equitable relief to ensure compliance with that law, are not appropriate.

Notwithstanding IGRA's clear language, the District Court found that Wisconsin state law barred SMC's claims against both Ho-Chunk and the State as untimely. The District Court's decision runs counter to IGRA's clear language, established case law regarding the sovereign status of Indian tribes, and Wisconsin's application of its own statute of limitations. As explained below, this Court must reverse the District Court's erroneous decisions.

1. Statutes of limitations are not applicable to sovereigns seeking prospective equitable relief to comply with applicable law.

Sovereign governments historically have not been subjected to statutes of limitation. *See Guaranty Trust Co. v. United States*, 304 U.S. 126, 133 (1938) ("…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[.]"). As this Court has explained, this "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." *United States v. Central Soya, Inc*., 697 F.2d 165 (7th Cir. 1982).

The principle that state law statutes of limitation may not be used to bar claims brought by a sovereign government has been applied to cases brought by the United States on behalf of Indian tribes. *Board of Commissioners of Jackson County, Kansas v. United States*, 308 U.S. 343, 351 (1939) ("Again, state notions of laches and state statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise. This is so because the immunity of the sovereign from these defenses is historic. Unless expressly waived, it is implied in all federal enactments.") (citations omitted). The Supreme Court emphasized in

Jackson County, "The state will not be allowed to invade the immunities of Indians, no matter how skilful (sic) its legal manipulations." 308 U.S. at 350.

Wisconsin's courts apply this principle to Wisconsin statutes of limitation. *See Baxter v. State*, 10 Wis. 454 (1860). Indeed, the District Court's ruling, by applying a Wisconsin statute of limitations to SMC's claims pursuant to 25 U.S.C. § 2710(d)(7)(A), which would not apply to the State's claims pursuant to the exact same provision of IGRA, puts SMC at a decided disadvantage when seeking to enforce the terms of a class III gaming compact: SMC would be required to bring its claims within the period allowed by Wisconsin's statute of limitations, but the State would not be similarly bound. Nothing in 25 U.S.C. § 2710(d)(7)(A) remotely suggests that the State's compact enforcement rights are superior to SMC's.

In its October 25, 2017 Order in this case (Dkt. 67, Aa001/Ab0371), the District Court noted that the traditional sovereign immunity from statutes of limitations does not extend to municipalities and other non-sovereign entities under Wisconsin state law, and stated: "The Stockbridge-Munsee do not explain why this court should extend the [sovereign immunity from statutes of limitations] to Indian tribes, and the court declines to do so." Dkt. 67, Aa001/Ab0371 at 7. The District Court's error is manifest in the examples it cited: sovereign immunity does not extend to municipalities and school boards. But, sovereign immunity does not need to "extend" to Indian tribes, because Indian tribes already possess such immunity. *See Michigan v. Bay Mills Indian Community*, ___ U.S. ___; 134 S. Ct. 2024, 2030-31 (2014). Supreme Court jurisprudence has long held that tribes are domestic dependent nations that exercise inherent sovereign authority. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505 (1991). Tribes are separate sovereigns pre-existing the United States Constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (2004). Tribes possess and retain all attributes of that

inherent sovereignty unless Congress expressly and intentionally divest tribes of such authority. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Notably, nothing in the briefs proffered by Ho-Chunk and the State explain why SMC should be divested of its traditional sovereign immunity.

Congress may alter this traditional sovereign immunity from statutes of limitation through clear legislative language. *See BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006). Nevertheless, "[a]bsent congressional action changing this rule, it remains the law…." *Id*. at 649. Ambiguous statutory language regarding the extent to which statutes of limitation should be applied against the sovereign should be resolved in favor of the sovereign. *See Id*. at 646. ("A corollary of this rule is that when the sovereign elects to subject itself to a statute of limitations, the sovereign is given the benefit of the doubt if the scope of the statute is ambiguous."). This canon of construction is further buttressed by the traditional canons of construction applicable to Indian statutes, such as IGRA. Under those canons of construction, ambiguous statutes should be resolved in favor of the Indian tribes. *See, e.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("…statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit[.]").

Congress did not alter SMC's traditional sovereign immunities when it enacted IGRA and authorized tribes to bring claims for prospective injunctive relief. There is no clear statement in IGRA, or any related federal statute, stating that SMC would be subject to Wisconsin's statutes of limitations or other federal statutes of limitations for claims brought under § 2710(d)(7)(A). Nothing in IGRA's language even suggests that state statutes of limitation would apply to such claims. IGRA's plain language, along with longstanding canons

of statutory construction make it abundantly clear: SMC's claims for injunctive relief are not barred by state (or federal) statutes of limitation.

2. Claims for injunctive relief, by their very nature, are not barred by the statutes of limitation applicable to claims for legal remedies.

IGRA limits the remedies available where one Indian tribe brings a lawsuit against another tribe for violating its own class III gaming compact. Pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii), the only relief in such cases is injunctive relief: "[Federal courts will have jurisdiction over] any cause of action initiated by a State or Indian tribe *to enjoin class III gaming activities located on Indian lands and conducted in violation of any Tribal-State compact*…." (emphasis added). IGRA does not allow plaintiffs, like SMC, to recover damages suffered as a result of another tribe's unlawful gaming. The only remedy is an injunctive order prohibiting further unlawful gaming.

An injunction is a powerful equitable remedy that is ongoing, so long as the facts and the law require it to remain in effect. *See Rufo v. Inmates of the Suffolk County Jail, et al*., 502 U.S. 367, 388 (1992). By its very nature, injunctive relief is neither necessary nor permissible when no unlawful activity is occurring. *See St. John's United Church of Christ v. Chicago*, 502 F.3d 616, 627 (7th Cir. 2007) ("Courts grant injunctive relief with the understanding that there will be an opportunity for modifying or vacating [the] injunction when its continuance is no longer warranted.") (internal quotations omitted). A plaintiff does not need an injunction when the defendant is not breaking the law.

By its nature, injunctive relief applies to ongoing violations of the law. The Supreme Court has explained, "[t]raditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946); *see also Russell v. Todd*, 309 U.S. 280, (1940) ("But where 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…"). According to the Supreme Court, "a suit in equity may lie though a comparable action at law would be barred." *Holmberg,* 327 U.S. at 396. The Supreme Court has affirmed this fundamental principle as recently as 2013, when it contrasted the application of statutes of limitations to suits in law and in equity. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. ___; 133 S. Ct. 1523, 1531 (2013) ("Unlike claims for injunctive relief challenging ongoing conduct, a claim for damages cannot evade review; it remains live until it is settled, judicially resolved, or barred by a statute of limitations.").

SMC is not seeking money damages or other legal relief from Ho-Chunk and the State in this case. IGRA's plain language would not permit such a suit. *See* 25 U.S.C. § 2710(d)(7)(A)(ii). Rather, SMC is seeking injunctive relief against Ho-Chunk to stop Ho-Chunk from openly and brazenly violating Ho-Chunk's class III gaming compact. Similarly, SMC is seeking injunctive relief against the State to ensure that the State complies with the SMC Compact going forward, namely, ensuring that the Wittenberg facility is operated as an Ancillary Facility, and not as a Gaming Facility, under the terms of the Ho-Chunk Compact. Neither the Appellees nor the District Court point to any statutory language that even suggests SMC must bring such claims within a defined period of time from the first occurrence of unlawful activity. Such a requirement would be inconsistent with the language Congress adopted to allow claims for injunctive relief under 25 U.S.C. § 2710(d)(7)(A)(ii). Indeed, the Supreme Court has recognized that a plaintiff may bring a claim to enjoin continued unlawful activity long after the unlawful activity first began:

> United has also advanced the argument that because the earliest impact on Hanover of United's lease only policy occurred in 1912, Hanover's cause of action arose during that year and is now barred by the applicable Pennsylvania statute of limitations. The Court of Appeals correctly

> rejected United's argument in its supplemental opinion. ***We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span***. Cf. *Emich Motors Corp. v. General Motors Corp*., 229 F.2d 714 (C.A.7th Cir. 1956), upon which United relies. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

Hanover Shoe, Inc v. United Shoe Machinery Corp, 392 U.S. 481, n.15 (1968) (emphasis added); *see also Montin v. the Estate Johnson*, 636 F.3d 409, 415 (8th Cir. 2011) ("Not every plaintiff is deemed to have permanently sacrificed his or her right to obtain injunctive relief merely because the statute of limitations has run as measured from the onset of the objected-to condition or policy.").

This Circuit has similarly differentiated between the deadlines applicable to claims for legal relief and claims for equitable relief. In *Scherr v. Marriott Int'l, Inc*., 703 F.3d 1069 (7th Cir. 2013), this Court examined whether claims for injunctive relief under the Americans with Disabilities Act (the "ADA") were subject to state law statutes of limitations. The Court quoted the text of the statute itself, which stated that injunctive relief is available to "any person who is being subjected to discrimination on the basis of disability [or] has reasonable grounds for believing that such person is about to be subjected to discrimination." *Id*. at 1075-76 (quoting 42 U.S.C. § 12188(a)(1)). The Court explained that this statutory language clearly applies to continuing, and threatened, violations of the law; and that state law statutes of limitations did not bar the plaintiff's claims for injunctive relief. *Id*. at 1076.

