UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

THE COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

and

AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. and TOWN OF AQUINNAH,

Intervenor-Plaintiffs/Counterclaim-Defendants,

vs.

THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION,

Defendants/Counterclaim-Plaintiffs,

and

CHARLIE BAKER, in his official capacity as GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, et al.,

Third-Party Defendants.

CASE NO: 1:13-cv-13286-FDS

[Formerly Supreme Judicial Court for Suffolk County, Massachusetts, CIVIL ACTION NO. 2013-0479]

WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH) and AQUINNAH WAMPANOAG GAMING CORPORATION'S OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT FILED BY THE COMMONWEALTH, AGHCA AND THE TOWN OF AQUINNAH

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Defendants[1] Counterclaimants Wampanoag Tribe of Gay Head (Aquinnah) and the Aquinnah Wampanoag Gaming Corporation (collectively "Defendants" or "Tribe"), hereby respond in opposition to Motions for Summary Judgment filed by the Plaintiff Commonwealth of Massachusetts and Third-Party Defendants Governor Charlie Baker, Attorney General Maura Healey, and Massachusetts Gaming Commission Chairman Stephen Crosby (collectively referred to as "Commonwealth" or "State") (doc. 112-114) and by Intervenor-Plaintiffs/Counterclaim-Defendants the Town of Aquinnah ("Town")(doc. 116-118) and the Aquinnah/Gay Head Community Association, Inc. ("AGHCA") (doc. 120-121). On May 28, 2015, the Tribe also filed for Summary Judgment (doc. 119) against all claims brought by the Commonwealth, the Town and AGHCA and in favor of its counter-claims and Third-Party Claims. To avoid duplicity, the Tribe incorporates its Motion for Summary Judgment (doc. 119) into this response in opposition as if fully set forth herein.

I. INTRODUCTION

After the first round of pleadings, all parties agree/concede that the First Circuit Court of Appeals decision in *Rhode Island v. Narragansett*, 19 F.3d 685 (lst Cir.1994) is binding on this Court and sets out the paradigm by which this Court should resolve the dispositive issues on cross-motions for summary judgment. *Narragansett* established a two-step analysis that applies to the issues presented to this Court: first, does the Tribe possess the requisite jurisdiction for the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA") to apply to its Settlement Lands, and second, can the Massachusetts Indian Land Claims Settlement Act, 25 U.S.C. § 1771 et. seq. (the "Federal Act" or "Settlement Act") and IGRA be read together without conflict, and

[1] Although Plaintiffs named the Wampanoag Tribal Council of Gay Head, Inc. as a party defendant, alleging that Defendant Wampanoag Tribe of Gay Head (Aquinnah) "includes"

if not, does IGRA impliedly repeal those portions of the Federal Act regarding gaming? Applying that two-step analysis to the instant litigation, this Court should conclude that the Federal Act did not divest the Tribe of jurisdiction over the Settlement Lands, and therefore, IGRA applies to such lands. Further, this Court should conclude that IGRA impliedly repealed those portions of the Federal Act related to Indian gaming. The Court should also afford substantial deference to the thorough and well-reasoned opinions of the United States Department of the Interior (doc. 107, Exh. W) and the National Indian Gaming Commission ("NIGC") (doc.107, Exh. Z) that reach these same conclusions. This Court cannot properly conclude that the Commonwealth and Town have jurisdiction over gaming activities conducted on the Tribe's Indian Lands, and accordingly, this Court should deny the motions for summary judgment brought by the Commonwealth, AGHCA and the Town.[2] Conversely, this Court should enter summary judgment in favor of the Tribe on its counterclaims and third-party claims.

In deciding whether the Commonwealth has jurisdiction over Indian gaming on the Tribe's lands under the Settlement Agreement, this Court must necessarily determine that IGRA has impliedly repealed, abrogated or preempted any such jurisdiction. IGRA applies to gaming conducted by a tribe on its Indian lands unless Congress, in the exercise of its plenary authority over Indian tribes, divested the tribe of jurisdiction through an exclusive grant of jurisdiction to a state or through an explicit divesture of tribal jurisdiction. Section 1771g of the Federal Act does

[2] The Tribe is responding in the pleading in opposition to three separate motions for summary judgment. Although the Town's brief meets the representations all three entities made to this Court regarding efficiency of briefing, the Commonwealth and AGHCA both submitted extensive briefs that overlap and are duplicitous in many regards. To better guide this Court to the exact argument, authority and analysis, this brief often refers to the specific party's brief. However, the Tribe's analysis set forth herein is intended to apply to the motions submitted by all three entities, the Commonwealth, the Town, and AGHCA.

not grant exclusive jurisdiction to the State, and Section 177le(a) of the Federal Act does not divest the Tribe of jurisdiction over its land. For this reason, IGRA applies to those lands now held by the United States of America in trust for the benefit of the Tribe (the "Settlement Lands"). The Federal Act and IGRA are repugnant to each other regarding their respective provisions related to jurisdiction over gaming, and for this reason, cannot be read in harmony. Additionally, Congress intended for IGRA to cover the entire subject matter and occupy the field. Because (i) IGRA post-dates the Federal Act, (ii) the Federal Act does not contain a savings clause, and (iii) IGRA's applicability furthers Congressional intent, IGRA impliedly repeals those portions of the Federal Act pertaining to the State's jurisdiction over Indian gaming. Therefore, the Federal Act no longer governs the Tribe's gaming on its Settlement Lands.

