IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CONNECTICUT and MASHANTUCKET PEQUOT TRIBE, *Plaintiffs,* v. UNITED STATES DEPARTMENT OF THE INTERIOR, and RYAN ZINKE, SECRETARY OF THE INTERIOR, *Defendants,* and MGM RESORTS GLOBAL DEVELOPMENT, LLC, *Intervenor-Defendant.*	No. 1:17-cv-02564-RC

INTERVENOR-DEFENDANT MGM RESORTS GLOBAL DEVELOPMENT, LLC'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND

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INTRODUCTION AND SUMMARY OF ARGUMENT

After this Court issued a 58-page ruling dismissing Plaintiffs' complaint, Plaintiffs now seek leave to amend their complaint to assert three new causes of action that could have been asserted when they originally filed the case. The Court should not countenance such tactics and the piecemeal litigation that would result, and should reject Plaintiffs' motion for two independent reasons.

First, Plaintiffs' motion is untimely: it was filed nearly 11 months after Plaintiffs initiated the lawsuit and only after the Court dismissed the original complaint on the merits. The D.C. Circuit has upheld denials of leave to amend because of such undue delay even where motions to dismiss were merely pending. *See, e.g.*, *Cameron v. Thornburgh*, 983 F.2d 253, 258 (D.C. Cir. 1993) (affirming denial of leave to amend where motion to dismiss had been pending for 15 months even though district court had not yet decided motion); *Wilderness Soc'y v. Griles*, 824 F.2d 4, 19 (D.C. Cir. 1987) (affirming denial of leave to amend where "plaintiffs' motion occurred more than a year after the filing of their initial complaint and after dispositive motions had been filed and opposed" even though court had not yet ruled); *see also James Madison Project v. DOJ*, 208 F. Supp. 3d 265, 277 (D.D.C. 2016) ("[W]here a defendant has filed a dispositive motion . . . and plaintiff has opposed it, denial of permission to amend is proper." (alteration and omission in original)).

Plaintiffs offer no legitimate explanation for this delay. They concede that their three new legal theories "are all based on the same events" and "the same statutory framework" as the original complaint, and could have been raised when the suit was first filed last year (or, at the least, months ago). ECF 60-1 at 7, 9. Plaintiffs "made a tactical decision not to present the new claim at an earlier, more appropriate stage of this litigation" and should be held to that choice. *Key Airlines, Inc. v. Nat'l Mediation Bd.*, 745 F. Supp. 749, 752 (D.D.C. 1990).

Granting Plaintiffs leave to amend their complaint at this stage would allow them a second bite at the apple and encourage parties to engage in piecemeal litigation. The Court should reject Plaintiffs' attempt to use "Rule 15 to make the complaint a moving target" and "present theories seriatim in an effort to avoid dismissal." *Nat'l Sec. Counselors v. C.I.A.*, 960 F. Supp. 2d 101, 133 (D.D.C. 2013).

Second, the Court should deny leave to amend on the additional ground that each count of the proposed complaint is futile. "Denial of leave to amend based on futility is warranted if the proposed claim would not survive a motion to dismiss." *Appalachian Voices v. Chu*, 262 F.R.D. 24, 27 (D.D.C. 2009) (citing *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996)).

Proposed Count I is futile because it ignores this Court's holding that procedures and compacts are distinct. The sole theory underlying proposed Count I is that Interior acted arbitrarily in failing to approve the amendment to the Mashantucket Pequot Gaming *Procedures* because Interior permitted a similar amendment to the Mohegan-Connecticut Tribal-State *Compact* to be "deemed approved" by operation of law. Proposed Compl. ¶ 64. This Court has already explained the difference between compacts and procedures, *see* ECF 59, and thus Plaintiffs' argument that there is "no legitimate basis to treat" the two amendments differently has already been rejected. *See, e.g., Sherrod v. McHugh*, 249 F. Supp. 3d 85, 87 (D.D.C. 2017) (denying request for leave to amend where "proposed amendments are similar to already-rejected claims or otherwise unlikely to succeed on their face"). Moreover, Plaintiffs' claim fails because Interior did not determine the lawfulness of the Mohegan Compact amendments when it allowed those amendments to be "deemed approved," and the Mashantucket amendments are not subject to the "deemed approval" mechanism in any event.

Proposed Count II is futile because it merely alleges that a Senator, a Congressman, and a White House official exerted "political pressure" by meeting with Interior officials. That allegation does not state a claim under controlling D.C. Circuit precedent, which recognizes that executive and legislative branch officials routinely interact with agency officials and that political "pressure" is improper only where "the content of the pressure upon the [decisionmaker] is designed to force him to decide upon factors not made relevant by Congress in the applicable statute" and the decisionmaker in fact does so. *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981); *see also, e.g.*, *ATX, Inc. v. Dep't. of Trans.*, 41 F.3d 1522, 1528 (D.C. Cir. 1994) ("[W]e have never questioned the authority of congressional representatives to exert pressure . . . ."). Plaintiffs' threadbare allegations of "political pressure" do not satisfy that standard and ignore that Plaintiffs themselves enlisted the support of federal, state, and local officials to lobby Interior into approving the amendments. Advocacy from all sides was particularly appropriate here given the unprecedented nature of the Mashantucket's amendments and the policy consequences approval of those amendments could have throughout the country.

Finally, proposed Count III is futile because it advances an unsubstantiated argument that the amendments to the Mashantucket *Procedures* are themselves *compacts* subject to the deemed-approval provisions of the Indian Gaming Regulatory Act (IGRA). This Court already rejected the analogous assertion that the Mashantucket Procedures are a compact, and that holding forecloses Plaintiffs' argument. Plaintiffs' novel argument also fails on its own terms: the amendments revise the Mashantucket Procedures and so are a discrete category of documents separate from compacts. IGRA's implementing regulations treat compacts and compact amendments separately, but accepting Plaintiffs' argument would obliterate that distinction and render significant portions of the regulations surplusage.

BACKGROUND

As discussed in the Court's order dismissing this action, ECF 59 at 5-6, the Mashantucket operate Foxwoods, an on-reservation casino governed by IGRA and Secretarial Procedures prescribed by Interior. The Mohegan Tribe, in contrast, operates its Mohegan Sun casino pursuant to a tribal-state compact with Connecticut.

In 2017, both Tribes executed similar amendments to their respective gaming documents designed to facilitate operation of an off-reservation, non-IGRA casino that would be operated by the Tribes' jointly-owned commercial entity, MMCT Venture, LLC. The Tribes submitted those amendments to Interior for review on August 2, 2017. Proposed Compl. ¶ 33.

On September 15, 2017, Interior "returned" the amendments to the Tribes based on the Tribes' failure to provide "[s]ufficient information upon which to make a decision." Proposed Compl. ¶¶ 50-51.

Plaintiffs, as well as the Mohegan, filed suit on November 29, 2017, challenging Interior's non-approval of their amendments. ECF 1. That complaint alleged two legal theories. Count I alleged that the "deemed approval" provisions of IGRA, 25 U.S.C. § 2710(d)(8)(C) and 25 C.F.R. § 293.12, apply to both sets of amendments and mandate that they be deemed approved. Count II similarly alleged that the deemed approval requirements of IGRA impose a duty on Interior to publish a notice of "deemed approval" for both Tribes' amendments.

On February 5, 2018, Interior moved to dismiss the Mashantucket's claims on the grounds that the Mashantucket Procedures are not a compact and that therefore IGRA's "deemed approval" provisions for compacts are inapplicable. ECF 18.

Subsequently, on June 1, 2018, Interior published a "deemed approval" notice regarding the Mohegan Compact amendment, stating that the amendment is "considered to have been approved, but only to the extent the Amendment is consistent with IGRA." 83 Fed. Reg. 25,484

(June 1, 2018). At the same time, Interior's Bureau of Indian Affairs issued a statement indicating that Interior issued the "deemed approval" notice "without determining whether the Mohegan compact amendment is actually consistent with the statutory framework of IGRA." Andrew Westney, *BIA Says Mohegan-Conn. Gambling Deal Change Is In Effect*, Law360 (May 31, 2018) (attached as Ex. A).[1]

After exhaustive briefing by the parties, the Court granted Interior' motion to dismiss on September 29, 2018 in a 58-page opinion discussing the differences between the amendment processes for compacts and procedures. The Court concluded that the "deemed approval" provisions of IGRA are inapplicable to the Mashantucket Procedures and the proposed amendments to those procedures. ECF 59.

Rather than appeal that ruling, Plaintiffs elected, on October 17, 2018, to seek leave to amend their complaint to assert three additional legal theories. As noted, two of those theories echo arguments this Court has already rejected: Proposed Count I argues that Interior unlawfully treated the Mohegan *Compact* amendment differently from the Mashantucket *Procedures* amendments, *compare* Proposed Compl. ¶ 64 *with* ECF 59 at 39, 44; similarly, proposed Count III argues that the Mashantucket *Procedures* amendments are themselves *compacts*, *compare* Proposed Compl. ¶ 78 *with* ECF 59 at 48-52. Plaintiffs also allege, in proposed Count II, that "pressure" allegedly applied by a Senator, a Congressman, and a White House official in three meetings and two phone calls over a 45-day period caused unspecified "taint" in the administrative process. Proposed Compl. ¶ 68.

[1] *Available at* https://www.law360.com/articles/1048901/bia-says-mohegan-conn-gambling-deal-change-is-in-effect. The exhibits to this brief are attached to the supporting declaration of Thomas Brugato.

ARGUMENT

I. PLAINTIFFS' MOTION IS UNTIMELY.

Plaintiffs' motion for leave to amend their complaint should be denied on the basis of "undue delay." *Atchinson v. District of Columbia*, 73 F.3d 418, 425 (D.C. Cir. 1996); *see also, e.g.*, *Mowrer v. Dep't of Transp.*, 326 F.R.D. 350, 352 (D.D.C. 2018) ("Undue delay in adding claims is a sufficient reason for denying leave to amend." (citation and quotation marks omitted)).[2]

Plaintiffs did not seek leave until October 17, 2018, nearly 11 months after they filed their original complaint, more than a year after Interior's return of the Mashantucket amendments, and only after the Court dismissed Plaintiffs' original complaint on the merits.

Although mere chronological delay may not be sufficient to deny leave to amend, Plaintiffs sought leave to amend only *after* the Court dismissed their Complaint. As noted, the D.C. Circuit has held that district courts appropriately deny motions for leave to amend even where a motion to dismiss has been *pending* for many months. *See supra*, at 1; *see also, e.g.*, *Hajjar-Nejad v.*

[2] Citing a district court case, Plaintiffs argue that the burden is "on the opposing party to show that there is reason to deny leave." Mot. at 6. However, the D.C. Circuit has not ruled on the issue, and the overwhelming weight of circuit authority holds that the burden is on the *moving* party to explain any significant delay. *In re Lombardo*, 755 F.3d 1, 3–4 (1st Cir. 2014) (noting that when "considerable time has elapsed between the filing of the complaint and the motion to amend, the movant has [at the very least] the burden of showing some valid reason for his neglect and delay" (alteration in original) (quotation marks omitted)); *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 72 (2d Cir. 1990) ("The burden is on the party who wishes to amend to provide a satisfactory explanation for the delay."); *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006) ("[T]he question of undue delay requires that we focus on the movant's reasons for not amending sooner."); *Deasy v. Hill*, 833 F.2d 38, 41 (4th Cir. 1987) ("Plaintiff failed to offer to the trial court, and does not offer here, any reason for his delay . . . . The burden rests primarily upon the plaintiff to amend his complaint, not upon the defendant to anticipate a new claim."); *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982) ("Where there has been an apparent lack of diligence, the burden shifts to the movant to prove that the delay was due to excusable neglect." (citations omitted)); *In re Engle Cases*, 767 F.3d 1082, 1119 (11th Cir. 2014) ("Plaintiffs' counsel suggest that it was the defendants' burden to show why their request for leave to amend shouldn't have been granted. That is wrong. The party seeking leave to amend under Rule 15 bears the burden of establishing his entitlement to it—particularly where there has been such a long and seemingly unjustified delay.").