As with the statutory language at issue in *Scherr*, IGRA's enforcement provisions clearly allow claims to enjoin ongoing (or threatened) unlawful activities. Section 2710 authorizes claims "***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) (emphasis added).

The word "enjoin" can be an affirmative command to do something, or a command to stop or refrain from doing something. Enjoin. (1970). In *Websters New World Dictionary* (2d ed.). NY: World Publishing Company. In the context of 25 U.S.C. § 2710, Congress clearly intended to use the word "enjoin" in the prohibitory sense – it would be absurd to allow a plaintiff tribe to seek a judicial order commanding a tribe to conduct gaming in violation of its own class III gaming compact. "Enjoin" is a transitive verb, meaning that it applies to one or more objects. *Id*. In 25 U.S.C. § 2710(d)(1)(A)(ii), the verb applies to "a class III gaming activity" that is "located on Indian lands," and that is also "conducted in violation of a Tribal-State compacted entered into" under IGRA. The word "game" is itself a verb expressed as a present participle, meaning that it describes action occurring in the present. Gaming. (1970). In *Westers New World Dictionary* (2d ed.). NY: World Publishing Company.

The grammatical construction of 25 U.S.C. § 2710(d)(1)(A)(ii) indicates that the equitable relief is applied to activity – "gaming" – that is presently occurring. This is consistent with the nature of injunctive relief itself, which is not used to remedy injuries sustained from unlawful activities that occurred in the past. As this Court explained in *Scherr*, a state statute of limitations will not bar injunctive relief authorized by a federal statute to stop ongoing unlawful activity from continuing to occur (or from occurring in the future). *Scherr*, 703 F.3d at 1076.

Scherr is consistent with Supreme Court precedent dating back for more than a half-century, which does not use state law statutes of limitation to bar federal law claims for injunctive relief. *See Russell*, *Holmberg*, and *Hanover Shoe, Inc*., *supra*. The District Court's

decision to use state and federal statutes of limitations to bar SMC's claims for equitable relief runs afoul of this precedent.

3. Laches, rather than statute of limitations, is the defense that appellees must establish to block claims of prospective equitable relief as untimely.

Laches, rather than statute of limitations, is the appropriate defense to challenge the timeliness of claims for equitable relief. *Hot Wax Inc. v. Turtle Wax Inc*., 191 F.3d 813 (7th Cir. 1999); *see also Oliver v. SD-3C LLC*, 751 F.3d 1081 (9th Cir. 2014) ("Because Plaintiffs seek only injunctive relief under federal law, their federal antitrust claim is subject to the equitable doctrine of laches and not the four-year statute of limitations in section 4B of the Clayton Act, 15 U.S.C. § 15b."). The Appellees in this case have never asserted the equitable defense of laches. SMC continues to assert that its claims are not barred by any state or federal statutes of limitations. SMC also asserts that the doctrine of laches would not bar its claims.

If laches analysis were to apply, it would not bar SMC's claims as untimely, and certainly not in the context of a motion to dismiss. Equitable 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. *Petrella v. Metro-Goldwyn-Mayer*, *Inc*., 134 S. Ct. 1962, 1978 (2014); *see also City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005). No such extraordinary circumstances are present here.

Laches is principally a question of the inequity of permitting a claim to be enforced. It is unlike limitation, which is based merely on time. Laches is based upon changes of conditions or relationships involved with the claim. *Galliher v. Cadwell*, 145 U.S. 368, 373 (1892); *Lingenfelter v. Keystone Cosol. Industries, Inc*., 691 F.2d 339, 340 (7th Cir. 1982).

"Laches," the corruption of an old French word (*lasche*) meaning "lax," in law means culpable delay in filing suit. Traditionally, suits in equity were not subject to statutes of limitations, but such suits could be dismissed on the basis of unreasonable, prejudicial delay by the plaintiff. *Piper Aircraft Corp. v. Wag-Aero, Inc*., 741 F.2d 925, 938-39 (7th Cir. 1984). The contrast is between rules and standards as regulatory devices. A statute of limitations cuts-off the right to sue at a fixed date after the plaintiff's cause of action has accrued. Laches cuts off the right to sue when the plaintiff has delayed "too long" in suing. "Too long" for this purpose means that the plaintiff delayed inexcusably and the defendant was harmed by the delay. *Costello v. United States*, 365 U.S. 265 (1961); *United States v. Administrative Enterprises, Inc*. 46 F.3d 670, 672 (7th Cir. 1995); *Herman v. City of Chicago*, 870 F.2d 400, 401 (7th Cir. 1989). Laches requires proof of: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *Costello* 365 U.S. at 282; *Lingenfeller*, 691 F.2d at 340. If the plaintiff's delay is inexcusable, then the defendant must show prejudice. *Id.*

Here, there is neither inexcusable delay, nor prejudice. 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. To raise the claim shortly after Ho-Chunk announced that it would transform the modest Wittenberg Ancillary Facility into a full blown gaming casino and resort, is reasonable. That announcement represented a sea change in the circumstances and facts applicable to the two tribes, and the consequences to SMC are potentially devastating. Moreover, even if SMC's delay was wholly unreasonable, Ho-Chunk cannot properly assert prejudice as SMC quickly put Ho-Chunk on notice of SMC's position and claims, before Ho-Chunk expended substantial resources to construct the gaming expansion, and Ho-Chunk elected to proceed from that juncture at its own peril. Any prejudice is purely the result of Ho-Chunk's

own election and knowing decision to proceed, rather than waiting for the merits of SMC's claims to be resolved.

Accordingly, neither Ho-Chunk nor the State cannot avail on a laches defense, even if it were raised below. If laches is asserted as an alternative means to affirm the lower court, it fails. At a minimum, the laches issue should be remanded to allow for discovery and adjudication as to whether the elements of a laches defense are present.

B. IGRA preempts the application of Wisconsin state law, including Wisconsin statutes of limitations.

This Court has acknowledged the inherent problems with applying state statutes of limitations to claims brought pursuant to federal law. *See McCartney C. v. Herrin Community Unit School Dist. No. 4*, 21 F.3d 173, 174 (7th Cir. 1994) **(**"The process by which judges pick a statute of limitations for a federal statute that lacks one is at best uncertain and at worst arbitrary."). The Supreme Court has likewise explained that state statutes of limitations should not be borrowed where they are inconsistent with, or undermine, the overriding purpose of federal law. *See County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 240-41 (1985) (refusing to apply state statute of limitations because it would be inconsistent with federal policy allowing Indian land claims).

The District Court found that Wisconsin's statute of limitations for breach of contract claims barred SMC's claim against Ho-Chunk regarding its violation of the "Ancillary Facility" restrictions in the Ho-Chunk Compact Dkt. 67, Aa001/Ab0371 at 7. The District Court also found that the same statute of limitations applied to bar SMC's claims against the State Dkt. 88, Aa013/Ab0592 at 11. In reaching these conclusions, the District Court did not explain how Wisconsin's statute of limitations fit into the enforcement scheme Congress created at 25 U.S.C.

§ 2710(d)(7)(A) assuming instead that there simply must be some statutory time limitation on claims brought under that section.

The District Court's conclusion on this point conflicts with Congress' clear and overriding objective in adopting IGRA: to establish a federal statutory basis for the operation and regulation of gaming activities on Indian lands. *See* 25 U.S.C. § 2702. It also runs counter to settled law that Indian tribes – like SMC – are not subject to the application of state laws.

From its very first Indian gaming case, the Supreme Court has understood federal and tribal law to preempt the application of state laws to Indian gaming conducted on tribal lands. *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."). Congress responded to the Supreme Court's decision in *Cabazon* by enacting IGRA in 1988. But, in doing so, Congress was abundantly clear that IGRA would preempt the application of state laws to Indian gaming:

> The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact. In no instance, does S.555 contemplate the extension of state jurisdiction or the application of State laws for any other purpose. *** ***S.555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands***.[10]

S. Rep. No. 100-446 at 6, 100th Cong., 2d Sess. 2 (1988), reprinted in 1988 U.S.C.C.A.N. 3017 (emphasis added).

Federal courts have adhered to Congress' intent by holding that IGRA preempts the application of state law to regulate Indian gaming. *See Gaming Corp. of America v. Dorsey &*

[10] By their very nature, class III gaming compacts apply only to Indian gaming on Indian lands. *See* 25 U.S.C. § (1) (stating that Indian tribes may conduct class III gaming on Indian lands in conformance with a class III gaming compact).

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)).[11]

Dorsey & Whitney has been widely cited for the general rule that IGRA preempts the application of state law to the regulation of Indian gaming. In that case, Ho-Chunk had denied a gaming license to its business partners who sought to manage one of Ho-Chunk's many casinos. The business partners brought a suit against Ho-Chunk's law firm (Dorsey & Whitney) in Minnesota state court on various common law contract claims. The law firm sought removal to federal court on the grounds that IGRA preempted state law claims. The Court examined the structure of IGRA itself, noting that the statute provides for "comprehensive" regulation of Indian gaming. *Dorsey & Whitney*, 88 F.3d at 544. The Court found that IGRA completely preempted the application of state laws to the regulation of Indian gaming. *Id*. at 547. In doing so, the Court noted that the only method by which states could apply their laws to Indian gaming was by tribal consent through a negotiated compact. *Id*. at 546 ("…under [IGRA], the only

[11] State law can limit a State official's authority to enter into a class III gaming compact. *See, e.g.*, *Panzer v. Doyle*, 271 Wis. 295; 680 N.W.2d 666 (Wis. 2004). But, the federal courts have not found that states can directly apply their own laws to tribes in order to regulate Indian gaming.

method by which a state can apply its general civil laws to gaming is through a tribal-state compact.").