II. CONCISE STATEMENT OF MATERIAL FACTS

All parties in this litigation jointly filed "Stipulated Facts Not in Dispute" (doc. 107). The Tribe included a Concise Statement of Material Facts in its Motion for Summary Judgment (doc. 119, pp. 3-7) which included a Declaration by Tribal Chairman Tobias Vanderhoop together with several exhibits (doc. 119-1 through 119-18). AGHCA has since taken the deposition of Chairman Vanderhoop (doc. 125-1), and the Town has since filed for preliminary injunctive relief (doc. 125). One of the exhibits, the Operational Plan that is entered under a Tribe-Town Agreement, was intended to be submitted as Exhibit P to the Vanderhoop Declaration (doc. 119-17) but was inadvertently a duplication of Exhibit O. The inadvertent error is now moot as the Town has submitted the Operational Plan into the record as doc. 125-3 (it is also Exhibit 2 to the Vanderhoop Deposition transcript). The transcript of the Vanderhoop deposition has been submitted into the Record by the Town as doc. 125-1. The Tribe intends for

the Operational Plan (doc. 125-3) and the Vanderhoop Deposition Transcript (doc. 125-1) to be considered, along with the Stipulated Facts Not in Dispute (doc. 107) and the Concise Statement of Material Facts (doc. 112, pp. 3-7 and attendants exhibits) as facts and evidence submitted in support of the Tribe's motion for summary judgment and its Opposition to the Commonwealth, AGHCA and Town's motions for summary judgment. All of those facts are incorporated by reference as if fully set forth herein.

III. ANALYSIS AND ARGUMENT

A. The First Circuit Established the Two-Step Analysis to Determine Whether IGRA or the Federal Act Governs Aquinnah's Gaming Activities.

In the Tribe's Motion (doc. 119) it set out the law of this Circuit regarding the dispositive question of whether gaming on the Tribe's Indian lands is governed by IGRA, or by the Federal Act. In *Narragansett,* the land the United States held in trust for the Narragansett Indian Tribe had been received through the Rhode Island Indian Claims Settlement Act ("RIICSA"), 25 U.S.C. § 1701 et. seq. The RIICSA mandated that the settlement lands "shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708. The litigation began when the Narragansett Indian Tribe requested that Rhode Island enter into a tribal-state compact pursuant to IGRA. Rhode Island filed suit in federal district court asking the court to rule that IGRA did not apply to Narragansett's settlement lands, and therefore, the lands were subject to Rhode Island law. The district court found that IGRA controlled because the Narragansett Indian Tribe had jurisdiction sufficient to trigger IGRA, 816 F.Supp. 796 (D. R.I. 1993), and Rhode Island appealed.

The First Circuit in *Narragansett* began by asking whether the RIICSA left the Narragansett Indian Tribe with sufficient jurisdiction over the land, and whether it exercised

governmental power over the land, thereby triggering IGRA. After concluding that IGRA was triggered, the court examined the interface between the two laws, first asking whether IGRA and the RIICSA could be read to give full effect to each, and finding that they could not, secondarily determining that IGRA performed an implied partial repeal of portions of the RIICSA.

The First Circuit[3] addressed a similar question two years later in *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 790-91 (1st Cir. 1996). In *Passamaquoddy,* the Court declined to find an implied repeal because the land claim settlement statute in question contained a savings clause:

> The provisions of any federal law enacted after October 10, 1980 [the effective date of the Settlement Act], for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, ... shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

25 U.S.C. § 1725(b). Significantly, as discussed below, neither the settlement act at issue in *Narragansett,* nor the Federal Act at issue here, contain anything close to such language at issue in *Passamaquoddy.* Words matter. The best face that the Commonwealth, AGHCA and Town can put on their position is that they believe Congress made a mistake by not fully divesting the Tribe of jurisdiction and/or not expressly exempting the Tribe from IGRA's reach. Although the Tribe believes that Congress' words here match its intent such that IGRA applies, the Tribe