George Washington Univ., 873 F. Supp. 2d 1, 12 (D.D.C. 2011) (denying motion for leave to amend filed "one year and five months after the commencement of this action" and "after a full round of dispositive motions had already been briefed and submitted for the Court's consideration"). Here, the rationale for denying leave to amend is even stronger because the Court has already ruled on the motion to dismiss. *See, e.g.*, *Nat'l Sec. Counselors*, 960 F. Supp. 2d at 135 (waiting until after "the Court ruled on the motion to dismiss to seek such an amendment," when the plaintiff had "ample opportunity" to amend the complaint after the motion to dismiss was filed, warranted finding of undue delay).

Plaintiffs provide "no sound reason for [] failure to seek amendment earlier." *Doe v. McMillan*, 566 F.2d 713, 720 (D.C. Cir. 1977); *see also James Madison Project*, 208 F. Supp. 3d at 277 ("Whether there has been an unexplained delay in pleading previously-known allegations is another important consideration." (cleaned up)). Plaintiffs point only to two purportedly "new" factual allegations to justify their delay in seeking leave to amend, neither of which justifies their delay here.

First, Plaintiffs advance the mistaken argument that it was not until their original complaint was dismissed "that Plaintiffs became aware of the need to amend their complaint to account for the Federal Defendants' new reading of IGRA." Mot. at 11. Defendants, however, made their position clear when they filed their motion to dismiss on February 5, 2018, more than eight months before Plaintiffs sought leave to amend. ECF 18.[3] Moreover, this Court's opinion makes clear that Plaintiffs *never* should have proceeded under the mistaken assumption that the Mashantucket

[3] That position was not new, as Plaintiffs contend. Rather, Interior made clear in an internal email dated September 12, 2017 that the amendments to the Mashantucket procedures "ha[ve] no deadline" because they amend procedures, not a compact. ECF 57-2. Given Plaintiffs' allegation that they were in regular contact with Interior officials during the same period, *see* Proposed Compl. ¶¶ 35-38, Interior's position could not have come as a surprise to Plaintiffs.

Procedures were a compact subject to the deemed approval provisions of IGRA: "IGRA unambiguously does not apply the same approval timing requirements to secretarial procedures as it does to tribal-state compacts." ECF 59 at 35.

Second, although Plaintiffs vaguely state that "some of the facts giving rise to Count II . . . were not discovered until after the lawsuit had been filed," Mot. at 11, they do not identify what those facts are. Instead, Plaintiffs candidly admit that proposed Count II "relies on many of the same facts that Plaintiffs have already set forth in this litigation," citing a filing made by Plaintiffs on March 5, 2018. Mot. at 8 (citing ECF 27). Another filing made by Plaintiffs that day contains many of the same allegations as are set forth in support of Count II of Plaintiffs' proposed amended complaint, demonstrating that Plaintiffs could have amended their complaint to assert proposed Count II by March 5, 2018 at the latest. ECF 23 at 5.

Moreover, it is noteworthy that Plaintiffs raised an argument identical to Count I of the Proposed Complaint in June 2018, four months before moving for leave to amend. In a status report filed June 18, 2018, Plaintiffs argued that "in light of Defendants' recent publication of approval of the amendments to the Mohegan compact in the Federal Register, it would be arbitrary and capricious for the Defendants to treat differently a compact amendment that is substantively identical in all material respects." ECF 41 at 3. Plaintiffs acknowledged that they could have amended their complaint to state such a claim, but nevertheless determined that it was in "Plaintiffs' interest" to refrain from doing so. *Id.* at 3-4. Plaintiffs must bear the consequences of that "tactical decision not to present the new claim at an earlier, more appropriate stage of this litigation." *Key Airlines*, 745 F. Supp. at 752.[4]

[4] Plaintiffs do not point to the June 1, 2018 publication of the "deemed approval" of the Mohegan Compact amendment as an intervening development, for good reason. As is explained below, and

Accordingly, because Plaintiffs could have brought these claims many months ago, and could have brought at least proposed Counts II and III as part of their original lawsuit, Plaintiffs' request should be dismissed as untimely: it is "abundantly clear" that Plaintiffs were "fully aware of the information underlying [the new] claims long before" seeking leave to amend. *Onyewuchi v. Gonzalez*, 267 F.R.D. 417, 421 (D.D.C. 2010); *see also, e.g.*, *Nat'l Sec. Counselors.*, 960 F. Supp. 2d at 134 (denying proposed amended complaint because plaintiff was aware of the facts underlying the amendment "approximately three months before filing the original complaint" and "approximately four months before filing the First Amended Complaint."). In these circumstances, Plaintiffs' motion to amend is little more than "an attempt to evade" the Court's ruling on the motion to dismiss and should be denied on that basis. *See Kurtz v. United States*, No. 10-1270, 2011 WL 2457923, at *1 n.1 (D.D.C. June 20, 2011).

II. PLAINTIFFS' PROPOSED AMENDED COMPLAINT IS FUTILE AS A MATTER OF LAW.

A court may deny leave to amend where the party's proposed amendment is futile. *See Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). "Denial of leave to amend based on futility is warranted if the proposed claim would not survive a motion to dismiss." *Appalachian Voices v. Chu*, 262 F.R.D. 24, 27 (D.D.C. 2009) (citing *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996)); *see also, e.g.*, *Cole v. Boeing Co.*, 621 F. App'x 10, 11 (D.C. Cir. 2015) (courts "often deny" amendments on this basis). To survive a motion to dismiss, the amended complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up).

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as the Court has already ruled, that publication deems approved a different type of document under IGRA–a compact, not a set of secretarial procedures—and so has no bearing on Plaintiffs' claims here. *See infra*, Part II.A. In any event, more than five and a half months passed between that event and Plaintiffs' request for leave to amend.

Here, each count Plaintiffs propose to assert is futile.

A. Proposed Count I Is Futile Because It Fails to State a Viable Arbitrary-and-Capricious Claim.

Proposed Count I alleges that Interior's failure to approve the amendments to the Mashantucket Procedures was arbitrary and capricious. Proposed Compl. ¶¶ 59-66. The proposed complaint provides only one allegation as to why Defendants' action was unlawful: "there is no legitimate basis to treat as approved the identical Mohegan Compact and not approve the Tribal-State Agreement. Treating agreements which function identically in the real world different is the very definition of arbitrary and capricious." Proposed Compl. ¶ 64.

This argument is foreclosed by the Court's ruling that it was reasonable for Congress to "impose strict deadlines on the Secretary's review of a completed tribal-state compact, while providing the Secretary with more time and discretion" relating to procedures. ECF 59 at 46-47. The Court also observed that "[t]he Secretary's divergent responsibilities with respect to tribal-state compacts and secretarial procedures may justify divergent approval processes." ECF 59 at 46. That alone renders proposed Count I futile: these are two different types of documents, subject to two different review processes.

In addition, Plaintiffs ignore that the Mohegan Compact amendment was only "deemed approved," meaning that the amendment is effective "only to the extent the [amendment] is consistent with the provisions of [IGRA]." 25 U.S.C. § 2710(d)(8)(C); *see also* 83 Fed. Reg. 25,484 (June 1, 2018) (Mohegan amendment approved "only to the extent the Amendment is consistent with IGRA"). The fact that the Mohegan amendment is only approved "to the extent" that it is consistent with IGRA leaves unclear whether, and to what extent, it has *any* legal effect. Indeed, the Bureau of Indian Affairs explained that Interior allowed the Mohegan amendment to be "deemed approved" merely "[t]o facilitate a more timely resolution of these complicated issues,

and *without determining whether the Mohegan compact amendment is actually consistent with the statutory framework of IGRA*." Westney, Ex. A, *supra* (emphasis added).[5] Because the Mohegan approval was, in fact, not an approval at all, there is no plausible basis for Plaintiffs' disparate-treatment argument.

Plaintiffs' argument is also futile because Interior had good reason to treat the Mohegan and Mashantucket amendments differently. In contrast to compacts and compact amendments, there is no equivalent "deemed approval" provision applicable to gaming procedures and procedures amendments. ECF 59 at 51 & n.35, 56. Procedures and procedures amendments are "prescribe[d]" by the Secretary, 25 U.S.C. § 2710(d)(7)(B)(vii), and must be "consistent with" applicable state and federal laws, 25 C.F.R. §§ 291.8(a)(4)-(7), 291.11(b)(4)-(7). As a result, Interior cannot approve procedures or procedures amendments without affirmatively determining whether they are lawful—a step Interior did not take in allowing the Mohegan compact amendment

[5] Interior has repeatedly taken the same approach in other cases, allowing tribal-state compacts or compact amendments to be "deemed approved" without reaching a final determination regarding their lawfulness. *See, e.g.*, Letter from Assistant Secretary - Indian Affairs, U.S. Dept. of the Interior, to Hon. Robert Guenthardt, Chairman, Little River Band of Ottowa Indians (Feb. 9, 1999), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-025946.pdf (allowing compact to be deemed approved "by operation of law" "because we are particularly concerned with the legality under IGRA" of provisions of the compact) (attached as Ex. G); Letter from Acting Secretary - Indian Affairs, U.S. Dept. of the Interior, to Hon. Harold Frank, Chairman, Forest County Potawatomi Community (Apr. 25, 2003), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-024612.pdf (allowing compact amendment to "take effect without Secretarial action" due to "unsettled issue" regarding amendment's legality) (attached as Ex. H). Indeed, a former Assistant Secretary for Indian Affairs has noted that Interior often uses deemed approvals "to avoid providing a stamp of approval to terms in a compact that are problematic or potentially problematic. The 'deemed approval' approach allows the parties to move forward with Class III gaming, but it preserves the legal issue for a potential showdown in the courts or arbitration proceeding at a later date. As a practical matter, the 'deemed approval' approach allows the compact to take effect, but withholds the Department's endorsement of problematic terms." Kevin Washburn, *Recurring Issues in Indian Gaming Compact Approval*, Gaming Law Review and Economics, Vol. 20 No. 5, at 391 (2016), *available at* https://www.liebertpub.com/doi/pdf/10.1089/glre.2016.2055

to be "deemed approved." Because the Mashantucket and Mohegan amendments seek to use IGRA's procedures in an unprecedented way—to authorize a commercial casino located on non-tribal lands—Interior had every reason to tread more carefully in analyzing the Mashantucket amendments, for which a non-binding "deemed approval" was not an option.[6]

Anticipating this possibility, the Connecticut Legislature made clear that *both* the Mashantucket and Mohegan amendments must be approved by Interior for the East Windsor casino to be authorized. In Public Act 17-89, the Connecticut Legislature provided that MMCT's casino is only authorized when "the amendments to the Mashantucket Pequot procedures, the Mashantucket Pequot memorandum of understanding, the Mohegan compact *and* the Mohegan memorandum of understanding are approved or deemed approved by the Secretary of the United States Department of the Interior pursuant to the federal Indian Gaming Regulatory Act." Pub. Act 17-89 § 14(c)(2) (emphasis added). Requiring *all* of these documents to be amended before MMCT may engage in gaming was necessary for Connecticut to reduce the risk of violating the exclusivity provisions contained in each Tribe's gaming documents, because any such violation would terminate each Tribe's obligation to make revenue-sharing payments to the State. *See* ECF 11-1 at 4-5 & n.5, 10 (describing exclusivity scheme and Connecticut Attorney General's warning of risks to State's revenues if both sets of gaming documents are not amended). In short, the State structured Public

[6] Kathryn Rand, who serves as Dean of the University of North Dakota School of Law and co-director of the Institute for the Study of Tribal Gaming Law and Policy, and who "is not affiliated with MGM or the Connecticut tribes," recently explained that the Tribes' amendments involve "an unusual situation" and are "pushing the bounds of IGRA." Nick Juliano, *Interior Rejected Staff Advice When Scuttling Tribes' Casino*, Politico (Apr. 22, 2018), https://www.politico.com/story/2018/04/22/tribes-casino-approval-trump-zinke-494541 (cited in Proposed Complaint, ECF 60-2 ¶ 56). The Mohegan Tribe's own representative acknowledged the same, indicating at a hearing before the Connecticut legislature that the Tribes' amendments are "clearly unique." Connecticut General Assembly, Hrg. Before the Public Safety and Security Committee (Mar. 9, 2017) (statement of George Skibine, counsel for Mohegan Tribe), *available at* https://www.cga.ct.gov/2017/psdata/chr/2017PS-00309-R00830-CHR.htm (attached as Ex. D).

