UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Forest County Potawatomi Community,

Plaintiff,

v.

United States of America; United States Department of the Interior; Ryan Zinke in his capacity as Secretary of the United States Department of Interior; and Michael Black in his capacity as Acting Assistant Secretary – Indian Affairs of the United States Department of the Interior,

Defendants,

Menominee Indian Tribe of Wisconsin and Menominee Kenosha Gaming Authority,

Defendant-Intervenors.

Case No. 1:15-cv-00105-CKK

Judge Colleen Kollar-Kotelly

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF FOREST COUNTY POTAWATOMI COMMUNITY'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Table of Authorities ii

I. Introduction 1

II. Statement of Facts 3

A. Background on the Community's Lands and the 1992 Gaming Compact 3

B. The 2003 and 2005 Amendments to the Potawatomi Gaming Compact 5

C. The Arbitration 8

D. The 2014 Amendment 10

E. The Disapproval 12

III. Argument 13

A. Standard of Review 13

B. IGRA and the Review Process for Compacts 16

C. The Assistant Secretary Erred in Interpreting the 2014 Amendment to Require Menominee to Make the Mitigation Payments to the Community. 18

i) The 2014 Amendment Would Not Have Required Menominee to Make the Mitigation Payments to the Community. 18

ii) The Provisions of the 2014 Amendment Relied Upon by the Assistant Secretary Did Not Impose Any Legal Obligations Upon Menominee 22

iii) The Assistant Secretary's Own Predictions That Menominee Would Assume the Mitigation Payments Was Also Not a Proper Basis for Disapproval of the 2014 Amendment. 25

D. The Assistant Secretary Erred in Finding that the 2014 Amendment Fell Outside the Permissible Subjects of a Class III Gaming Compact. 29

i) Exclusivity Agreements Are Permissible in Gaming Compacts Under IGRA.. 30

ii) The Assistant Secretary Provided No Valid Reason Under IGRA for Distinguishing the 2014 Amendment from Other Approved Exclusivity Agreements. 36

iii) The Inclusion of Class II Revenue in the Calculation of Mitigation Payments Also Did Not Provide a Basis for Distinguishing Other Exclusivity Agreements. 41

E. The Assistant Secretary's Disapproval Deprived the Community of the Benefit of its Bargain with the State. 43

IV. Conclusion 43

TABLE OF AUTHORITIES

CASES

ABM Onsite Servs.-W., Inc. v. NLRB, 849 F.3d 1137 (D.C. Cir. 2017) 40

Albuquerque Indian Rights v. Lujan, 930 F.2d 49 (D.C. Cir. 1991)..... 14

Am. Coll. of Emergency Physicians v. Price, No. CV 16-913 (CKK), 2017 WL 3836045 (D.D.C. Aug. 31, 2017) 13

Amador Cty., Cal. v. Salazar, 640 F.3d 373 (D.C. Cir. 2011)..... 16, 17

Anthony Gagliano & Co. v. Openfirst, LLC, 850 N.W.2d 845 (Wis. 2014)..... 20

Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003)..... 31

Cal. Valley Miwok Tribe v. United States, 515 F.3d 1262 (D.C. Cir. 2008) 14

Carcieri v. Salazar, 555 U.S. 379 (2009) 14

Chemehuevi Indian Tribe v. Brown, No. ED CV 16–1347–JFW (MRWx), 2017 WL 2971864 (C.D. Cal. Mar. 30, 2017) 15

Chi. Coll. of Osteopathic Med. v. George A. Fuller Co., 719 F.2d 1335 (7th Cir. 1983) 21

Citizens Exposing Truth About Casinos v. Kempthorne, 492 F.3d 460 (D.C. Cir. 2007) 15

City of Roseville v. Norton, 348 F.3d 1020 (D.C. Cir. 2003) 15

Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) 14

Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n, 466 F.3d 134 (D.C. Cir. 2006)..... 16

Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell, 830 F.3d 552 (D.C. Cir. 2016) 15

Flandreau Santee Sioux Tribe v. Gerlach, No. CV 14-4171, 2017 WL 4124242 (D.S.D. Sept. 15, 2017) 30, 35

Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec., 769 F.3d 1127 (D.C. Cir. 2014) 15

Fort Indep. Indian Cmty. v. California, 679 F. Supp. 2d 1159 (E.D. Cal. 2009)..... 15, 32

Gonzales v. Oregon, 546 U.S. 243 (2006)..... 15

Grumman Ohio Corp. v. Dole, 776 F.2d 338 (D.C. Cir. 1985)..... 20

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States, 367 F.3d 650 (7th Cir. 2004) 40

Mesa Air Grp., Inc. v. Dep't of Transp., 87 F.3d 498 (D.C. Cir. 1996) 14

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) 14

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) . 13

Motorsport Eng'g, Inc. v. Maserati SPA, 316 F.3d 26 (1st Cir. 2002) 21

Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439 (D.C. Cir. 1988) 14

NLRB v. CNN Am., Inc., 865 F.3d 740 (D.C. Cir. 2017) 40

Panzer v. Doyle, 680 N.W.2d 666 (Wisc. 2004) 7

Petroleum Commc'ns, Inc. v. F.C.C., 22 F.3d 1164 (D.C. Cir. 1994) 14

Seminole Nation of Okla. v. Norton, No. CIV.A. 00-2384(CKK), 2001 WL 36228153 (D.D.C. Sept. 27, 2001) 14

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 15

United States v. Mead Corp., 533 U.S. 218 (2001) 15

STATUTES

25 U.S.C. § 2702(1) 16, 42, 43

25 U.S.C. § 2703(7) 16

25 U.S.C. § 2703(8) 16

25 U.S.C. § 2710(a)(1) 16

25 U.S.C. § 2710(a)(2) 16

25 U.S.C. § 2710(b) 16

25 U.S.C. § 2710(d)(1)(C) 16

25 U.S.C. § 2710(d)(2)(A) 42

25 U.S.C. § 2710(d)(2)(C) 42

25 U.S.C. § 2710(d)(2)(D)(iii)(I) 42

25 U.S.C. § 2710(d)(3)(A) 42

25 U.S.C. § 2710(d)(3)(B) 17

25 U.S.C. § 2710(d)(3)(C) 30

25 U.S.C. § 2710(d)(3)(C)(vii) ..... passim

25 U.S.C. § 2710(d)(4) 32

25 U.S.C. § 2710(d)(7)(A)(ii) 42

25 U.S.C. § 2710(d)(8)(B) ..... passim

25 U.S.C. § 2710(d)(8)(B)(i) 18

25 U.S.C. § 2710(d)(8)(C) 6, 43

25 U.S.C. § 2710(d)(9) 42

25 U.S.C. § 2719(a) 8

25 U.S.C. § 2719(b)(1)(A) 9, 28, 40

5 U.S.C. § 706 13

REGULATIONS

25 C.F.R. § 293.14 17

25 C.F.R. § 293.4 17

25 C.F.R. §§ 293.8–293.14 16

25 C.F.R. Part 151 15

OTHER AUTHORITIES

13 Samuel Williston & Richard A. Lord, *Williston on Contracts* § 37:9 (4th ed. 2017) 21

S. Rep. No. 100–446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071 ..... 17, 30

Plaintiff Forest County Potawatomi Community (the "Community") submits this memorandum of points and authorities in support of its motion for summary judgment.

I. INTRODUCTION

In 2014, the Community and the State of Wisconsin (the "State") submitted an amendment to their tribal-state gaming compact (the "2014 Amendment") to the Assistant Secretary – Indian Affairs ("Assistant Secretary") for his approval under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq*. The 2014 Amendment provides that if the State of Wisconsin ("State") allows a competitor casino to be built within 30 to 50 miles of the Community's Milwaukee casino, the State is required to make "Mitigation Payments" to the Community to offset any lost revenue caused by the competitor casino. Under earlier exclusivity provisions in the Community's gaming compact, the Community paid the State hundreds of millions of dollars to help relieve a state budget crisis, and in exchange the State agreed to either limit new casino competition in the area around its Milwaukee casino or compensate the Community for revenue lost to a competing casino. The 2014 Amendment implements the second part of that bargain, providing that if the State choses to allow a competing casino in the area, the State is required to partially compensate the Community for the substantial payments that the Community made to the State.

On January 9, 2015, the Assistant Secretary disapproved the 2014 Amendment, which is the decision challenged in this lawsuit. The disapproval was based on two fundamental errors. First, the Assistant Secretary's core justification for his disapproval was his view that the 2014 Amendment actually made the Menominee Indian Tribe of Wisconsin ("Menominee"), an applicant for a casino in the Milwaukee area, responsible for making the Mitigation Payments to the Community, which he found impermissible under IGRA. That reading of the agreement was simply incorrect. The 2014 Amendment does not impose any legal obligations upon Menominee,

nor could it because Menominee is not a party to the agreement. The 2014 Amendment makes the State solely responsible for the Mitigation Payments. The Assistant Secretary, therefore, disapproved the 2014 Amendment based upon something that it does not say.

Second, the Assistant Secretary determined that the 2014 Amendment violated IGRA because it contains provisions that are outside the permissible subjects of a gaming compact under IGRA. This was also incorrect. The 2014 Amendment is permissible under IGRA because it falls within IGRA's broad catch-all category for "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). Numerous tribal-state gaming compacts contain exclusivity agreements in which a state agrees to limit competition to a tribe's casino in exchange for payments from the tribe, and the Assistant Secretary has found many such agreements permissible under Section 2710(d)(3)(C)(vii). The 2014 Amendment is part of just such an exclusivity agreement between the State and the Community, and thus is also permitted under IGRA.

IGRA only allows the Assistant Secretary to disapprove a gaming compact under limited circumstances where the compact violates IGRA, other federal law, or the United States' trust obligations to Indian tribes. *See* 25 U.S.C. § 2710(d)(8)(B). Due to the two fundamental errors in his decision, the Assistant Secretary did not identify any valid violation of IGRA in the 2014 Amendment, and thus his disapproval itself violated IGRA. Instead, the Assistant Secretary based his decision on his personal policy preferences and notions of "fairness," which are not permissible grounds for disapproval under Section 2710(d)(8)(B). The Assistant Secretary's disapproval denied the Community the benefit of its lawful bargain with the State after it had paid the State hundreds of millions of dollars in reliance on that bargain. The Assistant Secretary's disapproval

was therefore "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and must be set aside under the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2).

