UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

THE STOCKBRIDGE-MUNSEE COMMUNITY,

a federally recognized Indian tribe,

Plaintiff,

v.

STATE OF WISCONSIN,

and

SCOTT WALKER, in his official capacity

as the Governor of Wisconsin,

and

THE HO-CHUNK NATION,

a federally recognized Indian tribe,

Defendants.

STOCKBRIDGE-MUNSEE COMMUNITY RESPONSE IN OPPOSITION TO HO-CHUNK NATION'S MOTION FOR JUDGMENT ON THE PLEADINGS

17-cv-249

ORAL ARGUMENT REQUESTED

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Plaintiff STOCKBRIDGE-MUNSEE COMMUNITY ("SMC") submits this Response in Opposition to Defendant HO-CHUNK NATION'S ("Ho-Chunk") Motion for Judgment on the Pleadings ("MJOP") (Doc. 56). SMC opposes the MJOP. SMC requests oral argument on Ho-Chunk's MJOP. Based upon the multitude of arguments made in the MJOP, and the importance of the litigation to SMC and the region, SMC believes oral argument is appropriate and will facilitate this Court's deliberation of the Motion.

I. INTRODUCTION

In support of the instant MJOP, Ho-Chunk spills copious amounts of ink to obscure a simple fact: the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA") expressly allows one tribe to bring a claim against another tribe to enjoin gaming activities that violate its tribal-state gaming compact. 25 U.S.C. § 2710(d)(7)(A)(ii).

The question at the core of SMC's suit against Ho-Chunk is rather simple: Is Ho-Chunk operating the Wittenberg Casino in violation of its class III gaming compact with the State of Wisconsin ("Ho-Chunk Compact")? The answer to that question is apparent from a review of the facts and the language of the Ho-Chunk Compact itself: Yes, Ho-Chunk is operating the Wittenberg Casino in violation of the Ho-Chunk Compact.

Ho-Chunk attempts to obscure the nature of the dispute in its brief to the Court by mounting lengthy and complicated arguments that distract from the fact that Ho-Chunk is violating its own class III gaming compact. As discussed below, Ho-Chunk's arguments fail as a matter of law.

SMC respectfully urges this Court to deny Ho-Chunk's motion, and to allow this matter to proceed.

II. FACTUAL BACKGROUND

The Complaint in this action provides the basic factual allegations that Ho-Chunk's gaming facility on the Wittenberg parcel is operating in violation the Ho-Chunk Compact with Defendants Governor Walker and the State of Wisconsin (collectively referred to as the "State"). Thorough discussions of the facts have been set forth in SMC's Proposed Findings of Fact in Support of SMC's Motion for Preliminary Injunction, Doc. 9, which in turn identify original source documentation for each proposed fact. This Court is encouraged to review that document and the factual recitations in SMC's Memorandum in Support of its Motion for Preliminary Injunction, Doc. 8 at 8-12, for a fuller discussion of the factual background. However, a very brief summary is provided to place Ho-Chunk's MJOP in context.

Two critical factual matters are at issue, each and either of which establish the illegality of Ho-Chunk's gaming on the Wittenberg parcel. First, the parcel was not in trust status as of October 17, 1988, rendering the parcel ineligible for gaming unless Ho-Chunk secures a two – part determination pursuant to 25 U.S.C. § 2719(b)(1)(A) from the Secretary of the Department of the Interior that (i) gaming on the parcel is in the best interest of Ho-Chunk and (ii) not detrimental to the surrounding community, and the Governor of the State concurs in the determination. Such a two-part determination has not occurred, and cannot occur without requiring the State to refund to SMC monies paid to the State under SMC's class III gaming compact (the "SMC Compact"), and substantially reducing monies to be paid to the State going forward. Ho-Chunk is attempting to circumvent the entire two-part determination process by misrepresenting that the Wittenberg parcel was in trust status as of October 17, 1988, which it was not. Second, Ho-Chunk has announced major expansion plans for its gaming operation on the Wittenberg parcel, establishing a major gaming operation in violation of the Ho-Chunk

Compact, which limits any gaming by Ho-Chunk in Shawano County to ancillary facilities, a defined term.

The proposed expansion, merely one of six current gaming facilities and one proposed off-reservation gaming facility operated by Ho-Chunk, if allowed, will devastate SMC's primary source of governmental revenue, jeopardizing essential governmental services provided to SMC's members and the community, and displacing hundreds from well-paying and established jobs. SMC has brought this lawsuit seeking only prospective equitable relief that Ho-Chunk be required to comply with the terms of the Ho-Chunk Compact currently in effect.

III. DIFFICULT STANDARD FOR DELIBERATION OF MOTIONS FOR JUDGMENT ON THE PLEADINGS

A 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 material issues of fact to be resolved. *Moss v. Martin*, 473 F.3d 694, 698 (7th Cir. 2007); *Brunt v. Serv. Employees Int'l Union*, 284 F.3d 715, 718-19 (7th Cir. 2002); *Fiers v. La Crosse County*, 132 F. Supp. 3d 1111, 1114 (W.D. Wis. 2015) (J. Peterson); *Extreme Sports Divas v. Polartec*, 2017 WL 3588649 at *2 (W.D. Wis. 2017) (J. Peterson). *Humphrey v. Trans Union LLC*, 2017 WL 1379405 at *2 (W.D. Wis. 2017) (J. Peterson). A 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. *Northern Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 499, 452 (7th Cir. 1998); *Fiers*, 132 F. Supp. 3d at 1114; *Extreme Sports Divas*, 2017 WL 3588649 at *2. Rule 12(c) motions for judgment on the pleadings differ from Rule 12(b) motions to dismiss because they are brought after the pleadings are closed. *See* Fed. R. Civ. P. 12(c); *Northern Ind. Gun*, 163 F.3d at 452. Despite the difference in timing, a court reviews Rule 12(c) motions

under the same standards that apply to motions under Rule 12(b)(6). *Guise v. BMW Mortgage, LLC,* 377 F.3d 795, 798 (7th Cir. 2004).

Under Rule 12(c), the court accepts all well-pleaded allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff. *Thomas v. Guardsmark*, 381 F.3d 701, 704 (7th Cir. 2004). The essence of the motion is not that the plaintiff has pleaded insufficient facts, it is that even assuming all of its facts are accurate, the plaintiff has no legal claim. *Fiers*, 132 F. Supp. 3d at 1114; *Brown v. Pick 'N Save Food Stores*, 138 F. Supp. 2d 1133, 1136-37 (E.D. Wis. 2001) (citing *Payton v. Rush-Presbyterian-St.Luke's Med. Ctr.*, 184 F.3d 623, 627 (7th Cir. 1999); *Humphrey*, 2017 WL 1379405 at *2.

As demonstrated below, this is a very high bar that Ho-Chunk cannot meet. The MJOP attempts to have this Court disregard material factual allegations in the Complaint and obfuscate the status of the Wittenberg parcel as of October 17, 1988, IGRA's cut-off date for a tribe's then-existing trust lands to be eligible for gaming. Amongst the allegations that this Court must accept as true, and must draw all inferences in favor of SMC for consideration of Ho-Chunk's MJOP, are the allegations at ¶¶ 32-34 that: the 1969 deed for the Wittenberg parcel provided for the parcel to revert back to the grantor Native American Church in the event housing construction did not occur on the property by 1974, and that no timely construction occurred; and the allegations at ¶¶ 37 and 67 that the parcel did not go back into trust status until 1993, when the Native American Church deeded its (reverted) interest back to the United States to be held in trust status for Ho-Chunk. Moreover, the allegations at ¶¶ 41 and 45 that Ho-Chunk is operating gaming on the parcel in a manner that violates the Ho-Chunk Compact's limitations regarding ancillary facilities must also be accepted as true for purposes of evaluating the MJOP. These allegations, amongst the others in the Complaint, preclude Ho-Chunk from meeting the

appropriately high standard for MJOPs.

IV. ARGUMENT

A. IGRA Allows This Litigation To Proceed In This Court.

IGRA abrogates tribal immunity from suit and vests the United States District Courts with jurisdiction to hear claims brought by one Indian tribe against another to enjoin class III gaming activities in violation of a tribal - state gaming compact. The law does so in clear and unambiguous language:

> (A) The United States district courts shall have jurisdiction over…(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under [IGRA] that is in effect…

25 U.S.C. § 2710(d)(7)(A)(ii).

Ho-Chunk devotes a great deal of time to arguing that Congress did not mean what it said when it adopted this language, and that even if Congress meant what it said, SMC's claim doesn't fall within the abrogation of Ho-Chunk's immunity. *See* Doc. 57 at 12-36. In making these arguments, Ho-Chunk simply repackages old arguments that other courts have squarely rejected. Ho-Chunk's arguments should fare no better here.

1. Congress expressly allowed one tribe to sue another in United States District Court to enjoin gaming that violates its class III gaming compact.

SMC acknowledges that all federally recognized Indian tribes are vested with sovereign immunity from suit, and that such immunity remains in effect unless it has either been waived by the Indian tribe or abrogated by Congress. *Michigan v. Bay Mills Indian Community*, 572 U.S. ___; 134 S. Ct. 2024 (2014). But, as noted above, Congress vested the federal courts with jurisdiction to hear claims like the one SMC has brought against Ho-Chunk.

Ho-Chunk argues in its brief that, "[t]he Senate Report [accompanying IGRA] does not include any statement or implication that Congress intended to grant tribes the power to influence, let alone restrict or enjoin, gaming conducted by other tribes." Doc. 57 at 27. The absence of any such statement in the legislative history is irrelevant where the statutory language is clear and unambiguous: the District Courts may hear "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity…." 25 U.S.C. § 2710(d)(7)(A)(ii); *see also Boyle v. United States*, 556 U.S. 938, 950 (2009) ("Because the statutory language is clear, there is no need to reach petitioner's remaining arguments based on statutory purpose, legislative history, or the rule of lenity.").

