UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

The COMMONWEALTH OF MASSACHUSETTS, *Plaintiff*, and The AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) and TOWN OF AQUINNAH, *Intervenor-Plaintiffs/Counterclaim-Defendants*, v. The WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), et al., *Defendants/Counterclaim-Plaintiffs* and CHARLES D. BAKER, in his official capacity as GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, et al. *Third-Party Defendants.*	No: 1:13-cv-13286-FDS

COMMONWEALTH OF MASSACHUSETTS AND THIRD-PARTY DEFENDANTS' OPPOSITION TO WAMPANOAG TRIBE OF AQUINNAH (GAY HEAD) AND AQUINNAH WAMPANOAG GAMING CORPORATION'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Commonwealth of Massachusetts and the Third-Party Defendants (Governor Charles D. Baker, Attorney General Maura Healey, and Massachusetts Gaming Commission Chairman Stephen Crosby, all in their official capacities) (collectively, the "Commonwealth") oppose the Wampanoag Tribe of Gay Head (Aquinnah) and Aquinnah Wampanoag Gaming Corporation's Motion for Summary Judgment ("Tribe's Mtn.") (Dkt. # 119). As the Court knows, the parties dispute whether the Wampanoag Tribe of Gay Head (Aquinnah) ("Tribe")[1] may commence gaming operations unlicensed by the Commonwealth on acreage to which it received rights through a litigation settlement agreement, notwithstanding the fact that both the agreement ("Settlement Agreement") and the federal statute implementing it ("Massachusetts Settlement Act") dictate that, with certain non-relevant exceptions, state and local laws continue in full force in the Settlement Lands, including those laws pertaining to the conduct of gaming. In accordance with the schedule previously set by the Court, the parties have all moved for summary judgment and the Commonwealth now opposes the Tribe's motion.

In its motion, the Tribe argues that: (i) the Tribe possesses sufficient jurisdiction over the Settlement Lands to qualify them as "Indian lands," thus triggering the applicability of the Indian Gaming Regulatory Act ("IGRA"); (ii) once this Court determines that IGRA applies to the Settlement Lands, it should also conclude that IGRA impliedly repeals the Massachusetts Settlement Act insofar as that law would bar the application of IGRA to the Settlement Lands; and (iii) in resolving the applicability of IGRA to the Settlement Lands, this Court should be guided by two informal opinion letters provided to the Tribe by the Department of the Interior ("DOI") and the National Indian Gaming Commission ("NIGC"). In its Memorandum of Reasons in Support of its Motion for Summary Judgment ("Commonwealth's Motion" or "Comm. Mtn.") (Dkt. # 113), the Commonwealth has argued that IGRA did not impliedly repeal

[1] All references herein to "Tribe" shall include any or all of the three defendants: Wampanoag Tribe of Gay Head (Aquinnah), Wampanoag Tribal Council of Gay Head, Inc., and Aquinnah Wampanoag Gaming Corporation.

the federal law implementing the Settlement Agreement, *see* Comm. Mtn. at pp. 8-15, and therefore does not now re-address the Tribe's second argument except through incorporation by reference where appropriate. Below, the Commonwealth answers the first and third arguments made by the Tribe in its motion. For these reasons, as well as the reasons set forth in the filings made in support of summary judgment by the Commonwealth, the Town of Aquinnah, and the Aquinnah/Gay Head Community Association, Inc., this Court should deny the Tribe's motion for summary judgment.[2]

ARGUMENT

I. Both the 1983 Settlement Agreement and the 1987 Massachusetts Settlement Act Demonstrate the Tribe's Lack of Sovereign Jurisdiction over the Settlement Lands.

To support its position that IGRA applies to allow Class II gaming on the Settlement Lands without state approval, the Tribe argues that the Settlement Lands are "Indian lands within [the] Tribe's jurisdiction." *See* 25 U.S.C. § 2710(b)(1); *see also* Tribe's Mtn. at 10-11. Except for the specifically exempted areas of hunting and taxation, not relevant here, the Settlement Lands are not "within" the Tribe's jurisdiction because the Tribe does not possess jurisdiction over the Settlement Lands. To the extent it exercises some level of jurisdiction in a governmental sense, that jurisdiction is either expressly granted in the Settlement Agreement or is exercised only over tribal members and not over the Settlement Lands. Any such jurisdiction that the Tribe may possess does not qualify either by level or nature to trigger IGRA's applicability.

