

**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.

**STATEMENT OF FACTS IN SUPPORT
OF MOTION FOR PRELIMINARY
INJUNCTION**

17-cv-249

Pursuant to the Procedure established by the Court, Plaintiff Stockbridge-Munsee Community (“Tribe” or “SMC”) submits this Statement of Facts in Support of Motion for Preliminary Injunction. As to each of these facts, SMC identifies the source of the proposition. This Statement of Facts also serves as a detailed proffer of testimony to be presented at an evidentiary hearing if the Court determines such an evidentiary hearing is needed.

1. SMC is a federally recognized Indian tribe with a reservation located in Shawano County, Wisconsin and approximately 25,000 acres of land holdings. Federal Register, Vol. 82, No. 10, Tuesday, January 17, 2017, p. 4918; Affidavit of Tribal President Shannon Holsey in Support of Motion for Preliminary Injunction (“Holsey Aff.”), ¶ 5.
2. The Tribe entered into a class III gaming compact with the State of Wisconsin (“State”) in 1992 to govern the Tribe’s conduct of class III gaming activities on its Indian lands in accordance with IGRA (the “Stockbridge Compact”).
 - a. Exhibit 1 to Holsey Aff. is a true and correct copy of the Stockbridge Compact that went into effect on April 15, 1992.
3. The Stockbridge Compact has been amended three times since 1992.
 - a. Exhibit 2 to the Holsey Aff. is a true and correct copy of the first amendment to the Compact, which went into effect on September 24, 1998.
 - b. Exhibit 3 to the Holsey Aff. is a true and correct copy of the second amendment to the Compact, which went into effect on December 9, 2003.
 - c. Exhibit 4 to the Holsey Aff. is a true and correct copy of the third amendment to the Compact, which went into effect on August 19, 2009
4. The Tribe began operating class III gaming activities at a single location on its trust lands in 1992, in accordance with the Stockbridge Compact. Holsey Aff., ¶10.
5. In reliance on the protections included in the Stockbridge Compact, the Tribe expended \$ 110 million, \$ 48 million of which was financed on borrowed funds, to modernize its only class III gaming facility – the North Star Casino Resort – which is located within its reservation in Shawano County. Holsey Aff., ¶ 11.

6. The Tribe's North Star Casino Resort employs more than 460 people, including 56 members of the Tribe. Holsey Aff., ¶ 12.
7. The North Star Casino Resort is the single largest source of revenue for the Tribe's government. Revenues from the North Star Casino Resort constitute more than ninety-five percent (95%) of the tribal government's non-grant funding and eighty-six percent (86%) of the tribes total funding. Holsey Aff., ¶ 13.
8. SMC spends an additional \$4,252,791 on tribal member early childhood development, its elders services, social services, community health services, and culture revitalization programs. Holsey Aff., ¶ 14.
9. As an employer, SMC through its governmental and business operations pays a total of \$18.8 million in combined annual payroll and benefits, independent of the substantial payroll taxes paid to the State. Holsey Aff., ¶ 15.
10. Because of SMC's location and long history of contributing to the larger community, its gaming revenues not only allow for the provision of essential governmental services for the benefit of SMC and its tribal members, but also for the entire region (including non-Indian residents, visitors and neighbors), surrounding counties, and, ultimately, the State. Holsey Aff., ¶ 16.
11. While SMC provides Wisconsin residents with employment and benefits, it also realizes the value of investing in its future workforce, and has made education a top priority, funding higher education and private schooling for tribal members. SMC's Education Department is subsidized sixty-five percent (65%) by gaming revenues. Holsey Aff., ¶ 1
12. The Tribe distributes only a nominal amount (approximately on average \$500 per member per year) of its gaming revenues directly to members of the Tribe. The Tribe has

chosen to use its gaming revenues to fund essential government services in accordance with IGRA's purpose of "promoting...strong tribal governments." 25 U.S.C. § 2702. Holsey Aff., ¶ 18.