IGRA does not include any statute of limitations for claims brought by tribes – or by states – to enjoin gaming activities conducted in violation of a class III gaming compact under 25 U.S.C. § 2710(d)(7)(A)(ii). Nothing in the language of 25 U.S.C. § 2710(d)(7)(A) suggests that the Wisconsin legislature (or any other state legislative body) may limit federal court jurisdiction to hear tribal claims for injunctive relief.

Nevertheless, the District Court has opened the door to allow states to undermine Congress' comprehensive statutory scheme for the regulation of Indian gaming by manipulating when claims for injunctive relief may be brought under 25 U.S.C. § 2710(d)(7)(A). For example, the District Court's opinions below would allow the Wisconsin legislature to adopt a special statute of limitations for claims brought by an Indian tribe under 25 U.S.C. § 2710(d)(7)(A).

There would be nothing to stop the State of Wisconsin from enacting a special statute of limitations barring SMC's claims after the passage of thirty (30) days from Ho-Chunk's first compact violation, or even after the passage of as little as ten (10) days. There would be nothing to stop the State of Wisconsin from making this statute of limitations applicable only to tribal claims under 25 U.S.C. § 2710(d)(7)(A), while exempting such claims brought by the State itself from any statute of limitations. In fact, every single state could establish its own statute of limitations for claims brought under 25 U.S.C. § 2710(d)(7)(A). The federal courts would be drawn into disputes regarding how far each state could go to limit the ability of the federal courts to hear compact enforcement claims under IGRA. The scope and effectiveness of IGRA's

compact enforcement provisions would be subjected to the vagaries of politics in each state, leading to a patchwork of regulation of Indian gaming across the country.

Congress did not intend to create a patchwork system of regulation and enforcement for Indian gaming. Congress did not intend to subject Indian gaming to state regulation at all, except where agreed upon by mutual consent of each tribe and state. *See* 25 U.S.C. § 2710. Instead, Congress preempted the application of state laws thereby establishing a uniform statutory scheme for the regulation of Indian gaming across the United States. *See Dorsey & Whitney*, *supra*. The District Court's opinion undermines this statutory scheme, and enlarges the ability of states to regulate Indian gaming far beyond that which Congress intended.

In addition, the District Court's opinion subjects the SMC to the laws of the State of Wisconsin without its consent, and without a clear mandate from Congress. This also runs afoul of longstanding legal rules.

For the past two centuries, it has been settled law that Indian tribes are not subject to state jurisdiction and state laws. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force…"); and, *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."). Federal courts have held that Congress can modify this rule by subjecting tribes, their members, and their lands to the exercise of state jurisdiction. *See Williams*, 358 U.S. at 221 ("Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied.").[12] Where Congress seeks to subject Indian tribes themselves

[12] The Supreme Court has held that state laws can apply to on-reservation activities and conduct without an express congressional statement where the State's interest in regulating on-reservation activities

to the application of state laws, it must do so with clear and unambiguous language. *See Cabazon*, 480 U.S. at 207 ("…state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided."). Tribes may also consent to the application of state laws by agreement, including tribal-state gaming compacts. *See Dorsey & Whitney*, 88 F.3d at 546.

Congress clearly vested SMC with the right to initiate a cause of action in the District Court to enjoin Ho-Chunk's gaming activities in Wittenberg that are conducted in violation of the Ho-Chunk Compact. *See* 25 U.S.C. § 2710(d)(7)(A)(ii). In doing so, Congress did not subject SMC to the application of Wisconsin state law – either explicitly or implicitly. SMC did not consent to be subjected to the application of Wisconsin's statutes of limitations (or other procedural statutes) in exercising its enforcement rights under 25 U.S.C. § 2710(d)(7)(A)(ii).

Applying state statutes of limitation to Indian tribes, without either a clear directive by Congress or tribal consent, runs counter to two centuries of federal case law. Yet this is exactly what the District Court did. It held that, in the absence of a federal statute of limitations, SMC's right to bring its claims under 25 U.S.C. § 2710(d)(7)(A)(ii) is limited by Wisconsin state law as if SMC was a municipality or a state political subdivision or a private entity. This was in error.

The application of Wisconsin's statutes of limitations to SMC's claims is inconsistent with IGRA's purpose and scheme. Moreover, it is inconsistent with the general legal principles that have applied to questions involving Indian tribes for more than two centuries. For these reasons alone, this Court should reverse the District Court's decision.

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outweigh tribal and federal interests. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). The *Bracker* balancing test is inapplicable in cases like this one, where Congress has expressed its clear intent to preempt the application of state laws.

C. The District Court erred by applying a six-year statute of limitations to smc's claims.

As set forth above, it was error for the District Court to find that any statute of limitations applied to SMC's claims. However, for purpose of argument, if there is an applicable statute of limitations, the District Court erred in its determination that a six-year statute of limitations applies to render SMC's claims as untimely.

1. If Wisconsin state law regarding statutes of limitations applies, the District Court erred in determining that the six -year statute applicable to breach of contract actions is the "most analogous".

If the District Court was correct to determine the most analogous statute of limitations under Wisconsin law applicable to SMC's claims, the District Court still erred by applying Wisconsin's six-year statute of limitations applicable to claims sounding in breach of contract. The most analogous Wisconsin statute of limitations, applying the Indian canon of construction liberally but reasonably within its discretion, is the Wisconsin statute of limitations applicable to claims of 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 facility. 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. A nuisance is continuing if it is ongoing or repeated but can be abated. A permanent nuisance is one act that causes permanent injury, as opposed to acts continuing unabated and risking cause of additional injury. *Sunnyside Feed Co., Inc. v. City of Portage*, 222 Wis.2d 461, 588 N.W.2d 278 (Ct. App. 1998) (citing with approval, *Bartleson v. United States*, 96 F.3d 1270, 1276-77 (9th Cir. 1996)). Wisconsin courts have long-recognized that illegal gambling activity

is a public nuisance[13]. *See State ex rel Trampe v. Multerer*, 234 Wis. 50, 289 N.W. 600 (1940); *State v. Nixa*, 121 Wis.2d 160, 164, 360 N.W.2d 52 (Ct. App. 1984) (if one of a dwelling's primary purposes is to allow gambling, it is a public nuisance). Indeed, Wisconsin statutes expressly declare that illegal gambling houses are a public nuisance. Section 823.20, Wis. Stats. Moreover, Article IV, Section 24 (6)(c) of Wisconsin's Constitution expressly prohibits any forms of gaming anywhere in the State that are not authorized by a tribal/state gaming compact. IGRA, codified at 18 U.S.C. § 1166, specifically provides that state gaming laws apply as a matter of federal law to gaming on Indian lands not authorized by a gaming compact.

As discussed above, the District Court's treatment of the case as a contractual dispute between two non-sovereign entities, and accordingly treating the dispute as a run-of-the-mill contract claim, is contextually inappropriate. Rather, this case is a matter of SMC exercising the governmental authority bestowed upon it by Congress in the passage of IGRA to ensure that gaming on Indian lands is conducted lawfully. There is case law that informs that canons of construction regarding contracts may be used to determine the meaning of compact terms, *see, e.g.*, *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1099 (9th Cir. 2006), but that principle of construction does not morph a tribal-state compact under IGRA into a mere contract among non-sovereigns.

By way of severe analogy, there are many examples where Congress authorized lawsuits to be brought by private entities for purpose of advancing the public good. Even in these lawsuits, where the plaintiff is a non-sovereign, non-governmental entity, the plaintiff is cloaked

[13] The initial Complaint's allegation that Ho-Chunk's gaming is illegal is sufficient for the defendants to be on notice that SMC is alleging that the Wittenberg facility is a public nuisance. IGRA, codified at 18 U.S.C. § 1166, specifically provides that state gaming laws apply as a matter of federal law to gaming on Indian lands not authorized by a gaming compact. However, in an abundance of caution, the PFAC (Dkt. 75-1, Ab0431 at ¶ 49) included the specific allegation that gaming at the Wittenberg facility constitutes an illegal public nuisance.

with the "Mantle of Sovereignty ." *See, e.g.*, *Hutchings v. United Industries, Inc*., 428 F.2d 303 (5th Cir. 1970) (Plaintiff having settled contract dispute in arbitration does not divest Plaintiff of Title VII action: the individual "takes on the mantle of the sovereign"); *Patterson v. Youngstown Sheet & Tube Co.*, 1972 WL 292 at *3, 7 Empl. Prac, Dec. P. 9312 (D. N.D. Ind. 1972) (It is "the responsibility of the Court to devise remedies to effectuate the purpose of the act, eradicate both the discriminatory practice and its vestiges and make relief available to all who were damaged by the practice"); *Williams v Local No. 19 Sheet Metal Workers*, 59 F.R.D. 49 (E.D. Penn. 1973) (the individual plaintiff "often obscure, takes on the mantle of the sovereign. . . and the charge itself is something more than the single claim that a particular job has been denied him . . . due to Title VII forbidden discrimination"). Below, the District Court, rather than embrace SMC's inherent mantle as a sovereign, questions whether it is subordinate to a municipality, and essentially renders it a non-sovereign regarding its IGRA-based claims against Ho-Chunk. That error becomes abundantly clear when contrasted to circumstances where Congress has authorized true non-sovereign private plaintiffs to bring actions advancing the public good.