Act 17-89 such that it would not move forward with approval of only one Tribe's amendments, because that would have resulted in termination of the other Tribe's revenue-sharing obligations.

Connecticut was well aware of the possibility that amendments to the Mashantucket Procedures might be treated differently than amendments to the Mohegan Compact, as the Connecticut Attorney General repeatedly acknowledged the two documents were distinct gaming approvals under IGRA. ECF 30-2 at 6-7 (collecting Attorney General opinions); *see also infra* at 23 n.12 (discussing 1993 Attorney General opinion). As the Attorney General explained, "the unique history and nature of the Mashantucket Pequot Gaming Procedures … make them very different from the Mohegan Compact." Op. Atty. Gen. Ct. No. 94-010, 1994 WL 275088, at *6 (May 18, 1994). Indeed, in 2017 the Attorney General acknowledged that Interior had *never* approved the Mashantucket memorandum of understanding, which Plaintiffs now seek to amend, and so any Mashantucket amendments would *not* be similarly situated to any Mohegan amendments. Op. Atty. Gen. Ct. No. 2017-02, 2017 WL 1052342, at *5 (Feb. 1, 2017) (noting that approval of the original Mohegan memorandum of understanding "is not conclusive evidence that [Interior] deems the Mashantucket MOU valid notwithstanding the fact that it was never submitted to and formally approved by the Department").

Accordingly, the Tribes' amendments themselves incorporate this cross-dependency and pursuant to that design the Mohegan Compact amendment is not yet legally effective because its effective date hinges on approval of the Mashantucket amendments. Consistent with the structure of Public Act 17-89, both the Mohegan and the Mashantucket amendments provide that they will "become effective" only when conditions are satisfied, including approval of the other tribe's amendments. Thus, the Mohegan amendment provides that it "shall become effective" after "[t]his Agreement and the Mashantucket Pequot Agreement are approved or deemed approved by the

United States Secretary of the Interior pursuant to [IGRA] and its implementing regulations and notice thereof is published in the Federal Register." ECF 9-7 at 3-4 (Mohegan amendment); *see also* ECF 60-2 at 49-50 (similar condition in Mashantucket amendments). These cross-dependency provisions provide yet another reason why Interior could reasonably "deem approve" the Mohegan Compact amendments but not approve the Mashantucket amendments: approval of the *latter* amendments is key to the effectiveness of the entire scheme, and the automatic "deemed approval" of the Mohegan amendments has no legal consequence of itself by the amendments' own terms.

B. Proposed Count II Is Futile Because It Fails to State a Viable Improper Political-Influence Claim.

To state a claim for improper political influence, Plaintiffs must do more than allege that members of Congress and White House staff expressed their views to the Interior Department—they must set forth factual allegations demonstrating that any advocacy (which Plaintiffs' label "pressure") was designed to force Interior to consider impermissible factors and that Interior in fact relied on those factors.

Plaintiffs fail to make such allegations.

1. Plaintiffs' Allegations of Mere "Political Pressure" on Interior Are Facially Inadequate.

The Supreme Court has long recognized that "Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute." *Gravel v. United States*, 408 U.S. 606, 625 (1972). Likewise, "[t]he ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under

which they act." *Myers v. United States*, 272 U.S. 52, 135 (1926). The D.C. Circuit has also emphasized that political "pressure" is a core feature of our representative system of government. *See, e.g.*, *ATX*, 41 F.3d at 1528 ("[W]e have never questioned the authority of congressional representatives to exert pressure . . . .").[7]

The justification for inter- and intra-branch advocacy is particularly strong where, as here, an agency is considering a matter of widespread public importance. The Mashantucket amendments are the first of their kind and are the product of a legislative process that included numerous public hearings and the enactment of two state statutes—both of which were designed to affect the interstate flow of gaming dollars. *See, e.g.*, ECF 11-1 at 6-12. Every branch of government has acknowledged the need for public input with respect to IGRA casino gaming applications. Interior solicited public comment on the original Mashantucket Procedures from any "[i]nterested parties." 56 Fed. Reg. 15,746 (Apr. 17, 1991). Congress has likewise directed that Interior may take new lands into trust for the purpose of tribal "gaming establishment[s]" only after considering the interests of "the surrounding community" and the views of "the Governor of the State in which gaming activity is to be conducted." 25 U.S.C. § 2719(b)(1)(A). And the courts—including this Court—have held that third parties whose commercial and property interests are affected by a gaming application have standing to advocate for their views. *See* ECF 59 at 15-33; *Match-E-Be-*

[7] Indeed, courts recognize that political activity of members of the House and Senate is protected by the First Amendment: "Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute . . . . Although these types of communications are political rather than legislative in nature, . . . they are 'entirely legitimate' acts, performed in the legislator's 'official capacity,' and are protected by the First Amendment." *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 69 (2d Cir. 1999) (citations omitted).

Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 227-28 (2012) (authorizing "neighbors" to challenge Interior's approval of a proposed tribal casino); *Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 10-15 (D.D.C. 2015) (same with respect to competing tribe). "Pressure," in short, is simply the Plaintiffs' label for advocacy that is permissible in the vast majority of circumstances.

In light of these fundamental principles, the D.C. Circuit has made clear that mere Congressional or White House advocacy does not by itself provide a basis for invalidating an agency decision. To the contrary, such "pressure" is improper only where: (1) "the content of the pressure upon the [decision-maker] is designed to force him to decide upon factors not made relevant by Congress in the applicable statute" and (2) "the [decision-maker's] determination [is] affected by those extraneous considerations." *Sierra Club*, 657 F.2d at 409 (citation omitted); *see also, e.g.*, *Peter Kiewit Sons' Co. v. Army Corps of Eng'rs*, 714 F.2d 163, 170 (D.C. Cir. 1983) ("The test is whether 'extraneous factors intruded into the *calculus of consideration*' of the individual decisionmaker."); *Schagticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 134 (2d Cir. 2009) (per curiam) ("To support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute."). Thus, "an agency's patient audience to a member of Congress will not by itself constitute the injection of an extraneous factor. Nor would a simple plea for more effective enforcement of the law," including expressing a view as to the legality or illegality of a potential agency action. *DCP Farms v. Yeutter*, 957 F.2d 1183, 1188 (5th Cir. 1992).

Plaintiffs' factual allegations fail to state a claim under this controlling standard. Plaintiffs merely allege the existence of "political pressure," *not* that such political pressure urged consideration of improper factors or that Interior in fact considered improper factors. Specifically, Plaintiffs make four allegations of "pressure": (1) that Senator Dean Heller of Nevada "directly pressured Secretary [Ryan] Zinke" at a July 30, 2017 meeting, Proposed Compl. ¶ 42; (2) that Representative Mark Amodei of Nevada met with Associate Deputy Interior Secretary James Cason on September 13, 2017, during which he "pressured the Department to change its position," *id.* ¶ 46; (3) that Senator Heller called Cason and Secretary Zinke on September 14 and 15, respectively, "to further pressure" Interior, *id.* ¶¶ 47, 49; and (4) that Secretary Zinke met with White House official Rick Dearborn who "exerting Executive-level pressure, requested the Department to not approve the Mashantucket amendment," *id.* ¶ 48. Plaintiffs then allege that Interior returned the Mashantucket amendments "[i]n response to the extraordinary political pressure." *Id.* ¶ 50.

These allegations are insufficient on their face: nowhere do Plaintiffs even attempt to allege (much less plausibly allege) that anyone urged Interior to consider improper factors in evaluating the Mashantucket amendments.[8] As in *DCP Farms*, meetings with Congressional representatives relating to agency decisionmaking do not amount to improper political interference, and courts are "cautious in reading extraneous factors too broadly, lest they impair agency flexibility in dealing with Congress." 957 F.2d at 1188. Moreover, as this Court has observed, Interior has significant

[8] Although Plaintiffs' proposed complaint contains the conclusory allegation that Interior's actions were motivated "by improper and undue political influences, pressures, and considerations," Proposed Compl. ¶ 70, Plaintiffs nowhere explain what those considerations were. At most, this allegation is a "[t]hreadbare recital[] of the elements of a cause of action, supported by merely conclusory statements" that "do[es] not suffice" to withstand a motion to dismiss. *Iqbal*, 556 U.S. at 678; *see also id.* at 679 ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" (second alteration in original)).

discretion over whether to approve amendments to gaming procedures. *See* ECF 59 at 46-47 (Congress has provided the Secretary with "discretion to draft procedures consistent with state law, the IGRA, existing proposals, and the Secretary's obligations to the tribes"); *see also* 25 C.F.R. § 291.8(a).

Indeed, Plaintiffs' own conduct demonstrates that mere political advocacy is commonplace and proper. Plaintiffs' allies—including federal, state, and local officials—all contacted Interior "pressuring" the Secretary to approve the amendments. For example, Connecticut state legislators wrote to Secretary Zinke "urg[ing]" him to "expeditiously review and approve the amendments." Letter from Conn. Legislators Sen. Catherine A. Osten, Sen. Paul Formica, Rep. Kevin Ryan, and Rep. Mike France to Secretary Ryan Zinke (Aug. 11, 2017), ECF 57-3.[9] Likewise, East Windsor officials wrote the Secretary to "urge [him] to approve the" amendments. Letter from East Windsor, Conn. Board of Selectman to Secretary Ryan Zinke (Aug. 14, 2017) (attached as Ex. B). Shortly after the Secretary issued his September 15 decision, Senator Blumenthal, Senator Murphy, and Representative Courtney wrote the Secretary "urg[ing]" him to approve the Tribe's amendments and arguing that Interior's decision posed "serious legal and regulatory questions." Letter from Sen. Richard Blumenthal, Sen. Christopher Murphy, and Rep. Joe Courtney to Secretary Ryan Zinke, at 3 (Nov. 2, 2017) (attached as Ex. C). That letter followed a meeting between Senator Blumenthal, Senator Murphy, Representative Courtney, Associate Deputy Secretary James Cason, and other Interior staff the week of October 23, 2017, during which the elected officials expressed their "concerns" regarding Interior's September 15, 2017 decision. *Id.* at 1. In

[9] The Court may take judicial notice of these letters, which Intervenor-Defendant obtained from Interior through a FOIA request, as official government documents sent from local, state, and federal officials to Interior. *See, e.g.*, *Detroit Int'l Bridge Co. v. Gov't of Can.*, 133 F. Supp. 3d 70, 85 (D.D.C. 2015).

short, if mere political pressure were improper, Plaintiffs' own actions would preclude Interior from approving the Mashantucket amendments. *See generally* Kevin Washburn, *Recurring Issues in Indian Gaming Compact Approval*, Gaming Law Review and Economics, Vol. 20 No. 5, at 391 (2016) (observing that "powerful external political forces are often brought to bear to discourage the Department from issuing disapproval").[10]

2. Plaintiffs' Arguments in Support of Their Political-Influence Claim Are Meritless.

Plaintiffs' arguments in support of their political-influence claim fail for two reasons.

