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 John Tahsuda 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

PLAINTIFF FOREST COUNTY POTAWATOMI COMMUNITY'S CONSOLIDATED REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO THE DEFENDANTS' AND DEFENDANT-INTERVENORS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

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The Community submits this consolidated reply in support of its motion for summary judgment ("Motion"), ECF Nos. 79 ("Pl.'s Mot."), 79-1 ("Pl.'s Mem."), and response in opposition to the cross-motions for summary judgment (the "Cross-Motions"), filed by the Federal Defendants, ECF Nos. 81 ("Fed. Mot."), 81-1 ("Fed. Mem."), and Menominee, ECF Nos. 82 ("Men. Mot"), 82-1[1] ("Men. Mem.").

I. INTRODUCTION

In their Cross-Motions, the Federal Defendants and Menominee do not demonstrate that the Assistant Secretary's disapproval of the 2014 Amendment was proper under IGRA. Instead, they repeat and rely upon the same errors that the Assistant Secretary made in his disapproval letter.

The Federal Defendants, for example, echo the Assistant Secretary's claim that the 2014 Amendment makes Menominee responsible for the Mitigation Payments. As shown in the Community's Motion, this is simply incorrect because the 2014 Amendment imposes no obligations on Menominee, nor could it because Menominee is not a party to the agreement. IGRA does not permit the Assistant Secretary to disapprove a compact based upon a legal obligation that the agreement does not actually impose. The Federal Defendants also claim that the "intent" of the 2014 Amendment is to make Menominee responsible for these payments, but the "intent" of an agreement is not one of the permissible grounds for disapproval under IGRA. Rather, the Assistant Secretary's reliance on the "intent" of the agreement as a substitute for its actual terms is the type of subjective and discretionary grounds for disapproval that IGRA prohibits. Menominee, meanwhile, argues that it was permissible for the Assistant Secretary to disapprove the 2014

[1] The Defendant-Intervenors appear to have filed two identical copies of their memorandum in support of their Cross-Motion. *See* ECF Nos. 82-1, 83. The Community cites to the first-filed memorandum.

Amendment based upon the possibility that Menominee would assume the Mitigation Payments in a separate agreement with the State. But IGRA is clear that disapproval is only allowed based on a violation of IGRA in the agreement under consideration, not based upon the hypothetical terms of a separate agreement between the state and another tribe. Significantly, neither of the Cross-Motions dispute that any separate agreement between Menominee and the State would be subject to approval by the Assistant Secretary, and thus could not have imposed obligations upon Menominee that were inconstant with IGRA, which further repudiates the Assistant Secretary's claim that the amendment would impose an impermissible burden upon Menominee.

The Cross-Motions also fail to demonstrate that the 2014 Amendment falls outside the permissible subjects of IGRA. The Federal Defendants concede that exclusivity agreements, in general, are permissible under IGRA, but the Federal Defendants and Menominee attempt to distinguish the 2014 Amendment from other approved exclusivity agreements on grounds that are factually incorrect and legally irrelevant. They argue that the 2014 Amendment differs from other exclusivity agreements because it makes Menominee responsible for the Mitigation Payments, but, again, this is an incorrect reading of the 2014 Amendment, which imposed no legal obligations upon Menominee. They also raise other technical or factual distinctions between the 2014 Amendment and other exclusivity clauses, but these distinctions are irrelevant to the applicable legal standard of whether the agreement is "directly related to the operation of gaming activities" under the "catch-all" category of Section 2710(d)(3)(C)(vii). Additionally, they argue for an overly-narrow reading of this catch-all category that would restrict the types of payments a tribe could receive from a state, which is not supported by the case law, the purpose of this provision, and the Assistant Secretary's own prior decisions. Contrary to these arguments, the Assistant Secretary's repeated approval and deemed-approval of other exclusivity agreements, including

agreements with other tribes in Wisconsin that require a state to indemnify a tribe for competitive losses, demonstrate that the 2014 Amendment was permissible under IGRA and should have been approved as well.

For all of these reasons, the Community's Motion should be granted and the Cross-Motions should be denied, except, as explained below, the Community does not contest Menominee's request to dismiss the Second Claim for Relief in the Community's Complaint. ECF No. 1 ¶¶ 82–85.

II. RESPONSE TO FACTUAL ALLEGATIONS OF THE FEDERAL DEFENDANTS AND MENOMINEE

The Federal Defendants and Menominee do not dispute the factual allegations in the Community's Motion, and thus they should be treated as admitted. *See Hinson ex rel. N.H. v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 91–92 (D.D.C. 2008).

The Factual Background section of the Federal Defendants' Cross-Motion omits significant and relevant facts that are discussed in the Community's Statement of Facts. Fed. Mem. at 6–12. For example, the Federal Defendants omit the fact that the Community made lump sum payments to the State in 2004 and 2005 under its deemed-approved 2003 Amendments, which totaled over $83 million. *See* Pl.'s Mem. at 7. The 2005 Amendment, which the Assistant Secretary also deemed-approved, expressly stated that the Community had been required to use credit instruments to obtain funds for these lump sum payments, and that the exclusivity provision in the 2005 Amendment was a material consideration for these lump sum payments. *Id.* at 7–8. The Federal Defendants' description of the 2005 Amendment is also unclear. *See* Fed. Mem. at 8. The 2005 Amendment provided that the State would not concur in a two-part determination for a casino within 30 miles of the Community's Milwaukee casino unless the Community agreed. *See* FCPCAR000305. It also provided last-best arbitration process to determine the terms of the

parties' agreement if the Governor concurred with a two-part determination for a casino within 50 miles of the Community's Milwaukee casino. FCPCAR000297–98.

The Community disputes the Federal Defendants' assertion that the 2014 Amendment required Menominee or the "Applicant" tribe to make the Mitigation Payments. Fed. Mem. at 9. The 2014 Amendment only requires the State to make these payments, stating: "The State is responsible for ensuring that the Mitigation Payments are paid in a timely manner and in full." BIA_002961. It does not require the Applicant to make these payments but it does state that if the Applicant reaches an agreement with the State to make the Mitigation Payments, such payments by the Applicant would "satisf[y] the State's obligation to make that Mitigation Payments." *Id.* The Community also disputes the Federal Defendants' assertion that Menominee was not involved in the underlying negotiations of the 2014 Amendment. Fed. Mem. at 10, 12. Although Menominee was not a participant in the arbitration, it repeatedly met with the State and discussed the terms that the State would submit as its "last best offer" in the arbitration. *See* Pl.'s Mem. P. & A. Supp. Mot. Suppl. Admin. R. at 14, ECF No. 63-1; *see also* FCPCAR001129–31 (describing the State's "extensive discussions and negotiations with the impacted tribal governments to work toward a win-win-win scenario" regarding the Kenosha casino). Menominee also assured the Governor that it and its business partner would cover any payments the State was required to make to the Community. *See* BIA_003075–76.

