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]

LEAVE TO FILE GRANTED ON AUGUST 18, 2015.

WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH) and AQUINNAH WAMPANOAG GAMING CORPORATION'S REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Defendants[1] Counterclaimants Wampanoag Tribe of Gay Head (Aquinnah) and the Aquinnah Wampanoag Gaming Corporation (collectively "Defendants" or "Tribe"), hereby reply in support of their Motion for Summary Judgment (doc. 119), responding to the three opposition briefs 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. 131), by Intervenor-Plaintiffs/Counterclaim-Defendants the Town of Aquinnah ("Town") (doc. 132) and the Aquinnah/Gay Head Community Association, Inc. ("AGHCA") (doc. 134). On July 23, 2015, the Tribe also filed its opposition (doc.133) to motions for summary judgment filed by the Commonwealth (docs. 112-114), the Town (docs. 116-118) and AGHCA (docs. 120-121). To avoid duplicity, the Tribe incorporates its Opposition brief (doc. 131) into this response in opposition as if fully set forth herein, as well as all pleadings it has previously submitted in this matter.

I. INTRODUCTION

After the first two rounds 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

[1] Although Plaintiffs named the Wampanoag Tribal Council of Gay Head, Inc. as a party

without conflict, and if not, does IGRA impliedly repeal those portions of the Federal Act regarding gaming?

The bulk of the arguments set forth in the opposition briefs filed by the Commonwealth, Town and AGHCA have already been addressed in the Tribe's pleadings. To avoid duplicity, the Tribe focuses this reply brief on arguments and facts not previously addressed. Applying the two-step *Narragansett* analysis to the instant litigation, 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.

II. ANALYSIS AND ARGUMENT

A. 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 the 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), the AGHCA and the Commonwealth now contend that the Tribe's jurisdiction is not substantial enough for the lands to qualify for gaming. This issue is thoroughly briefed by the Tribe in its motion for summary judgment (doc. 119, pp. 6-10) and its brief in opposition to the motions for summary judgment filed by the Commonwealth, Town and AGHCA (doc. 133, pp. 6-11).

[2] The Tribe is responding in the reply pleading to three separate opposition briefs. 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.

This reply brief is focused on those arguments that appear for the first time in the briefs filed in opposition to the Tribe's motion.

AGHCA attempts to dismiss the undisputed fact to which it stipulated, that the Tribe exercises jurisdiction over its Indian lands (doc. 107, ¶ 22) by renaming their stipulation of undisputed fact as a "contention" and asserting that it provides "nothing meaningful given the applicable framework and analysis (doc. 134, p. 4, note 2). The Commonwealth attempts to dismiss the undisputed fact to which it stipulated by contending the Tribe's jurisdiction is limited to jurisdiction over its members even though doc. 107, ¶ 22 clearly references jurisdiction over the Tribe's Indian lands. Both AGHCA and the Commonwealth then attempt to alter the *Narragansett* paradigm to require something more than concurrent tribal jurisdiction. Additionally, AGHCA attempts to dismiss the Tribe's evidence of its actual exercise of jurisdiction as meaningless. Although the Tribe takes great issue with AGHCA's attempts to minimize the Tribe's actual jurisdiction, and will address those attempts in greater detail below, the undisputed fact that the Tribe does exercise jurisdiction over its lands and AGHCA's concession that the Federal Act does not divest the Tribe of its concurrent jurisdiction over its lands is sufficient to establish the land's eligibility for gaming under IGRA.