The Tenth Circuit Court of Appeals has found IGRA's abrogation of tribal immunity at § 2710(d)(7)(A) to be clear and unambiguous. *See Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379 (10th Cir. 1997). In *Mescalero Apache*, the Court held: "[Congress's] intent to abrogate tribal sovereign immunity by section 2710(d)(7)(A)(ii) when a state seeks to 'enjoin' gaming activities 'conducted in violation of any Tribal-State compact entered into' seems equally clear and unmistakable." *Mescalero Apache*, 131 F.3d at 1385. Nothing in the "clear and unmistakable" language of §2710(d)(7)(A)(ii) suggests that suits brought by an Indian tribe should be treated differently than suits brought by a state. In fact, the statutory language indicates that both state and tribal claims fall within its abrogation of tribal immunity. *See* 25 U.S.C. § 2710(d)(7)(A)(ii)("… any cause of action initiated by a State ***or Indian tribe***…)(emphasis added).

In *Michigan v. Bay Mills Indian Community*, 695 F.3d 406 (6th Cir. 2012), the Sixth Circuit explained that a tribal plaintiff must satisfy five criteria in order to bring a claim to enjoin another tribe from class III gaming in violation of its own compact:

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

Bay Mills, 695 F.3d at 412; aff'd *Michigan v. Bay Mills Indian Community*, 572 U.S. ___; 134 S. Ct. 2024 (2014)(emphasis added). The Court ultimately upheld the defendant tribe's immunity from suit in *Bay Mills*, but its ruling was based on the fact that the plaintiffs' complaint did not satisfy the five criteria, and not on a reading that § 2710(d)(7)(A) prohibited suits by one tribe against another. *See Id*.

In an earlier case also involving the Bay Mills Indian Community, the District Court for the Western District of Michigan squarely addressed whether IGRA's abrogation of tribal immunity allows one tribe to sue another to enjoin tribal-state compact violations. *See Bay Mills Indian Community v. Little Traverse Bay Bands of Odawa Indians*, unpublished opinion in File No. 5:99-CV-88, 1999 U.S. Dist. LEXIS 20314 (W.D. Mich. 1999) ("*Little Traverse*").[1] There, the Court rejected the exact same arguments that Ho-Chunk offers in its brief:

> Whatever the wisdom of Defendant LTBB's interpretation, that is not what the statute says. There is nothing in the language of § 2710(d)(7)(A)(ii) that renders it ambiguous. The statute clearly confers on Indian tribes the authority to file suit in district court to enjoin a class III gaming activity located on Indian lands and conducted in violation of "any" Tribal-State compact. The statute does not limit jurisdiction to violations of the compact to which the suing tribe is a party. The statute allows suit for violation of "any" Tribal-State compact, not "its" Tribal-State compact. Whether or not the Court agrees with such a broad grant of jurisdiction is not

[1] *Little Traverse,* issued in 1999, is not binding on this court. Indeed, although Ho-Chunk notes the case as *passim* in its Table of Authorities, Circuit Court Rule 32.1(d) only allows citation of unpublished opinions issued after January 1, 2007. Nevertheless, Ho-Chunk has cited to, and relied upon (in some respects) the Court's opinion *Little Traverse*. SMC does not object to Ho-Chunk's citation to the *Little Traverse* decision, and asks this Court to consider the reasoning in that opinion to the extent it has persuasive value. Westlaw citation unavailable.

> relevant. The Court is bound to apply the laws as set forth by Congress.

Id. at *11.

Ho-Chunk simply asserts that the *Little Traverse* opinion was a mistake, and that this Court should rule otherwise based upon the presumed policy goals of Congress and the proverbial "parade of horribles" that would flow from allowing one tribe to sue another to enjoin compact violations. *See* Doc. 57 at 29 ("Against the background of tribes having no authority or mechanism to negotiate the method and extent of enforcement of another tribe's compact, the notion that Congress intended to allow one tribe to sue another tribe to enjoin the defendant tribe's gaming is absurd."); and Doc 57 at 30-31 ("[SMC's interpretation] would allow any tribe to sue any other tribe for any alleged violation of the defendant tribe's compact…").

The Defendant in *Little Traverse* raised the same specter of a flood of tribal lawsuits that would follow if the District Court upheld IGRA's abrogation of tribal immunity. *See Little Traverse* at *10-11 ("LTBB contends that such an interpretation of the statute would enable tribes to roam throughout the country…looking for other tribes to sue for allegedly violating the terms of compacts to which the bounty-hunting tribes are not parties…."). But the flood of "bounty-hunting tribes" never materialized after the District Court rejected this argument in *Little Traverse* nearly two decades ago.

There would be no such bounty-hunting lawsuits after this case either. That is because a plaintiff tribe bringing a claim for injunctive relief under § 2710(d)(7)(A)(ii) must first demonstrate that it has standing. *See Bay Mills Indian Community*, 695 F.3d at 411 (6th Cir. 2012) (finding that one tribe has standing to seek to enjoin gaming in violation of a tribal state compact where it establishes injury, traceability, and redressability), aff'd 572 U.S. ___; 134 S. Ct. 2024 (2014); *See also Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d

910, 914 (6th Cir. 2002) (explaining that an Indian tribe may challenge an agency action to acquire land for another tribe if it establishes prudential and Article III standing).

Ho-Chunk's heavy reliance on the presumed policy goals of Congress in adopting IGRA is misplaced, and this Court should reject those arguments here. As the Supreme Court explained in *Bay Mills*, "[t]his Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that (in Michigan's words) Congress 'must have intended' something broader." *Bay Mills*, 134 S. Ct. at 2034.

2. SMC's claim against Ho-Chunk falls squarely within IGRA's abrogation of Ho-Chunk's immunity.

As noted above, the Sixth Circuit has explained that a tribal complaint for injunctive relief must satisfy five criteria to fall within IGRA's abrogation of tribal immunity at § 2710(d)(7)(A)(ii). *See Bay Mills*, 695 F.3d at 412.

Ho-Chunk has mounted an alternative argument that SMC's complaint does not fall within IGRA's abrogation of tribal immunity. *See* Doc 57 at 12-24. In effect, Ho-Chunk is arguing that SMC's complaint does not satisfy the third and fourth criteria for injunctive relief under § 2710(d)(7)(A)(ii). The third criterion for a valid complaint for injunctive relief requires a plaintiff tribe to allege that the class III gaming is occurring on Indian lands. *See Bay Mills*, 695 F.3d at 412. The fourth criterion requires that a plaintiff tribe allege that the class III gaming activity violates a tribal-state gaming compact. *Id*.

On the contrary, SMC has satisfied its burden of pleading to fall within IGRA's abrogation of Ho-Chunk's immunity under the test articulated in *Bay Mills*.[2]

[2] SMC urges this Court to adopt and apply the standard articulated by the Sixth Circuit Court of Appeals in *Bay Mills*, as it tracks IGRA's statutory language and simply breaks § 2710(d)(7)(A)(ii) into its component parts. Ho-Chunk has not asserted that the *Bay Mills*

(a) SMC has alleged that Ho-Chunk is operating the Wittenberg Casino on Indian lands.

SMC expressly alleged in its Complaint that the Wittenberg Parcel is presently held in trust by the United States for Ho-Chunk. *See* Doc 5 at ¶ 37 ("The BIA certified the 1993 Deed and acquired the Wittenberg Parcel in trust for the benefit of Ho-Chunk"); and at ¶ 67 ("The Wittenberg Parcel was not placed back into trust status until 1993…"). At no time in this litigation has SMC ever alleged that the Wittenberg Parcel is not presently held in trust status by the United States, and SMC has no intention of challenging the present trust status of the Wittenberg Parcel.

IGRA defines the term "Indian lands" to mean, "any lands title to which is either held in trust for the benefit of any Indian tribe…" or lands "within the limits of any Indian reservation." 25 U.S.C. § 2703(4). The Wittenberg parcel qualifies as Indian lands because of its current trust status. The fact that it was not Indian lands on October 17, 1988, and later became Indian lands in 1993 when taken back into trust, is what renders the Wittenberg parcel ineligible for gaming.

IGRA's abrogation of tribal immunity requires a plaintiff tribe to allege that the defendant tribe is conducting its gaming activities on "Indian lands." *See Bay Mills*, *supra*; 25 U.S.C. § 2710(d)(7)(A)(ii). SMC has expressly alleged that Ho-Chunk is operating the Wittenberg Casino on lands presently held in trust. Doc. 5 at ¶¶ 37, 67. Therefore, SMC has met its burden of pleading under § 2710(d)(7)(A)(ii). The inquiry should end there.

Nevertheless, Ho-Chunk continues to argue the point by mischaracterizing the nature of SMC's complaint, and by reading language into § 2703(4) that simply is not there.

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standard should not be applied; to the contrary, Ho-Chunk relies heavily on its own reading of the Court's opinion in *Bay Mills*.

The purpose of SMC's claim against Ho-Chunk is to enjoin the continuing operation of the Wittenberg Casino in violation of the Ho-Chunk Compact. *See* Doc. 5 at ¶¶ 70-71. The Ho-Chunk Compact defines the term "Tribe's Lands" to mean: "All lands within the State of Wisconsin which may be acquired by the Tribe subject to restriction by the United States against alienation, or in trust by the United States for the benefit of the Tribe after October 17, 1988, and which meet the requirements of Section 20[3] of [IGRA]." Ho-Chunk Compact at § III(J)(2). Section 20 of IGRA – 25 U.S.C. § 2719 – prohibits Indian tribes from conducting gaming activities on lands acquired in trust after October 17, 1988, subject to several exceptions. The Ho-Chunk Compact explicitly prohibits Ho-Chunk from operating class III gaming activities outside of those lands. *See id*. at § IV(B) ("…the Tribe shall not conduct or permit any Class III gaming or any component thereof outside Tribal lands….").