13. The Tribe's government provides essential government services to tribal members, including: educational support programs; emergency medical services; public works programs; medical, dental, and wellness programs; natural resource conservation and protection; and others. Holsey Aff., ¶ 19.
14. In 1995, the United States Bureau of Indian Affairs (the "BIA") acquired the Pine Hills Golf and Supper Club ("Pine Hills") in trust status for the benefit of the Tribe within what the Tribe believed was its existing reservation. Holsey Aff., ¶ 20.
15. In August 1998, the Tribe began operating approximately 166 class III gaming machines at its Pine Hills Golf and Supper Club ("Pine Hills") under the good faith belief that Pine Hills was located within the Tribe's reservation, and was therefore on lands eligible for class III gaming under IGRA pursuant to 25 U.S.C. § 2719(a)(1). Holsey Aff., ¶ 21.
16. In 1998, the State filed a lawsuit against the Tribe in the United States District Court for the Eastern District of Wisconsin alleging that the Tribe's class III gaming activities at Pine Hills were conducted in violation of IGRA and the Stockbridge Compact. *See Wisconsin v. Stockbridge-Munsee Community*, 366 F. Supp. 2d 698 (E.D. Wis. 2004).
17. The United States was successful in seeking a preliminary injunction preventing the Tribe from offering gaming on the Pine Hills property pending the litigation. *Wisconsin v. Stockbridge-Munsee*, 67 F. Supp. 2d. 990, 993 (E.D. Wis. 1999). The United States District Court for the Eastern District of Wisconsin ultimately held that Pine Hills was

not within the Tribe's existing reservation, because the reservation had been diminished. 366 F. Supp. 2d at 779-80 (E.D. Wis. 2004).

18. Ho-Chunk Nation, formally known as Winnebago Nation of Wisconsin, is a federally-recognized Indian Tribe. Federal Register, Vol. 82, No. 10, Tuesday, January 17, 2017, p. 4916.

19. On June 28, 1969, a local chapter of the Native American Church conveyed a parcel of land near the Village of Wittenberg, Wisconsin in Shawano County to the United States in trust for the Ho-Chunk Nation (the "Wittenberg Parcel). 1969 Deed of Transfer ("the 1969 Deed").

- a. A true and correct copy of the 1969 Deed is attached to Holsey Aff. as Exhibit 5 .
- b. Exhibit C to the Complaint is a true and correct copy of the 1969 Deed. Holsey Aff., ¶ 22.

20. The 1969 Deed, prepared by the United States Bureau of Indian Affairs at its local office in Ashland, Wisconsin expressly stated that the conveyance was subject to a reversionary interest:

The south 330 feet of the NE fr ¼ of the NE ¼ Section 4, Township 27 North, Range 11 E., Fourth Principal Meridian, containing 10 acres, more or less, subject to valid rights-of-way of record and existing easements of record; ***also subject to Housing construction which must commence within 5 years from date of approval of this deed or the land will revert to the grantor.*** (emphasis added)

1969 Deed.

21. Ho-Chunk never commenced housing construction on the Wittenberg Parcel within 5 years of the 1969 conveyance, as established by plat maps and aerial photos of the Wittenberg parcel. Holsey Aff., ¶ 23 and Exhibits 6 - 8 attached thereto.

22. On August 29, 1989, the Native American Church approved a resolution stating that its President and Secretary were “authorized to deliver to the Wisconsin Winnebago Tribe a Quit-Claim Deed which removes the aforementioned reversionary clause” with respect to the Wittenberg Parcel.
- a. A true and correct copy of the resolution is attached to Holsey Aff. as Exhibit 9.
 - b. Exhibit D to the Complaint is a true and correct copy of the resolution. Holsey Aff., ¶ 24.
23. Ho-Chunk entered into a class III gaming compact with the State of Wisconsin in 1992 (the “Ho-Chunk Compact”) to govern its class III gaming activities in accordance with IGRA. The Ho-Chunk Compact defines the term “Primary Business Purpose” as “the business generating more than 50 percent of the net revenue of the facility.” Ho-Chunk Compact at § III(H). The Ho-Chunk Compact also stated that Ho-Chunk may not conduct class III gaming activities on lands not eligible for gaming under IGRA. *See Id.* at § III(J) and § IV(B). The Ho-Chunk Compact authorized Ho-Chunk to operate class III gaming activities in Sauk, Jackson, and Wood Counties. *Id.* at § XXVII. *See Ho-Chunk Compact.*
- a. A true and correct copy of the Ho-Chunk Compact is attached to Holsey Aff. as Exhibit 10.
 - b. In 1992, the Ho-Chunk Nation was known as the Winnebago Nation of Wisconsin. *See Second Amendment to Ho-Chunk Compact, infra.*
24. The Native American Church executed a Quitclaim Deed four years later on April 15, 1993 claiming to transfer “All right, title and interest, [the Native American Church] may have under the reversionary clause in the Warranty Deed dated June 28, 1969....” with

respect to the Wittenberg Parcel. (The “1993 Deed”). The BIA certified the 1993 Deed and acquired the Wittenberg Parcel in trust for the benefit of Ho-Chunk.