[3] Both AGHCA and the Commonwealth refer at various times in their briefs (doc.113, pp. 10,12; doc.121, pp.15-20) to a decision out of the Fifth Circuit, *Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325 (5th Cir. 1994). The language at issue and the legislative history are critically different. The Tribe addresses *Ysleta* in its motion (doc.119, p.19-20) and the United States addresses *Ysleta* in the Solicitor's Opinion (doc. 107, Exh. W, pp.6-7, 17 and notes 95 and 133). That analysis is incorporated by this reference as if fully set forth herein and the Court is encouraged to consider all pleadings and supporting documentation submitted in this litigation in its deliberation of the pending cross-motions for summary judgment.

encourages its opposition to go to Congress, the proper venue to advocate that the alleged mistake needs to be corrected, where it will not be lost on its members that the Commonwealth, while vehemently resisting Aquinnah's efforts for a limited Class II gaming facility, is embracing full blown casino resorts operated by non-Indian entities, has compacted with Massachusetts's other federally-recognized tribe for a full-blown casino resort, and has entertained applications submitted by tribes from other states.

B. Step One: The Tribe Possesses Sufficient Jurisdiction Over the Settlement Lands to Make IGRA Applicable.

The Tribe, in its motion (doc. 119, pp. 10-16) sets forth the First Circuit's criteria to show that the Tribe possesses the requisite jurisdiction for its lands to qualify for gaming under IGRA. Although AGHCA, the Town and the Commonwealth all stipulated as an undisputed fact that the Tribe exercises jurisdiction over the Tribe's lands (doc. 107, ¶ 22), AGHCA contends that the Tribe's jurisdiction is not substantial enough for the lands to qualify for gaming. AGHCA's analysis is disingenuous as to both the law and as to the facts.

The Tribe, in its motion, sets out the First Circuit's legal analysis that a tribe retains jurisdiction over its Indian lands unless Congress has completely proscribed the tribe's jurisdiction[4]. The *Narragansett* Court expressly rejected Rhode Island's argument that AGHCA and the Commonwealth are making here, that language subjecting a tribe to the state's civil and criminal jurisdiction is the same as eliminating the tribe's jurisdiction. It is not. It is curious that they would make the argument, while at the same time stipulate that the

[4] AGHCA tries to rewrite the First Circuit standard as requiring the Tribe demonstrate that it has "full concurrent jurisdiction," (doc. 121, p.12) whatever that means. AGHCA fails to define the term, much less articulate how the standard should be different than the First Circuit's standard as articulated in *Narragansett* and set forth in detail in the Tribe's motion (doc. 119, pp. 10-16).

Tribe does exercise jurisdiction (doc. 107, ¶ 22). It is also curious that they provide to this Court, legislative history of the bill introduced into the 99th Congress in 1986 as if that is the legislative history of the bill introduced into and passed by the 100th Congress in 1987. The 1986 legislation (S. 1452) provides:

> No Indian tribe or band may exercise any form of jurisdiction (whether or not such tribe or band is a federally recognized Indian tribe or band) over any part of the settlement lands, or any other land that may now or in the future be owned by or held in trust for such Indian entity in the town of Gay Head, Massachusetts, except to the extent provided in this Act, the State Implementing Act, or the Settlement Agreement.

See Exhibit A to AGHCA's Declaration of Felecia Ellsworth, doc. 121-2, p. 14 of 36. In sharp contrast, the 1987 legislation that became law provides:

> The Wampanoag Tribal Council of Gay Head, Inc., shall not have any jurisdiction over nontribal members and 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.

25 U.S.C. § 1771e. The House Report accompanying the 1987 legislation that was passed by Congress explained:

> [W]hile the civil and criminal laws of Massachusetts will be applicable on the settlement lands, the [T]ribe will be able to assume concurrent jurisdiction over its own members with the State and the [T]own as long as such jurisdiction is consistent with the civil and criminal laws of the State and the Town."

H. R. REP. No. 100-238, at 6 (1987). The Tribe's motion (doc. 119, pp. 14-15) makes note of the change from the 1986 legislation to the 1987 legislation, and applying traditional canons of statutory construction, the change evidences that Congress deliberately rejected the earlier language. Yet the Commonwealth and AGHCA repeatedly refer this Court to the legislative history of the 1986 language (doc. 113, pp. 6-7 and note 6; doc. 121, p.7 and notes 4 and 5; doc. 121, p.12 note 7) without even informing the Court that it was different language, indeed a different bill before a different Congress than that which the 100th Congress enacted. This

distinction also underscores that Congress did not engage in a wholesale adoption of the 1983 MOU when it exercised its plenary authority over Indian affairs and deliberately limited the application of the MOU, as a matter of supreme federal law.