SMC has clearly, succinctly and repeatedly asserted that the Wittenberg Parcel constitutes "Indian lands" under IGRA's definition of that term. By virtue of that fact alone, SMC has satisfied the first of the two challenged burdens of pleading to bring its Complaint within IGRA's abrogation of Ho-Chunk's immunity. SMC has also argued that Ho-Chunk is not operating the Wittenberg Casino in compliance with § 2719 of IGRA, and by extension, that it is violating the Ho-Chunk Compact.

Ho-Chunk attempts to conflate IGRA's definition of "Indian lands" at § 2703(4) with IGRA's prohibition against gaming on lands acquired in trust after October 17, 1988 at § 2719 by arguing that § 2719 modifies the statutory definition of the term "Indian lands." *See* Doc. 57 at 21 ("The far more logical interpretation of the purpose and effect of Section 2719 is that lands subject to the Section 2719(a) prohibition do not fall within the term 'Indian lands.'") There is

[3] Section 20 of IGRA is codified at 25 U.S.C. § 2719.

nothing in § 2719 that even suggests that it modifies the definition in § 2703(4). That section was adopted in the same enactment as § 2703(4). Had Congress intended to define "Indian lands" as trust, restricted or reservation lands "held by an Indian tribe before October 17, 1988," it would have done so. But it did not.

Section 2719 is simply a categorical prohibition against gaming on lands acquired in trust after October 17, 1988 – even if those lands are otherwise "Indian lands" under § 2703(4). It is possible for a parcel of land to satisfy the definition of "Indian lands," while also being subject to the prohibition of gaming at § 2719. *See*, *e.g.*, Department of the Interior Record of Decision for Secretarial Determination Pursuant to the Indian Gaming Regulatory Act for the 145-acre Site the City of Airway Heights, Washington, for the Spokane Tribe of Indians at 1 (May 2015) (noting that the United States acquired lands in trust for the Spokane Tribe of Indians in 2001, and approving the Spokane Tribe's request for statutory exception to 25 U.S.C. § 2719)[4].

Ho-Chunk's argument in reliance on *Bay Mills* and *Oklahoma v. Hobia*, 775 F.3d 1204 (10th Cir. 2014), is unavailing. In *Bay Mills*, the plaintiffs asserted that the defendant tribe's gaming activities were occurring on land that was not even held in trust, and therefore, not "Indian lands" under § 2703(4). *See Bay Mills*, 695 F.3d at 412 ("Here, the plaintiffs allege that…title to the [casino] property is not held in trust by the United States."). In *Hobia*, the plaintiff similarly alleged that the defendant was "attempting to construct and ultimately operate a class III gaming facility on a parcel of land in Broken Arrow, Oklahoma that was neither owned nor governed by the [Tribe.]" *Hobia*, 775 F.3d at 1206. In fact, the plaintiff in *Hobia* "specifically alleged that the property at issue did not qualify as the tribe's 'Indian lands' under IGRA." *Id*. at n.3.

[4] Available on the Department of the Interior's Office of Indian Gaming official web page at https://www.indianaffairs.gov/sites/bia.gov/files/assets/public/oig/pdf/idc1-031452.pdf

As explained above, SMC has alleged that the Wittenberg Parcel is held in trust for Ho-Chunk, and by virtue of that fact alone, falls within IGRA's definition of "Indian lands." SMC has also argued that Ho-Chunk is operating the Wittenberg Casino in violation of the Ho-Chunk Compact because it also violates the § 2719 prohibition against gaming on lands acquired in trust after October 17, 1988. SMC has therefore satisfied its burden of pleading to bring its claim within IGRA's abrogation of tribal immunity.[5]

(b) SMC has alleged that Ho-Chunk is violating its tribal-state gaming compact.

The Court in *Bay Mills* explained that IGRA abrogates tribal immunity and vests the District Courts with jurisdiction over lawsuits brought by one tribe against another if the plaintiff tribe can satisfy five criteria. Among those criteria, a plaintiff tribe must demonstrate that "(4) the gaming activity is conducted in violation of a Tribal–State compact[.]" *Bay Mills*, 695 F.3d at 412. SMC has alleged that Ho-Chunk is operating the Wittenberg Casino in violation of Sections IV and XVI of the Ho-Chunk Compact. *See* Doc. 5 at ¶¶ 71 and 81. Once again, SMC has met its burden to plead facts that bring its claims within the scope of IGRA's abrogation of tribal immunity.

[5] Ho-Chunk simultaneously argues that SMC's claim does not fall within IGRA's abrogation of tribal immunity because SMC has argued that the Wittenberg Parcel is subject to the § 2719 prohibition against gaming on lands acquired after October 17, 1988, ***and*** that the Wittenberg Parcel does qualify as "Indian lands" by virtue of a 1986 Reservation Proclamation. See, Doc. 57 at 12-15. This is a curious "heads I lose/tails you win" argument – both parties are asserting that the Wittenberg Parcel constitutes Indian lands. SMC disputes Ho-Chunk's argument on the merits regarding the effect of the 1986 Reservation Proclamation, and explains its reasons below. Nevertheless, under either view, the Wittenberg Parcel qualifies as "Indian lands" and SMC's complaint falls within IGRA's abrogation of tribal immunity. Ho-Chunk's argument echoes the "jurisdictional gamesmanship" the Court criticized in *Little Traverse*. *See Little Traverse* 1999 U.S. Dist. LEXIS 20314 at •8 ("Given [Defendant] LTBB's assertion that the land is Indian land…LTBB's assertion that this Court does not have jurisdiction under [§2710(d)(7)(A)(ii)] has the ring of jurisdictional gamesmanship.").

Ho-Chunk argues that only a small number of compact violations are actionable under § 2710(d)(7)(A)(ii), and relies upon the Seventh Circuit's opinion in *Wisconsin v. Ho-Chunk*, 512 F.3d 921 (7th Cir. 2008)("*Ho-Chunk II*"). *See* Doc. 57 at 23-25. Ho-Chunk urges this Court to read the Seventh Circuit's opinion in *Ho-Chunk II* too broadly, while reading IGRA so narrowly that it would defeat the purpose of its tribal-state compact requirements.

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

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

25 U.S.C. § 2710(d)(3)(C)(i-vii).

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

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

This Court has already held that the location of Ho-Chunk's gaming facilities is a proper subject for inclusion in a gaming compact under IGRA. *See Wisconsin Winnebago Nation v.*

[6] The Secretary of the Interior has expressly approved dozens of tribal-state gaming compacts that include revenue-sharing provisions, but has explained that tribal revenue sharing must be accompanied by valuable consideration provided by the state. *See*, *e.g.*, Letter from Assistant Secretary of the Interior Kevin Washburn to Massachusetts Governor Deval Patrick at 11 (October 12, 2012)(disapproving tribal-state gaming compact) available at: https://www.bia.gov/cs/groups/public/documents/text/idc-023176.pdf. on the official web page of Department of Interior's Office of Indian Gaming: https://www.indianaffairs.gov/cs/groups/webteam/documents/text/idc1-028222.pdf . The Ninth Circuit Court of Appeals has adopted this standard. *See Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010); cert denied 131 S. Ct. 3055 (June 27, 2011). The enforceability of the gaming tax/revenue sharing provisions of the SMC Compact with the State are at issue in SMC's claims against the State. In contrast, the enforceability of the location and type of facility provisions of the Ho-Chunk Compact with the State are at issue in SMC's claims against Ho-Chunk.

Thompson, 824 F.Supp. 167, 171 (W.D. Wis. 1993) ("The language of [IGRA] itself contains the catch-all category in 25 U.S.C. § 2710(d)(3)(C)(vii) that could easily include site selection as a consideration…"). This is consistent with the views of nearly every court that has examined the question of which subjects may be addressed in a tribal-state gaming compact. *See In re Gaming Related Cases*, 331 F.3d 1094, 1109 (9th Cir. 2003) ("The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc.") (quoting S. REP. 100-446 (1988)); and *Chemehuevi Indian Tribe v. Brown*, 2017 WL_____, Case No. 5:16-cv-01347-JFW-MRW at 8 (C.D. Cal.. March 30, 2017) (westlaw citation not available at time of submission) ("…if Congress intended the permissible topics set forth in Section 2710(d)(3)(C)(vi) and (vii) to be more narrowly construed, it would not have utilized the broad language it did in those sections.").

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

3. SMC's claim meets all of the requirements to fall within IGRA's abrogation of Ho-Chunk's immunity.

The Sixth Circuit has adopted a five-factor test to determine whether a claim falls within IGRA's abrogation of tribal immunity. *Bay Mills*, 695 F.3d at 412. The Sixth Circuit's five-factor test, set forth in detail *supra* simply breaks § 2710(d)(7)(A)(ii) into its components. This Court should apply the same framework here, because it is based upon the statutory language itself.

It is undisputed that SMC is an Indian tribe that is initiating a cause of action. It is beyond dispute that SMC is seeking to enjoin a class III gaming activity (i.e. the operation of the Wittenberg Casino). SMC and Ho-Chunk both assert that the Wittenberg Casino is located on "Indian lands." And, it is undisputed that the Ho-Chunk Compact is presently in effect.

At this stage in the litigation, the only element of § 2710(d)(7)(A)(ii) that remains in dispute is the fourth: that Ho-Chunk's class III gaming activities violate the Ho-Chunk Compact. Nevertheless, as set forth above, SMC's factual allegations must be taken as true for purposes of Ho-Chunk's MJOP. SMC has alleged that Ho-Chunk is operating its gaming facility on lands in violation of § 2719 because Ho-Chunk's interest in the 1969 conveyance reverted to the Native American Church in 1974, only to be re-conveyed to Ho-Chunk in 1993, after IGRA's October 17, 1988 cut-off date. Consequently, gaming on the Wittenberg parcel is in violation of the Ho-Chunk Compact. SMC has also alleged that the Wittenberg Casino does not comply with the Ho-Chunk Compact's "ancillary facilities" provisions limiting the size and scope of Ho-Chunk's gaming activities in Shawano County.

For these reasons, SMC has met its burden of pleading to bring this action within IGRA's abrogation of Ho-Chunk's immunity.