- a. A true and correct copy of the 1993 Deed is attached to Holsey Aff. as Exhibit 11.
- b. Exhibit E to the Complaint is a true and correct copy of the 1993 Deed. Holsey Aff., ¶ 26.

25. The Ho-Chunk Compact has been amended three times since 1992.

- a. Exhibit 12 to the Holsey Aff. is a true and correct copy of the first amendment to the Ho-Chunk Compact, which went into effect on February 1, 1999.
- b. Exhibit 13 to the Holsey Aff. is a true and correct copy of the second amendment to the Ho-Chunk Compact, which went into effect on July 3, 2003.
- c. Exhibit 14 to the Holsey Aff. is a true and correct copy of the third amendment to the Ho-Chunk Compact, which went into effect on December 12, 2008.

26. The Second Amendment to the Ho-Chunk Compact authorized Ho-Chunk to operate an “Ancillary Facility” in Shawano County. The Second Amendment to the Ho-Chunk Compact emphasizes the difference between the terms “Gaming Facility” and “Ancillary Facility,” and defines the term “Ancillary Facility” to mean a gaming facility “where fifty percent or more of the lot coverage of the trust property upon which the facility is located, is used for a Primary Business Purpose other than gaming.” Ho-Chunk Compact at § XVI(E) and Second Amendment to Ho-Chunk Compact.

27. Marc Marotta, the Wisconsin Secretary of Administration and the State’s lead compact negotiator at that time, was quoted in a newspaper article published by the Wittenberg Enterprise shortly after negotiating the gaming compact amendment with Ho-Chunk. According to that article, “State Administration Secretary Marc Marotta said the changes

for mini-casinos were meant to do no more than lock in current practice, since several tribes have operated mini-marts with slot machines for some time.” The Wittenberg Enterprise quoted Secretary Marotta as stating, “[t]he intent continues to be that these be one-stop shops that sell everything from groceries to gas[.]” *Compacts might spur mini-mart gambling*, Wittenberg Enterprise (November 6, 2003).

- a. A true and correct copy of *Compacts might spur mini-mart gambling*, Wittenberg Enterprise (November 6, 2003) is attached to Holsey Aff. as Exhibit 15.

28. The Oneida Nation operates ancillary facilities as convenience stores and gas stations, with approximately 100 slot machines in each. Holsey Aff., ¶ 31(a), and *Tribal Gaming in Wisconsin, Informational Paper 88*, Wisconsin Legislative Fiscal Bureau, January 2013 (“Informational Paper 88”)Table 1.

- a. A true and correct copy of the Informational Paper 88 is attached to the Holsey Aff. as Exhibit 16.

29. The St. Croix Chippewa Tribe operates its ancillary facility as a convenience store and gas station, with approximately 145 slot machines. Holsey Aff., ¶ 31(b) and Informational Paper 88, Table 1.

30. In 2008, Ho-Chunk began construction of its Ancillary Facility on the Wittenberg Parcel. Ho-Chunk opened its class III Ancillary Facility on the Wittenberg Parcel (the “Wittenberg Casino”) later that year. Holsey Aff., ¶ 32.

31. The Wittenberg Casino presently includes approximately 502 slot machines, a snack area and a small bar within a stand-alone facility on the Wittenberg Parcel and a separate stand-alone convenience store on the parcel with no gaming. Informational Paper 88, Table 1.

32. Table games are currently not being offered at the Wittenberg Casino. Informational Paper 88, Table 1.
33. On August 16, 2016, Ho-Chunk issued a press release (Exhibit F) announcing plans to expand the Wittenberg Casino as part of a \$153 million investment in its casinos (the “August 16th Press Release”). The August 16th Press Release outlined plans to install a total of nearly 800 slot machines and 10 table games at the Wittenberg Casino, and to construct an 86-room hotel, and a restaurant, bar, and high-limit gaming area.
- a. A true and correct copy of the August 16th Press release is attached to Holsey Aff. as Exhibit 17.
 - b. Exhibit F to the Complaint is a true and correct copy of the August 16th Press Release. Holsey Aff., ¶ 33.
34. On August 29, 2016, the Tribe issued a letter to Ho-Chunk expressing concerns about its plans to expand the Wittenberg Casino and requesting a meeting between the leaders of the Tribe and Ho-Chunk to resolve those concerns. Ho-Chunk did not respond to the Tribe’s letter. Holsey Aff., ¶ 34.
35. Ho-Chunk has continued efforts to construct the expansion of its Wittenberg Casino, and those efforts are presently ongoing as of the April 19 filing date of the Complaint. Holsey Aff., ¶ 35.
36. If the Wittenberg Casino is expanded according to the specifications contained in the August 16th Press Release, it will contain more slot machines and hotel rooms than presently exist at Ho-Chunk’s class III gaming facility at Black River Falls, Wisconsin, which is not classified as an “Ancillary Facility.” Holsey Aff., ¶ 31(g); Informational Paper 88, Table 1.