A tribal-state gaming compact under IGRA is the result of IGRA-mandated good faith negotiations to ensure that gaming is conducted fairly and honestly by the tribe, 25 U.S.C. § 2702(2). A compact is the document, together with IGRA, which governs the conduct of Class III gaming on Indian lands. A compact is more analogous to a statute or duly-promulgated regulations such that SMC, seeking to abate the public nuisance of an illegal gambling house, is the IGRA-driven equivalent to the State (or a private attorney general under an applicable statute) bringing such an action.

2. The District Court suggests an alternate choice of the APA's six-year statute of limitations regarding SMC's claims based on the ineligibility of Ho-Chunk's Wittenberg parcel of Indian lands for gaming. Such a suggestion is in error.

The District Court's Order of October 25, 2017 suggests an alternate choice of the APA's six-year statute of limitations regarding SMC's claims based on the ineligibility of Ho-Chunk's Wittenberg parcel of Indian lands (Dkt. 67, Aa001/Ab0371 at 7), "Both proposed statutes contain a six-year limitations period, so the court need not determine which one applies"). Such suggestion is in error.

First, the District Court, by its own analysis, looks to the most analogous statute under state law (Dkt. 67, Aa001/Ab0371 at 6), citing *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983)). The APA's six-year statute of limitations, 5 U.S.C. §§ 701-706, is a federal statute regarding claims against a federal agency's final agency action.

Second, Ho-Chunk misconstrues SMC's claims as challenging the current trust status of the Wittenberg parcel and only argued below that the APA's six-year statute should apply to SMC's claims based on the eligibility of the Indian lands, as opposed to SMC's claims that the gaming violates the Ancillary Facility provisions of the Ho-Chunk Compact. Ho-Chunk improperly conflates the final agency actions regarding the trust status of the Wittenberg parcel with determinations as to the eligibility of Indian lands for gaming. Ho-Chunk argues that all final agency actions regarding the Wittenberg parcel occurred prior to 2011, and SMC's ability to challenge those final agency actions (presumably under an APA action against the United States Department of the Interior) expired prior to SMC filing its claims against Ho-Chunk. Ho-Chunk's analysis is a non-sequitur.

SMC does not dispute the current validity of the trust status of the Wittenberg parcel. Rather, Congress proscribed gaming on lands lacking trust status as of 1988, the year IGRA was

enacted, regardless of the fact that such lands they currently are in trust status, unless certain conditions occur. 25 U.S.C. § 2719. There has been no federal final agency action determining the eligibility of the Wittenberg parcel (now in trust) for gaming. Even if a formal opinion were issued by the Department or the National Indian Gaming Commission regarding such eligibility, such action would not be a final agency action redressable by the APA. *Kansas ex rel Schmidt v. Zinke*, 861 F.3d 1024, 1029 (10th Cir. 2017). Accordingly, 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.

Ho-Chunk's introduction of the APA into the discussion regarding an applicable statute of limitations (and the District Court's error in suggesting that it need not analyze the applicability of the APA because it has the same six-year limitations period as contract actions under Wisconsin state law) underscores the primary position that SMC advances in this appeal: that Congress expressly authorized tribal governments to bring actions to abate unlawful gaming on Indian lands.

Why vest federal, state *and* tribal governments with the authority to use the federal courts to abate unlawful gaming on Indian lands? Here, the federal government has taken no action, affirmatively or negatively, to determine the eligibility of the Wittenberg parcel under IGRA, and SMC cannot compel it to do so. Here, the State's interest in maximizing its own revenue from Ho-Chunk's amassment of large and successful casinos close to urban areas (as opposed to SMC's single modest and rural casino) provides a disincentive at best, and complicity at worst, keeping the State from taking its own appropriate enforcement action against Ho-Chunk's non-compliant gaming activity. With the State and the federal government failing to abate Ho-Chunk's unlawful gaming on Indian lands, Congress's empowerment of SMC and other tribes to

seek such abatement better ensures that gaming on Indian lands is conducted lawfully. The District Court's decisions below, flips that Congressional intent on its head and actually endorses and legitimize, unlawful gaming on Indian lands by allowing Ho-Chunk's illegal gaming to continue unabated.

3. As it relates to SMC's claims against the State, even applying a six-year statute of limitations, SMC's claims against the State would not expire until 2020.

Even if there is a six-year statute of limitations regarding lawsuits brought under 25 U.S.C. § 2710(d)(7)(A), barring SMC's claims against Ho-Chunk, that does not bar SMC's claims against the State for its failure to take action to ensure that Ho-Chunk complies with the Gaming Facility/Ancillary Facility restrictions in Ho-Chunk's Compact. It follows that, if SMC could have brought an action against Ho-Chunk prior to, but only until 2014, the State could also have brought an action as of 2014. SMC's claims against the State are, *inter alia,* based upon the State's failure to seek such enforcement, which the State, under the District Court's analysis, could have done in 2014. Accordingly, the six-year statute for SMC's claims against the State are timely now, and will not expire until 2020.

VII. CONCLUSION

For the reasons set forth herein, and SMC's submissions below, this Appeals Court should vacate the District Court's decision and remand the matter back to the District Court with direction to allow SMC to file the PFAC, and to proceed with SMC's claims on their merit.

Dated: May 21, 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

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 10,596 of words and complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify, that this brief has been prepared in a proportionally spaced typeface using Word Mac 2011 in a 12-point New Times Roman font with footnes set in 11-point font New Times Roman and that it complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6).

Date: May 21, 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

☑

CERTIFICATE OF SERVICE

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on May 21, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Scott D. Crowell

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Certificate of Service When Not All Case Participants Are CM/ECF Participants

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_____	_____

s/_____

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

APPELANT'S CIRCUIT RULE 30 APPENDIX (PART A)

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

BRIAN 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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LOCAL RULE 30(D) CERTIFICATION

I hereby certify that this Circuit Rule 30 Appendix includes all materials relevant by parts (a) and (b) of this rule are included.

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

Attorneys for Plaintiff-Appellant
Stockbridge-Munsee Community

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THE STOCKBRIDGE-MUNSEE COMMUNITY,

Plaintiff,

v.

OPINION & ORDER

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

17-cv-249-jdp

Defendants.

The Stockbridge-Munsee Community is an Indian tribe with a reservation in Shawano County in northern Wisconsin. Since 1992, the Stockbridge-Munsee have operated a casino on their reservation. In 2008, defendant the Ho-Chunk Nation, another Indian tribe, opened a casino in Shawano County, Ho-Chunk Gaming Wittenberg. The Stockbridge-Munsee tolerated the Ho-Chunk's competition to a point, but in August 2016, the Ho-Chunk announced plans to expand their Wittenberg casino. In response, the Stockbridge-Munsee filed this lawsuit, claiming that the Ho-Chunk's Wittenberg casino violates the Indian Gaming Regulatory Act and the gaming compact that the Ho-Chunk negotiated with the state. They also allege that defendants the State of Wisconsin and its governor, Scott Walker, are violating the state's compact with the Stockbridge-Munsee by refusing to enforce the Ho-Chunk compact. The central claim by the Stockbridge-Munsee is that the Ho-Chunk's casino is located on land on which casinos cannot be authorized.

Now the Stockbridge-Munsee seek a preliminary injunction under Federal Rule of Civil Procedure 65. Dkt. 7. Specifically, they want the court to enjoin the Ho-Chunk from operating any of the slot machines and gaming tables included in the Ho-Chunk's planned expansion.

The Ho-Chunk, meanwhile, have moved to dismiss the Stockbridge-Munsee's claims against them for failure to state a claim under Federal Rule of Civil Procedure 12(c). Dkt. 56.

The Stockbridge-Munsee could have brought their claims against the Ho-Chunk back in 2008, when the Ho-Chunk began the gaming activities that the Stockbridge-Munsee allege are unlawful. Their claims are now time-barred, so the court will grant the Ho-Chunk's motion for judgment on the pleadings and deny the Stockbridge-Munsee's motion for a preliminary injunction as moot.

ALLEGATIONS OF FACT

The court draws the following facts from the Stockbridge-Munsee's complaint, Dkt. 5, and accepts them as true for purposes of the motion for judgment on the pleadings. *Finch v. Peterson*, 622 F.3d 725, 728 (7th Cir. 2010).

The Ho-Chunk Nation is a federally recognized Indian tribe in Wisconsin. In 1969, the Native American Church conveyed a parcel of land near the Village of Wittenberg, Shawano County, Wisconsin, to the United States to hold in trust for the Ho-Chunk. 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." Dkt. 5-3, at 3. But the Ho-Chunk did not start building housing on the Wittenberg Parcel within five years. Decades passed. In 1989, the Native American Church approved a resolution "remov[ing] the condition and reversionary clause relating to construction of housing on the [Wittenberg Parcel]." Dkt. 5-4, at 2. In 1993, the Native American Church executed a quitclaim deed transferring "all right, title and interest, it may have under the reversionary clause in" the Wittenberg Parcel deed to the United States to hold in trust for the Ho-Chunk. Dkt. 5-5, at 3.