B. Ho-Chunk Is Operating The Wittenberg Casino In Violation Of The Ho-Chunk Compact.

It would be easy to lose sight of the central issues in this case when reading Ho-Chunk's voluminous brief. But, the central issues bear recounting here. First, Ho-Chunk is operating the Wittenberg Casino on lands in violation of § 2719 of IGRA, and by extension, in violation of § IV of the Ho-Chunk Compact. Second, the Ho-Chunk Compact only authorizes Ho-Chunk to operate an "ancillary facility" in Shawano County. The Wittenberg Casino, with its hundreds of

slot machines, table games, and traditional casino amenities, far exceeds the scope of gaming permitted under the Ho-Chunk Compact.

1. Gaming on the Wittenberg Parcel violates § 2719 of IGRA; and accordingly, violates the Ho-Chunk Compact.

IGRA generally prohibits Indian tribes from conducting gaming activities on lands that were acquired in trust after October 17, 1988. *See* 25 U.S.C. § 2719. IGRA states, "gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988...." 25 U.S.C. § 2719. The Ho-Chunk Compact prohibits Ho-Chunk from conducting class III gaming activities on lands in violation of § 2719. *See* Ho-Chunk Compact at § IV.

The BIA acquired the Wittenberg Parcel in trust for Ho-Chunk on July 1, 1993 pursuant to a quitclaim deed executed on April 15, 1993. Therefore, IGRA prohibits Ho-Chunk from conducting any gaming activities on the Wittenberg Parcel, and the Ho-Chunk Compact prohibits Ho-Chunk from conducting any gaming activities on the Wittenberg Parcel.

The Native American Church initially conveyed the Wittenberg Parcel to Ho-Chunk on June 28, 1969 through a deed prepared by the BIA. The 1969 Deed included an express reversionary clause stating, "the land will revert to the grantor" if Ho-Chunk did not commence housing construction within five years of the conveyance. 1969 Deed, *see* Doc. 5, Complaint at ¶ 32 and Doc 5-3 Exhibit C, thereto. The public record, which includes aerial photos of the Wittenberg Parcel from 1978 and 1980, as well as public plats from 1978 and 1984, conclusively demonstrates that Ho-Chunk did not begin to develop housing on the Wittenberg Parcel within five years of the 1969 Deed. *See* Doc. 10, Proposed Findings of Fact at ¶ 21. Pursuant to the terms of the 1969 Deed itself, title to the Wittenberg Parcel reverted back to the Native American Church by operation of law when Ho-Chunk failed to develop housing on the site within five

years. *See* 3-20 Powell on Real Property § 20.02 (2017) ("When the land is no longer used for [the designated] purposes, the transferee's estate terminates *automatically* and the transferor (or his heir) is immediately vested with the possessory interest.") (emphasis added); and, *Saleteri v. Clark*, 13 Wis.2d 325, 331; 108 N.W.2d 548 (Wis. 1961) (explaining that title to property automatically reverted to the original grantor when a school failed to meet the conditions for holding title as set forth in the deed).

Nothing in federal law invalidated or destroyed the Native American Church's reversionary interest in the Wittenberg Parcel. Ho-Chunk did not fulfill its obligation to develop housing on the Wittenberg Parcel within five years of the 1969 Deed, and the property reverted back to the Native American Church by operation of law. *See Saleteri*, *supra*. The BIA's proclamation of the Wittenberg Parcel as a "reservation" in 1986, after its reversion to the Native American Church, could not alter the fact that ownership of the land reverted back to the Native American Church by operation of law five years after the 1969 Deed. *See* 25 U.S.C. § 5110 (authorizing the Secretary of the Interior to proclaim land as an Indian reservation that are already in trust under authority of federal law).

The Wittenberg Parcel belonged to the Native American Church from 1974 until 1993, when it once again conveyed title to the United States for Ho-Chunk's benefit. IGRA clearly prohibits Indian tribes, including Ho-Chunk, from conducting gaming activities on lands acquired in trust after October 17, 1988. *See* 25 U.S.C. § 2719. Section IV of the Ho-Chunk Compact prohibits Ho-Chunk from conducting class III gaming on lands in violation of § 2719. Therefore, Ho-Chunk may not operate the Wittenberg Casino on the Wittenberg Parcel.

2. The Wittenberg Casino is not an "ancillary facility" pursuant to the Ho-Chunk Compact; therefore, it is not permitted in Shawano County.

The Ho-Chunk Compact establishes two categories of class III gaming facilities that Ho-Chunk may operate: "Gaming Facilities" and "Ancillary Facilities". A "Gaming Facility" is a large-scale gaming operation that any patron would recognize as a casino or a destination gambling resort – a business where casino gambling is the primary attraction. An "Ancillary Facility" is a smaller-scale operation that a patron would recognize as some other business – such as a gas station or supermarket – that includes limited opportunities for gambling.

The Ho-Chunk Compact defines these two categories. A "Gaming Facility" is defined as "a facility whose ***Primary Business Purpose*** is gaming[.]" Doc. 9-13, Ho-Chunk Compact, Second Amendment at ¶ 5 (emphasis added). The Ho-Chunk Compact defines the term "Primary Business Purpose" to mean "the business generating more than 50 percent of the net revenue of the facility." Doc. 9-10, Ho-Chunk Compact, at §III(H). In short, a "Gaming Facility" is a facility in which gambling generates a majority of the revenue.

The Ho-Chunk Compact also defines the term "Ancillary Facility" to mean "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***." Doc. 9-13, Ho-Chunk Compact, Second Amendment at ¶ 5 (emphasis added). In other words, an "Ancillary Facility" is a facility where gambling does not generate a majority of the revenue.

Under the Ho-Chunk Compact, Ho-Chunk is authorized to operate one "Gaming Facility" in each of the following counties: Jackson, Sauk, Wood, and Dane. Doc. 9-13, Ho-Chunk Compact, Second Amendment at ¶ 5(E). Ho-Chunk is also authorized to operate up to five "Ancillary Facilities" in the following counties: Jackson, Sauk, Monroe, and Shawano. *Id*. Ho-

Chunk is not allowed to operate a "Gaming Facility" in Shawano County, and is only allowed to operate an "Ancillary Facility" in Shawano County under the Ho-Chunk Compact.

The classification of the Wittenberg Casino is best understood by determining what the facility is, rather than what it is not. The Wittenberg Casino is a stand-alone facility that presently contains 502 class III slot machines, and after Ho-Chunk completes its expansion, will include approximately 800 class III slot machines – making it larger than Ho-Chunk's existing "Gaming Facility" or full-scale casino resort in Black River Falls. Ho-Chunk operates a convenience store in a separate building on the Wittenberg Parcel. Doc. 5, Complaint at ¶¶ 75-76. Ho-Chunk doesn't even argue that gambling activities do not presently generate a majority of the revenue for Ho-Chunk's business activities on the Wittenberg Parcel. Doc. 5, Complaint at ¶ 77.

In both its current and its expanded state, Ho-Chunk's Wittenberg Casino would qualify as a "Gaming Facility" because gaming is the "Primary Business Purpose" of the facility. That is the sole characteristic of a "Gaming Facility" under the Ho-Chunk Compact. The Ho-Chunk Compact does not allow Ho-Chunk to operate a "Gaming Facility" in Shawano County, instead, Ho-Chunk may only operate an "Ancillary Facility" in Shawano County. Therefore, Ho-Chunk's operation of the Wittenberg Casino – and, especially, its expansion of the Wittenberg Casino – violates the Ho-Chunk Compact.

C. Ho-Chunk's Arguments Sounding In Tribal Sovereign Immunity, State Eleventh Amendment Immunity And Rule 19 Do Not Establish Grounds For A MJOP.

1. SMC's claims meet the "straightforward inquiry" into whether *Ex Parte Young* applies; therefore the claims against the Governor are not blocked by State sovereign immunity.

Ho-Chunk makes two arguments with respect to *Ex Parte Young,* 209 U.S. 123 (1908*),* and its progeny. Doc. 57 at 42-48. Simply put, Ho-Chunk's first argument with respect to the holding of *Seminole Indian Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), is wrong. And Ho-Chunk's second argument with respect to *Ex Parte Young*'s application in this case presents an improper (and unnecessarily complicated) view of the test for whether *Ex Parte Young* applies to a specific case.

In *Seminole*, the Court held that the Seminole Tribe could not sue Florida's Governor under *Ex parte Young* to force the State to enter into good faith compact negotiations with the Seminole Tribe pursuant to IGRA. The *Seminole* Court found that *Ex parte Young* could not circumvent Eleventh Amendment immunity in that case because, in IGRA, Congress provided a detailed and comprehensive remedial scheme specifically designed to enforce an alleged failure to negotiate in good faith. The Court explained that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." 517 U.S. at 74. Put simply, the Court found it was inappropriate to allow a suit under *Ex parte Young* because Congress explicitly legislated for resolution with respect to failure to negotiate in good faith, and the judiciary should not replace that.

Ho-Chunk acknowledges that "some courts" have found that *Seminole*'s holding precludes the application of *Ex parte Young* only in cases where a tribe sues to force good faith

negotiation under IGRA. *See* Doc. 57 at 43. But Ho-Chunk opines, without explanation, that those cases take a "narrow view" of *Seminole*'s holding with respect to *Ex parte Young*. *Id*. The cases cited by Ho-Chunk do not express a narrow view of the *Seminole* decision; instead, they reflect the only proper view of *Seminole*'s holding with respect to proposed enforcement of IGRA's good faith negotiation provisions under *Ex parte Young*. Indeed, this interpretation has been reaffirmed by the Supreme Court.[7] Ho-Chunk does not claim that this case, in any way, implicates the good faith negotiation provisions of IGRA. Ho-Chunk also does not point to any case law that relied on *Seminole* to preclude *Ex parte Young* claims regarding any provision of IGRA other than the "good faith negotiation" provision. Furthermore, Ho-Chunk does not claim that Congress has provided a comprehensive remedial scheme, like the one in *Seminole*, that governs SMC's IGRA claims asserted here. *Seminole* simply does not preclude application of *Ex Parte Young* in this case.