Even where AGHCA references the 1987 legislation that became law, it attempts to dismiss the significant areas in which Congress rejected the 1983 MOU's invitation to deprive the Tribe of any and all jurisdictional authority. (doc. 121, p.6 note 3) ("The Settlement Agreement creates two exceptions to the Commonwealth's and the Town's jurisdiction and laws, *not material to this litigation*, relating to hunting by tribal members and taxation of real property") (emphasis added). Even if AGHCA was successful in establishing that the Tribe otherwise possessed no jurisdiction, the "two exceptions" beyond the reach of the Commonwealth or the Town, hunting and taxation of real property, demonstrate tribal jurisdiction over tribal lands sufficient to establish the eligibility of the Tribe's trust lands for gaming. The "two exceptions" are certainly "material to this litigation," indeed they are independently sufficient to establish the requisite jurisdiction. Additionally, AGHCA's concession regarding the two exceptions defeats yet again the position that the 1987 Federal Act was a wholesale adoption of the 1983 MOU. It was not.

The facts demonstrate that Aquinnah's exercise of jurisdiction on its lands is robust and extensive, far in excess of the minimal threshold required to satisfy the first step in the two-step analysis. AGHCA's motion (doc. 121, pp. 11-14) attempts to minimize the Tribe's jurisdiction by engaging in *non-sequitur* reasoning that to exercise jurisdiction consistent with the laws and regulations of the Commonwealth and the Town is not the exercise of jurisdiction at all. AGHCA even goes so far as to assert that the Commonwealth and the Town exercise their jurisdiction to the "exclusion" of the Tribe.

> "subject to two nonmaterial exceptions, the Commonwealth and the Town retain *exclusive* civil regulatory and criminal jurisdiction over the Tribe's lands"

(doc. 121, p.11) (emphasis added);

> "these provisions establish that the Commonwealth and the Town have *exclusive* jurisdiction [5]. . .over all activities and uses of lands within the Town, and most pertinently, *exclusive* jurisdiction and authority to regulate gaming on lands in the Town, to the exclusion of the Tribe.

(doc. 121, p.12) (emphasis added). AGHCA also tries to make use of *dictum* in litigation brought by the Narragansett Tribe against the NIGC after Congress adopted the Chafee Amendment (discussed in greater detail in subsection F, below). As noted in both the Tribe's and the Commonwealth's initial motions (doc. 119, p.9 note 2; doc. 119, p. 20, doc. 113, pp.14-15)

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[5] The deleted/ellipsis portion reads "over non-tribal members and." Although not necessary for the showing of sufficient jurisdiction for the lands to qualify for gaming under IGRA, the Tribe does not concede that the Federal Act is a complete bar of tribal jurisdiction over non-members. The Federal Act does not read as AGHCA wants it to read. The Federal Act reads:

> The Wampanoag Tribal Council of Gay Head, Inc., shall not have any jurisdiction over nontribal members and 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.

25 U.S.C. § 1771e.

The sentence contains a dangling modifier. Does the phrase "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" modify only "shall not exercise any jurisdiction over any part of the settlement lands" or does it also modify "shall not have any jurisdiction over nontribal members"? Applying the Indian canon of construction (doc. 119, pp. 8-9) to interpret that ambiguity in favor of the Tribe, the proper interpretation as to non-members reads: "shall not have any jurisdiction over nontribal members 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" This reading is also the more logical. Persons can enter into contracts and consensual relationships with the Tribe whereby they openly embrace the Tribe's jurisdiction, and do so without contravening the laws of the Commonwealth or the Town.

after the First Circuit's decision in *Narragansett,* Congress enacted legislation expressly stating that IGRA does not apply to the Narragansett Tribe, discussed in greater detail below. AGHCA seizes on *dictum* where the D.C. Circuit observed that "[t]he Catawba Indians' and the Wampanoag Tribal Council's settlement acts specifically provide for exclusive state control over gambling." *Narragansett v. National Indian Gaming Commission*, 158 F.3d 1335, 1341 (D.C. Cir. 1998). That *dictum* runs contrary to the First Circuit's analysis that subjecting a tribe to state civil and criminal laws is not a divestment of the tribe's jurisdiction. That *dictum* runs contrary to the legislative history of the 1987 Federal Act that was enacted by Congress (rather than the legislative history of the 1986 version upon which AGHCA and the Commonwealth improperly rely). Even if IGRA had never become law, and the Federal Act clearly governed the Tribe's gaming activities, the Tribe would still be able to govern gaming on its lands to the extent it was not in contravention with State or Town law. The Tribe would be free to require tribal licenses of tribal employees and tribal vendors. The Tribe would be free to impose strict minimum internal controls and procedures and otherwise dictate how business is to be conducted, so long as such gaming activities did not contravene state law. The *dictum* in Narragansett's litigation over the Chafee Amendment is simply wrong.