II. STATEMENT OF FACTS

A. Background on the Community's Lands and the 1992 Gaming Compact

The Community has long occupied Southeastern Wisconsin, including the areas of Milwaukee and Kenosha. *See* BIA_002935. The United States first officially recognized Kenosha and Milwaukee County as Potawatomi territory in the 1825 Treaty of Prairie du Chien. *Id.* In the 1833 Treaty of Chicago, the Community ceded to the United States the land that would eventually become Milwaukee and Kenosha. *Id.*

On June 10, 1987, before Congress enacted IGRA, the Community submitted an application to the United States to acquire in trust for the benefit of the Community two parcels of land known as the "Concordia College Land" and the "Menomonee Valley Land" ("Trust Application"). *See* BIA_002935. Both parcels were located in the City of Milwaukee. At the time the Community submitted its Trust Application, the Indian Community School of Milwaukee, Inc. (the "Milwaukee Indian School") operated an Indian elementary school on the Concordia College Land, which served Indian children from all of the Wisconsin tribes. *Id*.

In the Trust Application, the Community stated its intent to operate a bingo hall on the Menomonee Valley Land. Profits from the bingo hall would serve, in part, to fund the Milwaukee Indian School, which would remain on the Concordia College Land. *See* BIA_002935. The Milwaukee Indian School served the Milwaukee area and offered social programs to the local Indian community. *See* FCPCAR001655. The Milwaukee Indian School remained on the Concordia College Land under a Bureau of Indian Affairs approved lease from 1990 to 2010. *See* BIA_002935. During this time, the Community funded the Milwaukee Indian School on an annual

basis. At one point, the Community contribution to the Milwaukee Indian School was $28 million annually. *See* BIA_002936.

The United States acquired the Concordia College Land and the Menomonee Valley Land in trust for the Community on July 25, 1990 under the Indian Reorganization Act and approved gaming under IGRA, 25 U.S.C. § 2719(b)(1)(A). *Id.* On March 7, 1991, the Community opened a gaming facility on the Menomonee Valley Land. Potawatomi Bingo[1] began as a 45,800 square foot bingo hall. *See* BIA_002936.

On June 3, 1992, the State and the Community entered into a gaming compact (the "1992 Compact"), which established the parameters for the Community's conduct of Class III casino gaming under IGRA. FCPCAR00246–89. The 1992 Compact authorized 200 gaming devices and no blackjack games at Potawatomi Bingo. FCPCAR000274–75. The 1992 Compact required the Community to pay the State its proportional share annually of the State's $350,000 costs of regulation of Indian gaming. *See* FCPCAR00287. From 1992 to 1998, the Community received 30% of the net income from Potawatomi Bingo Casino. *See* BIA_002936. The casino management company and the Milwaukee Indian School received 40% and 30% of the net income, respectively. *See id.*

In December 1998, the State and the Community amended various aspects of the 1992 Compact and the Secretary approved the 1998 Compact Amendment. FCPCAR000237–45. The 1998 Compact Amendment allowed the Community to operate 1,000 gaming devices and 25 blackjack tables if the City and County of Milwaukee adopted resolutions approving expanded gaming. FCPCAR000239–40. The 1998 Compact Amendment increased the Community's annual

[1] In 1993, Potawatomi Bingo changed its name to Potawatomi Bingo Casino (sometimes referred to as "Potawatomi Bingo and Casino"). In summer 2014, Potawatomi Bingo Casino changed its name to Potawatomi Hotel & Casino.

payment to the State to $6,375,000 and extended the term of the 1992 Compact for 5 years. FCPCA000239–40. The subsequent City and County Intergovernmental Agreement required the Community to pay the City and County governments a combined total of 3% of modified net win. *See* BIA_002937. The Community also committed to annual charitable contributions. *See id.* The 1992 Compact, as amended in 1998, was set to expire, if not renewed, on June 3, 2004. FCPCAR000239.

B. The 2003 and 2005 Amendments to the Potawatomi Gaming Compact

In 2002, the State and the Community began negotiating an amendment to the 1992 Gaming Compact. *See* BIA_002937. At the time, the State was facing a budget crisis and turned to the Indian tribes of Wisconsin for help. *See id.* On or about February 19, 2003, the State and the Community agreed to terms in an amendment to the Community's gaming compact (the "February 2003 Amendment"). FCPCAR000096–111; *see also* BIA_002937. Under the February 2003 Amendment, the Community agreed to make lump sum payments to the State totaling $90.5 million over a 2-year period to help alleviate the State's budget crisis. *See* BIA_002937. The Community also agreed to pay increased annual payments to the State based on a percentage of Class III win. *Id*. In consideration for this substantial upfront lump sum payments and the increase in net win percentage, the State agreed to exclusivity for the Community's Milwaukee gaming facility.[2] *See* BIA_002938.

[2] The State also agreed to an expanded scope of gaming, agreed to extend the term of the compact to an indefinite term, removed limitations on the number of gaming devices, and included a waiver of the State's sovereign immunity. However, the State agreed to these conditions for all tribes in the 2003 Compact Amendments. Only a few tribes, namely the Oneida, Ho-Chunk and the Potawatomi agreed to pay the State large lump sum payments in exchange for exclusivity clauses. *See* BIA_003416-431 and ¶ 12 and ¶ 16 of the Second Amendment to the Wisconsin Winnebago Tribe, now known as Ho-Chunk Nation, and the State of Wisconsin Gaming Compact of 1992, Notice of Tribal-State Gaming Compact Amendment taking effect between the Ho-Chunk Nation and the State of Wisconsin, 69 Fed. Reg. 39964–02 (Jul. 3, 2003) (providing that Ho-Chunk will pay a 60 million dollar lump sum payment to State and State will not concur in a Two-Part

Under the exclusivity provision, if the State permitted Class III gaming under IGRA within 50 miles of the Community's Milwaukee gaming facility, the Community would no longer be required to pay its annual lump sum payment, and the State was required to refund the lump sum payments that the Tribe had paid to the State. *See* FCPCAR000008; FCPCAR001461 n.11.

The February 2003 Amendment was submitted for approval on February 20, 2003. Under IGRA, the Secretary has 45 days to approve or disapprove a gaming compact, or it goes into effect by operation of law. 25 U.S.C. § 2710(d)(8)(C). Two days before the Assistant Secretary's deadline, on April 4, 2003, the Assistant Secretary informed the State and the Community that she would not approve the February 2003 Amendment with the Milwaukee exclusivity provision. *See* FCPCAR000008. The Community did not agree with the Assistant Secretary's legal position regarding the exclusivity clause, but given the impending budget crisis and the lack of time to renegotiate the language in this provision, the Community and the State agreed to submit an amended version of the February 2003 Amendment that removed this provision and to instead negotiate a substitute provision with a similar benefit to the Community. FCPCAR000008–9. The State and the Community submitted a substitute Amendment on April 4, 2003. *See* FCPCAR000112–14. The February 2003 Amendment, the April 2003 Amendment, and a May

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determination that may cause a substantial reduction in Class III gaming revenues "unless the State has entered into a binding indemnification agreement with the Nation to compensate it for the Reduction, or the mandatory negotiations required herein have concluded and the binding arbitration procedures have commenced."); *see also* BIA-003553–531 and ¶ 27 to the Oneida Tribe of Indians of Wisconsin and State of Wisconsin Gaming Compact of 1991, Notice of Tribal—State Gaming Compact Amendments taking effect between the State of Wisconsin and the Lac Courte Oreilles Bank of Lake Superior Chippewa Indians, the Oneida Tribe of Indians, the Menominee Indian Tribe, and the Bad River Bank of Lake Superior Chippewa Indians, 68 Fed. Reg. 43366–01 (Jul. 22, 2003) (providing that Oneida will pay a 40 million dollar lump sum payment to the State and the State agrees to negotiate an amendment to the compact which shall address Oneida's payments and a return of the lump sum payments in the event the State approves a gaming facility with fifty miles of Oneida's Reservation).

2003 Technical Amendment (collectively the "2003 Amendments") went into effect by operation of law. *See* FCPCAR0000314–22; FCPCAR0000323–41.

On June 30, 2004, the Community paid the State a $40.5 million lump sum payment, and on or about June 30, 2005, the Community paid the State a $43.625 million lump sum payment. *See* BIA_002940–41. The Community was not technically required to make these payments under the 2003 Amendments due to a ruling by the Wisconsin Supreme Court in 2004, which found that the Wisconsin Governor did not have the authority to commit the State to perpetual compact terms. *See Panzer v. Doyle*, 680 N.W.2d 666, 701 (Wisc. 2004). The 2003 Amendments provided that if the duration provision of the compact was invalidated, the State was required to refund the lump sum payments to the Community, and the Community was no longer required to make further payments to the State. FCPCAR000340; *see also* BIA_002940. But despite the *Panzer* decision, the Community made the 2004 and 2005 lump sum payments in reliance on the State's promise to negotiate a substitute provision for the exclusivity clause that had been removed from the February 2003 Amendment.

In October 2005, following nearly a year and a half of negotiations, the Community and the State agreed to the 2005 Amendment, which included a substitute provision for the exclusivity clause that was removed from the February 2003 Amendment. *See* BIA_002941–42. The 2005 Amendment included a 30-mile exclusivity zone for the Community's Milwaukee gaming facility and, a last best offer arbitration process if another gaming facility were to be constructed within 30 to 50 miles of the Community's Milwaukee gaming facility. *See* FCPCAR000297-98; FCPCAR000305. The 2005 Amendment explained that exclusivity for the Community's Milwaukee gaming facility was the primary consideration for the lump sum payments made to the State, and the Tribe had to finance these payments over a term of years:

> WHEREAS, the State and the Tribe acknowledge that the obligation to make the lump sum payments pursuant to section XXXI.G.l. of the Compact requires the Tribe to utilize credit instruments to obtain funds for the payments. The ability to preserve the revenue stream anticipated by the Tribe at the time it agreed to these payments was a material consideration in its agreement to make the payments. In order to protect the Tribe's legitimate expectation that its Class III gaming operations would generate a level of revenues sufficient to support its promise to pay the amounts specified in section XXXI.G., the State and Tribe agreed to Section XXXI.B.3 in the amendments to the Compact dated February 17, 2003, but the parties then agreed to remove the amendment at the insistence of the Assistant Secretary of the United States Department of the Interior so that notice of the remaining amendments would be published in the Federal Register; and
>
> WHEREAS, the Parties have not been able to agree on changes to the rights and duties of the Parties in the event of a favorable determination of the Secretary of the Interior pursuant to Section 20 of the Act, 25 U.S.C. § 2719 (b)(a)(A) [sic], regarding a proposed gaming establishment located on lands more than 30 miles and within 50 miles of the Tribe's gaming facility in Milwaukee. The Parties have agreed to the procedure in Section XXII.A.11. herein to achieve a substitute provision for Section XXXI.B.3 of the amendment dated February 17, 2003; . . .