37. Ho-Chunk presently operates 6 gaming facilities across the State of Wisconsin, including three full-scale class III casino resorts, and has submitted an application to the BIA for the development of an additional class III gaming facility in Beloit, Wisconsin.
- a. Five Class III gaming facilities operated by Ho-Chunk are identified in Informational Paper 88, Table 1.
 - b. Ho-Chunk operates a large Class II-only gaming on eligible Indian lands in Madison, Wisconsin. *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1078 (7th Cir. 2015).
 - c. The National Environmental Policy Act (“NEPA”) process for Ho-Chunk’s application for gaming on lands to be taken into trust in Beloit Wisconsin was initiated on November 26, 2012, Federal Register, Vol. 77, No. 227, Monday, November 26, 2012, p, 70460.
38. These Ho-Chunk facilities offer a total of 5,151 gaming machines and 96 table games – more than 40 percent of the total gaming machines in the State of Wisconsin. Informational Paper 88, Table 1.
39. Ho-Chunk reportedly distributes more than \$12,000.00 per member, per year, or an aggregate of more than \$ 90 million of its gaming revenues to its tribal members on a per capita basis, pursuant to a revenue allocation plan approved by the BIA. Holsey Aff. ¶ 36 and Exhibits 18 - 20 thereto.
40. Ho-Chunk’s Per-Capita Distribution Ordinance allows for as much as seventy-eight and twenty-six one hundredths percent (78.26%) of its total gaming revenues to be distributed to members as per-capita payments. Ho-Chunk Nation Code, Title 2, Section 12, at § 6(a)(3.).

- a. A true and correct copy of Ho-Chunk's Per-Capita Distribution Ordinance, amended and restated, October 20, 2015 is attached to Holsey Aff. as Exhibit 21.
 - b. Ho-Chunk Ordinances are also posted on Ho-Chunk's official web page, ho-chunknation.com.
41. The State and the Governor have refused to initiate the dispute resolution procedures in the Ho-Chunk Compact or take other actions to prevent Ho-Chunk from operating the Wittenberg Casino on lands not eligible for gaming under IGRA. Holsey Aff., ¶ 38.
42. The State and the Governor have refused to initiate the dispute resolution procedures in the Ho-Chunk Compact or take other actions to prevent Ho-Chunk from operating the Wittenberg Casino in violation of the Ho-Chunk Compact's restrictions applicable to Ancillary Facilities. Holsey Aff., ¶ 39.
43. Ho-Chunk's present gaming activities on the Wittenberg Parcel constitute the Primary Business Purpose of the gaming facility, as the 502 slot machines certainly generate more than 50 percent of the net revenue of the facility as compared to the snack area and small bar. Holsey Aff., ¶ 40.
44. The Department of the Interior has described those types of businesses as *ancillary to* tribal gaming enterprises:

As tribal gaming has matured, many Tribes have developed businesses or amenities that are ancillary to their gaming activities, such as hotels, conference centers, restaurants, spas, golf courses, recreational vehicle parks, water parks, and marinas. These businesses are often located near or adjacent to tribal gaming facilities.

Letter from Paula Hart, Director of the Office of Indian Gaming, to Hon. Peter S. Yucupicio, Chairman of the Pascua Yaqui Tribe of Arizona (June 15, 2012) (describing the relationship between tribal gaming and other business activities).