The Community also disputes the Federal Defendants' assertion that the Assistant Secretary's "central inquiry" when analyzing a compact is whether it violates IGRA, federal law, or the trust obligations of the United States. Fed. Mem. at 10. It is more accurate to say that these are the *only* grounds under which disapproval is permitted, as the Assistant Secretary acknowledged in his decision. *See* FCPCAR001463; *see also* Pl.'s Mem. at 17. The Community

also disputes the Federal Defendants' assertion that "the purpose of state-tribal compacts was to ensure that states' interests were considered in the regulation and conduct of Class III gaming activities." Fed. Mem. at 10. In fact, it is the tribe's interests, not the state's interests, that are paramount under IGRA. Pl.'s Mem. at 16. Indeed, as explained in the Community's Motion, the seven categories of permissible subjects under IGRA were included for the benefit of tribes to prevent the imposition of State jurisdiction over issues unrelated to gaming. *Id.* at 30.

Menominee's "Background and Statement of the Case" contains extensive allegations about the Menominee tribe that are irrelevant to the issues before the Court. Men. Mem. at 3–16. Menominee also omits any mention of the Community's substantial lump sum payments to the State. Pl.'s Mem. at 7. Unlike the Federal Defendants, Menominee correctly acknowledges that the 2014 Amendment made the State responsible for the Mitigation Payments, and that Menominee would only assume this obligation if it reached a separate agreement with the State. Men. Mem. at 11. Menominee describes the objections it made to the 2014 Amendment, but many of these objections were not mentioned or relied upon in the Assistant Secretary's disapproval letter. *Id.* at 12–13. Moreover, the Community also explained the errors in these objections in its submissions to the Assistant Secretary. *See* BIA_002932–55; FCPCAR000145–46; FCPCAR000785–87; FCPCAR000788–93; FCPCAR000797–98.

In order to better understand how the 2014 Amendment arose, and why it was not "far beyond the pale of any compact amendments approved by Interior since the enactment of IGRA," as the Federal Defendants suggest, Fed. Mot. at 2, the following additional backgrounds facts are also relevant. On March 19, 2003, the Office of Indian Gaming Management ("OIGM") at the Department of the Interior ("Interior"), sent the Community suggested language "for discussion purposes" for a compact provision to replace the geographic exclusivity provision that had been

removed from the 2003 Amendment. FCPCAR000155–57. OIGM's proposal provided that the Governor would agree not to concur in a two-part determination for an off-reservation casino within 50-miles of the Community's existing casinos unless the other tribe entered into a binding indemnification agreement with the Community to compensate it for any loss of revenue. FCPCAR000157. Disagreements over the amount of compensation would be resolved by arbitration. *Id.* It was, thus, the Federal Defendants that proposed the concept of a compact provision whereby the Community would be indemnified for competitive losses, except Interior's proposal required this indemnification to come directly from the competitor tribe rather than from the State.

Shortly thereafter, on April 25, 2003 the Assistant Secretary deemed-approved an amendment to the Ho-Chunk-Wisconsin compact that required Ho-Chunk to make $60 million in lump sum payments and in exchange required the State to indemnify Ho-Chunk for revenue loss from a casino resulting from the Governor's concurrence. BIA_003416, BIA_003424–25, BIA_003429–31. This indemnification provision closely followed the language that had been recommended to the Community by OIGM, except it required indemnification by the State rather than the applicant tribe. BIA_003430–31. Over the next several months, the Assistant Secretary also deemed-approved a provision in the Oneida compact that provided that Oneida would pay a $40 million lump sum payment to the State and required that in the event the State approves a new Indian gaming facility within fifty miles of Oneida's reservation, the State would negotiate an amendment to terminate Oneida's future payment obligations and refund Oneida's prior payments. BIA_003553–56, BIA_003569. The Assistant Secretary deemed-approved a similar amendment to the St. Croix Chippewa-Wisconsin compact on Sept. 16, 2003, in which the tribe agreed to make a $3.5 million lump sum payment to the State and the State agreed to negotiate refund terms if the

Governor concurred in a new casino within 50 miles of the tribe's reservation. BIA_003580–82, BIA_003595–97. The Assistant Secretary also deemed-approved the Stockbridge-Munsee-Wisconsin compact amendment which provided that revenue sharing amounts would be renegotiated if the State approved a new Indian casino within 70 miles of its existing gaming facility. BIA_003607–09, BIA_003625. On November 10, 2004, George Skibine, of OIGM, informed counsel to the Community that the Interior Solicitor had advised the Assistant Secretary that there is no legal basis for rejecting a compact on the basis of an Indian gaming exclusivity provision, and that the Assistant Secretary will now approve, rather than deem-approve, such provisions assuming there are no other objectionable provisions. FCPCAR000145–46; FCPCAR000149.

On October 4, 2005, the Community's 2005 Amendment was submitted to the Assistant Secretary, which established the last best offer arbitration process that resulted in the 2014 Amendment. Pl.'s Mem. at 7–8 (citing FCPCAR000290–92, FCPCAR001462). The 2005 Amendment was deemed-approved by the Assistant Secretary without any explanation or analysis. *See* FCPCAR000290. On May 29, 2009, the Assistant Secretary affirmatively approved the Lac du Flambeau-Wisconsin compact amendment, which prohibited the State from concurring with a two-part determination that would cause substantial reduction to the tribe's gaming revenues unless the State agreed to indemnify the tribe for the reduction. *Id.* at 33 (citing, BIA_003146–48; BIA_003171).

Prior to the 2014 Amendment, therefore, the Assistant Secretary had approved and deemed-approved compacts for multiple other Wisconsin tribes that contained geographic exclusivity provisions that protected tribes from competition from other tribes' off-reservation casinos in exchange for substantial lump sum payments, and two of which required the State to

indemnify the tribe for competitive loses as a condition for concurring with a two-part determination. *See* Pl.'s Mem. at 5–6 n.2, 33 n.6, 37. These other compacts informed the parties' negotiation of the 2005 Amendment and the arbitration of the 2014 Amendment, and thus provide important context for understanding how the Community and the State agreed to the terms contained in those amendments. The Community also discussed and relied upon these other compacts in its submissions to the Assistant Secretary, explaining that "[p]rotection of the tribe's core market area is included in most of the compacts with Wisconsin tribes." BIA_002949; *see also id.* at n.6 (describing the other Wisconsin compacts).