First, Plaintiffs cite no authority that supports their claim. Two of the three cases on which Plaintiffs rely involved "quasi-judicial" proceedings, in which Congressional pressure "is of heightened concern" and even an "*appearance* of bias" is improper. *ATX, Inc.*, 41 F.3d at 1527; *Aera Energy LLC v. Salazar*, 642 F.3d 212 (D.C. Cir. 2011). The Mashantucket amendments were not evaluated in a quasi-judicial proceeding before an administrative law judge on a formal evidentiary record, so these cases are inapposite. The third case, *Volpe*, adopts the standard that forecloses Plaintiffs' claim here: Congressional and White House advocacy is improper only if the representative advocates for, and the decisionmaker "took into account[,] considerations that Congress could not have intended to make relevant." *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1247 (D.C. Cir. 1971) (quotation marks omitted). In that case, a Congressman "threaten[ed] to withhold money" unless the Secretary changed course, *Aera Energy*, 642 F.3d at 220; no such allegation is present here.

Second, Plaintiffs wrongly suggest that improper political pressure can be inferred because "the Department abruptly reversed over 17 months of consistent assurances to the Tribes" from

[10] *Available at* https://www.liebertpub.com/doi/pdf/10.1089/glre.2016.2055

"Associate Deputy Secretary Cason" and unnamed "Department officials that the amendment would be approved." Proposed Compl. ¶¶ 30, 35-37, 40, 44, 50.

As an initial matter, the supposed "assurances" were made by subordinate officials whose views, standing alone, did not bind the Department. *See, e.g.*, *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1040 (D.C. Cir. 2008) (explaining that "a definitive and binding statement on behalf of the agency must come from a source with the authority to bind the agency," and collecting cases where letters, emails, and other assurances from lower-level officials were held to be not binding); *see also* Washburn, *Recurring Issues in Indian Gaming Compact Approval*, at 390 (noting that while Interior provides "informal guidance," "the gaming staff at the Department usually will decline to issue any sort of pre-approval in deference to the fact that they are not the final decision makers").

Moreover, the "assurances" were nothing of the sort. The only two written "assurances" cited by Plaintiffs are two 2016 and 2017 "technical assistance letters" from Interior.

The 2016 letter made clear that it "should not be construed as[] a preliminary decision or advisory opinion regarding compacts or procedures that are not formally submitted to the Department for review and approval." ECF 9-11. Far from signaling approval of the proposed amendment, the technical assistance letter merely stated the obvious: that the proposed amendment, if approved, would mean that the proposed MMCT casino "would not violate the Tribe's" exclusivity arrangement. *Id.*

The same is true of the 2017 letter. ECF 9-13. That letter similarly noted that "[t]he Department does not provide preliminary decisions or advisory opinions regarding compacts, secretarial procedures, or amendments to compacts or procedures," and so neither it nor the previous letter should "be construed as preliminary decisions or advisory opinions." In addition, the

2017 letter said nothing about whether the amendments would ultimately be approved, but rather merely suggested that Interior "does not anticipate disturbing" the Tribes' "underlying agreements" when the amendments were submitted for review. *Id.*

C. Proposed Count III is Futile and Foreclosed by This Court's Dismissal Order.

Notwithstanding this Court's rejection of Plaintiffs' argument that the Mashantucket Procedures themselves amount to a *de facto* compact under IGRA, ECF 59 at 48-52, Plaintiffs illogically contend that even though the Procedures are not a compact, the *amendments* to those Procedures constitute compacts subject to IGRA's deemed-approval provisions. Only a short response is warranted.

1. The Procedures Themselves Demonstrate that the Mashantucket Amendments Are Not Compacts.

As an initial matter, Plaintiffs' argument is foreclosed by the Procedures themselves and the Court's prior ruling regarding those Procedures. The Court has already held that the "Pequot Procedures do contain 'deemed approved' provisions, but those provisions do not apply to proposed amendments to the Procedures. . . . [T]his indicates that had the Secretary wished to impose deadlines on the approval of amendments to the Pequot Procedures, the Secretary could have expressly done so." ECF 59 at 51 n.35. Instead, Section 17 of the Procedures governs amendments and contains no deemed approval provision. This absence alone is fatal to Plaintiffs' arguments: the Procedures' own provisions governing amendments apply, and those provisions neither contain any "deemed approval" provision nor indicate that they may be amended by compact. Indeed, the Court has made clear that "the IGRA statutory provisions and regulations cited by Plaintiffs do not require the Secretary to act on the proposed amendments to the Pequot Procedures within 45 days of their submission," and nothing in the Plaintiffs' proposed complaint alters that conclusion. ECF 59 at 56.

2. The Text and Structure of IGRA's Implementing Regulations and Interior's Guidance Demonstrate that the Amendments Are Not Compacts.

Plaintiffs' argument is also inconsistent with IGRA. Under IGRA, there are four categories of tribal gaming documents: compacts, procedures, amendments to compacts, and amendments to procedures. *See* 25 C.F.R. §§ 291.3, 291.14, 293.2(b). Indeed, the 2017 Technical Assistance Letter makes this limitation clear, noting that Interior does not provide advisory opinions "regarding compacts, secretarial procedures, or amendments to compacts or procedures." ECF 9-13 at 4. It is common sense that compacts are amended by compact amendments, and procedures are amended by procedure amendments. Plaintiffs cite no authority in support of their novel interpretation that procedures can be amended by compacts, and none exists.

Indeed, Interior's guidance on the issue indicates that attempting to amend compacts via procedures, or procedures via compacts, is impermissible. In adopting its Part 291 regulations governing procedures, Interior rejected the argument that "the scope be expanded to include compact amendments" because "the authority granted to the Secretary in IGRA to issue Class III gaming procedures speaks only in terms of entire compacts, not to amendments" to compacts. 64 Fed. Reg. 17,535, 17,537 (Apr. 12, 1999). Likewise, the Part 291 regulations are designed to have the "same process applicable to amendments as to original proposals." 64 Fed. Reg. at 17,542. Interior has thus made clear that compacts are amended by compact amendments, whereas procedures are amended by procedure amendments governed by different requirements. *See, e.g.*, 25 C.F.R. § 293.2(b).

Plaintiffs' argument is also inconsistent with other aspects of IGRA and its implementing regulations in at least two other respects.

First, compacts under IGRA are intended to govern gaming activity comprehensively,[11] but the Mashantucket amendments do not establish "the terms and conditions" for the Mashantucket's Class III gaming activities; those terms and conditions are set forth in the Mashantucket Procedures. The amendments address only a narrow subset of the Tribe's gaming activities–the moratorium on video facsimile games of chance established under Section 15(a) of the Procedures—and are principally focused on authorization of a *different, off-reservation* casino. *See, e.g.*, ECF 11-5 at 25 (amendments "will authorize said tribes to jointly operate a gaming facility in East Windsor, Connecticut").

Second, treating an "amendment" to a gaming document as a "compact" would also contravene the text and structure of IGRA's implementing regulations. Under Plaintiffs' proffered interpretation, any agreement between a state and a tribe relating to gaming would "mee[t] the definition of a Compact under 25 C.F.R. § 293.2" and therefore need to be treated as a compact. Mot. at 14. But the Part 293 regulations distinguish between an "[a]mendment" and a "compact." 25 C.F.R. § 293.2(b). If Plaintiffs' interpretation were correct, that distinction would be superfluous: all amendments would, by definition, be compacts, and the amendments addressed by the regulations would be an empty set. There is no reason to read the regulations in a manner that causes these provisions to be surplusage. Similarly, the Part 291 regulations that govern Secretarial procedures separately address "gaming procedures" and "amendment[s]" to such procedures.

[11] Interior's implementing regulations define a compact as "an intergovernmental agreement executed between Tribal and State governments . . . that establishes between the parties *the terms and conditions for the operation and regulation of the tribe's Class III gaming activities*." 25 C.F.R. § 293.2 (emphasis added).

25 C.F.R. § 291.14. Plaintiffs' argument cannot be reconciled with this language. In short, Plaintiffs' argument that an amendment to Procedures can also be a compact cannot be squared with the regulations' distinction between "amendments" to compacts and "compacts" themselves.[12]

3. Plaintiffs Have Not Satisfied the Regulatory Requirements.

Finally, even if Plaintiffs were correct that the Mashantucket amendments could be treated compacts, their argument would still be futile because Plaintiffs failed to submit all the information required by 25 C.F.R. Part 293, which governs compacts and compact amendments.

There are at least two such failures. *First*, the Mashantucket's tribal resolution does not state the "place of adoption" of the amendment, ECF 60-2 at 55-57, notwithstanding the requirement in Part 293 of submission of a "tribal resolution or other document, including the date and place of adoption and the result of any vote taken, that certifies that the tribe has approved the compact or amendment in accordance with applicable tribal law," 25 C.F.R. § 293.8(b). *Second*, there is no certification from the Governor notwithstanding the requirement of submission of a "[c]ertification from the Governor or other representative of the State that he or she is authorized under State law to enter into the compact or amendment." 25 C.F.R. § 293.8(c). While the Plaintiffs submitted a resolution from the Connecticut General Assembly approving the amendment and a certification by Connecticut Secretary of the State Denise W. Merrill, *see* ECF 60-2 at 68-69,

[12] Tellingly, Plaintiffs' argument that the Mashantucket amendments are really compacts is inconsistent with their prior statements concerning the Mashantucket memorandum of understanding. In 1993, based on advice from the Connecticut Attorney General that the Governor could enter into the memorandum of understanding with the Mashantucket without obtaining Interior approval, Op. Atty. Gen. Ct. No. 93-004, 1993 WL 378477 at *5 (Feb. 11, 1993), the Mashantucket never obtained approval of that document from Interior. In their motion for leave, however, Plaintiffs argue that the amendments are compacts, which IGRA makes clear must be approved by Interior and published in the Federal Register. 25 U.S.C. § 2710(d)(8). If any agreement relating to Class III gaming between a state and a tribe were in fact a compact, the original memorandum of understanding would itself be unlawful and of no effect.

there is no certification from the Governor, who is the counterparty that entered into the amendments, ECF 60-2 at 25.

Interior has previously returned amendments for similar failures to submit required documentation. Most notably, in 2013, Interior returned the Cheyenne-Arapahoe Tribe's proposed compact amendment for failing to include a tribal resolution and a Governor's certification and noted that these omissions meant that the "45-day review period provided by IGRA" had not been triggered. Cheyenne-Arapaho Return Letter at 1-2 (May 1, 2013) (attached as Ex. E);[13] *see also* Cheyenne-Arapaho Disapproval Letter at 4-5 (Aug. 1, 2013) (attached as Ex. F).[14]

Accordingly, Interior's return of the amendment on the basis of "insufficient information" was fully justified under the governing regulations and Interior's precedent.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for leave to amend their complaint should be denied.