Ho-Chunk also cites a non-binding Sixth Circuit case which it claims supports its argument that Congress intended to limit the causes of action established under IGRA. *See* Doc. 57 at 44. That case, *Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895 (6th Cir. 2014), dealt with claims under the Fair Labor Standards Act, and merely cited *Seminole* for the proposition that *Ex parte Young* does not itself create a cause of action. *Id.* at 905. The Sixth

[7] *See, e.g.*, *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, (2002) ("[in *Seminole*, an] Indian Tribe sued the State of Florida for violating a duty to negotiate imposed under [IGRA]. (citation omitted) Congress had specified the means to enforce that duty in § 2710(d)(7) [of IGRA], a provision intended ... not only to define, but also to limit significantly, the duty imposed by [IGRA] § 2710(d)(3). The intricate procedures set forth in that provision prescribed that a court could issue an order directing the State to negotiate, that it could require the State to submit to mediation, and that it could order that the Secretary of the Interior be notified. We concluded that this quite modest set of sanctions displayed an intent not to provide the more complete and more immediate relief that would otherwise be available under *Ex parte Young*. Permitting suit under *Ex parte Young* was thus inconsistent with the detailed remedial scheme — and the limited one — that Congress had prescribed to enforce the State's statutory duty to negotiate") (additional quotation and citation omitted).

Circuit case does not say anything about a general Congressional intent to limit the causes of action under IGRA.

Ho-Chunk then attempts to place additional requirements on the application of *Ex parte Young*. As stated above and discussed at length in SMC's previous filing,[8] *Ex parte Young* applies to claims for prospective injunctive relief to enjoin a state official's ongoing violation of federal law. But Ho-Chunk claims there are additional criteria, including that the state official's actions at issue must be compelled by a state statute that is either unconstitutional or violates a federal law. Doc. 57 at 45-46 (citing only *Ex parte Young* as support). Ho-Chunk's attempt to complicate and cloud the issue here is unavailing.

As the Supreme Court explained in *Verizon Maryland Incorporated v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), in order to determine whether *Ex parte Young* applies, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 645 (additional citation and quotations omitted). In that case, the plaintiff requested that the defendant (commissioners) be enjoined from enforcing an order in contravention of federal law, therefore the test was met. The *Verizon* court also explained that the plaintiff's additional claim for declaratory relief would not impose any monetary loss on the state for any past breach of its duty; therefore, that claim was appropriate under *Ex Parte Young* as well. It's also relevant to note that the *Verizon* defendants also argued that *Ex parte Young* was inapplicable because, they claimed, their order was consistent with federal law (not in violation of it, as alleged by the plaintiff). The Supreme Court rejected that argument as well, finding that "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis

[8] *See* Doc. 39 at 16-19.

of the merits of the claim." *Id*. at 646 (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 296 (1997) ("[a]n *allegation* of an ongoing violation of federal law . . . is ordinarily sufficient")).

Ho-Chunk attempts to further cloud the issue by claiming that the Governor has no obligations under the Ho-Chunk Compact, so there is nothing for this Court to direct the Governor to do in compliance with the Ho-Chunk Compact. Doc. 57 at 45-48. Ho-Chunk then claims that the Governor is not the proper party, and that SMC was required to sue other Wisconsin state officials.[9] Doc. 57 at 46-48. Contrary to Ho-Chunk's claims, the Governor is the State officer who is ultimately responsible for enforcing the terms of the Ho-Chunk Compact on behalf of the State. *See* Wis. Stat. § 14035 ("the governor may, on behalf of this state, enter into any compact that has been negotiated under 25 USC 2710 (d)."); and, Wis. Stat. § 569.02(4) (explaining that the Wisconsin Department of Administration "***Assist[s] the governor*** in determining the types of gaming that may be conducted on Indian lands and in entering into Indian gaming compacts"); Wis. Stat. § 15.01(2)(a) ("[a]s the chief administrative officer of the state, the governor should be provided with the administrative facilities and the authority to carry out the functions of the governor's office efficiently and effectively . . .").[10]

Ho-Chunk contends that the Governor of the State of Wisconsin must have "some connection with the enforcement" of the Ho-Chunk Compact, to be a properly named party under *Ex Parte Young*. Doc. 57 at 46. Indeed, the Governor entered the Ho-Chunk Compact, the

[9] If Ho-Chunk's allegation regarding other State officials were correct, the defect could easily and appropriately be cured by amending the Complaint to name the other State officials.

[10] *See also* Wis. Stat. §15.10 (establishing the Department of Administration as an agency under the Executive Branch of the State of WI); Wis. Stat. §15.05 (providing that the secretaries which head agencies within the Executive Branch, including the Secretary of the Department of Administration, shall be nominated by the governor).

Wisconsin Department of Administration assisted the Governor in determining whether gaming will be permitted and the Department of Administration is within the Wisconsin Executive Branch, which is under the Governor's authority. This is not a case where a Wisconsin official that is a stranger to the Ho-Chunk Compact was named as a party in a lawsuit about the Ho-Chunk Compact. Indeed, the Governor is the State's Chief Executive Officer, who is responsible for entering into the Ho-Chunk Compact and the Wisconsin Executive Branch assists him with enforcement. Furthermore, this Court could order that the Governor, or those empowered by him, can no longer take any action that is inconsistent with the Ho-Chunk Compact regarding the Wittenberg Parcel.

2. Even if this Court finds that the State's immunity remains intact, it is not a required party under Rule 19 for purposes of SMC's claims against Ho-Chunk.

Notwithstanding the fact that the State's immunity does not bar SMC's suit to enjoin the Governor from violating IGRA, Ho-Chunk contends that the State and Ho-Chunk are necessary and indispensable parties that cannot be joined because, they argue, neither Ho-Chunk nor the State has waived its immunity from suit. At the outset, SMC made both the State and Ho-Chunk parties to this lawsuit. As discussed at length herein, Congress has abrogated Ho-Chunk's sovereign immunity with respect to these claims, and the State has acknowledged that it expressly waived its Eleventh Amendment immunity with respect to SMC's claims. *See* Doc. 50, State's Amended Answer and Counterclaim at ¶ 13. Furthermore, for all the reasons stated above, the State's consent to suit is not necessary to sustain SMC's claims under *Ex parte Young*.

In addition, Ho-Chunk has not met its burden to show that the State is both a required and indispensable party with respect to either of SMC's claims against Ho-Chunk. *See* Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 1609 (3d ed.

2001) (burden of proof rests on the party raising Rule 19 defense to "show that the person who was not joined is needed for a just adjudication"). It's also worth noting that only Ho-Chunk – not the State or its officials – argues that SMC's complaint must be dismissed in the State's absence under Rule 19. Ho-Chunk also claims that the United States is a necessary party to this litigation and cites the Quiet Title Act. SMC is not challenging the trust status of the Wittenberg Parcel, or asserting a competing claim to the Wittenberg Parcel. Therefore, the Quiet Title Act is not triggered. Like its arguments with respect to the State, Ho-Chunk also has not met its burden to show that the United States is a necessary and indispensable party.

(a) Ho-Chunk has not met its burden to show that the State is a required party that must be joined under Rule 19.

Ho-Chunk never specifies what it believes the State's interest is, or how the State's ability to protect any alleged interest would be impaired if the instant litigation moves forward in its absence. Instead, Ho-Chunk assumes that which it is required to prove under Rule 19, claiming the State has "an interest relating to the subject of this action and [is] so situated that disposition of this action in . . . the State's absence will, as a practical matter, impair or impede their ability to protect that interest." (Doc. 57 at 38 and Doc. 37 at 17). Ho-Chunk cites and discusses a few cases (the majority of which are non-binding on this Court) regarding the interests of parties to contracts. A couple of the cases discuss the interests of parties to a lease or contract in a suit to set-aside or invalidate the contract or lease.[11] Some of the cases discuss the interests of states or tribes in suits to strike or invalidate compacts or provisions therein. As explained below, those cases are easily distinguished from this litigation on a number of grounds. None of those cases included *Ex parte Young* claims (in one case the claims were precluded and,

[11] *See*, *e.g.*, Doc. 57 at 38 ("No procedural principle is more deeply imbedded in contract law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable") (additional citation omitted).

in another, the plaintiff failed to bring them). In addition, unlike the contracts or leases in the cases cited by Ho-Chunk, SMC does not seek to strike or invalidate the Ho-Chunk Compact or any provision therein. SMC simply asks that Ho Chunk and the Governor abide by federal law when acting under the Ho-Chunk Compact and the SMC Compact, which, as a matter of law, all parties are already required to do.

In *Lac Du Flambeau Band v. Norton*, 327 F. Supp. 2d 995 (W.D. Wis. 2004), two tribes sued the U.S. Department of the Interior seeking to invalidate a provision of an amended compact between Wisconsin and Ho-Chunk. The Court found multiple deficiencies in the tribes' lawsuit, including the fact that the tribes failed to sue Ho-Chunk and the State, and did not plead any reason for non-joinder. Ultimately, the court dismissed the plaintiffs' flawed lawsuit finding, in part, that the "Plaintiffs [had] no viable cause of action against the defendants" anyway. *Id*. at 1001. Unlike the plaintiffs in *Lac Du Flambeau*, SMC did sue both Ho-Chunk and the Governor. Moreover, like many of the other cases cited by Ho-Chunk, the *Lac Du Flambeau* plaintiffs sought to invalidate provisions of the Ho-Chunk Compact. In the instant case, SMC does not seek to set aside any provision of any compact with the State. SMC simply asks this Court to direct Ho-Chunk and the Governor to comply with the terms of the compacts.