III. ARGUMENT

A. If the Court Finds Ambiguity in IGRA It Should Apply the Canon Favoring Indians.

The Federal Defendants agree with the Community that there is no ambiguity in the statutes applicable to this case, and thus they should be applied according to their plain terms. Fed. Mem. at 14, 16. The Federal Defendants also agree with the Community that if the Court does find any statutory ambiguity, "courts in this circuit generally construe the legislation in favor of the tribe rather than adopt the agency's interpretation." Fed. Mem. at 16; *see also* Pl.'s Mem. at 14–15. However, the Federal Defendants contend that the canon favoring Indians should not be applied in this case because it "would adversely affect the interests of [another] tribe" Fed. Mem. at 17–18; *see also* Men. Mem. at 17–18. This is incorrect because each of the statutory arguments made by the Community are in the interests of tribes generally.

There are two statutory provisions at issue in this case. First is 25 U.S.C. § 2710(d)(8)(B), which states that "[t]he [Assistant] Secretary may disapprove a compact . . . only if such compact violates— (i) any provision of [IGRA], (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." The Community argues that the use of the phrase "only if such compact violates . . . any

provision of [IGRA]" means that a disapproval must be based upon a violation in the compact under consideration, and may not be based on speculation about the terms of a separate agreement between the State and another tribe. Pl.'s Mem. at 26. As explained in more detail below, the Community also argues that this provision does not allow disapproval based upon the Assistant Secretary's determination of the "intent" of the agreement, which is the type of discretionary and subjective grounds that the plain meaning of this provision was intended to prevent. The Community believes that these interpretations are supported by the unambiguous language of the provision, which should be applied according to its terms. If the Court did find any ambiguity, however, the Community's interpretation would be in the interests of all tribes because it would promote uniformity and predictability in the compact approval process, and thus the canon favoring Indians should be applied. It is also supported by the intent of IGRA to commit the substantive terms of compacts to the state and the tribe to negotiate, and to carefully limit the Assistant Secretary's discretion and policy judgments as factors in the approval process, as discussed in more detail below.

The second provision at issue is 25 U.S.C. § 2710(d)(3)(C)(vii), which permits compacts to include "any other subjects that are directly related to the operation of gaming activities." The Community argues that this provisions permits exclusivity agreements that protect a tribe's revenue stream at class III gaming facilities. Pl.'s Mem. at 30–36. The Federal Defendants do not dispute that that is a permissible interpretation of this provision, admitting that "in general, exclusivity agreements *may* be permissible" under IGRA. Fed. Mem. at 25; *see also* Fed. Mot. at 2 ("Federal Defendants do not dispute that tribal-state gaming compacts may contain exclusivity provisions . . . "). The Community also argues that this provision should be interpreted broadly to permit a broad range of payments *from a state to a tribe*, including payments calculated based on

revenues from Class II gaming, food, beverage, hotel, and entertainment activity at the Community's gaming facility. Pl.'s Mem. at 30, 35, 41–42. That interpretation is consistent with the broad and unambiguous wording of Section 2710(d)(3)(C)(vii) because such payments have a direct connection to a tribe's gaming activities at its class III facilities and would be directly affected by a competitor's class III gaming facility. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1111 (9th Cir. 2003) (finding Section 2710(d)(3)(C)(vii) "is not ambiguous"). Such an interpretation is also in the interests of all tribes because all tribes benefit from being able to receive a broader range of payments from a state.

Contrary to the Federal Defendants' arguments, the Community is not advocating for an interpretation of either of these statutes that would be adverse to other tribes. In particular, the Community is not arguing that IGRA "authorize[s] states and tribes to negotiate to shift the burden of potential lost revenues from existing gaming operations to another tribe without the consent of the other tribe," as the Federal Defendants contend. Fed. Mem. at 17. Rather, the Community's Motion argues that the Assistant Secretary *erred* in interpreting the 2014 Amendment to impose legal obligations upon Menominee. Pl.'s Mem. at 18–29. The argument that the canon favoring Indians is inapplicable to this case is, thus, incorrect. To the contrary, adopting the interpretation of these two statutes advocated by the Federal Defendants and Menominee would narrowly restrict the types of payments that tribes are permitted to receive from states and would give the Assistant Secretary broad discretion to disapprove compacts for reasons outside the terms of the actual agreement before him, neither of which are in the interests of Indian tribes generally. Thus, such interpretations would be contrary to the application of the canon. Menominee also contends that the canon actually supports the Assistant Secretary's decision in this case because the "Indian canon arises from the trust relationship" the government owes to Indian tribes. Men. Mem. at 18

n.6. But this argument is undercut by the fact that the Assistant Secretary specifically did *not* rely upon his trust obligations as the basis for disapproving the 2014 Amendment. *See* Pl.'s Mem. at 40 n.7.

The Federal Defendants additionally argue that, assuming the canon does not apply, this Court should accord the Assistant Secretary's decision *Chevron* deference rather than *Skidmore* deference. Fed. Mem. at 18–19. The Community's Motion shows why this is incorrect. Pl.'s Mem. at 15. The cases cited by the Federal Defendants and Menominee in which the D.C. Circuit has applied *Chevron* deference are cases where the agency's interpretation was consistent with the canon of construction favoring Indians. Fed. Mem. at 19; Men. Mem. at 17; Pl.'s Mem. at 14–15 n.3. In this case, however, the agency's interpretation is contrary to the interests of Indian tribes generally, as described above, and thus these cases are inapposite. The disapproval letter should also not be accorded *Chevron* deference because it does not have precedential effect and is not binding on third parties, as explained in the Community's Motion. Pl.'s Mem. at 15. The Federal Defendants rely on *Citizens Exposing Truth About Casinos* as permitting *Chevron* deference based on the agency's "careful consideration" and "expertise," Fed. Mem. at 19–20, but as explained in the Community's Motion, that case involved a land-into-trust decision under 25 C.F.R. Part 151, which requires the agency to engage in a far more detailed and elaborate decisionmaking process than a compact disapproval decision, Pl.'s Mem. at 15 n.4. Similarly, Menominee relies upon the case of *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1279–80 (D.C. Cir. 2004), Men. Mem. at 19, but the court accorded *Chevron* deference to an agency's statutory interpretation in that case largely due to the great complexity of the statutory scheme relating to Abbreviated New Drug Applications under which the agency in that case was operating. There is no such complexity in the provisions of IGRA at issue here warranting such deference.