Meanwhile, the Ho-Chunk were setting up gaming activities around the state in compliance with the 1988 Indian Gaming Regulatory Act (IGRA). The IGRA "creates a framework for regulating gaming activity on Indian lands." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2028 (2014). It "divides gaming into three classes. Class III gaming, the most closely regulated . . . includes casino games, slot machines, and horse racing. A tribe may conduct such gaming on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State." *Id.* (citation omitted). It defines "Indian lands" to include "any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe." 25 U.S.C. § 2703(4)(B). But it prohibits gaming on "lands acquired by the Secretary [of the Interior] in trust for the benefit of an Indian tribe after October 17, 1988." § 2719(a)(1).

In 1992, the Ho-Chunk entered into a class III gaming compact with the State of Wisconsin, which allowed the Ho-Chunk to operate class III gaming activities in several Wisconsin counties. In 2003, the Ho-Chunk and the state amended the compact to allow the Ho-Chunk to operate class III gaming activities in Shawano County at what the compact defines as an "Ancillary Facility," that is, 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." Dkt. 5, ¶ 40.

In 2008, the Ho-Chunk opened the Ho-Chunk Gaming Wittenberg casino on the Wittenberg Parcel. This casino competed with the Stockbridge-Munsee's sole casino, the North Star Casino Resort, which the Stockbridge-Munsee had been operating in Shawano County since 1992 under a class III gaming compact with the State that the Stockbridge-Munsee negotiated the same year. In August 2016, the Ho-Chunk announced plans to expand their

Wittenberg casino by adding more than 200 slot machines, 10 gaming tables, a hotel, restaurant, and bar. The Stockbridge-Munsee immediately wrote to the Ho-Chunk "expressing concerns" about the expansion. *Id.* ¶ 43.

On April 19, 2017, the Stockbridge-Munsee filed this lawsuit, asserting claims that the Ho-Chunk's gaming activities at Ho-Chunk Gaming Wittenberg violate the Ho-Chunk compact and the IGRA and that the state's refusal to enforce the Ho-Chunk compact violates the Stockbridge-Munsee compact, rendering the gaming revenue payments required by the Stockbridge-Munsee compact an unlawful tax. The Stockbridge-Munsee purport to bring these claims under § 2710(d)(7)(A)(ii) of the IGRA, which "partially abrogates tribal sovereign immunity," *Bay Mills*, 134 S. Ct. at 2032, and provides

> 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 . . . .

The Stockbridge-Munsee allege that Ho-Chunk Gaming Wittenberg violates the Ho-Chunk compact in two ways. First, the Wittenberg Parcel was acquired in trust after October 17, 1988, and therefore is ineligible for gaming under § 2719(a)(1) of the IGRA and the corresponding provision of the Ho-Chunk compact. Second, the pre-expansion gaming activities at Ho-Chunk Gaming Wittenberg constitute more than 50 percent of the net revenue from the Wittenberg Parcel and more than 50 percent of the facilities on the Wittenberg Parcel, therefore Ho-Chunk Gaming Wittenberg is not an ancillary facility and is being operated in violation of the Ho-Chunk compact. These violations pre-date the planned expansion and would continue as Ho-Chunk Gaming Wittenberg operates the casino.

This court has subject matter jurisdiction over the Stockbridge-Munsee's claims against the Ho-Chunk under 28 U.S.C. § 1362 and 25 U.S.C. § 2710(d)(7)(A)(ii).

ANALYSIS

The Ho-Chunk assert numerous defenses to the Stockbridge-Munsee's claims. Most are based on principles of sovereign immunity. Because the timeliness issue proves dispositive here, the court need not reach the Ho-Chunk's sovereign-immunity arguments. *See Meyers v. Oneida Tribe of Indians*, 836 F.3d 818, 821 (7th Cir. 2016) ("[A] federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." (quoting *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007))). The court will grant judgment on the pleadings "[o]nly when it appears beyond a doubt that the plaintiff cannot prove any facts to support a claim for relief and the moving party demonstrates that there are no materials issues of fact to be resolved." *Moss v. Martin*, 473 F.3d 694, 698 (7th Cir. 2007). The court reviews motions for judgment on the pleadings under the same standard as motions to dismiss for failure to state a claim upon which relief can be granted, except that it considers all the pleadings. *N. Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 449, 452 (7th Cir. 1998).

The Stockbridge-Munsee request oral argument on the Ho-Chunk's motion. But Rule 12(c) considers the legal sufficiency of the Stockbridge-Munsee's claims as pleaded. The Stockbridge-Munsee have not explained why oral argument is necessary; they state only that "oral argument is appropriate and will facilitate [the c]ourt's deliberation." Dkt. 58, at 11. The court is satisfied that it can fully and fairly resolve the motion on the parties' written

submissions, including the parties' supplemental briefs on limitations issues, which the court requested. Dkt. 46.

The Ho-Chunk contend that the Stockbridge-Munsee's claims are barred because they were filed outside of the applicable statute of limitations period.[1] The Stockbridge-Munsee's claims against the Ho-Chunk arise under the IGRA, which does not expressly state a limitations period. The Stockbridge-Munsee argue that as a result, no statute of limitations is applicable to their claims. That is not an accurate statement of the law. "Congress, unless it has spoken to the contrary, did not intend by the mere creation of a 'cause of action' or 'claim for relief' that any plaintiff filing a complaint would automatically prevail if only the necessary elements of the federal substantive claim for relief could be established." *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980)). Congress has not indicated that no statute of limitations applies to the IGRA, so there is some time limit to the Stockbridge-Munsee's claims.

As the Stockbridge-Munsee concede, 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." *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983). The Stockbridge-Munsee again argue that under state law, *no* statute of limitations should apply, pointing to

[1] The Stockbridge-Munsee move to strike this and several other affirmative defenses from the Ho-Chunk's answer. Because the statute-of-limitations defense is meritorious, the court will not strike it. *See Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1400 (7th Cir. 1991) (Motions to strike affirmative defenses "are 'not favored and will not be granted unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense.'" (quoting *Glenside W. Corp. v. Exxon Co.*, 761 F. Supp. 1100, 1115 (D.N.J. 1991)). The remainder of the Stockbridge-Munsee's motion to strike is denied as moot.

Baxter v. State, in which the Wisconsin Supreme Court explained, 157 years ago, that "the king, and in this country the state, have been held not to be bound by statute of limitations." 10 Wis. 454, 455 (1860). They also point to *Metropolitan Railroad Co. v. District of Columbia*, in which the Supreme Court held that "the United States and the several states are not, without express words, bound by statutes of limitation." 132 U.S. 1, 11 (1889). But this rule does not extend to "municipalities, county boards, school districts, and the like." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 135 n.3 (1938). The Stockbridge-Munsee do not explain why this court should extend the rule to Indian tribes, and the court declines to do so. They argue that the Western District of Oklahoma did just that in *Ponca Tribe of Indians v. Continental Carbon Co.*, but in that case, the court applied an Oklahoma statute providing that "[n]o lapse of time can legalize a public nuisance amounting to an actual obstruction of public right." No. 05-cv-445, 2008 WL 11338469, at *3 (W.D. Okla. Nov. 21, 2008) (alteration in original) (quoting 50 Okla. Stat. § 7). Oklahoma statutes have no bearing on the Stockbridge-Munsee's claims.

The Ho-Chunk argue that Wisconsin's six-year statute of limitations for breach of contract claims, Wis. Stat. § 893.43, should apply to the Stockbridge-Munsee's claim that the Wittenberg casino is not an ancillary facility as defined in the Ho-Chunk compact and that the Administrative Procedure Act's six-year statute of limitations, 28 U.S.C. § 2401(a), should apply to the Stockbridge-Munsee's claim that the Wittenberg Parcel was not acquired until after 1988, relying on *Big Lagoon Rancheria v. California*, 789 F.3d 947 (9th Cir. 2015) (en banc). The Stockbridge-Munsee do not advocate for any particular statute of limitations. Both proposed statutes contain a six-year limitations period, so the court need not determine which one applies. The Stockbridge-Munsee's claims regarding the gaming activities that the Ho-Chunk can engage in on the Wittenberg Parcel accrued when the state approved engaging in

gaming activities there and the Ho-Chunk first began doing so. That occurred in 2008. So under a normal application of the statute of limitations, the Stockbridge-Munsee must have brought their claims against the Ho-Chunk by 2014, and their claims are now time-barred.

The Stockbridge-Munsee contend that the statute of limitations should not be applied in the normal way because they seek injunctive relief for a continuing violation of the Ho-Chunk Compact. They invoke two rules in support of their contention: Wisconsin courts' practice of not applying statutes of limitations to actions seeking injunctive relief and the federal continuing violations doctrine. The Wisconsin rule is plainly inapplicable. The accrual of a federal cause of action is a matter of federal law, even if the applicable statute of limitations is borrowed from state law. *O'Gorman v. City of Chicago*, 777 F.3d 885, 889 (7th Cir. 2015). The Stockbridge-Munsee point to no federal authority calling for the tolling of a statute of limitations period when the plaintiff seeks injunctive relief. And the Seventh Circuit applies statutes of limitations to claims for injunctive relief. *See, e.g.*, *United States v. Midwest Generation, LLC*, 720 F.3d 644, 646 (7th Cir. 2013), *construed in United States v. U.S. Steel Corp.*, 16 F. Supp. 3d 944, 949–51 (N.D. Ind. 2014) ("The Seventh Circuit seems to have reached [its] conclusion by applying a statute of limitations to the EPA's injunction claims."). So there is no bright-line rule mandating that claims for injunctive relief are *always* timely.