Respectfully submitted,

/s/ Kevin King
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[13] *Available at* https://turtletalk.files.wordpress.com/2014/01/ca-rejection-letter.pdf

[14] *Available at* https://www.bia.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/asia/oig/pdf/idc1-028608.pdf

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MGM Resorts Global Development, LLC

November 7, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on November 7, 2018, I caused the foregoing brief to be filed with the Clerk of the Court for the United States District Court for the District of Columbia using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

November 7, 2018

/s/ Kevin King
Kevin King
Counsel for Intervenor-Defendant
MGM Resorts Global Development

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CONNECTICUT and MASHANTUCKET PEQUOT TRIBE, *Plaintiffs*, v. UNITED STATES DEPARTMENT OF THE INTERIOR, and RYAN ZINKE, SECRETARY OF THE INTERIOR, *Defendants*, and MGM RESORTS GLOBAL DEVELOPMENT, LLC, *Intervenor-Defendant.*	)	No. 1:17-cv-02564-RC

DECLARATION OF THOMAS BRUGATO

I, Thomas Brugato, declare as follows pursuant to 28 U.S.C. § 1746:

1. I am an attorney admitted to the bar of the District of Columbia, and am employed by Covington & Burling LLP at 850 Tenth Street NW, Washington DC 20001. I represent Movant-Intervenor MGM Resorts Global Development, LLC ("MGM") in the above-captioned civil action.

2. I have personal knowledge of the facts set forth in this Declaration, which I make in order to place before the Court documents in support of MGM's Opposition to Plaintiffs' Motion for Leave to Amend.

3. The document attached as **Exhibit A** is a true and correct printout of a news article published by Law360.com on May 31, 2018, and is available at

https://www.law360.com/articles/1048901/bia-says-mohegan-conn-gambling-deal-change-is-in-effect.

4. The document attached as **Exhibit B** is a true and correct copy of an letter, dated August 14, 2017, from members of the East Windsor, Connecticut Board of Selectmen to U.S. Department of the Interior ("Interior") Secretary Ryan Zinke. MGM obtained this letter from Interior through a Freedom of Information Act request. Counsel for MGM received the letter from Interior on or about August 24, 2018.

5. The document attached as **Exhibit C** is a true and correct copy of a letter, dated November 2, 2017, from members of the U.S. Congress to Secretary Zinke. The letter is available at http://www.trbas.com/media/media/acrobat/2017-11/47149387106880-07114450.pdf.

6. The document attached as **Exhibit D** is a true and correct copy of excerpts of testimony by George Skibine, counsel for the Mohegan Tribe, before the Public Safety and Security Committee of the Connecticut General Assembly on March 9, 2017. The testimony is available at https://www.cga.ct.gov/2017/psdata/chr/2017PS-00309-R00830-CHR.htm.

7. The document attached as **Exhibit E** is a true and correct copy of a letter, dated May 1, 2013, from Interior's Office of Indian Gaming to the Cheyenne-Arapaho Tribes. The letter is available at https://turtletalk.files.wordpress.com/2014/01/ca-rejection-letter.pdf.

8. The document attached as **Exhibit F** is a true and correct copy of a letter, dated August 1, 2013, from Interior to the Cheyenne-Arapaho Tribes. The letter is available at https://www.indianaffairs.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/as-ia/oig/pdf/idc1-028608.pdf.

9. The document attached as **Exhibit G** is a true and correct copy of a letter (without attachments), dated February 9, 1999, from Interior to the Little River Band of Ottawa Indians.

The letter is available at https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-025946.pdf.

10. The document attached as **Exhibit H** is a true and correct copy of a letter (without attachments), dated April 25, 2003, from Interior to the Forest County Potawatomi Community. The letter is available at https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-024612.pdf.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on November 7, 2018, at Washington, DC.

Thomas Brugato

EXHIBIT A

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BIA Says Mohegan-Conn. Gambling Deal Change Is In Effect

By **Andrew Westney**

Law360 (May 31, 2018, 8:21 PM EDT) -- The Bureau of Indian Affairs is set to announce Friday that changes to the Mohegan tribe's gaming compact with the state of Connecticut are going into effect, but has yet to sign off on similar changes sought by the Mashantucket Pequot Tribal Nation to pursue a joint casino project in the state.

The Mashantucket Pequot and the Mohegan tribes had agreed to amendments last summer to their gambling agreements to guarantee revenue sharing with Connecticut from their existing casinos — Foxwoods and Mohegan Sun, respectively — and a proposed jointly operated $300 million casino in East Windsor, Connecticut. But the BIA's inaction over the amendments led the tribes and the state to **file suit against the agency in November** in D.C. federal court, seeking to force the U.S. Department of the Interior agency's hand.

In a notice to be published in the Federal Register on Friday, the BIA said that the amendment the Mohegan tribe and Connecticut agreed to last year is "considered to have been approved" under the Indian Gaming Regulatory Act since the Secretary of the Interior didn't act on it within 45 days of its submission, and that it will go into effect Friday.

However, the BIA hardly gave the changes a ringing endorsement, as the notice from the U.S. Department of the Interior's acting Assistant Secretary of Indian Affairs John Tahsuda said that the changes are approved "only to the extent the amendment is consistent" with IGRA.

And it's unclear whether the BIA will feel the need to act at all on the Mashantucket Pequot's proposed changes, as the agency has asked the D.C. federal court to **dismiss** that tribe's claims under IGRA because the tribe is operating its Foxwoods casino under procedures set out by the Interior Secretary in 1991, rather than a tribal-state compact under IGRA.

In a statement Thursday, the BIA didn't directly respond to questions about the possibility of acting on the Mashantucket Pequot tribe's request and the potential impact of Friday's notice on the ongoing litigation.

"To facilitate a more timely resolution of these complicated issues, and without determining whether the Mohegan compact amendment is actually consistent with the statutory framework of IGRA, we note that IGRA does provide for publication after 45 days," the BIA said in the statement. "Therefore we are publishing notice of this compact amendment."

Andrew Doba, a spokesman for MMCT Venture LLC — the company formed by the two tribes to operate their proposed third casino — said in a statement Thursday the company was "pleased that the department is taking this step and we expect similar action on the Mashantucket Pequot tribal amendments in the very near future."

"Our goal has never changed," Doba said in the statement. "We want to do right by Connecticut and to preserve the strong relationship between our tribal nations and the state. Today's decision is the latest step in our overall goal to preserve thousands of good paying jobs and millions in state tax revenue."

MGM Resorts International, which is opening a casino in Springfield, Massachusetts not far from the tribes' proposed East Windsor site, said in a statement that the BIA's notice "raises more questions than it answers."

"The notice provides no supporting reasoning and contradicts not only the Interior Department's prior ruling, but also the clear limits on off-reservation gaming imposed by federal law," MGM said in the statement. "After consulting with our attorneys, we can find no legal justification for the Interior Department's unprecedented action. In an effort to shed light on these serious legal questions, MGM will file a Freedom of Information Act request to uncover the process and inputs that led to today's notice."

The company, which pushed for a bill in the state legislature to open up bidding beyond the tribes for a commercial casino in the state, said the company "remain[s] committed to a transparent process that would give all parties an equal opportunity to compete in Connecticut."

The Connecticut General Assembly ended its legislative session on May 9 **without voting on the bill**.

Counsel from Dentons, which represents the Mohegan tribe in its D.C. federal suit, said in an email Thursday the tribe had no comment on the notice's impact on the suit.

In their November suit, the two tribes and Connecticut said the DOI had violated IGRA by failing to approve or disapprove the amendments and publish it in the Federal Register within the prescribed time period.

"The [interior secretary] has no authority to avoid IGRA's federal register publication requirement by placing a deemed approved compact or compact amendment in limbo," the suit said.

The suit said that as per IGRA, a 45-day period for the DOI to act began after the tribes submitted their amendments in the summer of 2017. No action was taken, however, so the "compact or amendment becomes deemed approved," according to the suit. In addition, the DOI is then required to publish the amendment in the Federal Register within 90 days, which puts it into effect, according to the filing.

But instead of following these steps, the acting assistant secretary of Indian affairs sent the tribes letters "in which the department purported to 'return' the compact amendments to plaintiffs." The DOI said in those letters that the applications were "premature and likely unnecessary," the filing said.

The state and tribes disagreed and filed a suit furthering a case they also made in a **letter** to the DOI in early November.

MGM has sought to **intervene** in the suit over the objections of the state, tribes and the federal government, telling the D.C. court that the Mohegan and Mashantucket Pequot tribes' East Windsor casino plan is in direct competition with its Springfield casino 10 miles to the north in Massachusetts, and MGM in September 2017 unveiled a proposal for a $675 million casino in Bridgeport, Connecticut, which the tribes have opposed while offering their own proposal for a Bridgeport casino.

Connecticut Assistant Attorney General Mark F. Kohler declined to comment Thursday.

Connecticut is represented by Mark F. Kohler and Robert W. Clark of the attorney general's office.

The federal government is represented by Devon Lehman McCune of the U.S. Department of Justice.

The Mohegan Tribe is represented by Tami Lyn Azorsky, V. Heather Sibbison and Christina M. Carroll of Dentons.

The Mashantucket Pequot Tribal Nation is represented by Kaighn Smith Jr. and Robert L. Gips of Drummond Woodsum, and Keith M. Harper and Catherine F. Munson of Kilpatrick Townsend & Stockton LLP.

MGM is represented by in-house by senior vice president and deputy general counsel Uri Clinton, and Kevin F. King, Neil K. Roman, Thomas Brugato and Edward H. Rippey of Covington & Burling LLP.

The case is State of Connecticut et al. v. Zinke et al., case number 1:17-cv-02564, in the U.S. District Court for the District of Columbia.

--Additional reporting by Michael Phillis and Joyce Hanson. Editing by Adam LoBelia.

Update: This story has been updated with comments from MGM Resorts International.

EXHIBIT B

TOWN OF EAST WINDSOR

011395

August 14, 2017

Secretary Ryan Zinke
Department of the Interior
1849 C Street NW
Washington DC 20240

Dear Secretary Zinke:

The Town of East Windsor is writing you to strongly affirm our support and excitement for the MMCT Venture project in our town.

We also urge you to approve the amended compacts between the state of Connecticut and our two federally recognized tribal nations, the Mohegan Tribal Nation and the Mashantucket Pequot Tribal Nation, so the project can begin in earnest.

Our Board of Selectman doesn't always see eye-to-eye, but this is one issue where we have bi-partisan, unanimous agreement.

And we're not alone – the vast majority of people in town feel the same as we do. At a town meeting in April, residents voted nearly 2 to 1 to support the casino coming to town.

Our town leadership has worked very closely with our police department, our school district, and our social service partners to understand what services will be required of the town for this project to happen, a process that happened over the span of months, not days or weeks.

We have entered into a development agreement with the Tribes that will provide an additional $3 million in funding on top of the projected property taxes of $5.5 million. This is money we need, at a time when resources are becoming more and more scarce.

For East Windsor, the opportunity to be the home of a world-class entertainment and gaming facility is a once in a lifetime opportunity. A development of this magnitude will grow our grand list by more than twenty percent, providing economic development to a town that is prepared for and excited about the chance to attract new business.

Simply put - the Mohegan and Mashantucket Pequot Tribes' willingness to invest a minimum of $300 million into a property that has been vacant for nearly a decade is the best possible use of this parcel.

Our constituents, our friends, our family and our neighbors have entrusted the Board of Selectmen to lead and make our community better. We hope you will hear our words, and know we speak for the people of East Windsor. We would be happy to discuss anything in further detail if that is at all helpful in your work.

Sincerely,

EAST WINDSOR BOARD OF SELECTMEN

Robert Maynard, First Selectman

Richard P. Pippin, Jr., Deputy First Selectman

Jason Bowsza, Selectman

Steve Dearborn, Selectman

Dale Nelson, Selectman

cc: James E. Cason, Acting Deputy Secretary of the Interior
Michael Black, Assistant Secretary of Indian Affairs

EXHIBIT C

Congress of the United States
Washington, DC 20510

November 2, 2017

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

Dear Secretary Zinke,

We write in support of the October 31, 2017 request by the Mashantucket Pequot and Mohegan Tribes (Tribes) for the Department of the Interior to publish notice of approval of the amendments to the Tribes' compacts with the State of Connecticut. We concur with the legal points raised by the Tribes.