See FCPCAR000291–92. The 2005 Amendment, which is described in more detail below, was submitted to the Assistant Secretary in October 2005 and was "deemed approved." FCPCAR000290; FCPCAR001462. In reliance on the 2005 Amendment and the good faith pledge of the State, the Community has continued to make the annual payments to the State required under Section XXXI.G.1.b to the present, and it invested substantial funds in increasing the size of its Milwaukee gaming facility. *See* BIA_002942.

C. The Arbitration

IGRA generally prohibits gaming on lands acquired by a tribe into trust after October 17, 1988, unless a statutory exception applies. *See* 25 U.S.C. § 2719(a). One of the statutory exceptions applies when:

> . . . the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community . . .

25 U.S.C. § 2719(b)(1)(A). This determination by the Assistant Secretary is commonly known as a "two-part determination." Once the Assistant Secretary has made a two-part determination, the tribe must also obtain the concurrence of the governor of the state in which the proposed casino is located. 25 U.S.C. § 2719(b)(1)(A). The governor has unfettered discretion under IGRA to concur or not concur.

On August 23, 2013, the Assistant Secretary issued a two-part determination approving the Menominee's proposed off-reservation casino in Kenosha, Wisconsin, under Section 20 of IGRA. *See* BIA_003084–145; BIA_002943–44; FCPCAR001462. The Assistant Secretary granted Governor Scott Walker (the "Governor") a six-month extension to February 19, 2015 to decide whether to concur in the determination. BIA_002944; FCPCAR001462. The Menominee's proposed casino in Kenosha was between 30 and 50 miles of the Community's casino in Milwaukee. FCPCAR001459, 1462. On June 2014, as a result of the Assistant Secretary's two-part determination, the State invoked the arbitration provisions under Section XXII.A.11 of the Compact, as amended in 2005. *See* BIA_002944.

Section XXII.A.11 of the Compact adopts a last-best-offer arbitration process to determine the rights, duties, and obligations of the parties if the Governor concurs in a favorable determination pursuant to 25 U.S.C. § 2719(b)(1)(A), allowing an off-reservation casino within 30 to 50 miles of the Community's Milwaukee facility. BIA_002942–43. This provision states:

> Last Best Offer of Substitute Compact Amendment. The parties shall each submit to last best offer arbitration a proposed Compact amendment which includes, without modification, the payments provisions of Section XXXI.G., as amended by this 2005 Amendment but which also specifies the rights, duties and obligations of the Parties in the event the State concurs in a favorable determination of the Secretary of the Interior pursuant to section 20 of the Act, 25 U.S.C 2719 (b)(1)(A), regarding a proposed gaming establishment on lands located within 50 miles of the Tribe's Class III gaming facility in Milwaukee. **The Tribe's last best offer may provide for a reduction in, or refund of, the payments to the State agreed to in section XXXI.G. of the Compact** in the event the State concurs in a favorable

> determination of the Secretary of the Interior pursuant to section 20 of the Act, 25 U.S.C 2719 (b)(1)(A), regarding a proposed gaming establishment located within 50 miles of the Tribe's Class III gaming facility in Milwaukee. **The State's last best offer will propose a procedure(s)** to establish an agreement between, at a minimum, the Tribe and the tribe making application pursuant to section 20 of the Act to have land located within 50 miles of the Tribe's Class III gaming facility in Milwaukee taken into trust for gaming purposes, **pursuant to which the Tribe will be compensated for revenues lost due to the operation of the Class III gaming facility located within 50 miles of the Tribe's Class III gaming facility in Milwaukee**, and which may not be inconsistent with, but may propose additional terms relative to, section XXXI.I. If the arbitrator determines that an offer does not comply with the requirements contained in this paragraph 11, the arbitrator shall select the offer of the other party if the arbitrator determines it does so comply. In the event the arbitrator determines neither offer so complies, the arbitrator shall reject both offers and shall require the parties to submit new last best offers. The Parties agree that in the event of a conflict between this paragraph 11 and any other provision of the Compact this paragraph 11 shall control for purposes of this dispute, and shall not be applicable to the resolution of any other dispute.

FCPCAR000297–98 (emphasis added). This provision was part of the 2005 Amendment, which was "deemed approved" by the Secretary. FCPCAR000290; *see also* BIA_002943.

The State and the Community engaged in a confidential arbitration process under this provision in October of 2014. *See* BIA_002944. A three-member arbitration tribunal unanimously selected the 2014 Amendment as the best proposed compact amendment submitted in the last-best-offer arbitration. *See id.* The unanimously-selected 2014 Amendment was the logical result of the history of the compact negotiations and multiple years of reliance by the State and the Community on the deemed-approved 2003 Amendment and 2005 Amendment.

D. The 2014 Amendment

The 2014 Amendment implements the intent of the 2003 Amendment and 2005 Amendment by providing some market stability to protect the Community's revenue stream, which was the critical consideration for the Community's agreement to make large lump sum payments and increased annual revenue sharing payments to the State. BIA_002944; BIA_003050. In particular, it set the terms of the State's agreement to provide reasonable stability for the

Community's core market area, which the Community had relied upon over the past 10 years, during which it had paid the State $234.3 million dollars. *See* BIA_002944–45. The State had received what it bargained for in the 2003 Amendment, namely lump sum payments to help close a $3.2 billion deficit and increased annual payments as a percentage of net win, but the Community had not. *See* BIA_002945. The 2014 Amendment provided the Community with at least part of the benefit of its 2003 bargain with the State. *See* BIA_002945.

The 2014 Amendment provided that if the Governor "concurs in a Secretary's Determination for an Applicant Facility," the State would be required to make an annual Mitigation Payment to the Community equal to the "Annual Revenue Loss." § XXXVII.C; BIA_002959. The Annual Revenue Loss was defined to only include the loss of revenue that is a direct result of the Applicant Facility. § XXXVII.D.1; BIA_002959–60. The State would annually determine the amount of revenue loss, if any, and once the loss ended, so would the Mitigation Payments. § XXXVII.E.5; BIA_002961.

While the 2014 Amendment made the State responsible for the Mitigation Payments, it anticipated that the State and the Applicant tribe would submit a separate compact amendment to the Assistant Secretary reflecting their agreement as to any additional financial obligations regarding a proposed casino. BIA_002947. The parties anticipated this separate agreement with respect to the Kenosha Application because Menominee had publicly promised to assume any obligations of the State to other tribes in Wisconsin. *See* BIA_003075–76. Although the Community agreed to negotiate possible future agreements whereby another party, such as Menominee, would make the Mitigation Payments, the 2014 Amendment made clear that the State was ultimately responsible for the Mitigation Payments. *See* § XXXVII.F; BIA_002962. The

question of whether Menominee would agree to amend its compact to assume some or all of these payments was left to the State and the Menominee to negotiate. *See* BIA_002948.

E. The Disapproval

On November 26, 2014, the Defendants received the 2014 Amendment. FCPCAR001459. On December 30, 2014 the Attorney General for the Community provided the Assistant Secretary with a detailed explanation of the background that led to the 2014 Amendment, an explanation of the terms of the 2014 Amendment, and the options available to the State to make the Mitigation Payments. BIA_002932–55. However, in a letter to Harold Frank, Chairman of the Community, dated January 9, 2015, the Assistant Secretary disapproved the 2014 Amendment on the grounds that it was in violation of IGRA. FCPCAR001459–1467. In his disapproval letter, the Assistant Secretary explained that he interpreted the 2014 Amendment to make Menominee responsible for making the Mitigation Payments to the Community, stating "the plain language of the 2014 Amendment . . . demonstrate[s] that, in fact, Menominee would be responsible for making all of the Mitigation Payments." FCPCAR001464. He determined that it was impermissible to impose this obligation on Menominee because "IGRA does not allow one tribe to use the state compact process to impose upon another tribe the obligation to guarantee the tribe's gaming and other profits." FCPCAR001460. He found that the 2014 Amendment therefore violated IGRA because it "includes provisions involving subjects that exceed the permissible scope of a Class III gaming compact." FCPCAR001466. This explanation for the disapproval was also summarized in a "Question and Answer" prepared by the Defendants on the same day as the disapproval. *See* FCPCAR001477.

On January 21, 2015, the Community filed this lawsuit challenging the Assistant Secretary's disapproval. *See* Plf.'s Compl., ECF No. 1. Two days later, on January 23, 2015, the Governor decided not to concur with the Assistant Secretary's approval of the Menominee's

proposed Casino in Kenosha, Wisconsin. *See* BIA_003245. The Assistant Secretary subsequently informed Menominee that as a result of the Governor's decision, the proposed gaming site in Kenosha "cannot be acquired in trust for the purpose of gaming." BIA_003244.

III. ARGUMENT

A. Standard of Review

In APA cases, summary judgment "is the mechanism for deciding whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Am. Coll. of Emergency Physicians v. Price*, No. CV 16-913 (CKK), 2017 WL 3836045, at *3 (D.D.C. Aug. 31, 2017). The ordinary summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure does not apply in APA cases. *Id.* Instead, the APA sets the standard for court's review, requiring the court to "'hold unlawful and set aside agency action, findings, and conclusions' that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (quoting 5 U.S.C. § 706(2)). The APA also requires the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.

An agency is required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Am. Coll. Of Emergency Physicians*, 2017 WL 3836045, at *3 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "[W]here the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the Court] must undo its action." *Seminole Nation of Okla. v. Norton*, No. CIV.A. 00-

2384(CKK), 2001 WL 36228153, at *4 (D.D.C. Sept. 27, 2001) (quoting *Petroleum Commc'ns, Inc. v. F.C.C.*, 22 F.3d 1164, 1172 (D.C. Cir. 1994)).

When an agency's decision involves an issue of statutory interpretation, the Court must "first determine whether the statutory text is plain and unambiguous." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). "If it is, [the court] must apply the statute according to its terms." *Id.* Similarly, "[w]here the language of a contract is clear and unambiguous on its face, a court will assume that the meaning ordinarily ascribed to those words reflects the intentions of the parties." *Mesa Air Grp., Inc. v. Dep't of Transp.*, 87 F.3d 498, 503 (D.C. Cir. 1996). In this case, both IGRA and the 2014 Amendment are unambiguous and thus required to be applied according to their terms.

If the statute is ambiguous in a case involving Indian law, then "[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). "*Chevron* deference is not applicable" in such cases. *Cobell*, 240 F.3d at 1101. Rather, the court is to "give the agency's interpretation 'careful consideration' but "[the court] do[es] not defer to it." *Id.* (quoting *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 n. 8 (D.C. Cir. 1988)); *see also Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008) ("we typically do not apply full *Chevron* deference to an agency interpretation of an ambiguous statutory provision involving Indian affairs"); *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991) (acknowledging "special strength" of canon favoring Indian tribes in the D.C. Circuit).[3]

[3] There are a few decisions in which the D.C. Circuit has applied *Chevron* deference to statutes governing Indian tribes, but in those cases the Court specifically determined that the agency's interpretation was consistent with the Indian canon of construction. *See Confederated*

The canon of construction favoring Indian tribes is applicable to IGRA. *See City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003).