The Commonwealth takes a somewhat different tactic and argues that the Tribe's jurisdiction as stipulated by the Commonwealth, is best characterized as the type of jurisdiction possessed by private corporations, which of course lack any governmental authority whatsoever (doc. 131, pp. 2-4). Like AGHCA, the Commonwealth is bound to the stipulation of undisputed facts, and its analysis is unavailing. At the time of the 1983 MOU, the Tribe was not a federally-recognized Indian tribe. It achieved federal recognition in 1987

in an administrative process completely separate and apart from the Federal Act. As set out by the First Circuit in *Narragansett*, upon federal recognition, the Tribe's inherent sovereign authority that it always possessed is, going forward, fully recognized as a matter of federal law, and the now-federally-recognized Tribe possesses the full reservoir of governmental power, except as expressly proscribed by Congress. 19 F.3d at 694 ("the Tribe is mistaken in its professed belief that it lacked jurisdictional power at the time of the Settlement Act. Federal recognition is just that: recognition of a previously existing status"). The Commonwealth's argument that the Tribe has only such governmental authority as was affirmatively granted in the 1983 MOU ignores the material change in status of the Tribe from a non-profit corporation under the laws of the State to a federally-recognized Indian tribe under the laws of the United States.

The Commonwealth rests its argument on a portion of the 1983 MOU addressing the future recognition of the Tribe, but that language was not incorporated into the Federal Act and none of the parties to the 1983 MOU had any capacity to restrict Congress' plenary authority over Indian tribes and Indian affairs. This point is also bolstered by the fact that the Tribe's lands were deeded to the United States to be held in trust for the benefit of the Tribe. If the MOU was the governing document, those lands would have been transferred to a non-profit corporation organized under the laws of the Commonwealth. Despite the Commonwealth's and AGHCA's assertions to the contrary, the Tribe received federal recognition, the lands are now federal trust lands, the non-profit corporation has been dissolved, and the Tribe is no longer a private corporation (if it ever was).

The Tribe submitted the Declaration of its Chairman, Tobias J. Vanderhoop, which includes several examples of Tribal Codes and intergovernmental agreements that are

demonstrative of the Tribe's jurisdiction (doc. 119-1 and Exh. A-Q). The submission prompted AGHCA to take the Chairman's deposition (doc. 125-1) and question him as to most (but not all) of the exhibits. AGHCA's opposition brief attempts to take the Chairman's Declaration, its Exhibits and the deposition testimony, and misconstrue them to evidence a minimization of the Tribe's exercise of its governmental power. Their improper attempts to rewrite history and render the Tribe to be a mere corporation are unavailing.

The Tribe is struggling, due to a lack of adequate funding or governmental revenue, to fully exercise its sovereign authority, including the exercise of jurisdiction concurrent with the Commonwealth. Nevertheless, the Tribe's actual extensive, multi-faceted and thorough exercise of its governmental authority, struggling aside, far exceeds the minimum threshold established by the *Narragansett* decision. This Court is encouraged to review the Vanderhoop deposition transcript (doc. 125-1 through 1) in its entirety[3]. AGHCA's assessment of a portion of the deposition testimony is addressed below, but before responding to those arguments, the Tribe directs this Court to portions of the deposition which AGHCA does not address.

AGHCA systematically addresses the codes and intergovernmental agreements attached to the Vanderhoop Declaration, but conveniently fails to address Exhibit B, the Wampanoag

[3] Both AGHCA (doc. 134, p. 4) and the Commonwealth (doc. 131, p. 2.note 2) take issue with Chairman Vanderhoop's statements in deposition as being from a "lay" witness offering "legal" conclusions, even though AGHCA noticed the deposition and asks for his understanding. The Tribe proffers that Chairman Vanderhoop qualifies as an expert able to render opinions as to the exercise of tribal sovereignty. Per the questions posed by AGHCA, Chairman Vanderhoop has a Masters Degree in Public Administration from the Harvard University Kennedy School of Government, and Bachelor's degree in Community Planning and Management from U-Mass Boston, has more than twenty years working in all aspects of Tribal government and has been on Tribal Council, with the exception of a short time, since 1999, for which he currently serves as Tribal Chairman (doc. 126, pp. 5-6 of 36, transcript pages 10-17). Even if not designated as an expert, his answers are his understanding of the law and should be extremely helpful to this Court's deliberations.