Similarly, *American Greyhound Racing v. Hull*, 305 F.3d 1015 (9th Cir. 2002) (another non-binding case), can also be distinguished from the instant litigation. In *American Greyhound*, the plaintiffs, horse and dog track owners and operators, sought to prevent the Governor from negotiating new compacts permitting casino-type gaming or from permitting the existing compacts to be automatically renewed. *Id*. at 1020-1021. The Ninth Circuit reversed a lower court decision, finding that the tribal parties to the existing compacts were necessary parties because, under the existing compacts, the tribes had a right to renewal if a Governor was willing

to leave the compacts in effect; after the lower court litigation, termination was the only option. *Id.* at 1023. Accordingly, the court found that the interests of the tribes in their compacts were impaired. *Id*. No such drastic result would occur in this case. Indeed, as stated repeatedly throughout this brief, SMC does not seek to invalidate or set aside any compact, compact renewal or any provision of any compact. SMC simply seeks injunctive relief to ensure that the Defendants keep their word. In any event, the State is a party to this suit and has waived its sovereign immunity for SMC's claims.

Ho-Chunk also cites *Hall v. Tribal Development Corp*., 100 F.3d 476 (7th Cir. 1996). In *Hall*, the Court of Appeals for the Seventh Circuit found that the Menominee Indian Tribe of Wisconsin ("MITW") was a necessary and indispensable party whose absence necessitated dismissal in a *qui tam* action to invalidate a lease contract for goods and services between MITW and Tribal Development Corporation. 100 F.3d. at 479-482. The *Hall* plaintiffs sought rescission of contracts to which MITW was a party, refunds of monies paid thereunder, and recovery of civil penalties and forfeiture of all equipment leased or sold to MITW. *Id.* at 477-78. The court found that MITW clearly had an interest because a judicial declaration to invalidate the contract necessarily would impact them. *Id*. at 479. Over the plaintiff's objection, the court found that MITW was a necessary party because its interests were not so aligned with the United States' (which was a party to the suit) interests to alleviate any concern for MITW's ability to protect its interests. *Id*. at 479.

Unlike the *Hall* plaintiffs' request that the court invalidate the lease, SMC does not seek to invalidate the Ho-Chunk Compact, only to compel the Governor and state officials acting on his behalf to comply with the provisions thereof. Moreover, in this case, Governor Walker (who is a party to this suit) is certainly well positioned to protect any interest the State may have in

enforcement of the terms of the Ho-Chunk Compact.[12] Indeed, the Governor's interests should be directly aligned with those of the State, since he is the State officer that is ultimately responsible for enforcing the terms of the Ho-Chunk Compact on behalf of the State. *See* Wis. Stat. § 14035 ("the governor may, on behalf of this state, enter into any compact that has been negotiated under 25 USC 2710 (d)."); and, Wis. Stat. § 569.02(4)(explaining that the Wisconsin Department of Administration "Assist[s] the governor in determining the types of gaming that may be conducted on Indian lands and in entering into Indian gaming compacts."). As such, the presence of the Governor in this suit should alleviate Rule 19(a)'s concern for the protection of the State's interests, even if the State has not expressly waived its immunity (but which the State has answered to this Court that it has. Doc. 43 at ¶ 13).

The instant case is also distinguishable from *Clinton v. Babbitt*, 180 F. 3d 1081 (9th Cir. 1999). In *Clinton*, the plaintiffs sued the Secretary of Interior to invalidate a major settlement agreement between the United States, the Hopi Tribe and the Navajo Nation (ratified by Congress as the Navaho-Hopi Land Dispute Settlement Act of 1996, Pub. L. 104-301, Oct. 11, 1996, 110 Stat. 3649 ("1996 Settlement Act")).[13] Under the terms of the agreement, the Hopi Tribe agreed that certain members of the Navajo Nation would be permitted to stay on land owned by the Hopi Tribe pursuant to 75-year leases (the standard terms of which were fixed).

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

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

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

Unlike the *Clinton* plaintiffs, who sought to invalidate the 1996 Settlement Act and block the Secretary from signing the leases, SMC does not seek to invalidate either the SMC Compact or the Ho-Chunk Compact, or to strike or alter any of their terms. Indeed, SMC is not attacking "the terms" of the Ho-Chunk Compact at all. Moreover, SMC has also sued the State and Ho-Chunk to block the illegal conduct at issue, whereas the *Clinton* plaintiffs only sued the Secretary, not the Hopi Tribe or its officials. In this litigation, the State will have the ability to protect its interests.

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

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

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

Ho-Chunk also purportedly relies on *Sandia v. Babbitt*, 47 F. Supp. 2d 49 (D.D.C. 1999) ("*Sandia*"), for the proposition that a state is a required party for addressing challenges to provisions of a gaming compact to which it is a party (Doc. 57 at 39). However, *Sandia* does not stand for such a sweeping proposition. In *Sandia*, the District Court for the District of Columbia "reluctantly" found that the State of New Mexico was an indispensable party to the Sandia and Isleta Pueblos' suit against the United States government. 47 F. Supp. 2d 49 (D.D.C. 1999).

In that case, the Pueblos were faced with shutting down their gaming operations or agreeing to compacts dictated by the State of New Mexico that included revenue sharing and regulatory provisions with which they vehemently disagreed. *Id*. at 51. The Pueblos reluctantly entered into the compacts with express reservations regarding the provisions they opposed, and asked New Mexico to renegotiate those provisions. *Id*. New Mexico refused to negotiate new

revenue sharing provisions with the Pueblos, despite the Department of Interior's and the Pueblos' urging. *Id*.

The Pueblos could not sue New Mexico to compel negotiation because the Supreme Court ruling in *Seminole Tribe v. Flori*da[14] prohibited *Ex parte Young* claims to compel good faith negotiations under IGRA. *Id*. at 50-51. Therefore, the Pueblos initiated a lawsuit against the United States. The court acknowledged that there was "no real dispute" among the parties that New Mexico was a necessary party and "no question" that New Mexico could not be joined under *Ex parte Young* (as a result of the ruling in *Seminole*). *Id*. at 52.

Ho-Chunk not only overstates the holding of *Sandia* but, as a general matter, its reliance on *Sandia* is misplaced. In *Sandia*, the Pueblos could not bring *Ex parte Young* claims to force the Governor of New Mexico to negotiate compact provisions (due to the *Seminole Tribe* decision). In the instant litigation, SMC can and did sue Governor Walker under *Ex parte Young*. That fact alone significantly distinguishes SMC's case from *Sandia*, where the court found the absence of New Mexico as a party precluded it from protecting a number of interests that New Mexico had in the revenue sharing provisions that the Pueblos sought to invalidate. In this case, Governor Walker is well-positioned to protect any interest, however limited, that the State may have in actions taken under the Ho-Chunk Compact that contravene federal law.[15]

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

[15] Indeed, the *Sandia* Court recognized that "[t]he prejudice to the State from [a decision to strike or modify the revenue sharing provisions that were inconsistent with IGRA] would be simply that the State would be required to comply with the law. It should go without saying that

Finally, Ho-Chunk makes a cursory argument that the United States is a required party to this litigation.[16] The United States is not a necessary party to this litigation because SMC is not challenging the status of the Wittenberg Parcel as trust land and does not seek to alter the status of the land vis-à-vis the United States' or Ho-Chunk's interests in the property.[17]

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

Even if this Court were to find that the State itself is a "necessary" or "required" party but cannot be joined, the State is not an indispensable party without which this case must be dismissed. Courts consider four factors to determine "whether in equity and good conscience the action should proceed among the parties before it or should be dismissed." Fed. R. Civ. P. 19(b). The four factors are as follows: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which prejudice can be avoided by shaping relief or other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder. *Id*.

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the State's interest in the continuing effectiveness of compact provisions that violate federal law must be small, if not altogether insignificant." 47 F. Supp. 2d at 54.

[16] Ho-Chunk does not argue that the United States is an indispensable party.

[17] In any event, the Quiet Title Act would not render the United States immune from suit in this action. In the wake of the Supreme Court's ruling in *Match-E-Be-Nash-She-Wish Band v. Patchak*, the Quiet Title Act would not apply to block SMC's suit because SMC does not claim an interest in the Wittenberg Parcel. 132 S. Ct. 2199, 2206 (2012) ("[t]he QTA's 'Indian lands' clause does not render the Government immune because the QTA addresses a kind of grievance different from the one Patchak advances. As we will explain, the QTA—whose full name, recall, is the Quiet Title Act—concerns (no great surprise) quiet title actions. And Patchak's suit is not a quiet title action, because although it contests the Secretary's title, it does not claim any competing interest in the Bradley Property. That fact makes the QTA's 'Indian lands' limitation simply inapposite to this litigation").

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

Nevertheless, Ho-Chunk argues this Court should dismiss SMC's complaint, in its entirety, because, they claim, the State itself is a necessary and indispensable party that cannot be joined because of its Eleventh Amendment immunity. Dismissing SMC's complaint under Ho-Chunk's theory would not only leave SMC with no remedy, but would also effectively read the *Ex parte Young* exception out of existence in this case. In other words, if this Court dismisses SMC's Complaint based on a finding that the State itself must, but cannot, be joined because of

Eleventh Amendment immunity, SMC's *Ex parte Young* claims would also be dismissed. It defies reason that the State's Eleventh Amendment immunity could, as a practical matter, bar claims brought under *Ex parte Young*'s well-established exception to a state's Eleventh Amendment immunity. This Court should not permit such an absurd result and should reject Ho-Chunk's argument that the State is a necessary and indispensable party that requires dismissal under Rule 19.[18]

(c). Ho-Chunk cannot assert Eleventh Amendment immunity on behalf of the State.

In advancing its Rule 19 arguments, Ho-Chunk continues to assert defenses on behalf of the State that the State has not asserted for itself. For example, Ho-Chunk argues that at least one of SMC's claims against the State is barred by the State's Eleventh Amendment immunity from suit. *See* Doc. 57 at 8.