Whether the continuing violations doctrine applies to the Stockbridge-Munsee's claims is a closer question. The claims here concern what could be conceived of as a continuing injury. *See Turley v. Rednour*, 729 F.3d 645, 654 (7th Cir. 2013) (Easterbrook, C.J., concurring). A continuing injury is a continuing harm that stems from a discrete wrongful act—here, the Ho-Chunk's decision to open the Wittenberg casino and the state's decision to approve it are the discrete wrongful acts, and the resulting competition with the Stockbridge-Munsee's North

Star Casino is the continuing harm. A continuing injury "does not extend the period of limitations." *Id.* (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), and *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)).

But one could also conceive of the Stockbridge-Munsee's claims as concerning a genuine continuing violation, that is, is a violation that begins and continues through a series of discrete violations. *See id.* Each day that the Ho-Chunk operate the Wittenberg casino, from 2008 through the present day, is arguably a discrete violation of the Ho-Chunk compact. In such a scenario, the continuing violation doctrine "treats new acts, or ongoing inaction, as new violations" so that the statute of limitations runs from the date of the last act, rather than the first. *Id.*

But the continuing violations doctrine does not apply to every continuing violation. It "is applicable only if 'it would have been unreasonable to expect the plaintiff to sue before the statute ran on the conduct . . . .'" *Tinner v. United Ins. Co. of Am.*, 308 F.3d 697, 707–08 (7th Cir. 2002) (quoting *Filipovic v. K & R Express Sys., Inc.*, 176 F.3d 390, 396 (7th Cir. 1999)). The continuing violations doctrine provides such a narrow exception to statutes of limitations because "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Ledbetter*, 550 U.S. at 630 (quoting *United States v. Kubrick*, 444 U.S. 111, 117 (1979)). Here, it is entirely reasonable to expect the Stockbridge-Munsee to have sued the Ho-Chunk over the operation of the Wittenberg casino well before 2014. They have known of the facts supporting each element of their claims since 2008. They could have sued the Ho-Chunk then. Instead, they acquiesced to the Wittenberg casino for nearly a decade until the Ho-Chunk decided to expand. In other words, the Stockbridge-Munsee had six years to call attention to the Wittenberg casino's alleged violations of the Ho-Chunk Compact, but failed to do so. The

Ho-Chunk, believing the Wittenberg casino was operating legitimately, decided to invest in expansion, only to be forced to defend against the Stockbridge-Munsee's claims that the Wittenberg casino has been operating in violation of the Ho-Chunk Compact since the first day it opened. It is precisely this failure "to put the adversary on notice to defend within a specified period of time" that statutes of limitations serve to guard against. *Id.* (quoting *Kubrick*, 444 U.S. at 117).

The Stockbridge-Munsee do not argue that they couldn't have asserted their claims at any point after the state approved the Wittenberg casino; instead, they argue that the text of the IGRA and regulations implementing the IGRA call for application of the continuing violations doctrine. They point to § 2710(d)(7)(A)(ii), which limits a plaintiff's remedy to enjoining non-compliant gaming activity. But the fact that only continuing violations are actionable under the IRGA doesn't mean that continuing violations are *always* actionable under the IGRA.[2] The Stockbridge-Munsee also point to the National Indian Gaming Commission's regulations implementing the IGRA, which treat "each daily illegal act or omission as a separate violation" and therefore allow the NIGC to assess daily fines. 25 C.F.R. § 575.4(a)(2). But the procedures for the NIGC's assessment of civil fines under § 2706 of the IGRA don't speak to the accrual of a tribe's cause of action to enforce a tribal-state compact under § 2710. And the

[2] The Seventh Circuit has held that public accommodation claims under the Americans with Disabilities Act for injunctive relief concerning continuing violations—even claims that the plaintiff reasonably could have brought within the limitations period—are not time-barred because the statutory text "makes clear that . . . a continuing . . . violation of the ADA is an injury within the meaning of the Act." *Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1076 (7th Cir. 2013) (quoting *Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1136 (9th Cir. 2002)). The court is hesitant to extend *Scherr*'s reasoning from an anti-discrimination statute (an area of law in which the continuing violations doctrine is often applied) to the IGRA. The Stockbridge-Munsee don't argue that *Scherr* controls here—in fact, they don't cite *Scherr* at all. The court will not extend *Scherr* without a strong argument that it should do so.

two NIGC notices of violations that the Stockbridge-Munsee adduce were sent to the offending tribes less than a year after the first illegal act, so it's not clear that the NIGC would consider it appropriate to assess fines for continuing violations that began years ago.

The Stockbridge-Munsee have not demonstrated that application of the continuing violations doctrine is appropriate in this case. Indeed, it appears that the doctrine would undermine the purpose of statutes of limitation. The Stockbridge-Munsee's claims against the Ho-Chunk are untimely, so the court will grant the Ho-Chunk's motion for judgment on the pleadings and dismiss them from the case.

It appears that the Stockbridge-Munsee's claims against the state may be untimely, too. The state preserved a statute-of-limitations defense in its answer, *see* Dkt. 50, at 28, but has not yet moved to dismiss. In the interest of ensuring a prompt resolution of this case, the court will allow the remaining parties to address the timeliness of the remaining claims. Should the Stockbridge-Munsee fail to show that its claims against the state are timely, the court will dismiss the claims against the state.

ORDER

IT IS ORDERED that:

1. Plaintiff's motion to strike, Dkt. 48, is DENIED.
2. Defendant the Ho-Chunk Nation's motion for judgment on the pleadings, Dkt. 56, is GRANTED.
3. Defendant the Ho-Chunk Nation is DISMISSED from this lawsuit.
4. Plaintiff the Stockbridge-Munsee Community's motion for a preliminary injunction, Dkt. 7, is DENIED as moot.

5. Defendant the Ho-Chunk Nation's motion for leave to file a sur-reply, Dkt. 41, is DENIED as moot.

6. Plaintiff's motion for leave to supplement its motion for a preliminary injunction, Dkt. 63, is DENIED as moot.

7. Plaintiff and defendants the State of Wisconsin and Scott Walker may file briefs or otherwise inform the court of their positions on the timeliness of plaintiff's claims by November 8, 2017.

Entered October 25, 2017.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THE STOCKBRIDGE-MUNSEE COMMUNITY,

Plaintiff,

v.

OPINION & ORDER

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

17-cv-249-jdp

Defendants.

This case involves a dispute over competing casinos operated by two Indian tribes in Wisconsin. The court granted defendant the Ho-Chunk Nation's motion for judgment on the pleadings and dismissed it from the case. Dkt. 67. The court concluded that the claims by plaintiff, the Stockbridge-Munsee Community, against the Ho-Chunk accrued in 2008, when the Ho-Chunk opened the Wittenberg casino, which the Stockbridge-Munsee allege violates the Ho-Chunk gaming compact. Therefore, the court concluded, the Stockbridge-Munsee's claims against the Ho-Chunk fell outside the six-year statute of limitations.

The court noted that the Stockbridge-Munsee's claims against defendants the State of Wisconsin and its governor, Scott Walker, might be untimely, too. But rather than dismiss those claims outright, it allowed the remaining parties to address the timeliness of the remaining claims. The parties have done so. Dkt. 71 and Dkt. 72. The claims against the State and Walker are also time-barred, as explained below.

But there's more. The Stockbridge-Munsee, hoping to keep their case alive, also moved for leave to file an amended complaint containing new allegations against the state, Walker, and the Ho-Chunk. Dkt. 75. The motion to amend drew not only opposition, but a motion for

sanctions by the Ho-Chunk. Dkt. 82. The Stockbridge-Munsee's arguments in support of their motion to amend are particularly weak, and the court will deny the Stockbridge-Munsee leave to amend. But the court will deny the Ho-Chunk's motion for sanctions. The Stockbridge-Munsee's arguments are borderline, but the court does not want to punish unsuccessful but good-faith advocacy. So in a close case like this one, the court will decline to impose sanctions, particularly when the burden of defending the questionable pleading is modest, as it is here.

The court will dismiss the state's supplemental-jurisdiction counterclaim without prejudice and direct the clerk of court to close the case.

A. Proposed amended complaint

The court begins with the Stockbridge-Munsee's motion for leave to amend their complaint. To review, the Stockbridge-Munsee alleged in their original April 19, 2017 complaint that the Ho-Chunk's Wittenberg casino, which is located on the Wittenberg Parcel, violates the Ho-Chunk compact in two ways: first, the Wittenberg Parcel has always been ineligible for any gaming activity under the compact; and second, the Wittenberg casino operates as a gaming facility (a facility whose primary business purpose is gaming), which is barred by the compact. The Stockbridge-Munsee alleged that these violations pre-dated the planned winter 2018 expansion of the Wittenberg casino and would continue as the Wittenberg casino operates post-expansion. The court determined that these claims accrued in 2008, when the Wittenberg casino opened, and therefore fell outside the applicable six-year limitations period.