Tribe of Gay Head (Aquinnah) Tribal Historic Preservation Office Ordinance. When the fact that AGHCA did not address Exhibit B was pointed out, and Chairman Vanderhoop was asked to describe the Ordinance, he attested:

> The Tribal Historic Preservation Ordinance is the exercise of the tribe's ability to protect cultural resources and tribal culture and intellectual property on tribal lands and elsewhere through the National Historic Preservation Act as well as Native American Graves Repatriation Act. There are responsibilities to the tribal historic preservation officer in which she is able to enforce through consultation the stoppage of activities that would necessarily affect burials and other items -- other cultural resources that may have not been -- that the contractors may not have been aware were there. But it's our ability to enforce the protection of cultural resources affiliated to our tribe, not only on our tribal lands, but, you know, certainly well into our ancestral territory.

(doc. 127, p. 31 of 33, transcript pages 255-256).

AGHCA conveniently fails to include the Chairman's response to its questions regarding the Tribe's role in providing health care to its members, wherein the Chairman clearly states the Tribe has been designated by the United States as a "self-governance tribe" and, accordingly, operates its own clinic on its trust lands in providing services to its members. (doc. 127, p. 23 of 33, transcript pages 224-225). When later asked what exactly is a "self-governance tribe," the Chairman responded:

> The self-governance program is available to, you know, what one might call a mature tribal government. When a tribal government is able to show that they have, you know, a firm grasp on fiscal responsibility, they are then able to apply for the special designation of self-governance, which allows for both BIA programs and IHS programs to be compacted rather than contracted, which is – you know, an immature tribe is required to hold a contract, where, you know, sort of the manipulation of those funds is more dictated from their regional office. Under the self-governance program, the tribe can redesign and redirect their funds when they're given it all in one lump sum at the beginning of a fiscal year and create new programs that may not necessarily have existed under, you know, the average contract so that they can better serve their tribal members. And, as I said, it's a mature tribal government program.
>
> Q. And what is the status of the Aquinnah tribe?
>
> A. We have a self-governance compact in both the BIA and the IHS.

> Q. And in the context of your compact status with the IHS, what type of services does that include?
>
> A. It allows us to provide some direct services through our health clinic, as well as additional services through the purchase and referred care program. It's a new term, so I'm still getting used to it. But under that, we contract directly – you know, the health service contracts directly with any number of medical care providers, and we pay for those services directly on behalf of tribal members who are enrolled in the Indian Health - in the Wampanoag health service.
>
> Q. And in terms of the compact status with the BIA -- BIA stands for Bureau of Indian Affairs?
>
> A. Yes.
>
> Q. And what type of services does that include?
>
> A. That includes all -- you know, the majority of the government functions, you know, and - other than the health service side. So it supports all of our, you know, overall administration. We are able to provide education, education scholarships, as well as advocacy through the education department and youth programs. We provide natural resources, programs that, you know, maintain all of the tribal lands, you know, from the Face of the Cliffs all the way to the interior tribal lands that our tribal members live on. Let's see. We have trust services, which is just our relationship with the Bureau of Indian Affairs, ensuring for the protection of, you know, and maintenance of our trust lands, which is why the Interior -- Department of Interior is actually intervening on some of those tax issues that I was referring to earlier in the day. Let's see. I think I have covered the major programs. Of course, we have finance and, you know, just the other ancillary governmental functions that are necessary to run a sovereign nation.

(doc. 127, p. 29 of 33, transcript pages 246-249). The federal self-governance designation plays a significant role in advancing the federal policy of promoting strong tribal government. See, Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, And Future Of Tribal Self-Governance Under The Indian Self- Determination And Education Assistance Act*, 39 Am. Indian Law Rev. 1 (2014-15); S. B. Dean, *Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination*, 36 Tulsa L. J. 349 (2000).