Agency decisions that do not have precedential effect and are not binding on third parties are also not entitled to *Chevron* deference. *See Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1136–37 (D.C. Cir. 2014) (finding *Chevron* deference inapplicable to non-precedential ruling because "the decision's 'binding character as a ruling stops short of third parties' and is 'conclusive only as between [the agency] itself and the [petitioner] to whom it was issued.'") (quoting *United States v. Mead Corp.*, 533 U.S. 218, 233 (2001))). Non-precedential agency decisions are "'entitled to respect' only to the extent it has the 'power to persuade.'" *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Applying these principles, Courts have found that *Chevron* deference should not be applied to the Assistant Secretary's statutory interpretation in the approval of individual gaming compacts. *See Fort Indep. Indian Cmty. v. California*, 679 F. Supp. 2d 1159, 1176–77 (E.D. Cal. 2009); *Chemehuevi Indian Tribe v. Brown*, No. ED CV 16–1347–JFW (MRWx), 2017 WL 2971864, at *8 n.9 (C.D. Cal. Mar. 30, 2017).[4]

Tribes of Grand Ronde Cmty. of Or. v. Jewell, 830 F.3d 552, 558, 565 (D.C. Cir. 2016); *California Valley Miwok Tribe*, 515 F.3d at 1266 n.7; *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 467, 471 (D.C. Cir. 2007).

[4] The Community is aware of two cases in which the D.C. Circuit applied *Chevron* deference to decisions to take land into trust for a tribe under the Indian Reorganization Act ("IRA"). *See Confederated Tribes of Grand Ronde Cmty. of Or.*, 830 F.3d at 559; *Citizens Exposing Truth about Casinos*, 492 F.3d at 465. In those cases *Chevron* deference was consistent with the Indian canon of construction, as described in n.3, *supra.* Those cases are also distinguishable from cases involving decisions to approve a compact. The Secretary has broad discretion in whether or not to take land into trust and the process for taking land into trust requires a formal and complex statutory and regulatory process that involves lengthy submissions from the tribe, detailed requirements governing the agency's consultation and decision making processes, and an administrative appeals process. *See* 25 C.F.R. Part 151. The Assistant Secretary's approval of a gaming compact is not entitled to the same level of deference because IGRA does not afford the Secretary broad discretion and it involves a relatively informal procedure under which the

B. IGRA and the Review Process for Compacts

The purpose of IGRA is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA is "designed to promote the economic viability of Indian tribes." *City of Roseville*, 348 F.3d at 1032.

IGRA divides gaming into three classes. Class I gaming "consists of social gaming for minimal prizes and traditional forms of Indian gaming in connection with tribal ceremonies." *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 135 (D.C. Cir. 2006) (citing 25 U.S.C. § 2703(6)). IGRA provides that Class I gaming is "within the exclusive jurisdiction of the Indian tribes." 25 U.S.C. § 2710(a)(1). Class II gaming includes "bingo; 'non-banking' card games; and pull-tabs, lotto, and other games similar to bingo." *Colo. River Indian Tribes*, 466 F.3d at 135 (citing 25 U.S.C. §§ 2703(7)(A), (B)). Class II games are "within the jurisdiction of the Indian tribes," but are subject to certain regulations under IGRA. 25 U.S.C. §§ 2710(a)(2), (b). Class III games are "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). Class III gaming includes slot machines and "most casino games such as blackjack and roulette." *Amador Cty., Cal. v. Salazar*, 640 F.3d 373, 376 (D.C. Cir. 2011); *see also Colo. River Indian Tribes*, 466 F.3d at 135.

In order to engage in Class III gaming on Indian lands, an Indian tribe must have a tribal-state gaming compact. *See* 25 U.S.C. § 2710(d)(1)(C). "After lengthy hearings, negotiations and discussions, the [Senate] Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to

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compact and documents indicating the parties' approval of the compact are submitted to the Assistant Secretary, who then has 45 days to issue a decision or take no action, and there is no administrative appeal process. *See* 25 C.F.R. §§ 293.8–293.14.

the regulation of complex gaming enterprises . . .” S. Rep. No. 100–446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083. Class III gaming compacts do not become effective until the Secretary publishes a notice of approval in the Federal Register. 25 U.S.C. § 2710(d)(3)(B). All Class III gaming compacts and amendments to Class III gaming compacts must therefore be submitted to the Secretary for approval. *See* 25 C.F.R. § 293.4. The Secretary has delegated his authority to approve or disapprove gaming compacts to the Assistant Secretary.

Once a compact is submitted for approval, there are three actions the Assistant Secretary can take: he can (1) approve the compact, (2) disapprove the compact, or (3) take no action, in which case the compact is deemed approved after forty-five days, but only to the extent the compact is consistent with the provisions of IGRA. *See Amador Cty., Cal.*, 640 F.3d at 377 (citing 25 U.S.C. § 2710(d)(8)).

Disapproval is only allowed based on limited grounds specified in Section 2710(d)(8)(B), which states:

> The [Assistant] Secretary may disapprove a compact . . . only if such compact violates—
>
> > (i) any provision of this chapter,
> >
> > (ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or
> >
> > (iii) the trust obligations of the United States to Indians.

25 U.S.C. § 2710(d)(8)(B); *see also* 25 C.F.R. § 293.14. Under this provision, the Assistant Secretary is permitted to disapprove a compact “only” if it violates IGRA or other federal law or the United States’ trust obligations. *Amador Cty., Cal.*, 640 F.3d at 377; *see also* FCPCAR001463 (acknowledging that IGRA only permits disapproval under these limited circumstances). In the disapproval letter, the Assistant Secretary claimed that the 2014 Amendment was “in violation of

IGRA," FCPCAR001467, but he did not claim the 2014 Amendment violated any other federal law or the trust obligations of the United States.

C. The Assistant Secretary Erred in Interpreting the 2014 Amendment to Require Menominee to Make the Mitigation Payments to the Community.

The Assistant Secretary's principal explanation for his disapproval of the 2014 Amendment was the claim that it impermissibly made Menominee responsible for the Mitigation Payments to the Community. According to the disapproval letter, "IGRA does not allow one tribe to use the state compact process to impose upon another tribe the obligation to guarantee the tribe's gaming and other profits," FCPCAR001460.

The Assistant Secretary's reading of the 2014 Amendment was incorrect. The 2014 Amendment does not make Menominee responsible for the Mitigation Payments. By its express terms, the 2014 Amendment solely makes the State responsible for the Mitigation Payments. It does not impose any obligations upon Menominee, nor could it because Menominee was not a party to the agreement. The Assistant Secretary's disapproval was thus based on something that the 2014 Amendment simply does not say. This is a violation of IGRA, which only permits disapproval if there is a violation of IGRA in the compact under consideration. *See* 25 U.S.C. § 2710(d)(8)(B)(i).

i) The 2014 Amendment Would Not Have Required Menominee to Make the Mitigation Payments to the Community.

In the "Summary of Decision" section of the disapproval letter, the Assistant Secretary explained that the 2014 Amendment violated IGRA because "IGRA does not allow one tribe to use the state compact process to impose upon another tribe the obligation to guarantee the tribe's gaming and other profits." FCPCAR001460; *see also* FCPCAR001477 (same). Similarly, in the "Analysis" section of the disapproval letter, the Assistant Secretary wrote:

> The IGRA identifies in great detail what is allowable for negotiation in a tribal-state Class III compact, but it does not authorize states and tribes to negotiate to *shift the burden of loss [sic] revenues from existing gaming operations to another tribe* without the consent of the other tribe. Although the 2014 Amendment purports to make the State ultimately responsible for collecting the Mitigation Payments, the plain language of the 2014 Amendment and the supporting documents from the Potawatomi and the State demonstrate that, *in fact, Menominee would be responsible for making all of the Mitigation Payments intended to protect Potawatomi's revenue*.

FCPCAR001464 (emphasis added). The Assistant Secretary's disapproval was, thus, premised upon his view that the 2014 Amendment imposed an impermissible "obligation" or "burden" upon Menominee to make the Mitigation Payments. Indeed, this interpretation of the 2014 Amendment was repeated numerous times throughout the disapproval letter.[5]

[5] *See, e.g.*, FCPCAR001460 ("the 2014 Amendment seeks to guarantee its profits by *shifting the costs of any impact to the Menominee*") (emphasis added); FCPCAR001464 ("the plain language of the 2014 Amendment and the supporting documents from the Potawatomi and the State demonstrate that, in fact, *Menominee would be responsible for making all of the Mitigation Payments* intended to protect the Potawatomi's revenue") (emphasis added); FCPCAR001462 n.18 ("the intention of the 2014 Amendment is for the *Menominee to be responsible for making the Mitigation Payments*") (emphasis added); FCPCAR001460 ("The 2014 Amendment seeks to protect Potawatomi revenues fully by anticipating that the *Menominee will bear the burden* of making the Potawatomi whole . . .") (emphasis added); FCPCAR001460 ("the Potawatomi have attempted to *shift to Menominee the significant financial burden* of preserving all of the Potawatomi monopoly profits") (emphasis added); FCPCAR001460 ("we are troubled that the 2014 Amendment seeks to guarantee its profits by *shifting the costs of any impact to the Menominee*") (emphasis added); FCPCAR001460 ("We note that the Potawatomi's proposed compact amendment goes further than simply obtaining financial guarantees from the State. It seeks to impose *a substantial financial burden on the Menominee community* . . .") (emphasis added); FCPCAR001462 ("[the 2014 Amendment] requires the State, *or in the alternative, Menominee*, to make an annual 'Mitigation Payment' to the Potawatomi") (emphasis added); *id.* ("the 2014 Amendment also requires the State *or Menominee* to compensate the Potawatomi for revenue losses") (emphasis added); FCPCAR001463 ("We have never been presented with a compact or amendment that goes so far as to attempt to guarantee the continued profitability of one tribe's casino *at the expense of another tribe*.") (emphasis added); FCPCAR001465 ("it is clear that the 2014 Amendment intends to *make Menominee responsible* for any Mitigation Payment due") (emphasis added).

The Assistant Secretary's reading of the 2014 Amendment was incorrect because the 2014 Amendment repeatedly and expressly states that the Mitigation Payments are the obligation of the State:

> *The State is responsible for ensuring that the Mitigation Payments are paid in a timely manner and in full. This obligation is an obligation arising under a contract with the State* and enforceable under this Compact, including section XXIII.E. *The obligation of the State* to pay the Annual Revenue Loss to the Tribe shall begin upon the announcement of any gaming activity at the Applicant Facility and shall continue for the duration of the Compact.