In response to the two California district court cases that found that *Chevron* deference was not applicable to the approval of individual gaming compacts, *see* Pl.'s Mem. at 15, the Federal Defendants argue that these courts applied *Skidmore* deference rather than the canon favoring Indian tribes. Fed. Mem. at 18. But that is because the Ninth Circuit, unlike the D.C. Circuit, has held that deference given to administrative agencies trumps the canon. *See Haynes v. United States*, 891 F.2d 235, 239 (9th Cir. 1989). Menominee argues that the California cases are "wrongly decided," Men. Mem. at 20–21, but the court's reasoning in *Fort Independence Indian Cmty. v. California*, 679 F. Supp. 2d 1159, 1176–77 (E.D. Cal. 2009), that an individual compact approval does not "have a precedential effect that binds third parties," is correct and applicable here. Pl.'s Mem. at 15. Notably, neither Cross-Motion cites any case in which a court has given *Chevron* deference to a compact disapproval decision.

B. The Assistant Secretary Erred in Finding That the 2014 Amendment Made Menominee Responsible for the Mitigation Payments.

In their Cross-Motion, the Federal Defendants echo the Assistant Secretary's claim that the 2014 Amendment made Menominee responsible for the Mitigation Payments. Fed. Mot. at 1, 2, 38; Fed. Mem. at 1. As explained in the Community's Motion, this assertion is simply incorrect because the 2014 Amendment imposed no legal obligations on Menominee, nor could it have because Menominee was not a party to the agreement. Pl.'s Mem. at 18–21. Disapproval on these grounds was thus erroneous and itself a violation of IGRA. *Id.* at 21. The Federal Defendants also claim that the "intent" of the 2014 Amendment was to make Menominee responsible for these payments, but that is incorrect and IGRA does not permit disapproval of a compact based on its "intent," as explained in more detail below. Menominee also argues that the Assistant Secretary properly considered the possibility of an agreement between Menominee and the State to assume these payments, but IGRA also does not permit the disapproval of a compact based on speculation

about the hypothetical terms of an entirely separate agreement between the State and another tribe. Each of these defenses of the Assistant Secretary's decision must therefore be rejected.

i) The 2014 Amendment Did Not Impose Any Legal Obligation on Menominee.

In their Cross-Motion, the Federal Defendants repeat the Assistant Secretary's claim that the 2014 Amendment made Menominee responsible for the Mitigation Payments. *See* Fed. Mem. at 1 ("The 2014 Amendment is designed to protect FCPC's gaming revenue by requiring that [Menominee] pay an annual Mitigation Payment to FCPC"); *id.* ("by its terms, the 2014 Amendment's exclusivity provision requires Menominee to make Mitigation Payments to FCPC and guarantee FCPC's total profitability."); *id.* at 2 ("by its stated terms, the 2014 Amendment's exclusivity provision requires Menominee to make Mitigation Payments to FCPC"); *id.* at 38 ("the 2014 Amendment obligated Menominee to pay what amounts to profit insurance to FCPC . . . "). This interpretation of the 2014 Amendment is simply incorrect. As explained in the Community's Motion, the 2014 Amendment did not impose any legal obligations upon Menominee, nor could it have because Menominee was not a party to the agreement. Pl.'s Mem. at 18–21. The only party that was required to make the Mitigation Payments under the 2014 Amendment is the State. *Id.* at 20.

In support of their argument that Menominee would be responsible for the Mitigation Payments, the Federal Defendants rely upon the provisions of the amendment that specifically reference Menominee, including Section XXXVII.A, which states that Menominee's proposed casino in Kenosha is an "Applicant Facility." Fed. Mem. at 21. They also rely upon Section XXXVII.E.1, which states that the parties "anticipate" that the State will reach an agreement with an Applicant tribe in which the Applicant will agree to pay the Mitigation Payment, *id.* at 21–22. None of these provisions, however, make Menominee responsible for the Mitigation Payments, as explained in the Community's Motion. *See* Pl.'s Mem. at 22–25. To the contrary, the 2014

Amendment expressly states that the obligation to make the Mitigation Payments lies with the State, and that an Applicant tribe would *only* be obligated to make the Mitigation Payments if the tribe entered into a separate agreement with the State to assume such obligations. *Id.* There is also nothing in the 2014 Amendment that requires the State or Menominee to enter into such an agreement, and the State's obligations to make the Mitigation Payments under the agreement do not depend on any such agreement. *Id.* The claim that the 2014 Amendment made Menominee responsible for the Mitigation Payments is thus incorrect and contrary to the express terms of the agreement. Moreover, as explained in the Community's Motion, the 2014 Amendment could not have imposed any legal obligations upon Menominee under well-established principles of contract law, because Menominee was not a party to the agreement. *Id.* at 20–21. The Federal Defendants and Menominee do not respond to or dispute that argument.

The Federal Defendants' failure to show that the 2014 Amendment made Menominee responsible for the Mitigation Payments is fatal to their defense of the disapproval decision. The Assistant Secretary's core justification for the disapproval, as reiterated throughout the disapproval letter, was his claim that the amendment imposed an impermissible "obligation" or "burden" on Menominee. *See* Pl.'s Mem. at 18–19, 19 n.5. As the Assistant Secretary's stated in both his disapproval letter and the "Question and Answer" explaining the decision: "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." Pl.'s Mem. at 18 (citing FCPCAR001460; FCPCAR001477). Similarly, the Federal Defendants argue that "[t]he Assistant Secretary properly found that IGRA does not authorize states and tribes to negotiate to shift the burden of potential lost revenues from existing tribal gaming operations to another tribe without its consent." Fed. Mem. at 2. These justifications are incorrect and improper because the 2014 Amendment imposed no such

"obligation" or "burden" upon another tribe. IGRA does not allow the Assistant Secretary to disapprove a compact amendment based upon a legal obligation that the amendment does not actually impose. *See* 25 U.S.C. § 2710(d)(8)(B); Pl.'s Mem. at 21. The Assistant Secretary's disapproval on these grounds was thus itself a violation of IGRA, and therefore was "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)(A).

ii) IGRA Does Not Permit the Assistant Secretary To Disapprove a Compact Amendment Based On the "Intent" of the Agreement.

The Federal Defendants also attempt to defend the Assistant Secretary's decision by arguing that the "intent" of the 2014 Amendment was to require Menominee to make the Mitigation Payments. Fed. Mem. at 20; *see also id.* at 23 ("FCPC and the State *intended* Menominee to make those payments") (emphasis added); *id.* at 24 (*the intent* of the 2014 Amendment was to make Menominee responsible for making all of the Mitigation Payments to FCPC") (emphasis added); Fed. Mot. at 2 ("FCPC and the State *intended* for Menominee to make the Mitigation Payments.") (emphasis added). The Assistant Secretary similarly justified his disapproval based upon the "intention" of the agreement. *See, e.g.*, FCPCAR001462 n.18 ("*the intention* of the 2014 Amendment is for the Menominee to be responsible for making the Mitigation Payments") (emphasis added). This justification for the disapproval is also improper because IGRA does not permit the Assistant Secretary to disapprove a compact based on the "intent" of the agreement.