SMC has brought several claims against the State arising under the SMC Compact. The State conceded that it has waived its sovereign immunity from suit by SMC in its amended answer. *See* Doc. 50 at ¶ 13 ("ADMIT that the State agreed to waive its sovereign immunity under limited circumstances specified in [the SMC Compact]"). The State has asserted its sovereign immunity as an affirmative defense, but only for those acts that are "***not an alleged violation of the SMC compact***[.]" Doc. 50 at 27 (emphasis added). To date, the State has not claimed that Eleventh Amendment immunity is a bar to any of SMC's claims under the SMC compact – including SMC's claims that the State's failure to enforce the Ho-Chunk Compact constitutes a violation of the SMC Compact. *See* Doc. 5, Complaint at ¶ 53 ("The State's and the

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

Governor's refusal to enforce the terms of the Ho-Chunk Compact…constitutes a violation of Section XXXII.B. of the Stockbridge Compact.").

Ho-Chunk's attempt to raise Eleventh Amendment immunity on behalf of its co-defendant must fail as a matter of law. The Supreme Court has consistently held that Eleventh Amendment immunity from suit belongs exclusively to the states, and that this defense is not available to non-states. *See, e.g.*, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-01 (1979) ("By its terms, the protection afforded by that Amendment is only available to 'one of the United States.'"); *John Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636, 642-43 (1910) ("But immunity from suit is a high attribute of sovereignty,—a prerogative of the state itself,—which cannot be availed of by public agents when sued for their own torts.").

Moreover, the State's Eleventh Amendment immunity is an affirmative defense that may be waived. Federal courts have consistently held that one defendant cannot assert a waivable defense on behalf of a co-defendant – including defenses relating to jurisdiction. *See, e.g.*, *Seguros Commercial America v. American President Lines*, 934 F.Supp. 243, 245 (S.D. Tex., 1996) (holding that a defendant may not rely upon defects in service of process to another defendant because "the right to waive these defects are personal to the party upon whom service of process is attempted."); *In re Pharmaceutical Ind. Aver. Whole. Price Lit.*, 431 F.Supp.2d 109, 120 (D. Mass., 2006) ("personal jurisdiction is an individual liberty right and is therefore waivable, and neither of the other two physician defendants, Berkman and Hopkins, have moved to dismiss based on personal jurisdiction."); *Zufelt v. Isuzu Motors Am., L.C.C.*, 727 F. Supp. 2d 1117, 1131 (D. N.M., 2009) ("The Court finds that it is inappropriate to permit Isuzu LLC to assert a defense that is available only to Sam Dell Nissan…").

If the State wishes to raise its Eleventh Amendment immunity as a defense against SMC's claims under the SMC Compact, that is a decision for the State alone to make. Ho-Chunk cannot step into the shoes of its co-defendant in this case in order to maximize its potential defenses.[19]

D. SMC's Claims Are Not Barred By Any Applicable Statute Of Limitations

Ho-Chunk also argues that SMC's claims are barred by statutes of limitations under both federal and state law. Ho-Chunk largely repeats the argument made in opposition (Doc. 37) to SMC's Motion for Preliminary Injunction (Doc. 7), and merely incorporates by reference Ho-Chunk's Supplemental Brief on the Application of the Continuing Violations Doctrine to Plaintiff's Claim for Injunctive Relief Pursuant to the Court's Order Dated July 10, 2017 (Doc. 46)[20].

Federal statutes of limitations do not have any bearing on SMC's claims, because it is not necessary for SMC to challenge any final agency action of a federal agency. SMC does not challenge the Department of the Interior's decision to place the Wittenberg Parcel into trust status in 1969 and again in 1993, and SMC does not challenge the Department of the Interior's subsequent proclamations or statements concerning the status of the Wittenberg Parcel, in order to succeed on SMC's claims. SMC's claims are against Ho-Chunk, the State, and the Governor. To succeed in several of those claims, SMC must simply demonstrate that title to the Wittenberg Parcel reverted back to the Native American Church in 1974 in accordance with the 1969 Deed.

The State's statutes of limitations for breach of contracts are also inapplicable to SMC's

[19] As SMC has explained above, the State's Eleventh Amendment immunity is no bar to this claim due to its request for prospective injunctive relief under the Ex Parte Young doctrine.

[20] SMC does refer this Court to SMC's Supplemental Memorandum in Support of Motion for Preliminary Injunction, Doc. 52, which it submitted pursuant to Court's Order, Doc. 46, for additional authority and analysis on the issue.

claims here. Moreover, the cases cited by Ho-Chunk equating compacts to contracts, *Cachil Dehe Band of Wintun Indians v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010) and *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006), both looked to state law to assist in the interpretation of contract terms. Neither looked to state law to determine an applicable statute of limitations. Ho-Chunk concedes that there is no applicable federal statute of limitations – IGRA certainly does not provide for one when expressly permitting SMC to bring this suit against Ho-Chunk to enjoin its gaming activities in violation of its tribal-state compact. *See* 25 U.S.C. § 2710(d)(7)(A)(ii). Ho-Chunk argues that this Court should fill the void by applying the most analogous state law. That unsubstantiated premise defeats Ho-Chunk's own argument, however, because the most analogous state statute of limitations would be found in public nuisance law, not breach of contract law. 25 U.S.C. § 2710(d)(7)(A)(ii) provides that states and tribes may bring actions for prospective equitable relief to enforce the terms of gaming compacts. Gaming on Indian lands not in compliance with compacts is illegal. *See* 25 U.S.C. § 2710(d)(1) (stating that class III gaming activities are lawful "only if…conducted in conformance with a Tribal-State compact…"). Congress tagged governmental entities – tribes and states – with the ability to seek prospective equitable relief enjoining the illegal activity. Statutes of limitation are not applicable to state governments enforcing state public nuisance laws. *See Metropolitan R. Co. Dist. Of Columbia*, 132 U.S. 1, 12 (1889) (well settled maxim '*nullum tempus occurrit regi*' prevents statutes of limitations running against sovereigns seeking to protect public interest); *Baxter v. State*, 10 Wis. 454, 455 (1860); *City of Chicago v. Latronica Asphalt and Grading Co.*, 346 Ill. App. 3d 264, 269, 805 N.E.2d 281, 286 (Ill. App. 2004); It follows, using Ho-Chunk's own direction to fill the void by applying the most analogous body of law, that statutes of limitations are equally inapplicable to actions brought

pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii). *See Ponca Tribe v. Continental Carbon Copy*, 2008 WL 11338469 at *3 (W.D. Okla. 2008) (applies maxim to allow otherwise untimely claims by Plaintiff Indian Tribe).

Ho-Chunk is in violation of the Ho-Chunk Compact each passing day in which it operates a "Gaming Facility" on the Wittenberg Parcel. Ho-Chunk is engaging in a continuing violation of its compact, which is presently in effect. Moreover, courts recognize the continuing violation theory in the context of assessing whether otherwise applicable statutes of limitations have run. The continuing violation theory provides that, where practices complained of are alleged to be continuing in nature, the timeliness of the plaintiff's claim is determined based on when the last violation occurred. This doctrine is recognized by federal courts. *See Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321 (1971). In *Zenith Radio*, the United States Supreme Court concluded in the context of a continuing conspiracy to violate the federal antitrust laws, "each time a plaintiff is injured by an act of the defendant a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." *Id.* at 338. (cited with approval in *E-Z Roll Off, LLC v County of Oneida*, 335 Wis.2d 720, 800 N.W.2d 421(Wis. 2011). *See also Selan v. Kiley*, 969 F.2d 560, 564 (7th. Cir. 1992). This doctrine is also recognized by Wisconsin state courts, *Tamminen v. Aetna Casualty and Surety Co*., 109 Wis.2d 536 (1982); *First National Bank and White Knight Commercial Funding v. Trewin*, 2017 WL 1948428, *5-6 (Wis. App. May 9, 2017); *Noonan v. Northwestern Mut. Life Ins. Co.*, 276 Wis.2d 33, 49-50 (Wis. App. 2004); *Production Credit Ass'n of W. Cent. Wis. V. Vodak*, 150 Wis.2d 294, 306 (Wis. App. 1989). Moreover, Wisconsin courts do not apply statutes of limitations to actions, such as the action here, seeking prospective equitable relief rather than money damages. *Ripp v. Hackett*, 2014 WL 12669826, *3, n.6 (Wis.

App. 2014); *Suburban Motors of Grafton, Inc., v. Forester*, 134 Wisc.2d 183, 187 (Wis. App. 1986).

IGRA makes it clear that one tribe may bring an action to enjoin another tribe from conducting gaming in violation of the other tribe's class III gaming compact where that violation is ongoing. IGRA makes it equally clear that the remedy is limited to *enjoining* non-compliant gaming activity, 25 U.S.C. § 2710(d)(7)(A)(3). Hence, by definition, only continuing violations are actionable. SMC is not seeking an award of damages against Ho-Chunk for violations occurring within or outside of the last six years. Ho-Chunk appears to be arguing that it should be excused for continuing to violate its compact going forward, because it previously violated its compact without recourse. Nothing in IGRA provides for such exoneration.

SMC's position is further supported by the language set forth in IGRA's compliance and enforcement provisions, and the implementing regulations, 25 C.F.R.§ 575.4, published by the National Indian Gaming Commission (the "NIGC"). Those regulations explicitly state that each day during which an Indian tribe conducts gaming in violation of IGRA shall constitute a separate violation. *See also* Doc. 52 at 10-12 and citations set forth therein.

With respect to SMC's complaint, federal law (in general), IGRA (in particular), and Wisconsin state law are all clear: there is no statute of limitations to bar a claim for injunctive relief where Ho-Chunk continues to violate the terms of the Ho-Chunk Compact.

E. Ho-Chunk Fails to Establish That It Is Entitled To Judgment As A Matter Of Law On SMC's Claim That The Wittenberg Casino Is Not An Ancillary Facility Under The Ho-Chunk Compact.