IGRA's definition of "Indian lands" further requires the Tribe to "exercise[ ] governmental power" over the lands on which it would conduct gaming. 25 U.S.C. § 2703(4)(B); *State of R.I v. Narragansett Tribe ("Narragansett I")*, 19 F.3d 685, 702-703 (1st

[2] In its "Concise Statement of Material Facts," the Tribe recites certain "additional concise statements of material fact" that the parties did not include as part of their Stipulated Facts Not in Dispute (Dkt. # 107). Tribe's Mtn. at 4-7. The Commonwealth does not dispute those additional statements insofar as they assert actual fact, such as referring to the existence and content of agreements, documents, ordinances, or court orders. The Commonwealth does, however, dispute the Tribe's attempts to characterize those facts with opinion or legal conclusions.

Cir. 1994). The Settlement Agreement—the mechanism under which the Tribe acquired what rights it has in the Settlement Lands—does not invest the Tribe with general governmental authority over those lands. Rather, it specifies that the Tribe, as successor-in-interest to the Wampanoag Tribal Council, Inc., holds its interest in the Settlement Lands to the same extent a private corporation subject to the laws of the Commonwealth would. Settlement Agreement, ¶ 3. Private corporations do not exercise governmental authority and neither does the Tribe, except as specifically granted in the terms of the Settlement Agreement.

Rather than showing *any* control over the subject lands, in order to show that IGRA applies, the Tribe must demonstrate that it exercises *enough* power and of the proper type. *See Narragansett I*, 19 F.3d at 701 ("jurisdiction is sufficient to satisfy [IGRA]"), 703 ("more than enough governmental power"). Under the plain language of IGRA, that power must relate to the lands on which gaming would occur, not simply to the members of the tribe that would commence the gaming operations. *See* 25 U.S.C. § 2710(b)(1) (Class II gaming activity may occur on "Indian lands within [the] Tribe's jurisdiction"). The Tribe misreads both IGRA and *Narragansett I* to suggest that any level of jurisdiction and governmental power would satisfy IGRA. In actuality, the Tribe possesses insufficient jurisdiction and exercises insufficient power over the Settlement Lands for IGRA to apply. Moreover, any jurisdiction the Tribe retains is not of the territorial sort adequate to satisfy IGRA. Because IGRA applies to land and not to tribes, the Tribe may not invoke IGRA based on the quantum and type of the jurisdiction it holds.

A. Over the Settlement Lands, the Tribe Possesses Only the Jurisdiction Conveyed in the Settlement Reached by the Parties and Effectuated by Congress.

The Settlement Agreement establishes that the Tribe does not possess jurisdiction and cannot exercise governmental authority over the Settlement Lands as required for IGRA's applicability. As explained in earlier filings, the Tribe secured rights in the Settlement Lands through the Settlement Agreement, executed by the parties to resolve the Tribe's legal claims to the land. *See* Massachusetts Settlement Act, 25 U.S.C. § 1771 (describing lawsuit and

settlement). In implementing the parties' agreement, Congress expressly incorporated the terms of the Settlement Agreement. *See* 25 U.S.C. §§ 1771(4) (implementing legislation was necessary to effectuate Settlement Agreement), 1771d(c), (d) (public and private settlement lands to be held in trust for Tribe subject to terms of Settlement Agreement). Because the Tribe's interest in the Settlement Lands derives from the Settlement Agreement, that agreement is the touchstone for determining the scope of the Tribe's power over those lands.[3]

The Settlement Agreement specifies that the Tribal Council would receive and hold the Settlement Lands "in the same manner and subject to the same laws, as any other Massachusetts corporation." Settlement Agreement ¶ 3; *see also Building Inspector and Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp. ("Shellfish Hatchery")*, 443 Mass. 1, 16, 818 N.E.2d 1040, 1051 (Mass. 2004) ("[T]he Tribe would have no special status in its land holdings different from an ordinary… corporation."). In the event of future tribal recognition—as later occurred—the same restrictions would apply to the Tribe's holding of the land. Settlement Agreement ¶ 3 ("Under no circumstances, including any future recognition of the existence of an Indian tribe in the Town of Gay Head, shall the civil or criminal jurisdiction of the Commonwealth of Massachusetts, or any of its political subdivisions, over the settlement