IGRA specifically identifies the circumstances under which disapproval is allowed, stating 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) (emphasis added). The use of the word "only" demonstrates that disapproval is not permitted on other

grounds. *See* Pl.'s Mem. at 17–18; *Amador Cty., Cal. v. Salazar*, 640 F.3d 373, 381 (D.C. Cir. 2011) (Section 2710(d)(8)(B) "is best read to limit the circumstances in which disapproval is allowed."). The "intent" of the agreement is not one of the permissible circumstances for disapproval identified under Section 2710(d)(8)(B), and thus disapproval on such grounds is prohibited. Neither the Federal Defendants nor the Assistant Secretary identify any authority under IGRA or otherwise that authorize disapproval of a compact based upon its "intent."

The "intent" of an agreement also cannot constitute a violation of IGRA under Section 2710(d)(8)(B) because there is nothing in IGRA that governs or restricts compacts based upon their "intent." States and tribes have varied motivations and goals when entering into a gaming compact, but IGRA does not seek to police those "intentions." Rather, IGRA restricts the actual terms of the agreement, requiring, for example, that the "*provisions*" of any compact must fall within the seven categories of permissible subjects. 25 U.S.C. § 2710(d)(3)(C) (emphasis added). The compact must therefore be evaluated based on its express terms and the legal obligations that it imposes upon the parties, rather than the "intent" of the parties.

The Assistant Secretary's reliance on the "intent" of an agreement also frustrates the goals of Section 2710(d)(8)(B). By limiting the circumstances under which disapproval is allowed in this provision, Congress prohibited the Assistant Secretary from disapproving compacts based upon his own discretion or policy preferences and sought instead to provide uniformity and predictability for the approval process. The "intent" of an agreement is a vague concept that requires the Assistant Secretary to look beyond the express terms of the agreement to the goals and motivations of the parties when they entered into the agreement. This is precisely the type of subjective and discretionary grounds for disapproval that Section 2710(d)(8)(B) does not allow. *See* Pl.'s Mem. at 27. The Assistant Secretary's reliance on "intent" also adds uncertainty and

irregularity to the approval process because the "intent" of an agreement is an ill-defined and highly-subjective concept. It also puts tribes seeking approval of compacts in an unfair position of not merely defending the terms of the agreement but the motivations behind it, even though they have no control over the motivations of the state.

In this case, it is evident from the disapproval letter that the reason that the Assistant Secretary relied on the "intention" of the 2014 Amendment is because he knew that the agreement did not actually impose the obligations that he was claiming. *See* Pl.'s Mem. at 25–26. The "intent" was thus being used *as a substitute* for the actual terms of the agreement. The 2014 Amendment only makes the State responsible for the Mitigation Payments, and thus, under Section 2710(d)(8)(B), the Assistant Secretary should have based his decision on whether that obligation *upon the State* violated IGRA. *See* Pl.'s Mem. at 28–29. The Assistant Secretary's disapproval did not even address that question. *Id.* Instead, the Assistant Secretary relied upon his vague notion of the "intent" of the agreement in order to treat the agreement as if it imposed these obligations upon Menominee, even though he knew that the actual terms of the agreement imposed no such obligation. *See* Pl.'s Mem. at 25–26. The Assistant Secretary should not be permitted to circumvent the restrictions on disapprovals under Subsection 2710(d)(8)(B) in this manner.

The Assistant Secretary's reliance on the "intent" of the agreement is improper for the additional reason that the Assistant Secretary's determination of the "intent" of the 2014 Amendment was incorrect. The intention of the 2014 Amendment is to make *the State* responsible for the Mitigation Payments which is precisely what the 2014 Amendment does. *See* Pl.'s Mem. at 20 (quoting BIA_002961–62). The Community did not "intend" for the State to pass that obligation on to Menominee; rather its sole "intention" was to make sure the State agreed to assume these payments. Indeed, if the parties had "intended" for Menominee to be responsible for these

payments, one would have expected the 2014 Amendment to *require* the State to seek to enter into a separate agreement with Menominee to assume such payments, but the 2014 Amendment contains no such requirement. It is also important to note that the 2014 Amendment was the product of a confidential arbitration process, *see* Pl.'s Mem. at 10, which further clouds any claim by the Assistant Secretary that he could determine the underlying "intent" of the agreement. He did not have any evidence before him of who proposed the 2014 Amendment during the arbitration or why it was selected by the arbitration panel.

To be clear, the Community is not arguing that the Assistant Secretary must consider compacts in a vacuum or that he cannot apply his experience and expertise when making his decision. Rather, the Community's objection is that IGRA does not allow the Assistant Secretary to disapprove a compact based on its "intent," and in particular, it does not allow him to use his vague notions of "intent" *as a substitute* for the actual legal obligations imposed by the compact. The 2014 Amendment solely imposes obligations upon the State, and the Community was therefore entitled to have the compact evaluated based on those terms. The Assistant Secretary's claim that the "intent" of the agreement was to make Menominee responsible for the payments was *not* what the agreement stated, and Section 2710(d)(8)(B) does not permit him to use this ill-defined and highly-subjective notion of "intent" to circumvent the limited circumstances for disapproval permitted under IGRA.

iii) The Assistant Secretary's Anticipation that the State and Menominee Would Reach a Separate Agreement Was Also Not a Permissible Grounds for Disapproval.

Menominee, in contrast to the Federal Defendants, does not argue that the 2014 Amendment actually imposed any legal obligation upon Menominee to make the Mitigation Payments. Instead, Menominee argues that the Assistant Secretary "understood that under the 2014 Amendment the State was 'ultimately responsible' for the Mitigation Payments, but that it could

meet its obligation by requiring Menominee to make the payments." Men. Mem. at 22. Menominee argues that it was proper for the Assistant Secretary to base his disapproval on this hypothetical separate agreement between the State and Menominee when making his decision, because the parties to the 2014 Amendment "anticipated" such an agreement and it was discussed in the submissions to the Assistant Secretary. *Id.* at 22–23. This is incorrect. IGRA does not allow the Assistant Secretary to disapprove a compact based upon the hypothetical terms of an entirely separate agreement between the State and another tribe. *See* Pl.'s Mem. at 25–29.