AGHCA also conveniently omits the Chairman's testimony that the Tribe has been designated for treament in the same manner as a state in all five categories designated by the United States Environmental Protection Agency. (doc. 126, p. 14 of 36, transcript pages 48; doc. 127, pp.3-31, transcript pages 253-254). The five categories are (1) the Clean Air Act, 42 U.S.C. §§ 7401 et seq., 40 C.F.R § 49.1, (2) the Clean Water Act, 33 U.S.C. §§ 1251 et seq., 40 C.F.R. § 131.8 (3) the Safe Drinking Water Act, 42 U.S.C. §§ 300f et seq., 42 C.F.R. § 142.72, (4) the Toxic Substance Control Act, 15 U.S.C. §§ 2601 et seq., 40 C.F.R. §§ 745.320-339, and (5) the Federal Fungicide, Insecticide and Rodenticide Act, 7 U.S.C. §§ 131 et seq., 40 C.F.R § 171.

AGHCA attempts to minimize the Tribe's jurisdiction by noting that some of its codes and inter-governmental agreements are no longer in effect (doc. 134, p. 5, and notes 4 and 5). Such codes and agreements are provided to this Court as examples of the Tribe's exercise of jurisdiction as a federally-recognized tribe under the limitations of the Federal Act. That some examples may no longer be in effect does not negate their relevance as evidencing the Tribe's governmental power. Of particular note, AGHCA uses this argument to minimize the significance of the Housing Code by noting that no public housing has been built since the mid 1990s (because of a lack of adequate funding, which would not be the case if the Tribe had access to governmental revenue from a gaming facility) (doc. 134, p. 10, note 13). This position by the AGHCA is itself an acknowledgment that the Tribe, under its Housing Code, did build houses on its Indian lands. AGHCA fails to point out the Chairman's testimony that the Tribal Housing Commission, under the Housing Code, and pursuant to its designation as a self-governance Tribe, continues the management and maintenance of Tribal Housing and the maintenance or Tribal Housing (doc. 126, pp. 32-35 of 36, transcript pages 120-132).

AGHCA argues that the Tribe's codes and Agreements may be applicable to lands other than those in trust, and therefore, that they are not a manifestation of jurisdiction on Indian lands. That is a non-sequitur. The codes, intergovernmental agreements and the EPA's designation of the Tribe for "treatment as a state" status all apply to the Tribe's existing trust lands regardless of whether they could also be argued to also apply to non-trust lands. Further, the cultural Preservation Code (contrary to the Commonwealth's assertion, doc. 131, p. 9), the Housing Code and all of the "treatment as state" EPA designations are expressly specific to Tribal lands.

The Commonwealth correctly notes that exercise of police authority is a core function of government, and then notes that the Tribal Rangers (police) do not have authority to arrest non-tribal members for violations of law (doc. 131, pp. 9-10). The on-the-ground fact is that the Tribal Rangers have authority to arrest non-tribal members for violations of state-law as cross-deputized law enforcement officers, and they have authority to arrest non-tribal members for violations of federal law as BIA certified law enforcement officers (doc. 126, pp. 32-33 of 36, transcript pages; doc. 127, pp. 19-20 of 33 transcript pages 207-212; doc.127, pp. 26-27 of 33, transcript pages 237-240). The Commonwealth also concedes that the Tribal Rangers possess the authority to arrest tribal members for violations of tribal law that occur on the Tribe's lands. The exercise of such "central factor" authority is sufficient for establishing threshold jurisdiction under *Narragansett*. The Commonwealth ignores the Chairman's deposition testimony that the Tribe also maintains a Harbor Master that provides police services in the context of patrolling the shores and providing search and rescue services (doc. 127, p. 22 of 33, transcript pages 218-219).

The Commonwealth improperly cites *United States v. Lara,* 541 U.S. 193 (2004) for the proposition that most tribes have inherent authority to prosecute non-members who enter tribal lands (doc. 131, p. 9). The Tribe properly cites *Lara* for the fundamental principle that Congress