BIA_002961 (emphasis added); *see also* BIA_002962 ("Such Alternative Mechanisms do not relieve *the State of its obligation*, as set forth above, *to ensure that the Mitigation Payments are paid in a timely manner and in full*.") (emphasis added); *id.* ("*the State is responsible* for ensuring that the Mitigation Payments are paid in a timely manner and in full") (emphasis added). The Community and the State's letters to the Assistant Secretary regarding the 2014 Amendment also unequivocally stated that the State would be responsible for the Mitigation Payments. *See* BIA_002947 ("the 2014 Compact Amendment makes the State responsible for the Mitigation Payment"); BIA_003082 ("By its terms, the [2014] Amendment would require the State to make an annual 'mitigation payment' to FCPC, equal to FCPC's lost revenue caused by Menominee competition.").

The 2014 Amendment did not require Menominee, or any other Applicant Tribe, to make the Mitigation Payments, nor could it have because Menominee was not a party to the agreement. It is a well-established principle of contract law that a contract cannot impose obligations upon a non-party. *See Grumman Ohio Corp. v. Dole*, 776 F.2d 338, 344 (D.C. Cir. 1985) (entity that was not party to contract owed no obligation under contract); *Anthony Gagliano & Co. v. Openfirst, LLC*, 850 N.W.2d 845, 858 (Wis. 2014) (finding obligations in contract do not apply to entity that was not a party to the contract); *see also Motorsport Eng'g, Inc. v. Maserati SPA*, 316 F.3d 26, 29

(1st Cir. 2002) (a third-party "who did not sign the contract, is not liable for either signatory's performance and has no contractual obligations to either"); *Chi. Coll. of Osteopathic Med. v. George A. Fuller Co.*, 719 F.2d 1335, 1345 (7th Cir. 1983) (entity that was not party to agreement and which did not agree to be bound had no contractual obligations); 13 Samuel Williston & Richard A. Lord, *Williston on Contracts* § 37:9 (4th ed. 2017) ("unprotected third parties are neither bound by the contract nor otherwise subject to its terms").

The Assistant Secretary's disapproval was thus premised upon a legal "obligation" imposed on Menominee that did not appear in the 2014 Amendment and which the agreement could not have imposed on a non-party. The 2014 Amendment does not "impose upon another tribe the obligation to guarantee the tribe's gaming and other profits," as the Assistant Secretary claimed. FCPCAR001460. Nor does it "shift the burden of loss [sic] revenues from existing gaming operations to another tribe without the consent of the other tribe." FCPCAR001464. The core justification for his disapproval was based upon an incorrect interpretation of the agreement before him. This disapproval was itself a violation of IGRA. IGRA states that the Assistant Secretary "may disapprove a compact . . . only if such compact violates" IGRA, other federal law, or the United States' trust obligations. 25 U.S.C. § 2710(d)(8)(B). Thus, the Assistant Secretary must identify a violation in the compact under consideration in order to disapprove it. The terms of the 2014 Amendment does not impose any "obligation" or "burden" on Menominee, and thus the Assistant Secretary's disapproval on such grounds did not properly identify a violation of IGRA within the compact under consideration. The disapproval was therefore "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and must be set aside by this Court. 5 U.S.C. § 706(2).

ii) The Provisions of the 2014 Amendment Relied Upon by the Assistant Secretary Did Not Impose Any Legal Obligations Upon Menominee

The Assistant Secretary's claim that Menominee would actually be responsible for the Mitigation Payments appears to have been based largely upon two provisions of the 2014 Amendment that refer to an "Applicant" tribe, which the Assistant Secretary interpreted as referring specifically to Menominee. *See* FCPCAR001462. Neither of these provisions, however, actually require the "Applicant" tribe to make the Mitigation Payments to the Community, and to the contrary, both provisions expressly state that the Mitigation Payments are the State's obligation.

The first provision the Assistant Secretary relied upon was Section XXXVII.E.1, *see* FCPCAR001462, which states:

> The State and the Tribe anticipate that the State will enter into agreements under which the Applicant will agree to pay the Mitigation Payments required in this Section. Timely payment of a Mitigation Payment in full to the Tribe by the Applicant satisfies the State's obligation to make that Mitigation Payment.

BIA_002961. The term "Applicant" refers to any Indian tribe that receives the approval of the Assistant Secretary to build a gaming establishment within 30 to 50 miles of the Community's casino in Milwaukee. *See* § XXXVII.A, BIA_002959. Menominee qualified as an "Applicant" under this provision in 2014 because of the Assistant Secretary's August 23, 2013 two-part determination approving its proposed casino in Kenosha. But the definition of Applicant is not limited to Menominee, and includes any other tribe that receives approval of an off-reservation casino in the relevant area around Milwaukee in the future. In the disapproval letter, the Assistant Secretary repeatedly substituted the word "Menominee" for "Applicant" when quoting the 2014 Amendment, *see* FCPCAR0001462, but this was misleading because it made these provisions appear to be limited to Menominee, when in fact these provisions actually apply to any Indian tribe meets the definition of an "Applicant."

Section XXXVII.E.1 does not make Menominee responsible for the Mitigation Payments. This provision "anticipate[s]" a separate agreement between the State and an Applicant tribe to assume those payments, but it does not require either the State or the Applicant to enter into such an agreement or guarantee the Assistant Secretary's approval of any such an agreement. One reason that the parties "anticipate[d]" such an agreement was because Menominee had issued press releases promising that it would assume all of the State's payment obligations to other tribes if its Kenosha Casino was approved. *See* BIA_003075 ("Menominee will ensure . . . that any amounts owed [by the State] to Potawatomi . . . will be covered by Menominee."). The statement of "anticipation" in Section XXXVII.E.1 does not seek to legally bind the Menominee to its promise, but rather it only establishes the rights and obligations of the Community and the State in the event that such an agreement is reached. Specifically, this provision establishes that the State's obligation to make the Mitigation Payments under the 2014 Amendment could be satisfied if those payments are made by an Applicant tribe. Far from demonstrating that Menominee was obligated to make the Mitigation Payments, Section XXXVII.E.1 actually expressly states that it is the "State's obligation" to make the Mitigation Payment and that Menominee would be allowed, but not required to assume that obligation if it reached a separate agreement with the State. BIA_002961.

The Assistant Secretary also appears to have relied upon Section XXXVII.F of the 2014 Amendment as evidence that Menominee would actually be responsible for the Mitigation Payments. *See* FCPCAR001462–63. That provision requires that upon a written request from the State, the Tribe will "negotiate in good faith to reach an agreement on reasonable terms proposed by the State which would obligate the Applicant or other third party to make some or all of the Mitigation Payments." BIA_002962. But, again, this provision does not impose any legal obligations upon Menominee and instead is intended to clarify the terms of the State and the

Community's obligations in the event that an Applicant tribe reaches an agreement with the State to assume the State's payment obligations. This provision also expressly reiterates that it is the State that is obligated to make the Mitigation Payments, stating that any agreements with an Applicant or other third party "do not relieve the State *of its obligation* . . . to ensure that the Mitigation Payments are paid," and "*the State is responsible* for ensuring that the Mitigation Payments are paid in a timely manner and in full." BIA_002962 (emphasis added).

In short, neither of the provisions cited by the Assistant Secretary imposed any obligation upon Menominee to make the Mitigation Payments to the Community. These provisions only establish the rights and obligations of the Community and the State in the event that an "Applicant" tribe agrees to assume the Mitigation Payments, but they do not require Menominee or any other Applicant tribe to assume such payments. To the contrary, both of these provisions expressly state that the Mitigation Payments are the responsibility of the State. These provisions, therefore, do not support the Assistant Secretary's claim that the 2014 Amendment imposed an impermissible obligation upon Menominee.

The mere fact that the 2014 Amendment references Menominee by name also does not provide any grounds for disapproval under IGRA. It was the Assistant Secretary's two-part determination regarding Menominee's proposed Casino in Kenosha that caused the State to invoke the arbitration process that resulted in the 2014 Amendment, *see* BIA_002944, which is why the 2014 Amendment expressly acknowledges that Menominee's proposed Kenosha casino qualified as an "Applicant Facility" under the terms of the 2014 Amendment. BIA_002959. There is nothing in IGRA that prohibits this factual acknowledgement that the Kenosha casino fit the definition of the term "Applicant Facility." Similarly, the one other reference to Menominee in the 2014 Amendment is an acknowledgment that the definition of "Alternative Mechanisms" under the

Agreement could include payments out of the "Lock Box" established under the Menominee's gaming compact. *See* BIA_002962. These references to Menominee are both factual statements that provided clarity about the meaning of terms in the agreement, and thus do not provide grounds for disapproval under IGRA. *See* BIA_003180–84 (Secretary of Interior's letter regarding Seneca Nation of Indians' 2002 compact found compact provision that limited the gaming opportunities of two other tribes that were specifically referenced by name did not provide grounds for disapproval under IGRA).

iii) The Assistant Secretary's Own Predictions That Menominee Would Assume the Mitigation Payments Was Also Not a Proper Basis for Disapproval of the 2014 Amendment.

To the extent that the Assistant Secretary's disapproval was based on his own predictions that Menominee would reach an agreement with the State to assume the obligation to make the Mitigation Payments, that was also not a permissible basis for disapproval under IGRA.

Near the end of the disapproval letter, the Assistant Secretary wrote:

> The 2014 Amendment contemplates that the State is ultimately is [sic] obligated to make the mitigation payments to the Potawatomi to reimburse it for any lost revenue experienced by its Milwaukee Casino, but may pass its payment obligation to the Menominee. If Menominee did not consent to make the Mitigation Payments, for example, the Governor may decline to concur in the Secretary's two part-determination [sic] for Kenosha.

FCPCAR001466. This statement is revealing in two important respects. First, it acknowledges that the 2014 Amendment ultimately made the State responsible for the Mitigation Payments and that Menominee would only be obligated to make these payments through a separate agreement with the State. This directly contradicts the Assistant Secretary's assertions throughout the disapproval letter that the 2014 Amendment itself imposed an impermissible "obligation" or "burden" upon Menominee to make the Mitigation Payments. This passage shows that the Assistant Secretary

decided to treat the 2014 Amendment as if it imposed this obligation upon Menominee in order to justify his disapproval, even though he knew that it actually did not.