[3] The Tribe incorrectly asserts that the Commonwealth must show "divestiture" of its jurisdiction over the Settlement Lands, citing a series of inapposite tribal termination acts from the 1950s. *See* Tribe's Mtn. at 13 (". . . Commonwealth must first prove that the [Massachusetts Settlement] Act completely divested the Tribe of jurisdiction over the Settlement Lands.") The cited termination acts dissolved the United States government's trust relationship with certain Indian groups, including apportioning land previously held in trust, to individual Indians. Accordingly, the purpose of those acts was to terminate federal supervision and trust responsibilities over the land in question, with the land and affected Indians expressly subject to state laws going forward. *See id.* and cited acts. The acts pose no obstacle to the Commonwealth's position. All rights the Tribe has in the Settlement Lands come from the Settlement Agreement and the Massachusetts Settlement Act, which did not confer the plenary jurisdiction necessary for the invocation of IGRA. There was no need to "divest" the Tribe of jurisdiction it did not previously have. And surely not in a fashion similar to the tribal termination acts passed in the 1950s, which aimed not to restore Indian tribes to land—as was accomplished in the Massachusetts Settlement Act—but to extinguish tribal landholdings in favor of individual ownership or ownership through state corporations. *See* Cohen's Handbook of Federal Indian Law § 1.05, at 91 (Nell Jessup Newton ed., 2012).

lands . . . be impaired or otherwise altered[.]"). Both before and after the Tribe was recognized, therefore, the Commonwealth and the Town of Aquinnah possessed the full measure of their jurisdiction over the Settlement Lands, except as expressly specified in the Settlement Agreement over matters not relevant here.

Put another way, the Tribal Council originally received ownership interest in the Settlement Lands in the same way any private corporation would: subject to all applicable state and local laws. Subsequent recognition of the Tribe (and its becoming successor-in-interest to the Council) did not expand that interest to include sovereign power because (i) the Settlement Agreement provided that it would not; and (ii) Congress stipulated that any subsequent holder of the Settlement Lands, such as the Tribe, would be bound to the same terms and conditions as the Council. 25 U.S.C. § 1771e(b).[4]

In enacting the Massachusetts Settlement Act, Congress did not modify the agreed-on legal relationship between the Commonwealth and the newly recognized Tribe with respect to the Settlement Lands. To the contrary, by expressly incorporating the Settlement Agreement into the Massachusetts Settlement Act, Congress maintained the parties' legal relationship under which the Tribe continued to hold its interests as a private corporation, subject to all applicable state and local regulations. Congress was similarly clear that the taking of the lands into trust by the United States would not alter this relationship. *See* 25 U.S.C. § 1771d(a), (d) (public settlement lands, private settlement lands, and any additional lands acquired by Secretary of Interior on behalf of Tribal Council to be held in trust subject to Settlement Agreement).

[4] The Tribe's reliance on an ancillary ruling in the unrelated matter of *KG Urban Enterprises, LLC v. Patrick*, Civil No. 11-12070-NMG (D. Mass.), does not establish otherwise. *See* Tribe's Mtn. at 7, 11. In denying the Tribe's motion to intervene, the Court (Gorton, J.)—merely by way of introduction—described the Tribe as "a federally recognized tribe with jurisdiction over land on the western half of Martha's Vineyard." *See* Memorandum and Order, June 6, 2013, *KG Urban Enterprises, LLC v. Patrick*, Civil No. 11-12070-NMG (Dkt. # 117) at 7. The Court made no findings of fact concerning the extent or nature of that jurisdiction, but rather denied the Tribe's motion on the basis of the Tribe's concession to the attenuated nature of its interests and due to the unresolved question—under consideration here—of the Tribe's legal right to conduct gaming on the Settlement Lands. *See id.* at 9, 10.

Later provisions of the Settlement Agreement and the Massachusetts Settlement Act cement the legal relationship among the parties set forth in Paragraph 3. Paragraph 11(a) of the Settlement Agreement specifies, "no Indian tribe or band shall ever exercise sovereign jurisdiction as an Indian tribe other than to the extent agreed herein, over all or any part of the Settlement lands." This provision was carried forward into the Massachusetts Settlement Agreement, both by its repeated incorporation of the Settlement Agreement, discussed above, and explicitly. *See* 25 U.S.C. § 1771e(a) (Tribal Council "shall not exercise any jurisdiction over any part of the settlement lands in contravention of this subchapter, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable federal laws."). Similarly, Paragraph 13 provides that "all Federal, State and Town laws shall apply to the Settlement Lands, subject only to the following special provisions, regardless of any federal recognition the alleged Gay Head Tribe may acquire." The special provisions relate only to taxation of real property and hunting regulations. *Id.*; *see also* 25 U.S.C. § 1771g (settlement lands subject to "civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the Town of Gay Head, Massachusetts"). These provisions conclusively demonstrate that the Tribe does not possess jurisdiction, and cannot exercise governmental authority, over the Settlement Lands. Accordingly, those lands are not "Indian lands" within the meaning of IGRA.[5]