IGRA states that the Assistant Secretary "may disapprove a compact . . . only if *such compact* violates" IGRA. 25 U.S.C. § 2710(d)(8)(B) (emphasis added). The use of the words "such compact" makes clear that the violation must be in the compact under consideration. The Assistant Secretary's speculation about the terms of a separate agreement between the State and the Menominee, and whether those terms would violate IGRA, was thus not a permissible grounds for disapproval of the agreement before him. Pl.'s Mem. at 25–29. Indeed, his disapproval on such grounds was itself a violation of IGRA. *Id.*

In the disapproval letter, the Assistant Secretary acknowledged that he could not actually answer the question of whether a separate agreement between the State and Menominee would comply with IGRA because he did not have any such agreement in front of him, and thus he was "unable to determine whether making the Mitigation Payments [would] result[] in substantial economic benefits to the Menominee . . ." Pl.'s Mem. at 26 (quoting FCPCAR001467). This statement further highlights the error of the Assistant Secretary's reliance on this hypothetical separate agreement as grounds for disapproving the 2014 Amendment. He did not know what, if any, terms the State and Menominee might agree to and whether those terms would comply with IGRA, yet he nonetheless disapproved the 2014 Amendment based on the mere possibility that

such an agreement would not comply with IGRA. IGRA does not allow this. Moreover, as explained in the Community's Motion, there was actually great uncertainty as to whether the State actually would pass its payment obligations on to Menominee, or what the terms of such an agreement would be if it did. Pl.'s Mem. at 27. There was, for example, a strong possibility that the Governor would decide not to concur with the Kenosha casino, as he ultimately did, in which case the State would not seek any agreement with Menominee. IGRA does not permit the Assistant Secretary to disapprove a compact based on such speculative and highly-uncertain predictions about occurrences beyond the terms of the agreement before him. *Id.*

IGRA is clear that a compact can *only* be disapproved if it violates IGRA, and thus the Assistant Secretary must identify an actual violation in the agreement before him. *See* 25 U.S.C. § 2710(d)(8)(B). Although the Assistant Secretary may have personally anticipated that the State would attempt to pass its payment obligations on to Menominee as a condition for approval of the Kenosha casino, *see* Pl.'s Mem. at 26, there was no provision in the 2014 Amendment that required the State to do so, and the State's obligation to make the Mitigation Payments were not contingent upon such an agreement. The Assistant Secretary's anticipation of such an agreement, thus, did not constitute any violation of IGRA in the agreement before him, as was required for disapproval. *Id.*

Menominee also notes that the 2014 Amendment stated that the parties "anticipated" that the State and Menominee would reach a separate agreement. Men. Mem. at 23. But, as explained in the Community's Motion, this statement of "anticipation" did not impose any legal obligations on the State or Menominee to reach such an agreement, and thus could not constitute a violation of IGRA. Pl.'s Mem. at 23. The reason the parties "anticipated" such an agreement was because Menominee had repeatedly made public statements that it would assume the State's payment

obligations. *Id.* ("Menominee will ensure . . . that any amounts owed [by the State] to Potawatomi . . . will be covered by Menominee.") (quoting BIA_003075). The 2014 Amendment was thus an accurate acknowledgment of the factual circumstances that existed at the time. The 2014 Amendment also acknowledged this possibility because it sought to set the terms of the State's obligations toward the Community if it did reach such an agreement with Menominee, which is the type of contingency planning common and reasonable in a contract negotiation. Pl.'s Mem. at 23–24. IGRA does not prohibit states and tribes from anticipating and preparing for possible future circumstances, and thus the Assistant Secretary's disapproval based on such a provision was improper.

It also bears repeating that the Assistant Secretary had the power to protect Menominee from assuming any obligations that were in violation of IGRA, as the Assistant Secretary acknowledged in his disapproval letter, because he would be required to review and approve any amendments to Menominee's gaming compact with the State. *Id.* at 27–28 (citing FCPCAR001466). Thus, while the 2014 Amendment stated that the parties "anticipated" that the State would try to pass at least some of its payment obligations on to Menominee, the parties also understood that the only payment obligations that Menominee would ultimately be able to assume would be those that were consistent with IGRA. Neither the disapproval letter nor the Cross-Motions explain how the anticipation of a possible separate agreement that would only become effective if it were *consistent* with IGRA could constitute a violation of IGRA.

The Federal Defendants' Cross-Motion completely ignores the important fact that the Assistant Secretary had the power to disapprove any agreement between the State and Menominee that violated IGRA, failing to offer any explanation why it does not undercut the core justification of the Assistant Secretary's decision. Menominee addresses this argument only in a footnote,

responding that "FCPC's argument fails to consider how, in light of disapproval of such a compact amendment, the Governor would have concurred." Men. Mem. at 25 n.11. This is a *non sequitur*. Moreover, to the extent the Assistant Secretary used his decision on the 2014 Amendment to help advance the Kenosha casino project or to influence the Governor's concurrence decision, that was improper under IGRA. *See* Pl.'s Mem. at 28. Ultimately, the fact remains that the Assistant Secretary had the ability to protect Menominee from assuming any obligations that violated IGRA, and thus the possibility of a separate agreement between Menominee and the State that was consistent with IGRA could not provide any grounds for disapproving the 2014 Amendment.

C. The Assistant Secretary Erred in Finding the 2014 Amendment Outside the Permissible Subjects for a Class III Gaming Compact.

The Federal Defendants and Menominee also do not persuasively rebut the Community's argument that the Assistant Secretary erred in finding that the 2014 Amendment fell outside the permissible subjects of a Class III gaming compact. As explained in the Community's Motion, the 2014 Amendment was part of an exclusivity agreement between the Community and the State, and such exclusivity agreements are permissible and have been approved by the Assistant Secretary under IGRA's "catch-all" category of Section 2710(d)(3)(C)(vii). *See* Pl.'s Mem. at 29–42. In response, the Federal Defendants concede that "in general, exclusivity agreements *may* be permissible in a gaming contract under IGRA," but they argue that the 2014 Amendment is distinguishable from other agreements that have been approved. Fed. Mem. at 25; *see also* Fed. Mot. at 2. None of the distinctions identified by the Federal Defendants and Menominee, however, are meaningful under the relevant legal standard under IGRA. They distinguish most of the compacts based on the factually incorrect claim that the 2014 Amendment made Menominee responsible for the Mitigation Payments. They also fail to tie any of their claimed distinctions to the applicable standard of whether the provision is "directly related to the operation of gaming

activities" under Section 2710(d)(3)(C)(vii). They also advocate for an overly-restrictive reading of Section 2710(d)(3)(C)(vii) which has no authority to support it, and which is contrary to the Assistant Secretary's approval of other exclusivity agreements. These arguments must therefore be rejected.

i) The Federal Defendants' Attempt to Distinguish Other Exclusivity Clauses Is Based on an Incorrect Reading of the 2014 Amendment.