Second, this statement indicated that the Assistant Secretary's decision was based on his own prediction that the State would choose to pass along this obligation to Menominee as a condition for approval of the Menominee's casino. IGRA, however, does not allow the Assistant Secretary to disapprove a compact on such grounds. IGRA states that the Assistant Secretary "may disapprove a compact . . . only if such compact violates" IGRA, other federal law, or the United States' trust obligations. 25 U.S.C. § 2710(d)(8)(B). The words "such compact" in the statute demonstrate that the violation of IGRA must be in the compact under consideration. The Assistant Secretary was, therefore, not permitted to disapprove a compact amendment that was before him based upon his predictions about the terms of a hypothetical separate agreement between the State and another tribe.

On the last page of the disapproval letter, the Assistant Secretary delved more deeply into his speculation as to the possibility of an agreement between the State and Menominee, discussing whether such an agreement would comply with the Defendants' "long-standing revenue sharing test" under IGRA. FCPCAR0001467. He stated that it was "unlikely" that such an agreement would pass this test, but then he acknowledged that he could not actually answer this question because he did not have any such agreement in front of him, and thus "without a companion agreement we are unable to determine whether making the Mitigation Payments results in substantial economic benefits to the Menominee . . ." *Id.* But, again, Section 2710(d)(8)(B) of IGRA does not permit the Assistant Secretary to disapprove a compact based on this type of speculation about the terms of a separate agreement. Even if the Assistant Secretary were correct that the State and Menominee would reach a separate agreement and that agreement would violate

IGRA, the violation in that agreement would not permit him to disapprove an entirely separate compact amendment between the Community and the State under Section 2710(d)(8)(B).

Contrary to the Assistant Secretary's predictions, there was actually great uncertainty as to whether the State would pass its obligations on to Menominee, or what the terms of such agreement would be. At the time of the disapproval, it was very possible that the Governor would decide not to concur with the two-part determination for the Kenosha casino, as he ultimately did, *see* BIA_003245, in which case the State would not have sought any agreement with Menominee to assume the Mitigation Payments. It was also possible that the State could have offered to provide something valuable to Menominee in exchange for Menominee assuming some or all of the Mitigation Payments, in order to ensure that any such agreement with Menominee would be approved under IGRA. Finally, the State could credit any Mitigation Payments against the annual revenue sharing payments by either the Community or by Menominee. The Assistant Secretary's prediction that Menominee would assume all of the Mitigation Payments and not receive anything valuable in return was thus highly speculative. By limiting the circumstances under which disapproval is allowed in IGRA, Congress sought to prohibit the Assistant Secretary from disapproving compacts based on this kind of discretionary and uncertain speculation about the terms of other possible agreements. *See* 25 U.S.C. § 2710(d)(8)(B). Rather, Congress required that the violation of IGRA must be in the agreement under consideration. *Id.*

The Assistant Secretary's claim that the State would require Menominee to assume the Mitigation Payments was also undercut by his own admission that he could prevent Menominee from assuming any such obligations that violated IGRA. The Assistant Secretary specifically noted in the disapproval letter that if the "obligation [to make the Mitigation Payments] was transferred to Menominee in an amended Menominee gaming compact, we would be hard pressed to approve

it." FCPCAR001466. The Assistant Secretary, thus, had the power to protect Menominee from assuming any obligations that were not in compliance with IGRA through his power to review Menominee's compact amendments. That admission directly repudiates the central justification for his decision that the 2014 Amendment would impose an impermissible "burden" or "obligation" upon Menominee.

The Assistant Secretary's predictions about negotiations between the State and Menominee also suggest that he was improperly using the decision on the 2014 Amendment to influence the Governor's decision on the Kenosha casino. IGRA does not impose any conditions upon a governor's decision to concur or not concur with a two-part determination, nor does it require him to explain his decision. 25 U.S.C. § 2719(b)(1)(A); *see also* BIA_003245 (non-concurrence decision for Kenosha casino). The Governor, thus, had unfettered discretion regarding his concurrence decision on the Kenosha casino, and he was free to negotiate an agreement with Menominee on the Mitigation Payments as a condition of his approval. The Assistant Secretary's attempt to preemptively avert such an agreement through his disapproval of the 2014 Amendment was an improper interference with the Governor's authority and discretion under IGRA. It is evident from the Assistant Secretary's two-part determination that he strongly supported the Menominee's proposed casino in Kenosha, *see, e.g.*, BIA_003084–86, but IGRA does not allow him to disapprove a compact in order to advance those policy preferences or to influence the Governor's decision on that project. *See* 25 U.S.C. § 2710(d)(8)(B).

Ultimately, the 2014 Amendment *only* made the State responsible for the Mitigation Payments, and so the Assistant Secretary should have based his decision on whether that obligation *upon the State* violated IGRA. The Assistant Secretary made no such finding. In fact, he expressly declined to decide whether an agreement that did not involve Menominee would have been

permissible. *See* FCPCAR001464–65 ("Had the State alone, without reference to Menominee as the "Applicant," agreed to a reduction in revenue sharing, for example, rather than the Mitigation Payment as calculated by the 2014 Amendment, *our decision might be different*.") (emphasis added). The Assistant Secretary instead based his disapproval on his speculation about at separate agreement between the State and Menominee, which, for all the reasons described above, IGRA does not allow.

D. The Assistant Secretary Erred in Finding that the 2014 Amendment Fell Outside the Permissible Subjects of a Class III Gaming Compact.

The second fundamental error in the Assistant Secretary's disapproval was his incorrect view that the 2014 Amendment fell outside the permissible subjects of a gaming compact under IGRA. The Assistant Secretary asserted that "the 2014 Amendment violated IGRA because it includes provisions involving subjects that exceed the permissible scope of a Class III gaming compact." FCPCAR001466. Specifically, the Assistant Secretary explained that "IGRA identifies in great deal what is allowable for negotiation in a tribal-state Class III compact, but it does not authorize states and tribes to negotiate to shift the burden of loss [sic] revenues from existing gaming operations to another tribe without the consent of the other tribe." FCPCAR001464.

This claimed violation of IGRA was incorrect because, as explained in more detail below, the 2014 Amendment fell within IGRA's permitted catch-all category for "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). Numerous tribal-state gaming compacts contain exclusivity agreements in which a state agrees to limit competition to a tribe's casino in exchange for payments from the tribe, and the Assistant Secretary has found many such agreements permissible under Section 2710(d)(3)(C)(vii). The 2014 Amendment was part of just such an exclusivity agreement between the State and the Community, and thus was also permitted under IGRA.

i) Exclusivity Agreements Are Permissible in Gaming Compacts Under IGRA.

IGRA permits a Class III gaming compact to include topics within seven separate categories. *See* 25 U.S.C. §§ 2710(d)(3)(C)(i)–(vii). Congress included these topics for the benefit of tribes to "prevent compacts from being used as subterfuge for imposing State jurisdiction on tribes concerning issues unrelated to gaming." *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003) (citing S. Rep. No. 100–446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084). The last of the seven categories permits a compact to include "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). Department of the Interior officials and the Assistant Secretary have described this broadly-worded provision as a "catch-all" category, BIA_003177, or "catchall provision," BIA_003249.

Courts have interpreted the phrase "any other subjects that are directly related to the operation of gaming activities" in Section 2710(d)(3)(C)(vii) to permit a wide range of compact provisions that have a connection to gaming activity. *See, e.g.*, *In re Indian Gaming Related Cases*, 331 F.3d at 1110, 1113–16 (finding provisions requiring revenue sharing with non-gaming tribes, funding of state gaming-related programs, and labor relations provisions to all be within Section (d)(3)(C)(vii)); *Chemehuevi Indian Tribe*, 2017 WL 2971864, at *6 (finding provision governing duration of compact to be within the "broad language" of Section 2710(d)(3)(C)(vii)); *Flandreau Santee Sioux Tribe v. Gerlach*, No. CV 14-4171, 2017 WL 4124242, at *10 (D.S.D. Sept. 15, 2017) ("slots, table games, food and beverage services, hotel, RV park, live entertainment events, and gift shop are directly related to class III gaming pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii)").

Exclusivity agreements are one of the types of provision that the Assistant Secretary has frequently approved or deemed-approved in gaming compacts. Exclusivity agreements generally require a tribe to make an increased revenue-sharing payment to a state in exchange for a promise from the State to limit competition to the tribe's casino. In some compacts, the state agrees to

maintain limits on non-Indian gaming in the entire state. *See, e.g., Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 724 n.12, n.13 (9th Cir. 2003) (discussing statewide exclusivity agreements in California, New York, and Connecticut); FCPCAR001585–86 (statewide exclusivity in Michigan compact); BIA_003569 (statewide exclusivity in Wisconsin compact). In other compacts, the state agrees to not allow competitor casinos, including casinos operated by other tribes, to be built within a particular geographic region around a tribe's casino. *See, e.g.*, BIA_003224–27 (excluding other tribes from operating gaming devices in a 10,500 square mile region in Western New York and within a 25-mile radius of any of the tribe's gaming facilities); FCPCAR001618–19 (excluding other tribes from off-reservation gaming in ten counties in Michigan); BIA_003625 (allowing reduction in revenue-sharing payment if another tribe is allowed to build off-reservation casino within 70 miles of tribe's casinos in Wisconsin). Exclusivity agreements generally require that if the state chooses to end the tribe's exclusivity and allow competitor casinos in the relevant geographic area, the tribe is no longer required to make the increased revenue-sharing payments to the state. *See, e.g.*, FCPCAR001615 ("In exchange for the geographical exclusivity, the tribe agrees to pay between 10 and 12 percent of net win from the class III electronic games at the tribe's second site, depending on the amount of actual revenues. The payment to the State ceases if the scope of non-Indian gaming is expanded within the State or if a federally recognized tribe opens a class III gaming facility within the 10 county areas."). The purpose of these exclusivity agreements, as expressly stated in the Little Traverse Bay Bands of Odawa Indians' compact, is to "maximize the economic benefits of class III gaming for the Tribe . . . in exchange for the Tribe providing important revenue to the state." FCPCAR001585.

The Assistant Secretary has approved and deemed-approved numerous exclusivity agreements under IGRA. *See, e.g.*, BIA_003146–47 (exclusivity agreement approved);

FCPCAR001634–5 (exclusivity agreement found permissible under IGRA and deemed approved). The fact that the Assistant Secretary has "repeatedly approved" such agreements shows that the agency has concluded they are "consistent with IGRA, and thus with[in] section 2710(d)(3)(C)(vii)." *Fort Indep. Indian Cmty.*, 679 F. Supp. 2d at 1177. Like the Assistant Secretary, the Ninth Circuit has also found that exclusivity agreements are permissible under IGRA. *See In re Indian Gaming Related Cases*, 331 F.3d at 1110–13 (ruling that a compact agreement between the State of California and California Indian tribes that granted the tribes the exclusive right to conduct class III gaming partially in exchange for contributions by the tribes into a revenue sharing trust which was distributed among non-gaming tribes was permissible under Section 2710(d)(3)(C)(vii)).