B. IGRA Did Not and Could Not Expand the Tribe's Rights Over the Settlement Lands.

Congress intended IGRA to preserve existing tribal jurisdiction over Class II gaming but not to create jurisdiction where none previously existed. This intent is clear from the statutory language: "[a]ny class II gaming on Indian lands *shall continue to be* within the jurisdiction of

[5] In concluding that IGRA applied to allow gaming on the Rhode Island Settlement Lands, the First Circuit noted the distinction between the Rhode Island Settlement Act—which did not limit the Narragansett Tribe's jurisdiction over the Rhode Island Settlement Lands—and the Massachusetts Settlement Act, which did. *See Narragansett I*, 19 F.3d at 702 (Massachusetts Settlement Act includes a limitation on Indian jurisdiction absent from the Rhode Island Act).

the Indian tribes." 25 U.S.C. § 2710(a)(2) (emphasis added). By using the language "shall continue to be," Congress signaled its intent that IGRA was meant to preserve tribal jurisdiction over this level of gaming to the exclusion of state jurisdiction only when a tribe had enjoyed such jurisdiction pre-IGRA. Here, this Court should give effect to Congress's clear intent and hold that IGRA did not create new tribal jurisdiction over Class II gaming where, pre-IGRA, the Tribe lacked such jurisdiction under the Massachusetts Settlement Act.[6]

As set forth above and in the Commonwealth's motion, upon adoption of the Massachusetts Settlement Act, the Tribe held the Settlement Lands as a private party subject to all applicable civil and criminal laws and did not possess jurisdiction over those lands except in the limited ways specified. Of particular note (and wholly unaddressed by the Tribe in its motion for summary judgment) is the express applicability to the Settlement Lands of "laws or regulations which prohibit or regulate the conduct of bingo or any other game of chance." 25 U.S.C. § 1771g. Under those laws, the Tribe may not commence gaming, including Class II gaming, on its lands without a license from the Commonwealth. *See* Mass. Gen. Laws c. 23K, § 37, c. 271 § 3.[7] Therefore, at the time IGRA was adopted in 1988, the Tribe did not have jurisdiction over the Settlement Lands that would allow it to commence Class II gaming operations. By its terms, IGRA carried forward only existing tribal jurisdiction to conduct Class II gaming. Because the Tribe had no such jurisdiction to carry forward, IGRA does not apply to permit Class II gaming.

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[6] No particular preference in favor of the Tribe guides statutory interpretation in this arena. *Compare* Tribe's Mtn. at 8-9 (urging this Court to apply "Indian canons of [statutory] construction" construing statute in favor of the Tribe) *with Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784, 793 (1st Cir. 1996) (no basis for employing artificial weight in tribe's favor where statutory "ambiguity does not loom"); *and Narragansett I*, 19 F.3d at 703 (gauging two federal statutes for implied repeal does not trigger the "rationale for encouraging preemption in the Indian context—that the federal government is a more trustworthy guardian of Indian interests than the states").

[7] The Tribe does not assert that the Class II gaming operation it plans to commence would not otherwise fall within the prohibition of these statutes if not separately authorized by IGRA.

C. The Tribe's Membership Jurisdiction and Limited Exercise of its Governmental Powers is Not Adequate to Invoke IGRA.

Much of the Tribe's asserted jurisdiction is membership jurisdiction, over its tribal population, rather than territorial jurisdiction, over the Settlement Lands. *See United States v. Wheeler*, 435 U.S. 313, 326 (1978) (tribes may lack sovereign power over lands but possess full powers of internal self-governance); *see also John v. Baker*, 982 P.2d 738, 754 (Alaska 1999) (to same effect). Only territorial jurisdiction is sufficient to trigger IGRA. *See* 25 U.S.C. § 2710(b)(1) (IGRA allows for Class II gaming "on Indian lands"). Tribal jurisdiction over matters of internal self-governance is not relevant for gauging whether land to which a tribe may have some rights qualifies for Indian gaming under IGRA. Except for the jurisdictional carve-outs discussed above (taxation and hunting), the Tribe possesses only membership jurisdiction, not the land-based jurisdiction required to satisfy IGRA.