The primary distinction the Federal Defendants draw between the 2014 Amendment and other approved exclusivity agreements relies upon the incorrect claim that the 2014 Amendment makes Menominee responsible for the Mitigation Payments. They argue:

> While numerous tribal-state gaming compacts contain exclusivity agreements whereby a state agrees to limit non-tribal gaming competition with a tribe's casino in exchange for payments from the tribe, these agreements have been carefully crafted and *have not sought to unilaterally impose a financial burden on another tribe by making it guarantee another tribe's revenue.*

Fed. Mem. at 25 (emphasis added); *see also id.* at 2 ("the 2014 Amendment's exclusivity provision's requirement that one tribe reimburse another tribe for all of its potential lost revenues is far beyond the pale of any compact amendments approved by Interior since the enactment of IGRA."). This claim that the 2014 Amendment imposes a "financial burden on another tribe" or requires one tribe to "reimburse another tribe for all of its potential lost revenues" is false. The 2014 Amendment imposes no legal obligations upon Menominee, nor could it have because Menominee is not a party to the agreement, as described above. Such an obligation could only have arisen under a separate agreement between Menominee and the State, which would have been subject to review and approval by the Assistant Secretary. The Federal Defendants' primary distinction between the 2014 Amendment and other exclusivity agreement is thus based on an incorrect reading of what the agreement actually requires. Moreover, even if this distinction were

correct, it has no relevance under the applicable legal standard, as discussed in the following section.

The error in this distinction is particularly evident in the Federal Defendants' attempt to distinguish the Lac du Flambeau compact. The Federal Defendants state: "Although the LDF compact amendment contemplates the state compensating LDF for the reduction in revenue from Class III gaming, *it is the state that is required to make that payment. It doesn't bring another tribe to the table*." Fed. Mem. at 26 (emphasis added). This distinction is simply incorrect because the 2014 Amendment, just like the Lac du Flambeau compact, solely makes the State responsible for payments to offset the competitive impacts of another tribe's casino. Pl.'s Mem. at 33-34. Neither agreement requires another tribe to make these payments; the Federal Defendants' assertion that the 2014 Amendment does is simply wrong.[2] Under both of these compacts it is possible that the State could try to reach an agreement to pass these payment obligations on to another tribe, but neither compact requires that to occur.[3] Far from justifying the Assistant Secretary's decision, the Assistant Secretary's affirmative approval of the Lac du Flambeau compact actually demonstrates that the obligations imposed on the State under the 2014 Amendment are highly similar to those that the Assistant Secretary has found permissible under IGRA for other tribes. *See* Pl.'s Mem. at 33–35.

[2] The Federal Defendants attempt to distinguish the four other Wisconsin compacts on similar grounds, arguing that "they do not seek to impose a guarantee of their profitability on other tribes not included in the negotiations. . . ." Fed. Mem. at 27 n.7; *see also* Men. Mem. at 37 ("Not one of the five [Wisconsin] compacts required a mitigation payment by another tribe."). This distinction, again, is based on an incorrect interpretation of the 2014 Amendment.

[3] Menominee also argues that the indemnification provision in the Lac du Flambeau compact is merely "ephemeral" because the compact also gives the State the option to arbitrate. Men. Mem. at 37. This argument is wrong. The Assistant Secretary's affirmative approval of this compact demonstrates the Assistant Secretary's determination that the indemnification provision was permissible under IGRA. There is nothing in that decision that suggests that the Assistant Secretary viewed the indemnification as "ephemeral" due to the option of arbitration.

The permissibility of the 2014 Amendment is further evident from the model compact used by Oklahoma tribes, which contain an exclusivity provision that states that if the state of Oklahoma authorizes a nontribal entity to operate additional gaming machines (i.e., slot machines) within 45 miles of a compacted tribe's casino, the state will pay liquidated damages to the tribe in the amount of 50% of the increase in gross revenue following the addition of such machines at the nontribal gaming operation. *See* Okla. Stat. tit. 3A, § 281 at Part 11.E. The Assistant Secretary found this provision permissible under IGRA, and specifically found that the payments from the state to the tribe actually weighed *in favor* of approval because it showed that the state had made meaningful concessions to the tribe. *See* Notice of Approved Tribal-State Compacts, 70 Fed. Reg. 18041, 18041 (April 8, 2005); Letter from George Skibine, Deputy Assistant Secretary, Department of the Interior, to Honorable William Blind, Chairman, Cheyenne-Arapaho Tribe at 2 (March 16, 2005), *available at* https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc-038408.pdf. Similar to the approval of the Lac du Flambeau compact, the Assistant Secretary's affirmative approval of the Oklahoma compact shows that IGRA permits exclusivity agreements that require states to make payments to tribes if the state chooses to end the tribe's exclusivity.

ii) The Federal Defendants' Claimed Distinctions Also Have No Basis in the Relevant Legal Standard Under IGRA.

The Federal Defendants' claimed distinctions between the 2014 Amendment and other approved exclusivity agreements also have no basis in the relevant statutory language of IGRA. In order to find that the 2014 Amendment was outside the permissible subjects of IGRA, the Assistant Secretary needed to find that the 2014 Amendment did not fall within the "catch-all" category for "any other subjects that are directly related to the operation of gaming activities" under Section 2710(d)(3)(C)(vii). The Federal Defendants' claimed distinctions are irrelevant under this standard.

For example, the Federal Defendants first argue that the Lac du Flambeau compact is distinguishable from the 2014 Amendment because it only made the state responsible for the payments and did not "bring another tribe to the table." Fed. Mem. at 26. The claim that the 2014 Amendment made Menominee responsible for the payments is incorrect, as described above, but even if it were not, the Federal Defendants fail to explain how that distinction has any relevance under IGRA. By approving the Lac du Flambeau compact, the Assistant Secretary determined that payments from the State to offset competitive losses due to another tribe's casino were permissible under IGRA and thus "directly related to the operation of gaming activities" under Section 2710(d)(3)(C)(vii). The Federal Defendants, and the Assistant Secretary in his disapproval letter, do not offer any explanation for why such payments would no longer be "directly related to the operation of gaming activities" if they came from another tribe, rather than the State. In other words, they fail to explain why the question of whether these payments are sufficiently related to the operation of gaming activities would depend upon the source of the payments.

Similarly, the Federal Defendants distinguish the Ho-Chunk Nation compact on the grounds that the payments were required in the event of a "substantial reduction of Class III gaming revenues," whereas the 2014 Amendment requires Mitigation Payments "equal to the Annual Revenue Loss no matter how insignificant the loss may be." Fed. Mem. at 31. Again, the Federal Defendants do not offer any explanation for why that distinction about whether the losses are "substantial" would affect whether the compact fell within the catch-all category of Section 2710(d)(3)(C)(vii). Both of these compacts require the State to compensate the Community for competitive losses, and thus both should have been found to be directly related to the operation of gaming activities. Moreover, in the Community's view, the fact that the Mitigation Payments under the 2014 Amendment compact may be minimal or "insignificant" actually weighs further *in*

favor of approval, because it undercuts the Assistant Secretary's assertions regarding how burdensome these payments would be if the State reached an agreement to pass them on to Menominee.[4]

Menominee attempts to distinguish the Ho-Chunk compact on the grounds that the indemnification from the State was to be paid through reductions in the tribe's revenue sharing payments, rather than from payments directly from the State. Men. Mem. at 38. The Community fails to see how that distinction in the method of payment would have any relevance in deciding whether the provision is directly related to gaming activity, and thus permissible under Section 2710(d)(3)(C)(vii). Moreover, it is extremely likely that the Community and State would agree to a similar arrangement under the 2014 Amendment whereby the Community would reduce its annual revenue-sharing payments to the State by the amount of the Mitigation Payments, which further renders this distinction meaningless.