Near the end of its brief, Ho-Chunk argues that SMC cannot bring an action to enjoin Ho-Chunk from violating the Ho-Chunk Compact provisions limiting the size and scope of Ho-Chunk's gaming activities in Shawano County. Doc. 57 at 56-58. Ho-Chunk argues that,

because SMC is neither a party to, nor a third-party beneficiary of, the Ho-Chunk Compact, SMC has no standing to bring such a claim under the common law regarding contracts. *Id*.

Tribal-state gaming compacts are not typical private contracts enforceable under common law. Instead, they are a creation of federal law by virtue of Congress's enactment of IGRA. *See* 25 U.S.C. § 2710(d)(1)(C)(stating that class III gaming activities are lawful only if conducted in accordance with a tribal-state gaming compact). Congress can modify common law rules that would otherwise apply to agreements between states and Indian tribes. *See Stumo v. United Air Lines, Inc*., 382 F.2d 780, 787 (7th Cir. 1967)("…Congress has the power to modify or abolish common law rights or remedies.").

IGRA expressly provides federal court jurisdiction and a cause of action for one Indian tribe to seek to enjoin another Indian tribe from operating class III gaming activities in violation of its tribal-state compact. *See* 25 U.S.C. § 2710(d)(7)(A). Ho-Chunk's argument here fails as a matter of statutory law. IGRA allows SMC to bring this action.

F. The 1986 Reservation Proclamation Does Not Bring Ho-Chunk Into Compliance With Its Own Compact.

Ho-Chunk points to the Bureau of Indian Affairs' issuance of a "Reservation Proclamation" for the Wittenberg Parcel in 1986 as conclusive evidence that it is operating the Wittenberg Casino on lands that are eligible for gaming under § 2719 of IGRA. *See* Doc. 57 at 15.[21] Ho-Chunk's reliance on the Reservation Proclamation is based on a presumption that: 1) it

[21] Curiously, Ho-Chunk has separately filed a Request for Judicial Notice, Doc. 56, for the referenced proclamation and related documents. That Ho-Chunk must divert from the Complaint and Answer to establish its arguments regarding the effect of the proclamation, itself, warrants the denial of the MJOP, discussed *supra*. SMC questions the need to seek judicial notice for documents already part of the record in this case as attachments to the Complaint or pleadings relating to SMC's Motion for Preliminary Injunction or public documents, such as the Federal Register, which may de cited without the need for judicial notice. However this Court may consider and deliberate regarding the proclamation as set forth in the Federal Register, this Court

had title ownership of the Wittenberg Parcel in 1986; and 2) that the Wittenberg Parcel was held in trust by the United States at that time. Those very issues are at the core of the dispute between SMC and Ho-Chunk. Taking SMC's allegations as true, for purposes of this motion, Ho-Chunk's presumptions are wrong. The Native American Church owned the Wittenberg Parcel in 1986, and on October 17, 1988.

Ho-Chunk was correct when it observed that the BIA cannot issue reservation proclamations for land that is not held in trust for an Indian tribe. *See* Doc. 57 at 50. Under 25 U.S.C. § 5110, the BIA may only issue reservation proclamations for "lands acquired pursuant to any authority conferred by [the Indian Reorganization Act]." If the lands were not held in trust for Ho-Chunk in 1986, the BIA's reservation proclamation for the Wittenberg Parcel had no legal effect because it exceeded the statutory authority to issue such a proclamation. *See, e.g.*, *United States v. Noble*, 237 U.S. 74, 84 (1915) (holding that certain leases of Indian lands were void, despite federal approval, because they did not comply with the statute); *United States v. Haddock*, 21 F.2d 165, 167 (8th Cir. 1927) ("Of course, if the lease was void, the approval of the Secretary of the Interior or the Superintendent for the Five Civilized Tribes could not give it life…"); *Utah Power Light Company v. United States*, 243 U.S. 389, 410 (1917) ("If any of the regulations go beyond what Congress can authorize, or beyond what it has authorized, those

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should give it no weight as to the trust status of the Wittenberg parcels as of October 17, 1988 as the proclamation does not address the issue. Ho-Chunk's reference of the 1986 Reservation Proclamation is an attempt to shoe-horn its substantive arguments on the merits into its arguments relating to jurisdiction. For example, Ho-Chunk first raises this argument in support of its jurisdictional defense that SMC's claim is barred by sovereign immunity. Later in its brief, Ho-Chunk raises the 1986 reservation proclamation again as evidence that SMC's claims must be filed against the United States. SMC addresses Ho-Chunk's reliance on the 1986 Reservation Proclamation here. Nevertheless, SMC urges the Court to reserve judgment on the merits of this issue until the parties have had an opportunity to discover evidence relating to the issuance of the Reservation Proclamation, including Ho-Chunk's representations to the Bureau of Indian Affairs regarding the status of the Wittenberg Parcel at that time.

regulations are void and may be disregarded[.]"); and, *Dixon v. United States*, 381 U.S. 68, 74 (1965)("A regulation which does not do [comply with the statute], but operates to create a rule out of harmony with the statute, is a mere nullity.'").

The error of Ho-Chunk's reasoning, is apparent when considering it under slightly different circumstances. Under Ho-Chunk's reasoning, the BIA could proclaim Lambeau Field as part of its reservation in spite of the fact that Ho-Chunk does not have fee or trust ownership to the property. Ho-Chunk would then argue that it could wait more than two decades and begin imposing a tax on tickets to events at Lambeau Field, and that its taxing jurisdiction could not be questioned by individuals who are impacted by Ho-Chunk's civil regulations, but who were not impacted by the unlawful reservation proclamation two decades earlier.

Ho-Chunk's assertion of jurisdiction over a hypothetical Lambeau Field Reservation would be no more unlawful than its assertion that the Wittenberg Parcel is eligible for gaming by virtue of the 1986 Reservation Proclamation.

The relevant issue here is the status of the Wittenberg Parcel on October 17, 1988. *See* 25 U.S.C. § 2719 (prohibiting Indian tribes from conducting gaming activities on lands acquired after that date). On October 17, 1988, the Wittenberg Parcel was owned in fee simple by the Native American Church. Perhaps owing to IGRA's passage, with the § 2719 deadline, the Native American Church adopted a resolution in 1989 to convey the Wittenberg Parcel to Ho-Chunk once again. The parties waited another four years to complete the transaction, and the BIA placed the land back into trust status in 1993.

Neither the government nor the public is bound by the actions of individual officers that are beyond the scope of their statutory powers. *See CACI, Inc. v. Stone*, 990 F.2d 1233, 1236 (Fed. Cir. 1993) ("…because the Army lacked procurement authority to contract with VSE and

the Board has no power to ratify the contract or otherwise cure this fatal defect, we find that the contract is void."). Because the Native American Church owned the Wittenberg Parcel in 1986, the BIA simply had no authority to proclaim the property as part of Ho-Chunk's reservation. It was a "mere nullity." *See Dixon v. United States*, 381 U.S. at 74. The passage of two years between the BIA's reservation proclamation and IGRA's October 17, 1988 deadline did not bring it to life for purposes of making the Wittenberg Parcel eligible for gaming. *See Haddock*, 21 F.2d at 167 ("Of course, if the lease was void, the approval of the Secretary of the Interior or the Superintendent for the Five Civilized Tribes could not give it life…"); *Foehl v. United States*, 238 F.3d 474, 480 (3rd Cir. 2000)("a judgment of forfeiture obtained without proper notice to a claimant is void, and that the passage of time could not transmute this nullity into a binding judgment."). As the Seventh Circuit has explained, "[a]n order so completely ultra vires is no order for purposes of deciding whether compliance and completion have been achieved; the valid and the void commands in the order can be separated, and the void discarded." *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 665 (7th Cir. 1995).

It bears repeating here that SMC is not challenging the present trust status of the Wittenberg Parcel. SMC acknowledges that the Wittenberg Parcel is currently held in trust by the United States for Ho-Chunk's benefit. By virtue of this fact, the Wittenberg Parcel has been considered "Indian country" for purposes of federal law since 1993, and Ho-Chunk may lawfully exercise jurisdiction over such land. *See* 25 U.S.C. § 1151. The only issue that is relevant here is the ownership status of the Wittenberg Parcel on October 17, 1988. This date is important because IGRA specifies that date as a deadline: lands held in trust on or before that date are eligible for gaming, and lands acquired in trust after that date are not. *See* 25 U.S.C. § 2719. Ho-Chunk agreed to incorporate that deadline into its own compact. *See* Ho-Chunk Compact at

§ IV. A judicial determination that the Wittenberg Parcel does not satisfy § 2719 does not alter the scope of Ho-Chunk's or the United States' present interests in the Wittenberg Parcel.

Ho-Chunk has put the cart before the horse in relying upon the 1986 Reservation Proclamation, and in trying to resolve the merits of the case at this stage. The central question involved here is whether title to the Wittenberg Parcel reverted back to the Native American Church in 1974. Taking SMC's allegations as true, the answer is unequivocally "yes."

V. Conclusion

Despite Ho-Chunk's blitzkrieg of arguments to divert, obfuscate and muddle**,** the question at the core of SMC's suit against Ho-Chunk remains rather simple: Is Ho-Chunk operating the Wittenberg Casino in violation of the Ho-Chunk Compact? The answer to that question is apparent from a review of the facts, and the language of the Ho-Chunk Compact itself: Yes, Ho-Chunk is operating the Wittenberg Casino in violation of the Ho-Chunk Compact.

For the reasons set forth herein, and in the pleadings previously filed by SMC in this matter, Ho-Chunk's MJOP should be denied in its entirety. This case should proceed in accordance with the schedule submitted by the parties and approved by Magistrate Judge Crocker.

Dated: September 15, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that on September 15, 2017, I caused the **STOCKBRIDGE- MUNSEE COMMUNITY RESPONSE IN OPPOSITION TO DEFENDANT HO-CHUNK NATION'S MOTION FOR JUDGMENT ON THE PLEADINGS** to be served upon counsel of record through the Court's electronic service system. To my knowledge all parties are registered for the CM/ECF system and shall be served electronically upon filing.

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