All parties in this litigation stipulated that "[t]he Commonwealth, the Town, and the Tribe have each exercised jurisdiction over the Settlement Lands pursuant to the provisions of the Federal Act" (doc. 107 at ¶ 22). That stipulated fact is alone sufficient to meet the first step of the *Narragansett* two-step analysis. The Tribe's actual exercise of its jurisdiction over the Settlement lands, however, far exceeds the threshold requirements. The Tribe in its motion (doc. 119, pp. 11-12) together with the Declaration of Chairman Vanderhoop and accompanying exhibits establishes that the Tribe regularly asserts its jurisdiction over its

Settlement Lands, manifested in many ways. The transcript of AGHCA's deposition of Chairman Vanderhoop (doc. 125-1) reinforces his Declaration. No doubt that AGHCA will in its brief in opposition to the Tribe's motion attempt to use the transcript in an attempt to minimize the breadth of that jurisdiction. The Tribe will have to await the opportunity in the reply brief to rebut AGHCA, but the Court is encouraged now to review both the Chairman's Declaration and deposition transcript, and the exhibits attached to each. They reveal that the Tribe's exercise of its jurisdiction over its Settlement Lands is robust and extensive. AGHCA appears intent on creating a dispute over the exact outer parameters of the Tribe's jurisdiction, but for purposes of the pending cross-motions for summary judgment, this Court need not define those exact outer parameters. Rather this Court need only find that the Tribe's jurisdiction exceeds the minimal threshold required to satisfy the first step in the two-step analysis set forth by the First Circuit in *Narragansett*.

C. Step Two: IGRA Impliedly Repeals Those Portions of the Federal Act that Otherwise Grant Jurisdiction to the Commonwealth, and its Political Subdivisions, Regarding Gaming.

The Tribe's motion (doc. 119, pp. 16-20) set out the analysis that IGRA supersedes the Federal Act, that Congress impliedly repealed those provisions of the Federal Act which vested the Commonwealth and the Town with jurisdiction over gaming activities on the Tribe's Indian lands. Applying the First Circuit's established criteria regarding implied repeal, the *Narragansett* Court found that IGRA impliedly repealed the RIICSA as to gaming activities on Narragansett's Indian lands:

> It is evident that the Settlement Act and the Gaming Act are partially but not wholly repugnant. The Settlement Act assigned the state a number of rights. Among those rights—and by no means one of the rights at the epicenter of the negotiations leading up to the Act—was the non-exclusive right to exercise jurisdiction, in all customary respects save two, (citation omitted), over the settlement lands. The Gaming Act leaves undisturbed the key elements of the compromise embodied in the Settlement Act. It also leaves largely intact the grant

> of jurisdiction—but it demands an adjustment of that portion of jurisdiction touching on gaming. Even in respect to jurisdiction over gaming, the two laws do not collide head-on. Thus, in connection with class III gaming, the Gaming Act does not in itself negate the state's jurisdiction, but, instead, channels the state's jurisdiction through the tribal-state compact process. It is only with regard to class I and class II gaming that the Gaming Act *ex proprio vigore* bestows exclusive jurisdiction on qualifying tribes. And it is only to these small degrees that the Gaming Act properly may be said to have worked a partial repeal by implication of the preexisting statute. In the area in which the two laws clash, the Gaming Act trumps the Settlement Act for two reasons. First, the general rule is that where two acts are in irreconcilable conflict, the later act prevails to the extent of the impasse. See *Watt v. Alaska*, 451 U.S. 259, 266, 101 S.Ct. 1673, 1677 (1981); *Tynen*, 78 U.S. (11. Wall.) at 92[6]; see also 2B (Norman J) Singer, Sutherland on Stat. Const., § 51.02, at 121 (5th ed. 1993). Second, in keeping with the spirit of the standards governing implied repeals, courts should endeavor to read antagonistic statutes together in the manner that will minimize the aggregate disruption of congressional intent. Here, reading the two statutes to restrict state jurisdiction over gaming honors the Gaming Act and, at the same time, leaves the heart of the Settlement Act untouched. Taking the opposite tack—reading the two statutes in such a way as to defeat tribal jurisdiction over gaming on the settlement lands—would honor the Settlement Act, but would do great violence to the essential structure and purpose of the Gaming Act. Because the former course keeps disruption of congressional intent to a bare minimum, that reading is to be preferred. Based on our understanding of the statutory interface, we hold that the provisions of the Indian Gaming Regulatory Act apply with full force to the lands in Rhode Island now held in trust by the United States for the Narragansett Indian Tribe.

19 F.3d at 704-705. The same analysis applied to the Federal Act leads to the same result. This is set forth in the Tribe's motion (doc. 119, pp.16-20) and in great detail in the August 23, 2013 opinion from the Office of the Solicitor, United States Department of the Interior (Doc. 107, Exh. W).