We appreciate Associate Deputy Secretary James Cason and other Interior staff taking the time last week to hear our concerns regarding the September 15, 2017 letter from Acting Assistant Secretary – Indian Affairs Michael Black returning the compact amendments without express approval or rejection. Given the importance of this issue to us and our State, we wanted to share our views and support directly with you.

As we discussed at that meeting, the state of Connecticut entered into these compacts more than 20 years ago. Since that time, pursuant to these compacts, the Mashantucket Pequot and Mohegan Tribes have operated casino gaming and provided the state of Connecticut with a percentage of slot machine revenues. In return, the state of Connecticut has agreed not to authorize the operation of additional casino gaming within the legal jurisdiction of the state.

This arrangement is consistent with the statutory language and intent of the Indian Gaming Regulatory Act (IGRA) to provide federally recognized Native American tribes with the ability to operate gaming for the economic benefit of the Tribe. And it is clear that the Mashantucket Pequot and Mohegan Tribes have benefited from this arrangement along with the state of Connecticut.

The genesis of the compact amendments is the desire of the state of Connecticut to authorize an additional casino operation within Connecticut borders. This is a decision based on the state's review of its gaming policies, the impact on the people of Connecticut and the state budget.

This third casino does not fall within IGRA and therefore does not need approval or authorization from the Department of the Interior. However, in order to clarify that the proposed third casino operation would not implicate the existing compact provisions, the Tribes and the State determined that it would be in the best interests of the Mashantucket Pequot and Mohegan Tribes along with the State of Connecticut for the compact language to be amended.

The proposed amendments merely clarify that the operation of a third casino as contemplated in Public Act 17-89 would not affect the existing agreements between the State of Connecticut and the Tribes.

The only question before the Department of the Interior is whether to approve the clarifying amendments to the Compacts indicating that the Tribes' agreements with the state are unaffected by the operation of a casino pursuant to Public Act 17-89. The decision to seek the Department's review of these amendments was informed, in part, through a series of consultations and correspondence between the Tribes and the department over the course of nearly two years, including just a couple of months ago. Nothing in the Department's approval of such amendments would actually authorize an additional casino in Connecticut. The approval simply means that if an additional casino owned and operated jointly by the Tribes is authorized by the state of Connecticut, it would not affect the existing agreements.

Finally, we strongly believe that publication of the September 15, 2017 letter is in the best interest of the Department given the serious legal and regulatory questions that are raised in this matter. As important, publication would fulfill the Department's tribal trust responsibility by continuing the current relationship between the Tribes and the State of Connecticut that has provided extraordinary economic development to the Tribes, consistent with the provisions of IGRA. Department of the Interior approval would merely continue this beneficial Tribal-State relationship.

We hope this clarifies the current situation in Connecticut and urge you to publish the approval of such amendments.

Very truly yours,

RICHARD BLUMENTHAL
United States Senator

Christopher Murphy
United States Senator

JOE COURTNEY
Member of Congress

cc: The Honorable Associate Deputy Secretary James Cason

EXHIBIT D

CHAIRPERSON: Witkos

SENATORS: Larson, Cassano

REPRESENTATIVES: Verrengia, Orange, Sredzinski, Arconti, Adams, Gonzalez, Rovero, Vail, Boyd, DiMassa, Paolillo, Dauphinais, Fishbein, Fusco, Ohler, Siegrist, Skulczyck, Simmons, Zupkus

SENATOR WITKOS (8TH): Good morning. If everyone can find a seat. If there's no seats available, please do not block the entrance or exit way, there's an overflow room in 2C.

If you're on the list to speak, we will be giving you advance notice when you're up.

In the interest of safety, I'd like to note that you are in room 1-D. The two doors in which you entered the room are the emergency exits and are marked with exit signs. In an emergency, the two doors behind the legislators can also be used.

In the event of an emergency, please walk quickly to the nearest exit. After exiting the room, go to your left and exit the building by the main entrance or follow the exit signs to one of the other exits.

Please quickly exit the building and follow any instructions from the capitol police. Do not delay and do not return unless and until you are advised it is safe to do so.

In the event of a lockdown announcement, please remain in the hearing room and stay away from the exit doors until an all clear announcement is heard.

The first hour of today's public hearing is devoted to agency heads and municipal official. The second, after the conclusion of the first hour, we will alternate between the agency head, municipal officials and the public.

Each speaker will be given three minutes to testify. There's usually many questions that follow that so your time may be elongated, however, we do have a lot of people signing up so we'd like to get started.

So the first three speakers today, under the legislative's agency heads and municipal officials, first up is Frank

Was that casino on tribal land and then they had an exclusive agreement as well? And that was, that compact was extended or was it broken or was there no exclusivity agreement made there. I mean I'm looking for something, another example that would compare to exactly what we have here.

GEORGE SKIBINE: That casino was in Detroit for the Sioux Saint Marie and it was not on Indian land.

There was a -- the tribe did not really have in their compact an exclusivity provision at the time. Right, they didn't pay revenue sharing, make revenue sharing payments.

It's, they made some sort of payment pursuant to a court settlement that the Department of the Interior didn't approve but it didn't -- so it was, it was not a, it was a payment that was not in exchange for any exclusivity.

So it is not, it's apples and oranges, you're right. For that particular one. I am not aware of any other example involving Indian tribes where there is a tribe with a compact and then they want, they're operating a non-Indian commercial establishment elsewhere that would impact their compact. I'm just unaware of another example.

REP. DAUPHINAIS (44TH): So this is clearly unique.

GEORGE SKIBINE: I think so, yes.

REP. DAUPHINAIS (44TH): Okay. So I, too, agree with many of the legislators here, I think we feel like we're between a rock and a hard spot, many of us. You talked about the risk reward and we're looking at those risk rewards, what is the risks that we take if we break that compact and what are the rewards. So many of us want to know what the rewards would be; should we entertain the idea of letting a bidding process go, go through.

Now I'm going to, I don't know if you can answer this question or not but if we open that process up and give other opportunities to other casinos to put in bids or RFTs, that doesn't break the compact until we make an agreement, is that correct?

GEORGE SKIBINE: I'm gonna defer to -- to counsel for that.

BETSY CONWAY: So I think as was said earlier, when, when the compact and the gaming procedures in the Pequot case was entered, there's a moratorium and one of the ways that that moratorium is lifted is if the state enacts law allowing gaming in the state otherwise.

happened in Windsor, South Windsor. I chased big development projects in Preston, Connecticut I spent years on.

So I guess dream projects, but what I found is maybe don't jump into the pot until you get a real project. This is a real project. These are people that have been in Connecticut who have used the building trades without question. Never have to, you know, go beg, it came to us. They're gonna build this project.

You know, usually I sit in this building and I'm trying to protect wages from people trying to raise the minimum wage thresholds or other workers getting attacked. Here's a project from somebody in Connecticut that we already know what they do and what they bring to the table.

I could tell you the thousands and thousands of man hours that building trades alone have gotten out of both casinos so I know what's gonna happen here in East Windsor. They're gonna build something, they're gonna use the right people, they're gonna build a good project and they're gonna be a successful place for East Windsor and the State of Connecticut when Connecticut is to the time when revenue is important.

Let's not think about something that may happen because I can tell you right now if this other process goes, you're three, four years down the road before anything happens. Before anything comes down the road. Here's a chance to grab it. You know what I always say? You go, stick with the people that took you to the dance. These people have taken us to the dance many times in Connecticut so I appreciate you giving me the time.

I was here for like six hours, had to run home and get my dog, bring him home, came back and so I appreciate you hearing me.

SENATOR LARSON (3RD): Thank you very much, Dave. This will conclude our public hearing, I want to thank everybody for their testimony and I want to thank all of the Representatives for their questions as we move forward.

Next Tuesday we'll have a fairly lengthy list of items that we'll have to JF. Our finishing date, is it, I think the 16th but we'd like to clear the calendar next Tuesday.

Thank you. Have a good night.

EXHIBIT E

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

MAY - 1 2013

TAKE PRIDE IN AMERICA

Ms. Janice Prairie Chief-Boswell
Cheyenne-Arapaho Tribes
Office of Tribal Council
P.O. Box 38
Concho, Oklahoma 73022

Dear Ms. Prairie Chief-Boswell:

On April 8, 2013, our office received a proposed Settlement Agreement (Agreement) between the State of Oklahoma (State) and the Cheyenne-Arapaho Tribes (Tribes). The letter from the Tribes' attorney covering the Agreement states that "neither Party believes it must be approved pursuant to the Indian Gaming Regulatory Act," while also stating "that the Agreement is being treated by the Parties as an Addendum to the Compact." In looking over the Agreement, it appears that its terms are intended to amend the Tribes' existing Class III gaming compact approved by the Department on March 16, 2005 (Compact). *See* Letter to Honorable William Blind, Chairman, Cheyenne-Arapaho Tribes from George T. Skibine, Deputy Assistant Secretary - Policy and Economic Development; *see also* Notice of Approved Tribal-State Compacts, 70 Fed. Reg. 18041 (April 8, 2005). In particular, the Agreement provides for substantive modifications to the Compact involving revenue sharing and expanded scope of gaming to include Internet gaming, in addition to other technical changes. Unfortunately, we are returning the Agreement to you because it is incomplete due to the lack of accompanying documentation required by the Department's regulations at 25 C.F.R. Part 293 governing submission and review of gaming compacts and amendments.

The Indian Gaming Regulatory Act, 25 U.S.C. 2701-2721 (IGRA), gives the Secretary 45 days to review and approve proposed compacts. 25 U.S.C. § 2710 (d)(8)(C). The Department has applied the same review and approval requirements to compact amendments since the enactment of IGRA. In 2008, we codified this long-standing policy at 25 C.F.R. § 293.4 by providing that "all amendments, regardless of whether they are substantive compact amendments or technical amendments, are subject to review and approval by the Secretary." In order to insure that all compacts or amendments we receive have been "entered into" by the responsible party, our regulations require that both a tribal approval resolution and certification from the state that its representative was authorized to enter into the agreement be included with all submissions. 25 C.F.R. §§ 293.8 (b) and (c).

We were unable to locate a tribal resolution or other document stating that the Tribe has approved the amendment in accordance with applicable tribal law. Similarly, we did not find a certification or other explanation from the State indicating that the Governor is empowered under the laws of the State of Oklahoma to bind the state to the proposed amendment. We find that the Agreement, as submitted without accompanying documentation required by our regulations, is

not properly before us and the 45-day review period provided by IGRA was not triggered on April 8, 2013, the date of its receipt by the Office of Indian Gaming.

We are returning the Agreement to the Tribe in order to allow the Tribe and the State to submit a complete set of documents in compliance with the requirements of 25 C.F.R. Part 293. We look forward to the opportunity to review the Agreement in the future.

A similar letter is being sent to the Honorable Mary Fallin, Governor, State of Oklahoma.

Sincerely,

for Paula L. Hart
Director, Office of Indian Gaming

EXHIBIT F

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

AUG - 1 2013

Honorable Janice Prairie Chief-Boswell
Governor, Cheyenne-Arapaho Tribes
Office of Tribal Council
P.O. Box 38
Concho, Oklahoma 73022

Dear Governor Prairie Chief-Boswell:

On June 18, 2013, the Department of the Interior (Department) received the proposed Class III Settlement Agreement (Agreement) between the Cheyenne Arapaho Tribes (Tribes) and the State of Oklahoma (State), providing for the conduct of Class III gaming activities by the Tribes.