The Assistant Secretary acknowledged his longstanding practice of approving exclusivity agreements in his letter to the Community deeming approved the 2003 Amendment, stating:

> It is the position of the Department to permit revenue-sharing payments in exchange for *quantifiable* economic benefits over which the State is not required to negotiate under IGRA, *such as substantial exclusive rights to engage in Class III gaming activities*.

FCPCAR000326 (second emphasis added). This statement highlights that the Assistant Secretary's primary consideration when reviewing exclusivity agreements is whether the exclusivity provided to the tribe is of sufficient economic benefit to justify the revenue sharing payments. Revenue-sharing provisions are generally prohibited under IGRA as an illegal "tax, fee, charge, or other assessment upon an Indian tribe" under 25 U.S.C. § 2710(d)(4). Thus, the Assistant Secretary determines whether exclusivity clauses are permissible by considering whether the state has offered meaningful concessions and whether the exclusivity clauses provide a sufficient economic benefit to the tribe to warrant such payments. *See* FCPCAR001565–66. Ensuring that the tribe receives a valuable economic benefit for its payments is thus the paramount

concern. *See, e.g.*, FCPCAR001565–66 (expressing concern that limitations on geographic scope of tribe's exclusivity resulted in inadequate benefit to the tribe); FCPCAR001591–93 (same).

The Assistant Secretary's affirmative approval of an exclusivity agreement in a compact amendment for the Lac du Flambeau Band of Lake Superior Chippewa Indians ("Lac du Flambeau") in Wisconsin in 2009 is particularly instructive. That compact amendment stated:

> If any Indian Tribe, other than the Lac du Flambeau Tribe, submits an application to the Secretary of the Interior ("Secretary") under 25 U.S.C. Sec. 2719(b)(1)(A), after execution of this Compact, and receives a determination ("Determination") that a proposed Class III gaming facility on off-reservation trust lands acquired by the United States for that Tribe, is in the best interest of that Tribe and its members and is not detrimental to the surrounding community, the State shall, within 10 days of receipt of the Determination, send a written notice ("Notice") to the Tribe that it has received a submission from the Secretary to concur in the Determination. The Governor of the State shall not concur in the Determination if the Tribe has notified the State, within sixty (60) days of receipt of the Notice, that the operation of Class III gaming facility will cause a substantial reduction of Class III gaming revenues at the Tribe's Class III gaming facility, unless the State has entered into [a] binding indemnification agreement with the Tribe to compensate it for the reduction, or the mandatory negotiations required under Section XXII. have concluded and the binding arbitration procedures in Section XXII. have been initiated.

BIA_003171; *see also* BIA_003146–47 (Federal Register notice of approval and approval letter).[6]

This provision, thus, expressly prohibited the State from allowing another Indian tribe to build an off-reservation casino if the Lac du Flambeau determined it would cause a "substantial" reduction of the tribe's gaming revenues, unless the State agreed to compensate the Lac du Flambeau for the reduction. *See* BIA_003171. The Assistant Secretary's approval of that provision demonstrates that exclusivity agreements between a tribe and a State fall squarely within the

[6] Similar exclusivity provisions have been deemed approved by the Assistant Secretary in gaming compacts of four other Wisconsin tribes, the Ho-Chunk Nation, the Oneida Tribe of Indians of Wisconsin, the St. Croix Chippewa Indians of Wisconsin, and the Stockbridge Munsee Community. *See* BIA_003429–31 (Ho Chunk Compact, Paragraph 16 (Revised), provides state indemnification for revenue loss); BIA_003569 (Oneida Compact, XXII.B.3, provides a 50 mile radius exclusivity zone); BIA_003596-97 (St. Croix Compact, XXXII.B.3, provides a 50 mile radius exclusivity zone); BIA_003625 (Stockbridge Compact, XXXII.B, provides a 70 mile radius market protection zone); *see also* FCPCAR000788–90 (summarizing these provisions).

permissible subjects of IGRA, even if they potentially restrict or limit off reservation gaming of other tribes. This approval also shows that it is permissible under IGRA for compacts to require a state to compensate a tribe for the competitive impact of another tribe's off-reservation casino. The Assistant Secretary conceded this point in the disapproval letter, acknowledging that the Defendants have permitted compact provisions that required negotiations over "indemnification by the State for either Class III gaming revenues or an undefined 'loss of revenue.'" FCPCAR001465.

Given this legal framework, the 2014 Amendment is clearly permissible under IGRA. The 2014 Amendment implements the exclusivity agreement with the State that was struck in 2003 and 2005, whereby the Community agreed to make lump sum payments and increased revenue-sharing payments in exchange for a promise from the State to limit competition in the region around the Community's Milwaukee casino. *See* BIA_002937. The Community received "quantifiable economic benefits" from the State in the form of a "substantial exclusive rights to engage in Class III gaming activities" in the Milwaukee area, and thus this agreement met Defendants' standards for approval of exclusivity provisions. FCPCAR000326. The 2014 Amendment is a key part of this exclusivity agreement because it sets the terms if the State chooses to end that deal, requiring the State to compensate the Community for losses caused by a competitor facility within 30 to 50 miles of Milwaukee. *See* BIA_002959–60. The terms of the 2014 Amendment are similar to the provisions in many exclusivity agreements, except that instead of reducing the tribe's revenue-sharing payments in the event that the state ends the tribe's exclusivity, the 2014 Amendment actually provides a more measured benefit to the Community because it is dependent on proof of actual loss. *See* BIA_002960. The Mitigation Payment could

be less than or more than the Community's revenue-sharing payments and will last only as long as the loss caused by the Applicant Facility. *Id.*

The 2014 Amendment is, thus, "directly related" to the Community's "gaming activities" within the meaning of Section 2710(d)(3)(C)(vii). Just like other exclusivity agreements, it provides protection for the Community's revenue streams from its gaming operations at its Milwaukee casino, and thus "maximize[s] the economic benefits of Class III gaming for the Tribe." FCPCAR001585. The 2014 Amendment also expressly defines the Mitigation Payments to be calculated based upon the "revenue from Class III gaming" and related operations at the Community's Milwaukee hotel and casino, further evincing the direct relationship between the agreement and the Community's gaming activities. BIA_002960; *see also Flandreau Santee Sioux Tribe*, 2017 WL 4124242, at *10 ("slots, table games, food and beverage services, hotel, RV park, live entertainment events, and gift shop are directly related to class III gaming pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii)").

The terms of exclusivity agreements vary widely from state to state and from tribe to tribe. The 2014 Amendment is unique to the circumstances that the State and the Community felt were relevant. The 2014 Amendment requires the State to make payments to the Community, which may be greater than or less than the Community's increased revenue-sharing payments to the State. But the direction of the payments between the Community and the State does not change the analysis of whether the 2014 Amendment was "directly related" to the operation of gaming activities under Section 2710(d)(3)(C)(vii). To the contrary, the Assistant Secretary's approval of the Lac du Flambeau amendment shows that IGRA permits the State to make payments to a tribe to offset revenue losses caused by competition. BIA_003171; *see also* FCPCAR001465 (acknowledging that the Defendants have permitted compacts amendments that call for

negotiations over "indemnification by the State for either Class III gaming revenues or an undefined 'loss of revenue.'"). Furthermore, the purpose of the categories of permissible subjects in IGRA was to protect tribes from states imposing their jurisdiction on tribes on issues unrelated to gaming. *See In re Indian Gaming Related Cases*, 331 F.3d at 1111. It would not be consistent with that objective of protecting tribes to interpret these provisions to allow tribes to make revenue-sharing payments to states but prohibit states from making payments to tribes. In this case, the Community had made exceptionally large lump-sum payments to the State in 2004 and 2005 totaling $90.5 million, in order to help relieve a state budget crisis. The assurance of receiving Mitigation Payments to the extent of a revenue loss caused by a Governor concurrence of an off-reservation casino is appropriate and to the Community's benefit because they would partially compensate the Community for those substantial payments.

For all of the foregoing reasons, the Assistant Secretary erred in determining that the 2014 Amendment fell outside the permissible subjects of IGRA. *See* FCPCAR001464; FCPCAR001466. The 2014 Amendment is permissible under Section 2710(d)(3)(C)(vii) because it is directly related to the operation of gaming activities, just like other approved exclusivity agreements. The Assistant Secretary's claim that it fell outside this provision and thus violated IGRA was, therefore, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and must be set aside under the APA. 5 U.S.C. § 706(2).

ii) The Assistant Secretary Provided No Valid Reason Under IGRA for Distinguishing the 2014 Amendment from Other Approved Exclusivity Agreements.

In the disapproval letter, the Assistant Secretary did not repudiate the longstanding position of his office that exclusivity agreements are permissible subjects for gaming compacts under IGRA. FCPCAR000326. Instead, he attempted to distinguish the 2014 Amendment from the exclusivity agreements that had been approved in other tribes' compacts. In particular, he relied

upon his erroneous view that the 2014 Amendment made Menominee responsible for the Mitigation Payments as his basis of distinction, stating: "We have never been presented with a compact or amendment that goes so far as to attempt to guarantee the continued profitability of one tribe's casino at the expense of another tribe." FCPCAR001463. Similarly, he distinguished the other Wisconsin compacts, including the Lac du Flambeau compact on the grounds that they "do not specifically call for anything approaching the Mitigation Payments that guarantee the Tribe's profits by another tribe." FCPCAR001465.

The Assistant Secretary's claimed distinction was incorrect on both the facts and the law. On the facts, the 2014 Amendment did not impose any legal obligations upon Menominee, as described in Section III.C, *supra*, so this distinction was based on an incorrect reading of the agreement. Furthermore, the exclusivity agreements that the Assistant Secretary had approved for other tribes were actually highly similar to the terms of the 2014 Amendment. In particular, the Lac du Flambeau compact amendment that was approved by the Assistant Secretary in 2009 contained an exclusivity clause that expressly prohibited the State from allowing another Indian tribe to build an off-reservation casino that the Lac du Flambeau determined would cause a "substantial" reduction of its gaming revenues, unless the State agreed to compensate the Lac du Flambeau for the reduction. *See* BIA_003171. Similar exclusivity provisions had been deemed approved for four other Wisconsin tribes. *See* n.6, *supra*. Thus, contrary to the Assistant Secretary's claims, he had approved compact provisions that were similar to the 2014 Amendment and which required the State to compensate a tribe for revenues losses from competition. The 2014 Amendment was, thus, also permissible under IGRA and should have been approved.