Indeed, IGRA's legislative history did suggest that Narragansett was to be excluded from IGRA and the *Narragansett* Court found that such legislative history did not overcome its conclusion that the RIICSA was partially repugnant to IGRA. 19 F.3d at 700 and note 17. In sharp contrast, there is no similar passage in IGRA's legislative history regarding the

[6] *United States v. Tynen*, 78 U.S. 88 (1870)

Massachusetts Indian Claims Settlement Act (or Federal Act). Further, as discussed in the Tribe's motion (doc. 119, p. 19), if Congress had intended for the Federal Act to be protected from implied repeal resulting from subsequent legislation enacted for the benefit of Indian tribes, it certainly had the tools available to do so. The First Circuit found that Congress employed that tool to prevent the Maine tribes from conducting gaming under IGRA. *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 790-91 (1st. Cir. 1996). Congress did not include any such language in the Federal Act.

The Commonwealth and AGHCA both repeat the same case law that the *Narragansett* Court acknowledged, disfavoring implied repeals (doc. 121, pp. 15-16; doc. 113, pp. 11-12). Since *Narragansett*, the First Circuit has been consistent in applying these same criteria and while acknowledging that implied repeals are disfavored, has found implied repeal where the requisite criteria are met. See, *Greenpack of Puerto Rico Inc. v. American President Lines,* 684 F.3d 20, 24 n.4 (1st Cir. 2012) (found implied repeal of statutory law governing damages to goods in transit – later statute covered circumstances at sea, but not circumstances at port and otherwise not at sea); *Greenless v. Almond,* 277 F.3d 601, 608 (1st Cir. 2002) (Congress' approval of Master Settlement Act –tobacco- impliedly repealed reach of civil rights plaintiff to reach Master Settlement funds); *Granite State Chapter v. Federal Labor Relations Authority,* 173 F.3d 25 (1st Cir. 1999)(found implied repeal – appropriations rider restricting use of DOD funds from lobby efforts impliedly repealed Union's statutory right to lobby); *Complaint of Metlife Capital*, 132 F.3d 818 (1st Cir. 1997) (found implied repeal – oil spills being subject to different regulatory and jurisdictional regimes are irreconcilable).

Narragansett found an implied repeal based on the repugnancy and irreconcilability between IGRA and the Federal Act. As noted by the standards set forth in the preceding case

law, finding an implied repeal is also appropriate where the later act covers the whole subject matter area and was meant as a substitute. As noted in its July 1, 2014 Order denying the Commonwealth's motion for remand, this Court acknowledged that the issue is "a question that this Court is empowered to decide" (doc. 31, p. 11). The Court then identified the strong authority for finding complete preemption and concluded that although it need not resolve the issue in the decision denying remand, it found the authority to be "further evidence of the strong federal interest at issue here" (doc.31, p.12). The Tribe fully briefed this issue in its Opposition to the Commonwealth's Motion to Remand (doc. 21, pp.17-19) and incorporates that analysis and supporting authority by this reference as if fully set forth herein. Subsequent to that briefing, another federal District Court concluded that IGRA completely preempts the field, *Alabama v. PCI Gaming Authority,* 15 F.Supp. 1161, (M.D. Ala. 2014), *appeal pending,* Dk. No. 14–12004–DD (11th Cir.). The preemptive reach of IGRA reinforces the correctness of finding an implied repeal under the repugnancy/irreconcilability criteria, and the repugnancy/irreconcilability of IGRA and the Federal Act reinforce the correctness of finding an implied repeal under IGRA where the later act covers the whole subject.

The Commonwealth and AGHCA attempt to distinguish the circumstances here from those present in *Narragansett*. They argue that IGRA being enacted by the same 100th Congress, one year and two months after the passage of the Federal Act, means Congress intended to exclude Aquinnah from gaming under IGRA (doc. 113, pp. 11-14; doc. 121, pp. 17-19). They argue that the inclusion of gaming-specific language means that the Federal Act is not repugnant to IGRA, and they wrongly assert that the Federal Act's gaming language is a federal prohibition of gaming on the Tribe's Indian lands (doc. 113, pp. 8-11; doc. 121, pp. 14-16). These arguments are unavailing.

Congress was deliberating a comprehensive statute to occupy the field and govern gaming activities on Indian lands at the time that the Federal Act was passed by Congress. Indeed, Congress had considered several different approaches to a comprehensive scheme to govern Indian gaming beginning in 1983, with the introduction of H.R. 4566, Indian Gambling Control Act (98th Congress). *See* Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where are We Going?*, 26 Creighton L. Rev. 387, 396 (1993). Several bills were introduced and Committee hearings were convened each year thereafter through 1988. Yet, no consensus was reached with enough votes for passage until the passage of IGRA. Accordingly, it was prudent for Congress to address the matter in the context of the Federal Act to serve as a placeholder to govern Aquinnah's gaming activities while Congress was deliberating comprehensive legislation. The Commonwealth's conjecture that Congress must have intended the language in the Federal Act to control over IGRA because they were enacted a year and two months apart has no basis in the language or in the legislative history of either Act. The true context is that Congress was aware at the time of enacting the Federal Act that it would likely pass legislation establishing a comprehensive scheme for the regulation of Indian gaming, but Congress was not aware of what the comprehensive scheme ultimately would be.