- a. A true and correct copy of the Letter from Paula Hart, Director of the Office of Indian Gaming, to Hon. Peter S. Yucupicio, Chairman of the Pascua Yaqui Tribe of Arizona (June 15, 2012) is attached to Holsey Aff. as Exhibit 22.
45. Presently, the size of Ho-Chunk's Wittenberg facility dedicated to gaming far exceeds the size of the facility dedicated to the non-gaming purpose of a snack area and small bar. Holsey Aff., ¶ 42.
46. Gambling activities presently generate a majority of the revenue for Ho-Chunk's business activities on the Wittenberg Parcel. A gaming facility in a similar location, and of similar size to the Wittenberg Casino, can generate more than \$120 per slot machine per day. This would amount to revenue of \$96,000 per day for a facility with 800 slot machines, and more than \$35 million per year (in addition to the revenue generated by table games). Holsey Aff., ¶ 43.
47. Ho-Chunk's additional gaming activities on the Wittenberg Parcel at the expanded Wittenberg Casino will continue to define the Primary Business Purpose of the facility because gaming activities are certain to continue to generate more than 50 percent of the net revenue of the facility. Holsey Aff., ¶ 44.
48. Allowing Ho-Chunk to expand its gaming activities at the Wittenberg Casino in excess of what is already operated will devastate SMC's current gaming operations, causing a \$22 million loss in critical governmental revenue each year, which equates to thirty-seven percent (37%) of SMC's existing slot revenue and equates to a seventy-four percent (74%) loss in funding of essential tribal programs. Holsey Aff., ¶¶ 45 and 46, and Impacts of Proposed Ho-Chunk Wittenberg Expansion, Market and Feasibility Advisors, January, 2017 (MFA Report).

- a. A true and correct copy of Impacts of Proposed Ho-Chunk Wittenberg Expansion, Market and Feasibility Advisors, January, 2017, is attached to Holsey Aff. as Exhibit 23.
 - b. The calculation of loss in funding of essential tribal programs from the loss in slot machine revenue resulting from the expansion of the Wittenberg Casino is based on previous drops in slot machine revenue resulting from the original opening of Wittenberg Casino and the corresponding loss in funding of essential tribal programs. Holsey Aff., ¶ 46.
49. SMC receives from its gaming operations \$16.7 million annually for essential governmental services and programs. With a thirty-seven percent (37%) decline in slot machine net win revenue, which will translate to seventy-four percent (74%) decline in profits transferred to the Tribe, that funding will be reduced from \$16.7 million to \$4.19 million, annually, Holsey Aff., ¶ 47.
50. That lost revenue will result in significant job losses, and drastic cuts to essential governmental services that SMC currently provides to its Tribal members, its residents and the surrounding community. If SMC loses seventy-four percent (74%) from gaming profits for its annual budget, it will be forced to lay off employees throughout all of its businesses, cut funding for essential governmental services, cut or eliminate programs, and delay plans and commitments for future economic growth. The result would cripple SMC's governmental operations and its economy. Holsey Aff., ¶ 48.
51. The reduction in gaming revenues will have a devastating impact on SMC's non-gaming commercial enterprises, including the Little Star Convenience Store, Mohican LP Gas, and Pine Hills Golf Course and Supper Club. Holsey Aff., ¶ 49.

52. SMC will need to eliminate approximately twenty percent (20%) of its full-time casino jobs (92 employees) and curtail or eliminate capital outlays. Holsey Aff., ¶ 50.
53. The overall quality and reputation of the North Star Casino Resort will suffer, including a loss of goodwill with patrons, eroding SMC's customer base. Holsey Aff., ¶ 51.
54. SMC's loss of over \$22 million per year in slot machine net win would cause numerous highly-trained employees to leave their positions with SMC to seek other employment. For others, SMC's inability to continue to provide solid jobs, career training, and employment-related benefits would force them to rely upon state and federal assistance. Holsey Aff., ¶¶ 52 and 53.
55. Although a large number of jobs are directly attributable to its casino, SMC's gaming operations also have a significant multiplier effect. There are many off-reservation impacts flowing from SMC's gaming operation, which directly and indirectly generate economic activity within the State through vendor and service agreements, goods and services purchases, and tourism activities. Holsey Aff., ¶ 54.
56. Vendors and contractors who do business with SMC's gaming operation also pay state and local taxes, and purchase goods and services throughout the entire State. Holsey Aff., ¶ 55.
57. Law enforcement; fire, rescue and other emergency services; water and infrastructure development and maintenance; and community health and wellness care, which all serve the general public, would be among the first impacted by reduced funding. If tribal and non-tribal participants from the Shawano County region are unable to use SMC services, these participants will turn to other non-SMC local, county and state sources. Holsey Aff., ¶ 56.

58. If SMC cannot effectively maintain the revenue stream from its gaming operations, its educational programs will be devastated and the education of all tribal members currently enrolled within the programs will be interrupted. Most of these students would be unable to continue their education without financial assistance from SMC. Holsey Aff., ¶ 57.

DATED: April 19, 2017

Respectfully Submitted,

s/ Scott D. Crowell

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