Under the Indian Gaming Regulatory Act (IGRA), the Secretary may approve or disapprove a proposed compact within 45 days of its submission. *See* 25 U.S.C. § 2710 (d)(8). Section 293.4(b) of 25 C.F.R Part 292 provides that "[a]ll amendments, regardless of whether they are substantive amendments or technical amendments, are subject to review and approval by the Secretary." If the Secretary does not approve or disapprove the proposed compact within 45 days, IGRA states that the compact is considered to have been approved by the Secretary, "but only to the extent the compact is consistent with the provisions of IGRA." 25 U.S.C. § 2710 (d)(8)(C).

We have completed our review of the Agreement, along with the additional material submitted by the Tribes and the State. As discussed in more detail below, we find that the Agreement constitutes an amendment to the Tribes' existing Class III compact (Compact) and pursuant to IGRA, it is subject to the Department's review. We note at the outset that the Agreement provides for the conduct of internet gaming. Because we find that other provisions of the Agreement violate IGRA, we do not reach the issue of whether the Tribes' proposed method of offering internet gaming is lawful.[1] For the reasons discussed below, the Agreement is hereby disapproved.

BACKGROUND

The Tribes currently operate Class III gaming under the terms of the Compact, which was approved by the Department on March 16, 2005. *See* Notice of Approved Tribal-State Compacts, 70 Fed. Reg. 18041 (April 8, 2005). Last year, the Tribes began operating a "free play" internet gaming site, *www.pokertribes.com*. The State challenged the Tribes' activities, contending that the Tribes were materially violating the Compact. As required by the Compact, the Tribes and the State entered into a dispute resolution process in an attempt to resolve their differences. Their efforts resulted in execution of the Agreement that is before us today.

[1] As this is an unsettled area of law that does not require clarification from the Department at this time, we take no position as to the legality of internet gaming under the circumstances presented.

The Agreement includes a number of stipulations between the Tribes and the State, including that all gaming in physical or electronic form is "covered gaming" under the Compact,[2] that all gaming, regardless of location of the gaming transaction is "covered conduct" under the Compact, and that "all forms of internet and/or electronic gaming by individual players . . . is permissible if the individual player is located or resides outside the boundary of the United States and its territories during the entirety of a gaming transaction pursuant to the attached technical standards of play."

Paragraph 8 of the Agreement provides that the Tribes "will pay to the State 20% of all gaming revenues generated by all forms of internet and/or electronic gaming by individual players, who are not physically present at all times in a facility located entirely on Indian lands as defined by IGRA, but are located or reside outside the boundary of the United States and its territories during the entirety of a gaming transaction." Paragraph 10 states that "twenty percent of all gaming revenues with respect to online activities that require no traditional brick and mortar operating expenses roughly equates to the ten percent maximum allowable under the State-Tribal Gaming Compact," and that "twenty percent is equitable." In other words, revenue sharing increases from between 4% to 6% of the Compact-defined "adjusted gross revenues" from specified games and 10% for non house-banked games, to 20% of all "gaming revenues" generated by all forms of internet and/or electronic gaming.[3]

On July 8, 2013, we sent the Tribes a letter seeking clarification on several issues arising from the Agreement. In part, we sought an analysis from the Tribes regarding the Agreement's revenue sharing requirements, an explanation of the meaningful concessions by the State, and how those concessions may provide substantial economic benefits to the Tribes such that the revenue sharing requirements do not constitute a tax, fee, charge or other assessment in violation of IGRA. *See* 25 U.S.C. § 2710(d)(4).

On July 17, 2013, counsel for the Tribes responded to the Department's letter. With regard to the Agreement's revenue sharing requirements, the Tribes provided a single paragraph that, stated in relevant part that the revenue sharing requirements were:

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[2] Section 3 of the Compact defines a "covered game" as:

> "Covered game" means the following games conducted in accordance with the standards, as applicable, set forth in Sections 11 through 18 of the State-Tribal Gaming Act: an electronic bonanza-style bingo game, an electronic amusement game, an electronic instant bingo game, nonhouse-banked card games; any other game, if the operation of such game by a tribe would require a compact and if such game has been: (i) approved by the Oklahoma Horse Racing Commission for use by an organizational licensee, (ii) approved by state legislation for use by any person or entity, or (iii) approved by amendment of the State-Tribal Gaming Act; and upon election by the tribe by written supplement to this Compact, any Class II game in use by the tribe, provided that no exclusivity payments shall be required for the operation of such Class II game.

[3] The Agreement does not define "gaming revenues." The Compact defines "adjusted gross revenues" in a manner that is similar to what is generally referred to as "net win" in other tribal-state compacts. For purposes of this decision, we interpret "gaming revenues" as having the same meaning as "adjusted gross revenues" as defined in the existing Compact.

> ...justified because a) the decrease in capital costs associated with 'brick and mortar' Facilities under the Compact, and/or b) the corresponding tax consequence of operating an online operation outside of the United States and having to repatriate funds to the Tribe at the repatriation rates of 15% for the State and 36% for the Federal Government, respectively. This consideration results in a 31% savings on the entirety of the transactions for the Tribes when compared to an offshore site.

The Tribes also provided a letter from Eclipse Compliance Testing dated July 18, 2013, discussing the games included in the Appendix to the Technical Standards.

ANALYSIS

The Secretary may disapprove a proposed tribal-state compact only when it violates IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians. 25 U.S.C. § 2710 (d)(8). The IGRA expressly prohibits the imposition of a tax, fee, charge, or other assessment on Indian gaming except to defray the state's costs of regulating Class III gaming activities. 25 U.S.C. § 2710 (d)(4). The IGRA further prohibits using this restriction as a basis for refusing to negotiate tribal-state gaming compacts. *Id.*

Revenue Sharing

We review revenue sharing requirements in gaming compacts with great scrutiny. Our analysis first looks to whether the state has offered meaningful concessions to the tribe. The Department's long-standing analysis on this issue examines whether the state concedes something it was not otherwise required to negotiate, such as granting exclusive rights to operate Class III gaming or other benefits sharing a gaming-related nexus. We then evaluate whether the value of the concessions provide substantial economic benefits to the tribe in a manner justifying the revenue sharing required. We note that the Ninth Circuit's recent decision in *Rincon Band of Luiseno Mission Indians of the Rincon Reservation* v. *Schwarzenegger*[4] cited with approval the Department's long-standing revenue sharing analysis.

a. Meaningful Concessions

Under the first step of our analysis, we find that the State has not offered a meaningful concession. We do not reach the issue of whether internet gaming as contemplated in the Agreement is lawful. The Tribes concede that, even if lawful, such games "fall into one of the four categories of permissible games under the Oklahoma State-Tribal Gaming Compact." *See* Letter to Richard J. Grellner, Esq., regarding *Synopsis of Permissible Games Included in Appendix of the [Technical Standards]for Compliance with IGRA and Oklahoma Tribal-State Gaming Compact,* from Nick Farley, President, Eclipse Compliance Testing (July 18, 2013). In other words, even if such gaming is lawful, the Agreement does not expand the scope of gaming authorized under the existing Compact. Rather, it provides a different method of delivering

[4] 602 F.3d 1019 (9th Cir. 2010), *cert denied,* 131 S. Ct. 3055 (2011).

types of games already permitted under the Compact. We recently determined that authority to operate wireless gaming was not a concession because it was simply an extension of the Class III gaming authorized by the proposed compact. *See* Letter to Chairman Cedric Cromwell, Mashpee Wampanoag Tribe, from Kevin K. Washburn, Assistant Secretary – Indian Affairs (October 12, 2012). In the absence of any meaningful analysis by the Tribes on this issue, we are not persuaded that offering the same scope of gaming already operated by the Tribes amounts to a meaningful concession.

b. Substantial Economic Benefits

Even if a different method of delivering types of games permitted under an existing Compact were a meaningful concession, the Tribes have not demonstrated that this concession would provide substantial economic benefits to the Tribes in a manner justifying the revenue sharing required. The single paragraph response provided in the Tribes' July 17, 2013, letter does not provide the basic information to analyze whether the concession provides substantial economic benefits to the Tribes. In the absence of a reasonable financial analysis from the Tribes, we cannot conclude that unquantified, unknown economic benefits the Tribes may realize, if any, would justify the 20% rate of revenue sharing required under the Agreement.

Bald assertions such as those contained in Paragraph 10 of the Agreement that "twenty percent of all gaming revenues with respect to online activities that require no traditional brick and mortar operating expenses roughly equates to the ten percent maximum allowable" under the Tribes' Compact cannot be relied upon to determine whether the Tribes are receiving a substantial economic benefit.[5] While internet gaming could have lower operational costs than traditional gaming, paying the State 20% of all internet gaming revenues could result in the State earning more revenue than the Tribes receive from such gaming after they pay its operational expenses. This would render the State, rather than the Tribes, the primary beneficiary of Indian gaming in violation of IGRA. We simply have not been provided adequate analysis to insure that these terms are lawful. Even if we were convinced that the State had made a meaningful concession, in the absence of any meaningful analysis of the economic benefits we hereby disapprove the Agreement.

The Agreement Amends the Tribes' Existing Compact

On April 8, 2013, the Tribes submitted the Agreement for review without a tribal resolution or certification from the State that Governor Fallin was authorized to bind the State to the Agreement. In order to insure that all compacts or amendments we receive have been "entered into" by the responsible parties, our regulations require that all submissions include both a tribal approval resolution and a certification from the state that its representative was authorized to enter into the agreement. 25 C.F.R. §§ 293.8 (b) and (c). In a May 1, 2013, letter, the Director of

[5] On rare occasions, compacts have taken effect by operation of law in situations where tribes have not provided sufficient justification for revenue sharing. Those instances have typically involved compacts with nominal revenue sharing requirements or a model tribal-state compact that contemplated brick-and-mortar gaming facilities. *See, e.g.,* Tribal-State Compacts between the Iowa Tribe, the Modoc Tribe, the Ottawa Tribe, the Delaware Nation, and the Sac & Fox Nation and the State of Oklahoma, 70 Fed. Reg. 31499 (June 1, 2005). Those compacts are approved by operation of law only to the extent they are consistent with IGRA.

the Office of Indian Gaming (Director) returned the Agreement to the Tribes, explaining that a compact submitted without the required documentation is "not properly before us and the 45-day review period was not triggered." The Director invited the Tribes to re-submit the Agreement in compliance with the regulations and the record was closed.

The Tribes assert that the review period under IGRA expired 45 days after the Agreement was originally submitted on April 8, 2013. However, the Department's regulations make plain that the Agreement was not lawfully submitted to the Department until the current submission was received on June 18, 2013. The Tribes' own resolution underscores this basic fact in that the resolution did not become effective until thirty days after it was signed on May 13, 2013, by the Tribes' Governor. Accordingly, no documents sent by the Tribes prior to the submission that was received by the Department on June 18, 2013, constitute a submission of the Agreement that complied with our regulations and triggered IGRA's 45-day review period.

In the letter accompanying the submission of the Agreement, the Tribes assert that they "believe that [the Agreement] is not a matter that merits your offices [sic] consideration or approval. However, we wanted you to be aware of it as a courtesy." As indicated in the Director's May 1 letter to the Tribes, it is clear that the Agreement's express terms amend the Tribes' existing Compact and incorporate many of the terms contained therein. Accordingly, we find that it constitutes an amendment of the Tribes' existing compact and is subject to our review and approval.

CONCLUSION

Based on the above analysis, we find that the Agreement violates IGRA. The Agreement is disapproved. The Department appreciates the efforts of the Tribes and the State to work together to attempt to reach an agreement on important matters affecting their relationship. We deeply regret that this decision is necessary, and understand that it may constitute a significant setback for the Tribes. Nevertheless, the Department is committed to upholding IGRA and we cannot approve a compact that violates IGRA in the manner described above.