As noted by the Tribe, the Massachusetts Settlement Act acknowledges some level of tribal jurisdiction. *See* Tribe's Mtn. at 14. The Tribe's jurisdiction over its own members is implied by the contrasting exclusion of tribal jurisdiction over non-members. 25 U.S.C. § 1771e(a) (Tribal Council "shall not have any jurisdiction over nontribal members"). This provision highlights that the Tribe's jurisdiction is of the membership, not the territorial, sort. This distinction is evident in a previous judicial decision involving the Tribe's susceptibility to state law. *See Wampanoag Tribe of Gay Head (Aquinnah) v. Massachusetts Comm'n Against Discrimination ("MCAD")*, 63 F. Supp. 2d 119, 125 (D. Mass. 1999) (Commonwealth jurisdiction over Settlement Lands does not extend to jurisdiction over the Tribe itself); *see also* Memo and Order on Mots. To Dismiss at 16 (Dkt. # 95) (no inconsistency between *Shellfish Hatchery*'s finding that Tribe had waived sovereign immunity to state and local laws concerning use of Settlement Lands and *MCAD*'s finding that Tribe had not waived sovereign immunity to state law concerning its members).

The Tribe exercises limited membership-related governmental powers subject to this jurisdiction. *See Montana v. U.S.*, 450 U.S. 544, 565 (1981) (membership sovereignty entails

power "to control internal relations"). Cultural and historic preservation fall under membership jurisdiction. *See* Dkt. # 119-3 (Vanderhoop Decl. Exh. B) (historic preservation ordinance); Dkt. # 119-13 (Vanderhoop Decl. Exh. L) (preservation agreement). Enrollment and membership, *see* Dkt. # 119-7 (Vanderhoop Decl. Exh. F), are also membership-based. *See, e.g., Kimball v. Callahan*, 590 F.2d 768, 775-776 (9th Cir. 1979); *John*, 982 P.2d at 751. The creation of a tribal government, *see* Dkt. # 119-8 (Vanderhoop Decl. Exh. G), is also an exercise of membership jurisdiction. *Healy Lake Vill. v. Mt. McKinley Bank*, 322 P.3d 866, 873 (Alaska 2014). And any action pertaining to children's welfare and custody falls under membership jurisdiction. *See John*, 982 P.2d at 753; Dkt. # 119-10 (Vanderhoop Decl. Exh. I) (regulating workers in contact with children), Dkt. # 119-11 (Vanderhoop Decl. Exh. J) (child-abuse reporting), and Dkt. # 119-15 (Vanderhoop Decl. Exh. N) (child welfare agreement). This type of jurisdiction over internal self-governance is not the type of territorial jurisdiction sufficient to trigger IGRA's applicability to "Indian lands."

The Tribe's lack of jurisdiction over non-tribal members highlights the limited nature of its jurisdiction over the Settlement Lands. Appointed tribal rangers may not arrest non-tribal members for violations of law, even if those violations occurred on the Settlement Lands. *See* 25 U.S.C. § 1771e(a) (Tribe has no jurisdiction over nontribal members). Law enforcement is a critical element of sovereignty. *See, e.g., Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 80 (3d Cir. 1994) ("It is fundamental that law enforcement is a core function of government."). It has been considered a central factor in determining whether a tribe exercises sufficient governmental powers for IGRA applicability. *See Cheyenne River Sioux Tribe v. State of S.D.*, 830 F. Supp. 523, 528 (D.S.D. 1993). A tribe's power to prosecute non-members who enter tribal lands is an inherent tribal authority. *United States v. Lara*, 541 U.S. 193, 210 (2004). Here, the Tribe may not exercise jurisdiction over non-members, even when present on tribal

land. 25 U.S.C. § 1771e(a). The membership jurisdiction professed by the Tribe is not adequate to support the applicability of IGRA.[8]

The Tribe has demonstrated membership jurisdiction, but it has not shown—nor could it—that it possesses the territorial powers required under IGRA. Because the Tribe does not possess sufficient jurisdiction or exercise sufficient governmental power over the Settlement Lands to fulfill IGRA's "Indian lands" requirement, IGRA does not apply to permit the Tribe to commence Class II gaming operations.[9]

II. This Court Owes No Deference to the Opinions of Either the DOI or NIGC.

The Tribe asks this Court to apply *Chevron* or *Skidmore* deference to either or both DOI's and NIGC's legal opinions—issued in letters outside of formal notice and comment or any adjudicatory process—concluding that the Tribe may conduct Class II gaming on the Settlement Lands. Tribe's Mtn. at 20-23. The Tribe's argument is misguided for several reasons.