has plenary authority over Indian affairs (doc. 119, p. 16). *Lara* held that the a federally recognized Indian tribes has authority to prosecute Indians who are not members, expressly distinguishing the circumstances defining regarding a federally-recognized Indian tribe's authority to prosecute non-Indians, in which the Supreme Court had previously held that tribes cannot do. *Id.* at 221, 222 (citing *Oilphant v. Suquamish Tribe*, 435 U.S. 191 (1978). The fact is, with the very recent and narrow exception provided by the Violence Against Women Reauthorization Act of 2013, (P.L. 113-4), no tribe, including all of the Tribe's under IGRA, has authority to prosecute non-Indians. Accordingly, The Tribe's lack of authority to prosecute non-Indians is not a relevant factor in the first step of the *Narragansett* paradigm. Importantly, the issue in *Lara* was whether Congress in the wake of *Oilphant,* could exercise its plenary authority over Indian affairs to carve out an exception as to non-tribal member Indians. The *Lara* court concluded that Congress does have that authority, which bolsters the analysis in *Narragansett* that Congress knows how to expand, as well as how to restrict the scope of tribal governance and jurisdiction. The statute at issue in *Lara*, 25 U.S.C. § 1301(2) was enacted after the Federal Act and although the issue is not before this Court, a strong argument can be made that the Tribe does indeed have authority to prosecute non-tribal member Indians, further bolstering a conclusion that the Tribe has met far more than the low jurisdictional threshold established by the *Narragansett* Court.

AGHCA also attempts to make a mockery of several underfunded tribal programs. AGHCA mocks the Tribe's health clinic because it is staffed by a full-time nurse and the Tribe can only afford a doctor a few times a year (doc. 134, p. 10). AGHCA mocks the Tribe's court because it can only afford to have a part-time visiting judge that conducts hearings telephonically (doc.134, pp. 10-11). AGHCA mocks tribal housing because it has not been able to afford to add

to its public housing stock for twenty years (doc. 134, p. 10). AGHCA mocks the Tribe's education program because it lacks the funding to establish a BIA school (doc. 134, p. 10) and the Tribal Rangers (police) because the Tribe only has the funds to keep two police officers on the payroll (doc. 134, pp. 9-10). AGHCA concludes that these governmental services are provided "only in the most cursory of fashions and generally not to the exclusion of other governments" (doc. 134, p. 10). The irony of course, is that all of these programs are provided to the greatest extent possible by the Tribe and would be provided to a much greater extent if the Tribe had governmental revenue generated by a gaming facility. IGRA mandates that the Tribe spend that gaming revenue on exactly these types of essential governmental services. 25 U.S.C. § 2710(b)(2)(B). And even when the Tribe is forced to rely on other communities to provide EMS and fire services as many other tribes across the country do[4], the Tribe does what it can in providing manpower for fire, boats for search and rescue, and equipment for EMS. The fact that the Tribe has all of these programs in place, albeit underfunded, and contracts on a government-to-government basis with the surrounding jurisdictions evidences that the Tribe is, in fact, exercising governmental authority over its lands in a manner that far exceeds the low threshold established by the *Narragansett* Court.

AGHCA also attempts to minimize the Tribe's jurisdiction by noting that several codes and intergovernmental agreement acknowledge the jurisdictional language in the Federal Act. That simply underscores that the Tribe's jurisdiction is concurrent with the Commonwealth's. AGHCA and the Commonwealth acknowledge that neither of them have any jurisdiction over hunting by Tribal Members on Tribal lands or over taxation of tribal lands. Only the Tribe has such jurisdiction. AGHCA then wrongly concludes that the Commonwealth and the Town,

[4] See e.g. http://www.snohomishcountywa.gov/DocumentCenter/View/23848

therefore, have "exclusive" jurisdiction (doc. 134, pp. 6-7). That is also a non-sequitur, and indeed, the concession regarding hunting and taxation is itself sufficient to establish the threshold jurisdiction required by the *Narragansett* Court.

Throughout the pleadings in this litigation, AGHCA and the Commonwealth have argued that the limitations on the Narragansett Tribe's exercise of its jurisdiction, "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, is qualitatively different than the analysis here. That is wrong. Just as the *Narragansett* Court found that such language does not vest Rhode Island jurisdiction to the exclusion of the Narragansett Tribe, this Court must find that such language does not vest the Commonwealth (or the Town) with such jurisdiction to the exclusion of the Aquinnah Tribe.