Now the Stockbridge-Munsee move for leave to amend their complaint to add three categories of allegations, all of which are aimed at evading the statute of limitations. First, they allege that they could not assert their claims earlier because the state and the Ho-Chunk

fraudulently concealed the factual basis for their claims. Second, they allege that the Wittenberg casino is a public nuisance, which they argue tolls the statute of limitations. Finally, they allege in the alternative that the Wittenberg casino originally operated as an ancillary facility (a facility whose primary business purpose is *not* gaming) and will begin to operate as a gaming facility only after the winter 2018 expansion.

Under Federal Rule of Civil Procedure 15(a)(2), the court should freely grant leave to amend when justice so requires. The court need not grant leave "when there is undue delay, bad faith, dilatory motive, undue prejudice to the opposing party, or when the amendment would be futile." *Bethany Pharmacal Co. v. QVC, Inc.*, 241 F.3d 854, 861 (7th Cir. 2001). The first two proposed amendments are more properly considered motions for reconsideration of the court's October 25 order; the third is a substantive amendment. All three categories of claims would be futile, so the court will deny the Stockbridge-Munsee leave to amend.

1. Fraudulent concealment

First, the Stockbridge-Munsee want to amend their complaint to include allegations of fraudulent concealment. They labeled this section of their amended complaint "Count VIII: The state's and Ho-Chunk's fraudulent concealment of intent to create amendments to the Ho-Chunk compact that deprive Stockbridge of the intended benefits of its own compact." Dkt. 75-1, at 17. Despite this label, they argue that they do not intend to bring substantive fraudulent concealment claims but rather claims for "breach of the Ho-Chunk Compact's inherent covenant of good faith and fair dealing" and "breach of the SMC Compact" in this section. Dkt. 84, at 22. The amended complaint does not contain a short and plain statement of breach-of-contract claims showing that the Stockbridge-Munsee are entitled to relief, as

required by Federal Rule of Civil Procedure 8(a), and again, such claims would be barred by the statute of limitations, so the court will not grant leave to amend to assert them.

The Stockbridge-Munsee's briefing indicates that they actually intend to assert the doctrine of fraudulent concealment in an attempt to toll the statute of limitations. *See* Dkt. 76, at 6. They argue that in 2003, the state and the Ho-Chunk represented that despite the amendments to the Ho-Chunk compact's definition of ancillary facility, the gaming activities on the Wittenberg Parcel "would never be more than mini-mart gambling." Dkt. 73, ¶ 3. But, so the argument goes, a May 18, 2017 filing by the Ho-Chunk directly contradicts the 2003 representations and indicates that the ancillary facility definition was intentionally amended to allow the Ho-Chunk to operate the Wittenberg casino—which is more than mini-mart gambling—on the Wittenberg Parcel.

An amendment to the Stockbridge-Munsee's pleading would be unnecessary to assert this doctrine, as "plaintiffs need not anticipate and attempt to plead around all potential defenses," including statute-of-limitations defenses. *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004). The Stockbridge-Munsee could have asserted the fraudulent-concealment doctrine promptly after the Ho-Chunk raised the statute-of-limitations defense in its answer on May 18. By asserting the doctrine now, they essentially ask the court to reconsider its October 25 ruling. But "[r]econsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion." *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996). So even if the Stockbridge-Munsee had properly moved for reconsideration, the court would deny the motion.

And the bottom line is that even if the Stockbridge-Munsee had raised the fraudulent-concealment doctrine in response to the Ho-Chunk's motion for judgment on the pleadings, it wouldn't have succeeded. The doctrine protects plaintiffs "from the expiration of claims the factual basis for which was shrouded by the veil of fraudulent concealment." *In re Cooper Antitrust Litig.*, 436 F.3d 782, 792 (7th Cir. 2006) (quoting *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 836 (1999), *amended by* 211 F.3d 1224 (11th Cir. 2000)). But here, the alleged fraudulent concealment did not conceal the factual basis for the Stockbridge-Munsee's claims, namely the state's approval of gaming activities on the Wittenberg Parcel and the Ho-Chunk's engaging in gaming activities there. The Stockbridge-Munsee simply didn't need to know the intent behind the 2003 amendment to the Ho-Chunk compact to bring their claims, as demonstrated by the fact that they brought their claims before the alleged fraudulent concealment was revealed. In sum, it would be futile for the Stockbridge-Munsee to amend their complaint to include the fraudulent-concealment allegations.

2. Public nuisance

The Stockbridge-Munsee's public-nuisance allegations are also futile and would also more properly be considered as a motion for reconsideration. The Stockbridge-Munsee propose a claim that the Wittenberg casino is a public nuisance. They argue that "the Wisconsin statute of limitations applicable to claims of public nuisance for illegal gambling is the most analogous statute of limitation to the circumstances here." Dkt. 76, at 9. In Wisconsin, a public nuisance claim carries a six-year statute of limitations—the same limitations period that the court already determined bars the Stockbridge-Munsee's claims—that may be tolled when the nuisance is continuing, but not when the nuisance is permanent. *See Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 588 N.W.2d 278, 280–81 (Ct. App. 1998). Again, because the Stockbridge-

Munsee could have asserted this argument when the Ho-Chunk first raised the statute-of-limitations defense, the court need not consider it now.

And even if they had timely raised this argument, it still would have failed. Even if the statute of limitations could be tolled under Wisconsin's public-nuisance law, the outcome here wouldn't change.[1] As the court explained in its October 25 order, federal courts look to state law only for the applicable statute of limitations; the analysis of how the limitations period would apply to a federal cause of action is still a matter of federal law. And under federal law, the Stockbridge-Munsee's claims accrued in 2008 and may not be tolled. The Wisconsin tolling rule is irrelevant here, so the continuing-nuisance argument fails. It would be futile for the Stockbridge-Munsee to amend their complaint to include these allegations.

3. Alternative factual allegations

Now we reach the heart of the Stockbridge-Munsee's proposed amendments: new factual allegations pleaded in the alternative to the allegations in the April 19 complaint. The Stockbridge-Munsee now allege that the Wittenberg casino did not operate as a gaming facility on April 19, 2017, but that it will begin to do so after the winter 2018 expansion is complete.[2] Dkt. 75-1, ¶¶ 88–90 ("Ho-Chunk's gaming activities . . . on April 19, 2017 do not constitute the Primary Business Purpose of the gaming facility . . . . Ho-Chunk's imminent expansion of

[1] The Stockbridge-Munsee don't actually allege or argue that the Wittenberg Casino's gaming activities are a continuing public nuisance, rather than a permanent one. But reading their filings generously, that appears to be what they intend to argue.

[2] In their briefing, the Stockbridge-Munsee argue that "[t]he precise moment at which Ho-Chunk began to violate the 'Ancillary Facility' provisions in the Ho-Chunk Compact is not yet known" and that "[d]iscovery is needed to determine when Ho-Chunk first violated the 'Ancillary Facility' provisions." Dkt. 76, at 8. But this argument contradicts their proposed allegations, which identify a precise moment, or at least a precise event: the winter 2018 expansion. *See* Dkt. 75-1, ¶¶ 89, 90.

gaming activities on the Wittenberg Parcel will cause the Wittenberg Parcel to be operated in a manner where gaming will constitute the Primary Business Purpose of the facility . . . .”). Unlike the first two proposals, this one is not a veiled attempt to move for reconsideration, but it really is an amendment to the allegations in the complaint.

The fact that the proposed amendment is contrary to the Stockbridge-Munsee’s initial allegations is not necessarily improper. A plaintiff can plead facts in the alternative, and under Rule 8(d)(3), “A party may state as many separate claims or defenses as it has, regardless of consistency.” But as the Seventh Circuit has explained, Rule 8(d) must be read with Rule 11, so “a pleader may assert contradictory statements of fact only when legitimately in doubt about the facts in question.” *Am. Int’l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1461 (7th Cir. 1996). The problem here is that the record indicates that the Stockbridge-Munsee have no legitimate doubt about the facts in question.

The Stockbridge-Munsee alleged in their April 19 complaint that the Wittenberg casino was operating and would continue to operate as a gaming facility. *See* Dkt. 5, ¶¶ 79, 80 (“Ho-Chunk’s present gaming activities on the Wittenberg Parcel squarely fit the definition of a Gaming Facility . . . . 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 . . . .”). They expressed no doubt about these allegations at the time. By presenting this pleading to the court, their counsel certified that to the best of their “knowledge, information, and belief, . . . [t]he factual contentions have evidentiary support.” Fed. R. Civ. P. 11(b)(3). But the Stockbridge-Munsee did not just make this allegation on information and belief for the purposes of their complaint. On April 18, 2017, the Stockbridge-Munsee’s president,

Shannon Holsey, signed an affidavit stating that the Wittenberg casino was operating as a gaming facility pre-expansion:

> Based on my knowledge of the Wisconsin Gaming industry, the 502 slot machines certainly generate more than 50 percent of the net revenue of the Wittenberg facility as compared to the snack area and small bar.
>
> . . . .
>
> Based on my own observations, presently, the size of Ho-Chunk's Wittenberg facility dedicated to gaming far exceeds the size of the facility dedicated to the non-gaming purpose of a snack area and small bar.
>
> . . . .
>
> Based on my knowledge of the Wisconsin Gaming industry, 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.

Dkt. 9, ¶¶ 40, 42, 44. The Stockbridge-Munsee confirmed this position in their briefs. *See, e.g.*, Dkt. 58, at 31 ("In both its current and its expanded state, Ho-Chunk's Wittenberg Casino would qualify as a 'Gaming Facility' . . . .").