At the threshold, courts give no judicial deference (under any standard) for agency interpretations of statutory provisions expressing a clear Congressional intent (as opposed to a statutory gap implicitly left for an agency to fill) or for agency interpretations resting primarily on analysis of judicial precedent. Both principles apply here. In addition, the First Circuit has ruled that an opinion letter such as NIGC's, analyzing the interplay of IGRA and a federal land claims settlement act, receives no judicial deference. *Passamaquoddy Tribe*, 75 F.3d at 793. DOI's opinion letter was similarly issued outside of formal administrative process and is not entitled to any deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*,

[8] A concern ancillary to the Tribe's lack of jurisdiction would be its practical inability to maintain order and the safety of its gaming patrons through governmental authority.

[9] Even if the Settlement Lands are "Indian lands" to which IGRA could otherwise apply, it could not apply here due to the Massachusetts Settlement Act's prohibition of gaming on the Settlement Lands for the reasons set forth in the Commonwealth's Memorandum of Reasons in Support of its Motion for Summary Judgment at pp. 8-15 and the related filing of the Aquinnah/Gay Head Community Association, Inc. (Dkt. # 121) at pp. 14-20. The Commonwealth expressly relies upon and incorporates by reference those previous arguments in opposition to the Tribe's Motion.

467 U.S. 837 (1984). *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference."). DOI's opinion letter also receives no judicial deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) because it lacks the power to persuade: the agency's analysis is incomplete and is not founded upon a prior body of decision-making expertise. Accordingly, the Court should decline the Tribe's invitation to defer to the opinions of NIGC and DOI.

A. Because Congress Has Spoken to the Issue Presented Here, the Agencies' Opinions Are Not Entitled to Deference.

The Commonwealth previously argued that Congress's intent with respect to tribal gaming is clear: IGRA did not impliedly preempt the Commonwealth's jurisdiction over tribal gaming, conferred through the Settlement Agreement and Massachusetts Settlement Act. Comm. Mtn. at 8-15. Where Congress has clearly expressed its will through statutory enactment, there is no room for judicial deference to agency conclusions to the contrary. *See Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). Thus, no level of deference applies to either NIGC's or DOI's analyses in the face of this clearly expressed Congressional intent.

B. Both NIGC's and DOI's Analyses Rely on Their Interpretation of Judicial Precedent and Thus are Not Entitled to Deference.

Courts do not defer to administrative agencies' interpretations of statutes where "an agency's conclusion rests predominantly upon its reading of judicial decisions." *Passamaquoddy Tribe*, 75 F.3d at 794. DOI's opinion letter—which NIGC's opinion letter incorporates by reference for the relevant conclusions—rests primarily on analysis of three judicial precedents: the First Circuit's decisions in *Narragansett I* and *Passamaquoddy Tribe* and the Fifth Circuit's decision in *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1335 (5th Cir.

1994). *See* DOI Opinion Letter at 16-18. In particular, DOI reached its conclusion based on its application of the holding in *Narragansett I* to the facts of this case, a flawed conclusion for all of the reasons previously argued by the Commonwealth. *See* Comm. Mtn. at 8-16. Because DOI reached its conclusions by interpreting and applying judicial precedent, it is not entitled to judicial deference. *See Passamaquoddy Tribe*, 75 F.3d at 794. It is this Court, and not an administrative agency, that has primary expertise to interpret and apply judicial precedent.

C. The First Circuit Has Held that an NIGC Opinion Letter Addressing IGRA and a Federal Land Claims Settlement Act Receives No Deference.

The Tribe's argument for deference to NIGC's opinion letter fails for yet another reason: the First Circuit has already concluded that such opinion letters are entitled to no judicial deference. In *Passamaquoddy Tribe*, NIGC had considered whether IGRA impliedly repealed provisions in Maine's land claims settlement act, which conferred upon Maine criminal and civil jurisdiction over lands held by the Passamaquoddy Tribe. 75 F.3d at 793-94; 25 U.S.C. § 1725. The Passamaquoddy Tribe argued that NIGC's conclusion that Maine's jurisdiction was impliedly repealed by IGRA was entitled to judicial deference, but the First Circuit rejected that argument. *See id.* For the same reasons that the First Circuit declined to defer to NIGC in *Passamaquoddy Tribe*, this Court should so decline.