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

Other than the Indian Canon of Construction, AGHCA's opposition brief provides no new analysis than provided in its motion for summary judgment (docs. 120-121), which arguments are fully addressed in the Tribe's opposition pleading (doc. 133). Other than arguing that the *Narragansett* Court's mentioning Aquinnah's circumstances suggests a different result (doc.131 ,p.6, note 5), the Commonwealth's opposition brief provides no new analysis than provided in it's motion for summary judgment (docs. 112-115), which arguments are fully addressed in the Tribe's opposition pleading (doc. 133).

AGHCA suggests that the Indian Canon of Construction does not apply because there is no ambiguity as to Congress' intent that the Tribe is not be able to game on its Indian lands upon the passage of IGRA. It should not be lost on this Court that AGHCA cites *Passamaquoddy Tribe v. Maine,* 75 F.3d 784 (1st Cir. 1996) as its support for this argument. As discussed in the

Tribe's Opposition pleading (doc. 133, pp. 5-6), Congress was very clear with its language regarding the statute at issue in *Passamaquoddy*:

> 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). Congress did not use that language here. Because Congress did not expressly state whether the Federal Act's gaming provisions would survive the passage of IGRA, and by not expressly stating its intent, an ambiguity in the Federal Act does exists, and the Indian Canon of Construction applies.

AGHCA attempts to expand the gaming language in the Federal Act to be a "savings clause" (doc. 134, pp. 15-16) and even drops a footnote declaring that the language in the "Federal Act's specific gaming language is an equally effective mechanism for doing so" (doc. 134, p.16, note 20). It is not, and AGHCA's use of the term "savings clause" is disingenuous. Unlike the language at issue in *Passamaquoddy,* which is truly a savings clause because it expressly addresses the impact of future actions of Congress, the Federal Act contains no similar language regarding the impact of future actions of Congress. Arguably, the language that was included in the earlier version of the draft Federal Act:

> 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.

1986 Legislation (S. 1452), Exhibit A to AGHCA's Declaration of Felecia Ellsworth, doc. 121-2, p.14 of 36 (emphasis added), could be read to provide some sort of savings clause. But that

language was expressly removed, evidencing the opposite intent of Congress, that there not be any savings clause.

AGHCA correctly cites the Ninth Circuit decision in *Artichoke Joe's Cal. Grand Casino v. Norton,* 353 F.3d 712 (9th Cir. 2003), that Congress, in the passage of IGRA, intended "to give back to state's some of the regulatory authority that the Supreme Court held inapplicable to Indian lands in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)*."* That "give back," however, is to be done solely by means of good faith negotiation of a tribal/state compact for Class III gaming, of which the Commonwealth refuses to engage the Tribe (doc. 107, ¶¶ 28-35). That is not the situation here where the Tribe is looking to open a Class II facility.

The Commonwealth argues that the *Narragansett* Court distinguished between the language in Rhode Island Settlement Act, 25 U.S.C. § 1701 et. seq., and the Federal Act, implying that such distinction leads a different result (doc.131, p.6, note 5) That analysis is entirely wrong. The *Narragansett* Court's reference to the Federal Act was in the context of explaining that Congress knows how to address tribal jurisdiction in the language of the statutes, noting that it can entirely terminate a Tribe's jurisdiction, or it can put parameters on the jurisdiction, citing the Federal Act, but the First Circuit's conclusion that the Narragansett Tribe's lands qualify was based on the fact that the language of statute at issue left the Tribe with jurisdiction concurrent with the State of Rhode Island and that such concurrent jurisdiction is adequate. Indeed the *Narragansett* Court concluded that the Federal Act was one where the qualified diminishment of Tribal jurisdiction further evidences that "an unadorned grant of jurisdiction to a state—such as is embodied in the Settlement Act—does not in and of itself

imply exclusivity." 19 F.3d at 702. *Narragansett* cites the Federal Act as an example of where tribal jurisdiction survives, entitling its lands to be eligible for gaming under IGRA.