The Assistant Secretary's claimed distinction also had no basis in law because it did not address the applicable standard for permissibility under Section 2710(d)(3)(C)(vii). The Assistant

Secretary claimed that the 2014 Amendment differed from other tribes' compacts because it required Menominee to "guarantee" the Community's profits, FCPCAR001465, but even if that reading of the agreement were correct (which it was not), he failed to explain why that would affect whether or not the agreement was "directly related to the operation of gaming activities" under Section 2710(d)(3)(C)(vii). The Assistant Secretary did not tie the distinctions that he claimed existed between the 2014 Amendment and other exclusivity agreements to the relevant statutory language. In particular, he did not offer any explanation or analysis of why the market protections for tribes in other exclusivity agreements are "directly related" to gaming activities, and thus permissible, but the market protections provided to the Community's casino in the 2014 Amendment are not "directly related" and thus not permitted under IGRA.

In Michigan the Assistant Secretary has approved compact provisions that require tribes to agree to share revenues from any new off-reservation casino with other tribes in the state. *See*, *e.g.*, BIA_003251 (finding this provision permissible under IGRA). The approval of those compact provisions demonstrates that payments between tribes can be permissible under the statute. Thus, even if the 2014 Amendment had required Menominee to make payments directly to Menominee (which it did not), that would not automatically mean that it fell outside the permissible subjects of IGRA. The Assistant Secretary claimed that those Michigan compacts were "distinguishable because they were based upon a model agreement and all of the signatories consented to its provisions." FCPCAR001466. But the Assistant Secretary failed to offer any explanation for why that distinction would affect whether these provisions are "directly related" to the operation of gaming activity under Section 2710(d)(3)(C)(vii).

Rather than basing his decision on the actual language in Section 2710(d)(3)(C)(vii), the Assistant Secretary instead invoked notions of "fairness in inter-tribal gaming competition" to

justify his decision. FCPCAR001466. "[D]isapproval of this compact ensures a continued level playing field among all tribal gaming market entrants," he claimed. *Id.* But his attempt to use Section 2710(d)(3)(C)(vii) as the statutory hook for these vague notions of "fairness" was baseless and improper because there is nothing in this provision that limits the permissibility of compact provisions on the grounds of "fairness" or the Assistant Secretary's views on "inter-tribal gaming competition." The Assistant Secretary did not identify any statutory provision or other legal authority that supported such a reading of Section 2710(d)(3)(C)(vii).

The error in the Assistant Secretary's interpretation of the permissible categories under IGRA is made plain by Secretary of Interior ("Secretary") Gale A. Norton's prior decision regarding a 2002 gaming compact between the Seneca Nation of Indians ("Seneca Nation") and the State of New York. In this compact, the Seneca Nation agreed to make increased revenue-sharing payments to the State in exchange for the exclusive right to operate gaming devices in a 10,500 square mile region in Western New York and within a 25-mile radius of any gaming facility authorized under the Compact. *See* BIA_003182; BIA_003224–27. This exclusivity provision limited the off-reservation gaming opportunities of two other tribes, the Tuscarora Indian Nation and the Tonawanda Band of Seneca Indians, which were specifically identified by name in the compact. *Id.* In her decision, the Secretary determined that this exclusivity agreement would "specifically deny other tribes gaming opportunities," BIA_003183, but she determined that this fact was not a permissible grounds for disapproval under IGRA, stating that such concerns "*fall outside of the limited reasons in IGRA for Secretarial disapproval*." BIA_003180–81 (emphasis added). To the contrary, Secretary Norton found that this provision was affirmatively "consistent with IGRA" because the Seneca Nation received substantial geographic exclusivity coupled with

other valuable consideration, in exchange for the revenue-sharing payments. BIA_003184; *see also* FCPCAR001660 (Federal Register notice of deemed approval of Seneca Nation compact).

This decision directly repudiates the Assistant Secretary's claim that the 2014 Amendment fell outside of the permissible subjects of IGRA because of the effect he anticipated it may have had on another tribe. The Seneca Nation decision specifically determined that the fact that a compact may "deny other tribes gaming opportunities" is *not* permissible grounds for disapproval of a gaming compact under IGRA. BIA_003183; BIA_003180–81. The 2014 Amendment, in contrast, did not deny Menominee any gaming opportunities, making disapproval on such grounds even more inappropriate. Moreover, the Assistant Secretary did not provide any explanation that would justify a departure from that prior decision in the Seneca Nation case. *See NLRB v. CNN Am., Inc.*, 865 F.3d 740, 751 (D.C. Cir. 2017) ("it is elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent") (quotation marks omitted); *ABM Onsite Servs.-W., Inc. v. NLRB*, 849 F.3d 1137, 1146 (D.C. Cir. 2017) (an agency "is not free to simply adopt . . . [a] new approach without offering a reasoned explanation for that shift").[7]

The Seneca Nation decision also highlights that when the Assistant Secretary is analyzing whether exclusivity agreements are permissible under IGRA, the relevant question for him to

[7] In his disapproval letter, the Assistant Secretary did not claim to rely upon the provision of IGRA that allows him to disapprove compact amendments based on a violation of his trust obligations to Indian tribes. The Seneca Nation decision explains why that provision was not applicable because Secretary Norton's letter specifically determined that a limitation on other tribes' off-reservation gaming opportunities did not violate the United States' trust obligations to the other Indian tribes because there is no "absolute right to off-reservation gaming" in IGRA. *See* BIA_003184; *see also Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650, 665–668 (7th Cir. 2004) (finding the governor's concurrence authority under 25 U.S.C. § 2719(b)(1)(A) does not violate the trust obligation of the United States to Indians).

consider should be whether the exclusivity provision provides sufficiently "valuable consideration" to the tribe receiving the exclusivity to justify the revenue sharing payments. BIA_003184; *see also* FCPCAR001565–66 (stating that permissibility depends upon whether the state has offered meaningful concessions and whether the exclusivity provisions provide a sufficient economic benefit to the tribe). At no point in the disapproval letter did the Assistant Secretary consider whether the terms of the 2014 Amendment would benefit the Community. Instead, his disapproval actually *deprived* the Community of the economic benefits that it had negotiated to receive from the State in the 2003 and 2005 Amendments, which should have weighed *against* a disapproval.

For all of these reasons, the Assistant Secretary's claims that the 2014 Amendment fell outside of the permissible categories of IGRA and could be distinguished from other exclusivity agreements were incorrect.

iii) The Inclusion of Class II Revenue in the Calculation of Mitigation Payments Also Did Not Provide a Basis for Distinguishing Other Exclusivity Agreements.

The Assistant Secretary also made a brief statement that the 2014 Amendment could be distinguished from other exclusivity agreements on the grounds that the 2014 Amendment included Class II gaming in the calculation of the Mitigation Payments. *See* FCPCAR001465 ("Nor do these other compact amendments include Class II gaming and other revenues."). The Assistant Secretary did not provide any further explanation or support for this argument, which was wrong for two reasons.

First, the inclusion of Class II revenues in the calculation of Mitigation Payments was to the Community's benefit because it increased the amount of the payments that the State would be required to make to the Community. *See* § XXXVII.D.2, BIA_002960. This provision thus represented a concession of the State and provided an economic benefit to the tribe, which are the

primary factors that the Assistant Secretary weighs *in favor* of approving exclusivity agreements. *See* FCPCAR001565–66. This benefit to the Community was also consistent with the broader goals of IGRA to "promote the economic viability of Indian tribes." *City of Roseville*, 348 F.3d at 1032; *see also* 25 U.S.C. § 2702(1).

Second, the Assistant Secretary did not provide any explanation for why the inclusion of Class II revenue in this calculation would mean that it is no longer "directly related to the operation of gaming activities" under Section 2710(d)(3)(C)(vii). The Assistant Secretary offered no legal authority that "gaming activities" in this provision is limited to Class III gaming. To the contrary, the specific references to "Class III gaming activity" throughout IGRA indicate that Congress did not intend the unqualified reference to "gaming activity" in Section 2710(d)(3)(C)(vii) to be limited to Class III gaming. *See, e.g.*, 25 U.S.C. §§ 2710(d)(3)(A); 2710(d)(2)(A); 2710(d)(2)(C); 2710(d)(2)(D)(iii)(I); 2710(d)(7)(A)(ii); 2710(d)(9).

Moreover, reading Section 2710(d)(3)(C)(vii) to prohibit any reference to Class II gaming, even if beneficial to a tribe, would not be consistent with the purpose of this provision. As discussed above, the categories of permissible subjects in IGRA were intended to protect tribes by "prevent[ing] compacts from being used as subterfuge for imposing State jurisdiction on tribes concerning issues unrelated to gaming." *In re Indian Gaming Related Cases*, 331 F.3d at 1111. The reference to Class II gaming in the 2014 Amendment did not implicate any such concerns because it solely provided a benefit to the Community and did not give the State any regulatory authority over the Tribe's Class II gaming operations. Thus it would be inconsistent with the purpose of the statute to read it as prohibiting the 2014 Amendment. The Assistant Secretary's attempt to distinguish the 2014 Amendment from other exclusivity agreements on these grounds was, therefore, incorrect.

E. The Assistant Secretary's Disapproval Deprived the Community of the Benefit of its Bargain with the State.

Over the past 10 years, the Community has paid the State $234.3 million in lump-sum payments and increased revenue-sharing payments, as it agreed to do in the 2003 and 2005 Amendments. The Community continues to make these increased revenue-sharing payments each year. *See* BIA_002944–45. In exchange for these payments, the 2005 Amendment provided that the Community will receive compensation if the State ever chose to end the Tribe's exclusivity in the Milwaukee region. That compensation was to be determined by the last-best-offer arbitration process that was deemed-approved by the Assistant Secretary in 2005. In reliance on that agreement and the market protections it provided, the Community has made substantial investments in its Milwaukee casino and hotel. The Assistant Secretary's disapproval of the 2014 Amendment deprived the Community of the benefit of this bargain, invalidating the core economic benefit that the Community had negotiated to receive as part of its exclusivity agreement with the State. The Assistant Secretary failed to protect the Community's interests in its contractual dealings with the State, which is contrary to the fundamental purpose of IGRA to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

IV. CONCLUSION

For the foregoing reasons, the Community's Motion for Summary Judgment should be granted. The Community requests that the Court vacate the January 9, 2015 disapproval letter and find that the 2014 Amendment is permissible under IGRA. In the alternative, the Community requests that the Court remand to the Defendants to reconsider its decision in accordance with the requirements of IGRA. If the Court remands, the Community also requests that the Court order that if the Defendants do not take action within 45 days of remand, that the 2014 Amendment be "deemed approved" under 25 U.S.C. § 2710(d)(8)(C).

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Respectfully submitted,

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