The Commonwealth's and AGHCA's use of the case law to support their contention that the Acts being passed by the same Congress voids what otherwise would qualify as an implied repeal, is dubious. The Supreme Court in *Traymor v. Turnage,* 485 U.S. 535 (1988) did note that the two statutes at issue were adopted in the same year, but based its decision applying the standard criteria to determine that there was not an implied repeal between the anti-discriminatory provisions of the Rehabilitation Act and the statutory limitations to review decisions of the Veterans Administration. *Id.* at 547. The *Traymor* Court did not conclude that

its decision would be different if the statutes had been passed in separate sessions of Congress. Both the Commonwealth and AGHCA cite to an old 1934 case from the Second Circuit (doc. 113, p. 12; doc. 121, p. 17), *Pullen v. Morgenthau*, 73 F.2d 281 (2nd Cir. 1934), which does say the presumption against implied repeal is stronger when the subject statutes are passed by the same Congress. *Id.* at 283, but the admiralty statutes at issue were passed within nine days of each other and the opinion fails to inform how the timing would undo an otherwise proper analysis of implied repeal. AGHCA's final citation is a dissenting opinion where then-Justice Rehnquist criticized the Court majority for having found an implied repeal where the statutes at issue were passed by the same Congress. *Washington County v. Gunther,* 452 U.S. 161, 188 and 193 (1981). The majority of the *Gunther* Court was not persuaded by the argument.

The Commonwealth argues that the inclusion of the gaming language in the Federal Act distinguishes it from the RIICSA because it allows the Federal Act to be read in harmony with IGRA. Both the Commonwealth and AGHCA make these self-serving conclusory statements of harmony, but neither explain how it would change the analysis in Narragansett:

> Taking the opposite tack—reading the two statutes in such a way as to defeat tribal jurisdiction over gaming on the settlement lands—would honor the Settlement Act, but would do great violence to the essential structure and purpose of the Gaming Act.

19 F.3d at 705. Indeed, the Federal Act's provision regarding lack of jurisdiction over non-members results in greater violence here that at issue in *Narragansett*. For example IGRA, through the Gaming Ordinance approved by the NIGC, IGRA provides tribal jurisdiction through the Tribal Gaming Commission's licensing authority over non-member employees, non-member vendors, and patron disputes. (doc. 107, Exh. X). The Commonwealth's argument begins with a partial citation to one of the Congressional findings in the passage of IGRA, the full text which provides:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2701(5). The Commonwealth then asserts "[h]ere, the Massachusetts Settlement Act's language subjecting the Settlement Lands to the Commonwealth's and the Town's civil jurisdiction constitutes such a federal prohibition" (doc. 113, p. 9). But the Federal Act does not prohibit gaming. Rather, the Federal Act allows gaming consistent with Commonwealth and Town law. Commonwealth law has certainly changed to now embrace full-blown casino gaming. Although the Town repeatedly asserts that its by-laws and zoning laws now and those in place in 1983 prohibit gaming, no such prohibitions exist in either the 1983 or current by-laws and zoning laws, and even if they did, the sea change in Massachusetts state law now provides that the Town could be eligible for full-blown casino gaming and the Town could at all times since 1983 affirmatively authorize bingo or allow for the multifaceted and aggressive Massachusetts Lottery. *See also*, the Solicitor's opinion (doc. 107, Exh. W. at note 95 "Although section 1771g of the Settlement Act does specifically apply State gaming law to the Settlement Lands, it does not 'prohibit' gaming activity"). The bottom line is that the Settlement Act does not constitute a federal prohibition against gaming.

Even if the language in the Federal Act did constitute a federal prohibition against gaming (which it does not), *Narragansett* instructs that the Settlement Act is still repugnant to IGRA. The Commonwealth and AGHCA make issue of the added language regarding gaming, but it is redundant. The civil and criminal laws of the Commonwealth and the Town, by definition, include its gaming laws. There is no need for additional language. If the intent of the additional language was to preclude the Tribe from being subject to future Acts of Congress intended for the benefit of Indian tribes, then Congress would have used the savings clause language it applied to the Maine tribes, discussed above. It did not.

D. The Tribe's Position in this Litigation is Supported by the Interpretations of the Two Federal Agencies Designated by Congress to Interpret and Implement the Federal Act and IGRA.