A similar letter has been sent to the Honorable Mary Fallin, Governor of the State of Oklahoma.

Sincerely,

Kevin K. Washburn
Assistant Secretary-Indian Affairs

EXHIBIT G

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

FEB 9 1999

Honorable Robert Guenthardt
Tribal Chairman
Little River Band of Ottawa Indians
P.O. Box 314
Manistee, Michigan 49660-0314

Dear Chairman Guenthardt:

On December 24, 1998, the Department received the Compact between the Little River Band of Ottawa Indians and the State of Michigan providing for the conduct of Tribal-Class III Gaming by the Little River Band of Ottawa Indians. Under Section 11 (d)(8)(C) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(8)(C), the Secretary may approve or disapprove the Compact within 45 days of its submission. If the Secretary does not approve or disapprove the Compact within 45 days, IGRA states that the compact is considered to have been approved by the Secretary, "but only to the extent the compact is consistent with the provisions of [IGRA]." The Compact takes effect when notice is published in the *Federal Register* pursuant to Section 11 (d)(3)(B) of IGRA, 25 U.S.C. § 2710(d)(3)(B).

We have declined to approve or disapprove the Little River Band's Compact within the 45 day period because we are particularly concerned with the legality under IGRA of the tribal payments to the State in Section 17 of the Compact. As a result, the Compact is considered to have been approved, but only to the extent it is consistent with the provisions of IGRA.

Section 17 of the Compact requires the Tribe to pay the State 8 percent of "net win" (defined as the total amounts wagered on each electronic game of chance, minus the total amount paid to players for winning wagers at such machines) derived from all Class III electronic games of chance, so long as no change in State law is enacted to permit the operation of electronic games of chance or commercial casino games by any other person (except a person operating such games in the City of Detroit pursuant to the Initiated Law of 1996) and no other person (except a federally recognized Indian tribe operating pursuant to an IGRA compact or a person operating in the City of Detroit pursuant to the Initiated Law of 1996) within the State lawfully operates electronic games of chance or commercial casino games.

The Department of the Interior has approved 196 tribal-state compacts to date. Only a few have called for tribal payments to states other than for direct expenses that the states incur in regulating gaming authorized by the compacts. To date, the Department has approved payments to the State only when the State has agreed to provide substantial exclusivity, *i.e.*, to completely prohibit non-Indian gaming from competing with Indian gaming, or when all payments cease while the State permits competition to take place. The Department has sharply limited the circumstances under which Indian tribes can make direct payments to a State. Otherwise, States effectively would be able to leverage very large payments from the tribes, in derogation of Congress' intent in 25 U.S.C. § 2710(d)(4) of IGRA not to permit States "to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in Class III gaming activities." In addition, because of the Department's trust responsibility, we seek to ensure that the cost to the Tribe — in this case up to 8 percent of "net win" — is appropriate in light of the benefit conferred on the Tribe.

The Department questions whether Section 17 provides the tribe with any meaningful level of exclusivity. The Initiated Law of 1996, MCL 432.201 *et seq.*, has legalized non-Indian gaming in the largest market in the State of Michigan, thus allowing non-Indian gaming to compete with and draw customers from Indian gaming. When the law is implemented, it may make *de minimis* the promised exclusivity.

In addition, seven federally-recognized tribes in Michigan are each party to a federally-approved Tribal-State compact with the State of Michigan. These seven compacts were finalized only after protracted litigation with the State. *See Sault Ste Marie, et al v. Engler,* 800 F.Supp. 1484 (W.D. Mich. Mar. 26, 1992) *dismissed,* 5 F.3d 147 (1993); *see also* Stipulation for Entry of Consent Judgment, August 18, 1993; Consent judgment, August 20, 1993. The seven compacted tribes make payments to the State similar to those required under your Compact pursuant to court-ordered stipulation, not pursuant to any provision of their federally-approved compacts. In contrast to the payments required under your Compact, the seven compacted tribes in Michigan will no longer have to make any payments to the State when three commercial casinos in Detroit receive licenses. This is because the gaming "exclusivity" for which the original seven compacted tribes bargained in the Stipulation for Entry of Consent Judgment in *Sault Ste Marie, et al v. Engler, supra,* will end.

The Department believes that its decision to let the 45-day statutory deadline for approval or disapproval of the Compact expire without action is the most appropriate course of action. The 45-day statutory time frame for review of the Compact is insufficient for us to make an accurate assessment of whether the substantial payments required under Section 17 of the Compact for partial exclusivity are justified. In addition, gaming has enabled Indian tribes (including the seven Michigan tribes with existing compacts) to generate revenues to provide health, housing, education, and other governmental initiatives to their members. Tribal gaming revenues have also strengthened previously faltering tribal economies and have enabled tribal governments to address various social and economic

problems. Therefore, we believe that it is in the best interest of the Tribe, notwithstanding our concern with Section 17, to permit the Compact to become effective by operation of law, and enable the Tribe to have the opportunity to enjoy the economic benefits of Indian gaming.

Sincerely,

Assistant Secretary - Indian Affairs

Identical Letter sent to: Honorable John Engler
Governor of Michigan
Lansing, Michigan 48909

EXHIBIT H

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

APR 25 2003

Honorable Harold "Gus" Frank
Chairman, Forest County Potawatomi Community
P.O. Box 340
Crandon, Wisconsin 54520

Dear Chairman Frank:

On February 20, 2003, we received the 2003 Amendments (Amendments) to the Forest County Potawatomi Community of Wisconsin (Community) and State of Wisconsin Gaming Compact of 1992, as amended December 3, 1998, executed on February 19, 2003. On April 4, 2003, we received amendments to the original submission deleting a proposed 50-mile radius exclusivity zone aimed at other Class III Indian gaming facilities, and modifying proposed Section IV.A.8. of the Compact by deleting references to gaming facilities in neighboring states.

Under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(8)(C), the Secretary of the Interior (Secretary) may approve or disapprove the Amendments within forty-five days of their submission. If the Secretary does not approve or disapprove the Amendments within forty-five days, IGRA provides that the Amendments are considered to have been approved, but only to the extent that they are consistent with the provisions of IGRA. Under IGRA, the Secretary can disapprove the Amendments if she determines that the Amendments violate IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians.

We have completed our review of the Amendments, along with the submission of additional documentation submitted by the parties and a number of third parties. Pursuant to Section 11 of IGRA, we have decided to allow the 2003 Amendments to take effect without Secretarial action for the following reasons.

Scope of Gaming

Under the 2003 Amendments, Section IV.A of the Compact is amended by adding, *inter alia*, electronic keno, roulette, craps, poker and similar non-house banked card games, and games played at blackjack style tables. We need to determine whether the inclusion of these gaming activities in the Compact complies with the requirements of Section 11(d)(1)(B) of IGRA. In our view, whether the addition of electronic keno and casino table games complies with Section 11(d)(1)(B) of IGRA, 25 U.S.C. § 2710(d)(1)(B), which requires that such gaming activities be permitted in the State of Wisconsin "for any purpose by any person, organization, or entity" is an unsettled issue. As you are

well aware, the scope of gaming question is one of the issues raised in the state court litigation in *Dairyland Greyhound Park v. Doyle,* No. 01-CV-2906. In addition, we understand that a petition has been filed with the Wisconsin Supreme Court on April 2, 2003, by the Majority Leader of the Wisconsin Senate and the Speaker of the Wisconsin Assembly seeking a declaratory judgment on several issues relating to the 2003 Amendments, including the permitted scope of gaming in the State. Although we are mindful that in the *Dairyland* case, the Dane County Circuit Court has ruled in favor of the Governor, the decision has been appealed to an intermediate court which is unlikely to be the final appeal of the case within the State court system. As a result, we believe that the best alternative available to the Department of the Interior (Department) under IGRA is to have the 2003 Amendments go into effect by operation of law.

Revenue-Sharing Provisions

As you may be aware, the Department has sharply limited the circumstances under which Indian tribes can make direct payments to a State for purposes other than defraying the costs of regulating Class III gaming activities. To date, the Department has approved payments to a State only when the State has agreed to provide the tribe with substantial exclusivity for Indian gaming, *i.e.*, where a compact provides a tribe with substantial economic benefits in the form of a right to conduct Class III gaming activities that are on more favorable terms than any rights of non-Indians to conduct similar gaming activities in the State.

The 2003 Amendments substantially modify Section XXXI of the Compact. When Section XXXI (Payment to the State) was added to the 1992 Compact as part of the 1998 Amendments, it provided for a payment of $6,375,000 per year for the duration of the term of the Compact (five years) in exchange for exclusive rights to conduct electronic games of chance (with mechanical or video displays), blackjack, and pull-tabs. Section XXXI.G. of the 2003 Amendments requires the Community to pay considerably more money to the State in exchange for the exclusivity agreement in proposed amended Section XXXI.B. of the Compact, *i.e.,* the addition of variations to the game of blackjack, pari-mutuel wagering on live simulcast of horse, harness, and dog racing events, electronic keno, and certain casino table games. We are uncertain whether the addition of these Class III gaming activities is worth the payment of $34,125,000 in 2004, $43,625,000 in 2005 (in addition to payments of $6,375,000 in 2003 and 2004). Starting in 2005, the Community is required to pay between 6% and 8% of net win, depending on the year, until 2011, when a permanent 6.5% payment of net win takes effect. The Community has reassured us that it will receive the benefit of the bargain, and has provided credible financial projections that indicate that it will be able to afford the payments.

The financial projections provided by the Community indicate that net revenues are expected to substantially increase under the 2003 Amendments. However, it is not clear to us that this increase is solely due to the exclusivity agreement in Section XXXI.B. of the Compact. We believe that it may also be due to the proposed modifications of other sections of the Compact, especially the elimination of the ceiling on the number of electronic gaming devices. In this context, we note that gaming revenues have tripled as a result of the increased number of machines and tables authorized

in the 1998 Amendments, which had no change in the scope of gaming. It is the position of the Department to permit revenue-sharing payments in exchange for *quantifiable* economic benefits over which the State is not required to negotiate under IGRA, such as substantial exclusive rights to engage in Class III gaming activities. We have not, nor are we disposed to, authorize revenue-sharing payments in exchange for compact terms that are routinely negotiated by the parties as part of the regulation of gaming activities, such as duration, number of gaming devices, hours of operation, and wager limits.

We are pleased that the parties removed the proposed amendment to Section XXXI.B of the Compact which was designed to protect the Potawatomi Bingo and Casino on the Menomonee Valley Land from competition within a 50-mile radius, including competition from other Indian tribes. As we stated in our November 12, 2002, letter to Governor Pataki and President Schindler, refusing to affirmatively approve the proposed Class III gaming compact between the State of New York and the Seneca Nation of Indians, we find a provision excluding other Indian gaming anathema to basic notions of fairness in competition and inconsistent with the goals of IGRA. We are also pleased that the parties engaged in a productive dialogue with us regarding this matter during consideration of the 2003 Amendments by the Department.

Conclusion

Our decision to neither approve nor disapprove the 2003 Amendments within 45 days means that the 2003 Amendments are considered to have been approved, "but only to the extent they are consistent with the provisions of [IGRA]." The 2003 Amendments will take effect when notice is published in the FEDERAL REGISTER pursuant to Section 11(d)(3)(B) of IGRA, 25 U.S.C. § 2710(d)(3)(B).

Sincerely,

Acting Assistant Secretary - Indian Affairs

Similar letter sent to: Honorable Jim Doyle
Governor of Wisconsin
State Capitol
Madison, Wisconsin 53707