D. DOI's Opinion Letter is Not Entitled to Judicial Deference Under Either the *Chevron* or *Skidmore* Doctrines.

1. DOI's Opinion Letter is Not Entitled to Deference Under *Chevron.*

Even assuming that Congress did not unambiguously express its intent regarding the matter, DOI's opinion letter would still not be entitled to judicial deference. The Supreme Court has generally limited the *Chevron* doctrine's applicability to formal adjudications and rulemaking. *See United States v. Mead Corp.*, 533 U.S. 218, 226-30 (2001). Absent Congressional delegation to an agency "to make rules carrying the force of law" and an agency interpretation of a statute "promulgated in the exercise of that authority," *Chevron* deference generally does not apply. *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769

F.3d 1127, 1136 (D.C. Cir. 2014) (quoting *Mead Corp.*, 533 U.S. at 226–27). This is so because "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Mead Corp.*, 533 U.S. at 230.

Here, DOI's opinion letter did not follow a formal administrative procedure. Accordingly, the Court's holding in *Christensen v. Harris County*—overlooked by the Tribe—controls: "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." 529 U.S. at 587; *see also Calvao v. Town of Framingham*, 599 F.3d 10, 18 (1st Cir. 2010) (applying *Christensen* to hold that a Department of Labor opinion letter was not entitled to deference).

To be sure, there are occasional circumstances in which courts grant *Chevron*-level deference to less formal agency interpretations, but that exception to the rule applies only where there is clear Congressional intent that courts defer to the agency. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–257 (1995) (applying *Chevron* deference based on longstanding precedent of agency authority over issue). The Tribe points to no evidence of this. Indeed, IGRA's text lacks any grant of authority to DOI to opine on the status of lands received by Indian tribes under land claims settlements. *See generally* 25 U.S.C. § 2701 *et seq.* By contrast, IGRA does grant DOI other authority, such as approving plans to pay gaming revenues, 25 U.S.C. § 2710(a)(3), and approving gaming compacts between tribes and states, *id.* § 2710(b)(3)(B). Congress knew how to specify when, where, and how DOI would play a role in IGRA. Its decision not to specify a role for DOI to opine on the statutes of settlement lands controls here.[10]

[10] DOI similarly has no corollary role under the Massachusetts Settlement Act because it does not administer that Act. *See generally* 25 U.S.C. § 1771, *et seq.* Instead, DOI has only narrow duties under that Act to implement terms of the settlement, such as using federal and state funds

2. DOI's Opinion Letter is Entitled to No Deference Under *Skidmore*.

As a fallback, the Tribe contends that the DOI's opinion letter merits deference under *Skidmore*. Tribe's Mtn. at 22-23. Again, because the intent of Congress is clear, and because DOI's opinion letter focuses on an analysis of judicial precedent, it receives no difference under *Chevron*, *Skidmore*, or any other doctrine.

Even if this Court were to apply *Skidmore*, DOI's opinion letter would still not be entitled to deference. Under *Skidmore*, an agency opinion gets "respect proportional to its 'power to persuade.'" *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2461 (2013) (quoting *Mead*, 533 U.S. at 235). This power to persuade turns on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *University of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (quoting *Skidmore*, 323 U.S. at 140). In *Mead*, the Court further explained that the degree of deference due under *Skidmore* "has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." 533 U.S. at 228. DOI's opinion letter lacks this power to persuade.

DOI omitted large portions of the central analysis, with three such omissions taking center stage. First, although this case concerns tribal gaming, DOI does not analyze the language of the Massachusetts Settlement Act subjecting tribal lands to Commonwealth and local laws regulating "the conduct of bingo or any other game of chance." While DOI acknowledges that

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to purchase lands for the Tribe. *E.g.*, 25 U.S.C. § 1771d. Accordingly, DOI does not administer the Massachusetts Settlement Act, entitling it to *Chevron* deference based on that act. *See Narragansett I*, 19 F.3d at 696 ("We do not believe the Tribe's cause is aided by the Bureau's tentative expression of support for the position that section 1708 excludes civil regulatory jurisdiction. The Bureau's views are not entitled to any special weight in the interpretation of statutory provisions that it is not charged to execute.") (citations omitted); *but see Passamaquoddy Tribe*, 75 F.3d at 794 ("Here, the question of the Gaming Act's applicability cannot be addressed in a vacuum, and the Commission, whatever else might be its prerogatives, does not administer the Settlement Act. That role belongs to the Secretary of the Interior … and has not been delegated by the Secretary to the Commission.") (citations omitted).