The NIGC's approval of the Tribe's Gaming Ordinance was supported by the Department of the Interior's and NIGC's issuance of two formal legal opinions confirming that the Tribe may conduct gaming activities under IGRA on its existing trust lands (doc. 107, Exhibits W and Z). The Tribe's motion (doc. 119, pp. 20-23) summarizes those opinions, places them in context, and offers them as persuasive authority for the Court's consideration, particularly the Solicitor's opinion that acknowledges and addresses the Commonwealth's position. The Tribe's motion also establishes that these two opinions are deserving of *Chevron*[7] and/or *Skidmore*[8] deference by this Court. Surprisingly, the opinions are not even referenced in the motions of the Commonwealth, AGHCA or the Town, but those opinions apply with equal persuasive authority in opposition to their motions for summary judgment and appropriate deference in opposition to their motions.

E. The Tribe is Not in Breach of Contract

AGHCA argues (Doc. 121, pp. 4-8) that even if IGRA supersedes the Federal Act, the Tribe is still in breach of contract (the 1983 MOU) and therefore cannot conduct gaming on its trust lands. AGHCA even goes so far as to assert that such is "the law of the case" (Doc. 121, p. 4) by means of this Court's ruling that the Tribe is estopped from arguing that sovereign immunity bars AGHCA's claims. This Court has already addressed AGHCA's breach of contract issue, but not in the context of applying and extending the *Shellfish* case[9] in the manner advocated by

[7] *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)
[8] *Skidmore v. Swift Co.*, 323 U.S.134, 139, 65 S.Ct. 161, 164 (1944).
[9] *Bldg. Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1 (2004).

AGHCA (to divest Congress of its plenary authority over tribal affairs). Rather, this Court has already ruled that if the Tribe is correct that IGRA supersedes the Federal Act, the Tribe is not in breach of contract:

> Resolution of the gaming jurisdiction issue is unquestionably "necessary" to the Commonwealth's case. The Commonwealth would not be responsible for the enforcement of gaming laws—and the Tribe would not violate Massachusetts law—if the Tribe, rather than the Commonwealth, had jurisdiction over the Settlement Lands.

July 1, 2014 Order at p.7. AGHCA's argument simply begs the question as to whether IGRA impliedly repealed the Settlement Act regarding gaming on the Tribe's Indian lands. Even if there was a breach of contract (which there is not), no party advocating the breach of contract theory has presented any argument that it has insufficient contractual remedies that would warrant any relief other than monetary damages.

F. The Commonwealth, AGHCA and Town's Proper Venue for Recourse is to Petition Congress to Amend the Federal Act.

In 1996, the RIICSA at Section 1708 was amended to expressly preclude Narragansett's Indian lands from qualifying under IGRA. See Omnibus Consolidated Appropriations Act, 1997, Pub.L. 104-208, September 30, 1996, 110 Stat. 3009 § 330 (amending the RIISCA, 25 U.S.C. § 1708(b) by specifying that for the purposes of IGRA Narragansett's Settlement lands shall not be treated as Indian lands under IGRA). That amendment was a direct result of the First Circuit issuing its opinion in *Narragansett*. No similar amendment has been made to the Federal Act at issue here. The 1996 Chafee Amendment underscores the Commonwealth's and Intervenors' appropriate venue for seeking their desired result; the United States Congress.

Both the Tribe's and the Commonwealth's initial motions (doc. 119, p. 9 note 2; doc. 119, p. 20, doc. 113, pp.14-15) bring this post–*Narragansett* development to the Court's attention. The Commonwealth, however, suggests that this Court should skip over Congress and judicially

amend the Federal Act in a fashion similar to the Chafee Amendment. Words similar to those articulated by the Chafee Amendment expressly making Narragansett's Indian lands ineligible under IGRA appear nowhere in the Federal Act. Perhaps it is an understatement, but the Tribe believes the more prudent course would be for this Court to direct the Commonwealth to Congress to redress its grievance.

CONCLUSION

For the reasons set forth herein, and in the Tribe's Motion for Summary Judgment (doc. 119) and based on the pleadings and submissions to the record in this litigation, the Motions for Summary Judgment filed by Commonwealth (doc. 112-114), the Town (doc. 116-118) and AGHCA (doc. 120-121) should be denied and the Tribe's Motion for Summary Judgment (doc. 119) should be granted.

DATED: July 23, 2015

Respectfully Submitted,

/s/ Scott Crowell

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CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH) and AQUINNAH WAMPANOAG GAMING CORPORATION'S OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT FILED BY THE COMMONWEALTH, AGHCA AND THE TOWN OF AQUINNAH were filed through the ECF System and therefore copies 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.

Dated: July 23, 2015

/s/ Scott Crowell
SCOTT CROWELL