Notably, in the six pleadings filed by the Commonwealth, Town and AGHCA on the cross-motions for summary judgment, none of them address the complete pre-emption analysis (doc.133, pp.14-15) which serves as an independent basis to find the IGRA impliedly repealed the gaming provisions of the Federal Act even if the court were to (wrongly) conclude that the Federal Act and IGRA were not repugnant to one another.

C. 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.

Regardless of whether the Court applies *Chevron*[5] deference, *Skidmore*[6] deference or no deference, the Court should look to the Department of the Interior ("DOI") and National Indian Gaming Commission ("NIGC") as very persuasive opinions reflecting the position of the United States. AGHCA only argues that the DOI and NIGC opinions are not entitled to *Chevron* deference. AGHCA does not dispute the Tribe's contention that, at a minimum, they should be afforded *Skidmore* deference. The Commonwealth argues that the opinions are not entitled to *Skidmore* deference because they do not make use of Agency expertise. The actual context of the issuance of the opinions is in regard to the Final Agency Action of the NIGC's approval of the Tribe's site-specific Gaming Ordinance under IGRA. Congress conferred general rulemaking and administrative authority on the NIGC, an independent agency within DOI. 25 U.S.C. § 2706(b)(10). The NIGC and DOI have a process in place whereby they share resources to evaluate the threshold questions in approving a Gaming Ordinance, including the two questions

[5] *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)
[6] *Skidmore v. Swift Co*., 323 U.S.134, 139, 65 S.Ct. 161, 164 (1944)

present here: do the lands qualify as a matter of law, and does the Tribe exercise sufficient jurisdiction that the lands qualify as a matter of fact. Contrary to the assertions of the Commonwealth and AGHCA, this is a circumstance where there *is* special expertise. At a minimum, the federal agencies' expertise in determining that the Tribe exercises the governmental power necessary for the lands to qualify under IGRA. The opinions are a necessary part of the NIGC's final agency action; the NIGC will not approve a site-specific gaming ordinance without making the determination that the lands qualify and that the Tribe exercises sufficient governmental authority over the lands. NIGC engages in that analysis in every site-specific gaming ordinance it review. See nigc.gov/reading room/ gaming ordinances. It is in this context that the opinions were issued. See, *Miami Tribe of Oklahoma v. United States,* 198 Fed. Appx. 686, 2006 WL 2392194 at *4 (10th Cir. 2006) (describing inter-agency process between DOI and NIGC for Indian lands opinion in the context of NIGC taking final agency action). Given the context of the two opinions, the Tribe believes they are entitled to *Chevron* and *Skidmore* deference.

Regardless of what level of deference, if any, is to be given, the Court is strongly encouraged to thoroughly review the DOI opinion. The opinion goes into great detail regarding the law, the legislative history, the positions set forth by the Commonwealth, and methodically applies the First Circuit's paradigm as instructed by *Narragansett,* and concludes that Aquinnah meets the requirements for both step one and step two.

CONCLUSION

After two rounds of pleadings, all parties agree/concede that the First Circuit's *Narragansett* decision 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 IGRA to apply to its Settlement Lands, and second, can the Federal Act and IGRA be read together without conflict, and 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. See, *Narragansett*, 19 F.3d at 704 ("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.") The Court should also afford substantial deference to the thorough and well-reasoned opinions of DOI (doc. 107, Exh. W) and the 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. 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 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 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 Commonwealth's jurisdiction over Indian gaming. Therefore, the Federal Act no longer governs the Tribe's gaming on its Settlement Lands.

For the reasons set forth herein, and all of the Tribe's 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: August 18, 2015

Respectfully Submitted,

/s/ Scott Crowell

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CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that e filed through the ECF System and therefore copies of **WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH) and AQUINNAH WAMPANOAG GAMING CORPORATION'S REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT** 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: August 18, 2015

/s/ Scott Crowell
SCOTT CROWELL