the language exists, it never analyzes how that language affects the issue of implied repeal. *See* DOI Opinion Letter at pp. 15-18; 25 U.S.C. § 1771g. The omission of such analysis vitiates the quality of DOI's conclusions. That language, summarily disregarded by DOI, allows both IGRA and the Massachusetts Settlement Act to work in harmony with no implied repeal.[11] It also serves as a key factor distinguishing Massachusetts' land claims settlement act from the Rhode Island act at issue in *Narragansett I*. [12] *See* Comm. Mtn. (Dkt. # 113), at pp. 11-14.

Second, DOI did not mention the legislative history of the Massachusetts Settlement Act, with respect to the aforementioned language. *See* DOI Opinion Letter at pp. 15-18. DOI did not mention that the Tribe and predecessor to the AGHCA both told Congress that the Tribe would not game on its Settlement Lands and that Congress inserted the important "conduct of bingo or any other game of chance" language into the Massachusetts Settlement Act only after that testimony and near the same time that Congress began considering parallel language regarding "bingo" as Class II gaming in IGRA. Comm. Mtn. (Dkt. #113) at pp. 7-8. DOI's failure to locate or consider that legislative history undermines the persuasiveness of its analysis.

Third, DOI failed to consider that Congress overrode the holding in *Narragansett I* by subsequently legislating that IGRA was not meant to impliedly repeal Rhode Island's jurisdiction over tribal gaming. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104–208, September 30, 1996, 110 Stat 3009, § 330 (amending the Rhode Island Settlement Act (25 U.S.C. § 1708(b)) by specifying that, for the purposes of IGRA, "settlement lands shall not be treated as Indian lands"). This confirmation by Congress of its intent in passing IGRA is

[11] As the Commonwealth previously noted, IGRA does not apply to lands where federal law otherwise prohibits gaming, 25 U.S.C. § 2701(5), and by including gaming specific language, the Massachusetts Settlement Act is one such law. Properly considering that gaming-specific language leads to the conclusion that both enactments work in perfect harmony.

[12] This omission is particularly apparent where DOI writes that the Massachusetts Settlement Act's "purpose is to cover the entire field of relationships between the State and the Tribe while IGRA only affects their relationship related to gaming." *See* DOI Opinion Letter at 17. DOI's conclusion ignores the specificity of the Massachusetts Settlement Act with respect to gaming, a specificity that was lacking from Rhode Island's act in *Narragansett I*, and renders the Massachusetts Settlement Act just as specific to gaming as IGRA. *See* DOI Opinion Letter at 17.

relevant to the analysis here, and its absence from DOI's analysis was another important omission.

Compounding these omissions, DOI has no previously developed expertise in this area. Its analysis does not cite to any prior DOI opinions in factual situations similar to the one here. That is because DOI has no history resolving questions of statutory interpretation between IGRA and Federal land claims settlement acts. Indeed, all of the citations in DOI's letter are to judicial opinions, not DOI opinions. *See* DOI Opinion Letter at pp. 15-18. Because DOI brings no prior decision-making expertise to the questions raised in this case, its letter is not entitled to deference under *Skidmore*.

CONCLUSION

For the reasons set forth herein and in the Commonwealth's Memorandum of Reasons in Support of its Motion for Summary Judgment and in the Memorandum of Law in Support of Intervenor-Plaintiff/Counterclaim Defendant Aquinnah/Gay Head Community Association Inc.'s Motion for Summary Judgment, the Tribe's Motion for Summary Judgment should be DENIED in its entirety.

Respectfully submitted,

THE COMMONWEALTH OF MASSACHUSETTS, CHARLES D. BAKER, in his official capacity as Governor, MAURA HEALEY, in her official capacity as Attorney General, and STEPHEN CROSBY, in his official capacity as Chair, Massachusetts Gaming Commission,

By their attorney,

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Dated: July 23, 2015

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CERTIFICATE OF SERVICE

I, Bryan Bertram, hereby certify that on this 23rd day of July, 2015, I filed the foregoing document through the Electronic Case Filing (ECF) system and thus copies of the foregoing will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF); paper copies will be sent, via first-class mail, to those indicated as non-registered participants.

/s/ Bryan Bertram