Now the Stockbridge-Munsee want to assert allegations directly contrary to 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. The Stockbridge-Munsee do not offer any valid explanation—such as new evidence—that would account for this about-face. 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." *Emkey v. Sec'y of Health & Human Servs.*, No. 08-cv-160, 2009 WL 3683390, at *15 (Fed. Cl. Oct. 20, 2009) (citing *Am. Int'l*, 86 F.3d at 1461); *see also Marquez v. Flextronics*

Am., LLC, No. 12-cv-61520, 2014 WL 4792997, at *4 (S.D. Fla. Sept. 25, 2014) (citing *Am. Int'l*, 86 F.3d at 1461, and dismissing a third amended complaint that "conveniently and strategically eliminated certain facts" in the second amended complaint). It appears that the Stockbridge-Munsee are attempting just that. Because their proposed alternative factual allegations would violate Rule 8(d), amendment would be futile.

B. Sanctions

The Ho-Chunk move for sanctions against the Stockbridge-Munsee's counsel under 28 U.S.C. § 1927 for changing litigation positions, repleading dismissed claims, and pleading claims that lack evidentiary support. Dkt. 82. Under § 1927, a district court has the discretion to sanction an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously." Unlike a sanction imposed under Rule 11, a sanction under § 1927 is not limited to cases involving frivolous claims or subjective bad faith. *Boyer v. BNSF Ry. Co.*, 824 F.3d 694, 708 (7th Cir.), *cert. denied*, 137 S. Ct. 391 (2016). But "[s]imple negligence" by the attorney does not warrant a sanction under § 1927. *Id.* A district court must be mindful that "sanctions are to be imposed sparingly, as they can 'have significant impact beyond the merits of the individual case.'" *Hartmarx Corp. v. Abboud*, 326 F.3d 862, 867 (7th Cir. 2003) (quoting *Pac. Dunlop Holdings, Inc. v. Barosh*, 22 F.3d 113, 118 (7th Cir. 1994)).

The court does not approve the Stockbridge-Munsee counsel's habit of "perpetually altering their line of argument as the moment suits them." *Boyer*, 824 F.3d at 709. The Ho-Chunk argue that this tactic should result in sanctions as it did in *Boyer*. But the Seventh Circuit didn't award sanctions in *Boyer* merely because of that tactic; the court focused instead on the "objectively unreasonable decision" to file a duplicative suit in an improper venue. *Id.* at 710. That decision needlessly and very significantly prolonged and complicated the litigation. Here,

counsel's fruitless attempt to sustain a time-barred action is understandably irritating, but it did not so significantly prolong or complicate the litigation. What could have been a very long and complicated lawsuit was cut short by the Ho-Chunk's successful statute-of-limitations defense. And this is a matter of great importance to the Stockbridge-Munsee, so counsel's last-ditch effort to save the case is understandable, even if it was of questionable merit. The court will deny the Ho-Chunk's motion for sanctions.

C. State claims

The remaining claims concern the Stockbridge-Munsee's and the state's obligations under the Stockbridge-Munsee compact. In its October 25 order, the court invited the Stockbridge-Munsee and the state to address the timeliness of these claims in the interest of ensuring a prompt resolution of the case, noting that the state preserved a statute-of-limitations defense in its answer and that the Stockbridge-Munsee's claims against it appeared to be untimely, too. The parties have now responded. Because the Stockbridge-Munsee's claims against the state also undoubtedly accrued in 2008 and are subject to a six-year limitations period, the court will dismiss them as time-barred.

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. Other portions of the Stockbridge-Munsee's brief are copied from

their motion for leave to amend their complaint; those arguments fail for the reasons explained above.

Turning to the remaining claims, the Stockbridge-Munsee allege that the state is (1) violating the Stockbridge-Munsee compact by refusing to initiate the dispute resolution procedures outlined in the Ho-Chunk compact; (2) violating the Stockbridge-Munsee compact's arbitrary enforcement provision; and (3) violating the Indian Gaming Regulatory Act by taxing the Stockbridge-Munsee's gaming revenues under the Stockbridge-Munsee compact without providing a corresponding benefit to the Stockbridge-Munsee. Dkt. 5. The state counterclaims, seeking a declaration of the Stockbridge-Munsee's obligation to make annual revenue sharing payments to the state under the Stockbridge-Munsee compact—it alleges that the Stockbridge-Munsee intended to stop making those payments in June 2017, shortly after they filed their complaint. Dkt. 50.

The first question is what limitations period applies to the claims. The state argues that Wisconsin's six-year statute of limitations for breach-of-contract claims, Wis. Stat. § 893.43, applies. The court agrees. The claims against the state are most closely analogous to breach-of-contract claims.

The Stockbridge-Munsee don't argue for application of a particular statute of limitations. Instead, they argue that "Wisconsin state law express[ly] recognizes the remedy of recoupment as being available despite the passage of time beyond statutes of limitations as to claims that may have been affirmatively brought on related claims." Dkt. 72, at 26–27. But the Stockbridge-Munsee aren't bringing claims for recoupment—they ask only for declaratory and injunctive relief. Plus, they cite no authority for the proposition that Wisconsin state law allows claims of recoupment outside the limitations period. (Regardless, as the court has explained

several times, federal courts only borrow the statute of limitations period from state law; the remainder of the timeliness analysis relies on federal law.) They cite two federal court opinions in support of their argument, but those cases explain that a *defendant* can raise the *affirmative defense* of recoupment even if the limitations period for an independent claim of recoupment has expired. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 415 (1998) ("[A] defendant's right to plead 'recoupment,' a 'defense arising out of some feature of the transaction upon which the plaintiff's action is grounded,' survives the expiration of the period provided by a statute of limitation that would otherwise bar the recoupment claim as an independent cause of action." (citation omitted) (quoting *Rothensies v. Elec. Storage Battery Co.*, 329 U.S. 296, 299 (1946))); *accord Citgo Petroleum Corp. v. Ranger Enters., Inc.*, 632 F. Supp. 2d 878, 886 (W.D. Wis. 2009). The Stockbridge-Munsee's claims, not defenses, are at issue here, and *Beach* and *Citgo* confirm that the statute of limitations applies to claims for recoupment, so they don't help the Stockbridge-Munsee. The court will apply a six-year limitations period to the Stockbridge-Munsee's claims.

The next question is when the claims accrued. The Stockbridge-Munsee argue that their claims against the state accrued only when they stopped making revenue sharing payments to the state in 2017. But the Stockbridge-Munsee's claims against the state don't depend on the withholding of payments, as demonstrated by the fact that they filed their complaint *before* they withheld any payments. Rather, their claims rest on the state's alleged refusal to prevent the Ho-Chunk from operating the Wittenberg casino in violation of the Ho-Chunk compact. The Ho-Chunk allegedly violated the Ho-Chunk compact the moment they began to operate the Wittenberg casino in 2008. The state allegedly "expressed uncertainty regarding the status of the Wittenberg Parcel, including whether it was eligible for gaming under the IGRA, as early

as 2008" but never took "any action to enforce the terms of the Ho-Chunk Compact." Dkt. 5, ¶¶ 62, 63. So 2008 is when the claims against the state accrued. Just like the claims against the Ho-Chunk, the claims against the state fall outside the limitations period and are time-barred. As a result, the court will dismiss them.

This leaves the state's counterclaim against the Stockbridge-Munsee seeking a declaration that the Stockbridge-Munsee must make the revenue sharing payments required by the Stockbridge-Munsee compact. The state invokes only supplemental jurisdiction for this claim. *See* Dkt. 50, at 32. Where, as here, the original-jurisdiction claims are dismissed, the general rule in this circuit is to dismiss without prejudice the supplemental-jurisdiction claims. *See Groce v. Eli Lilly & Co.*, 193 F.3d 496, 501 (7th Cir. 1999). The court sees no reason to depart from the circuit's general rule, so it will dismiss the state's counterclaim without prejudice.

ORDER

IT IS ORDERED that:

1. Plaintiff the Stockbridge-Munsee Community's motion for leave to amend its complaint, Dkt. 75, is DENIED.
2. Defendant the Ho-Chunk Nation's motion for sanctions, Dkt. 82, is DENIED.
3. Plaintiffs' claims are DISMISSED with prejudice.
4. Defendants the State of Wisconsin and Scott Walker's counterclaim is DISMISSED without prejudice.

5. The clerk of court is directed to enter judgment and close this case.

Entered February 2, 2018.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STOCKBRIDGE-MUNSEE COMMUNITY,

Plaintiff,

v.

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

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 17-cv-249-jdp

This action came before the court for consideration with District Judge James D. Peterson presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants the State of Wisconsin, Scott Walker, and the Ho-Chunk Nation against plaintiff the Stockbridge-Munsee Community dismissing plaintiff's claims with prejudice and the State of Wisconsin and Scott Walker's counterclaim without prejudice.

s/ K. Frederickson, Deputy Clerk
Peter Oppeneer, Clerk of Court

February 6, 2018
Date

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CERTIFICATE OF SERVICE

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on May 21, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Scott Crowell

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CERTIFICATE OF SERVICE

Certificate of Service When Not All Case Participants Are CM/ECF Participants

I hereby certify that on _____, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

counsel / party:	address:
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s/_____