The Federal Defendants distinguish the 2003 Oneida compact on the grounds that that agreement "provides that if the State executes a compact or an amendment with another tribe within 50 miles, the State will negotiate a compact amendment with Oneida whereby it returns certain payments made by Oneida," whereas the 2014 Amendment, "requires payment to FCPC of revenue losses and allows the State to assign those payments to an Applicant tribe." Fed. Mem. at 31. But the fact that the 2014 Amendment payments are tied to revenue losses actually provides

[4] The Federal Defendants' claimed distinction is incorrect for the additional reason that it is based on a misinterpretation of the Ho-Chunk compact. That compact requires that if the tribe determines that there may be a substantial reduction in Class III gaming revenues, the State must enter into an indemnification agreement compensating the tribe for the reduction. Pl.'s Mem. at 5–6 n.2 (citing BIA_003429–31). The "substantiality," thus, is just a factor in considering whether the indemnification agreement is required, but the indemnification agreement is not limited to only compensating the tribe for "substantial" reductions in revenue. Therefore, just like the 2014 Amendment, an indemnification agreement resulting from the Ho-Chunk compact could require the State to make payments offsetting competitive harms that are very small.

greater support for finding that these payments are "directly related to the operation of gaming activities" under Section 2710(d)(3)(C)(vii). The Federal Defendants provide no explanation to the contrary. Furthermore, under either agreement the State could potentially try to reach an agreement with another tribe to assume its payment obligations, so that possibility also provides no basis for distinction. The Federal Defendants also do not even attempt to connect any of these claimed distinctions to the standard in Section 2710(d)(3)(C)(vii).

The Federal Defendants' attempts to distinguish the exclusivity clauses of the Michigan tribes, the Little Traverse Band of Odawa Indians, and the North Fork Rancheria of Mono Indians, are unpersuasive for the same reasons as described above. Fed. Mem. at 32–33; *see also* Men. Mem. at 39. The Federal Defendants draw small technical distinctions in the structure of the agreements but fail to tie these distinctions to the relevant standard under Section 2710(d)(3)(C)(vii), and they again falsely claim that the 2014 Amendment "involved [a] specific guarantee[] of profitability or revenues for one tribe without the prior consent of another." Fed. Mem. at 33.

The Federal Defendants' attempt to distinguish Secretary Norton's 2002 decision to deem-approved the 2003 Seneca Nation compact is also unpersuasive. *Id.* at 33–35. The Federal Defendants emphasize that the Secretary objected to the impact the compact would have on other tribes, and claim that that objection also applies to the 2014 Amendment. *Id.* at 34. But what the Federal Defendants ignore is that Secretary Norton expressly found that those concerns were *not* a permissible grounds for disapproval of a compact under IGRA, which is why she allowed the compact to be deemed-approved. *See* Pl.'s Mem. at 39–40 (citing BIA_003180–81). The Federal Defendants, just like the Assistant Secretary, fail to explain why that portion of her letter was incorrect. *See id.* at 40 (citing case law requiring agencies to explain departure from prior

precedent). As explained in the Community's Motion, the 2014 Amendment is less restrictive than the Seneca Nation compact, yet it was nonetheless disapproved. *Id.* The Federal Defendants' other attempts to distinguish the Seneca Nation compact also fail because they are not tied to Section 2710(d)(3)(C)(vii) and are based on the false premise that the 2014 Amendment required Menominee to make the mitigation payments. *See* Fed. Mem. at 34–35.

Unlike the Federal Defendants, Menominee does acknowledge that in the Seneca Nation decision the "Secretary stated that the competition-protection provision did not itself contravene IGRA," but Menominee attempts to distinguish the 2014 Amendment on the grounds that it "essentially obligates Menominee to make the mitigation payments." Men. Mem. at 39. This is an incorrect interpretation of the 2014 Amendment, as described above, because the 2014 Amendment imposes no obligations on Menominee, nor does it restrict Menominee's gaming opportunities in the manner that the Seneca Nation did for two other tribes. Menominee also attempts to distinguish the Seneca Nation compact on the grounds that the affected tribes there were "regarded as traditionally opposed to gaming," whereas Menominee was "actively pursuing off-reservation gaming." Men. Mem. at 40. Menominee provides no explanation, however, for why the question of whether an exclusivity clause is "directly related to the operation of gaming activities" under the catch-all provision would turn on how actively another tribe was pursuing gaming. Menominee's claimed distinction is also undercut by the fact the Tuscarora Indian Nation and the Tonawanda Band of Seneca Indians had both expressly opposed the Seneca Nation gaming compact, as Secretary Norton noted in her decision, but she nonetheless found their opposition did not provide a legal basis to disapprove the compact under IGRA. BIA_003183 ("The Tonawanda Band and the Tuscarora Nation have notified us that they strongly object to the approval of the Compact . . .").

Finally, Menominee also argues that the Assistant Secretary properly distinguished all of the other exclusivity clauses discussed above on the grounds that "none of the examples involve a revenue guarantee for a tribe that is operating gaming on so-called 'off-reservation' lands acquired by the Secretary in trust under a two-part determination." Men. Mem. at 40; *see also* Fed. Mem. at 33. But again, neither the Assistant Secretary nor Menominee provide any explanation why this distinction has any relevance to the applicable standard under Section 2710(d)(3)(C)(vii). The phrase "directly related to the operation of gaming activities," is not limited to gaming activity at on-reservation casinos, and there is no basis for reading such a limitation into the statute. Thus, this is not a proper grounds for finding the 2014 Amendment fell outside the permissible subjects of IGRA.

Contrary to all of these arguments, the fact remains that the Assistant Secretary has approved or deemed-approved numerous exclusivity agreements for other tribes, which shows that compact provisions that protect a tribe's revenue stream from competition *are* permissible under IGRA and fall squarely within the catch-all provision of Section 2710(d)(3)(C)(vii). The 2014 Amendment, similarly, was part of an exclusivity agreement that provided protections for the Community's revenues at its Milwaukee casino, and thus it too was permissible under IGRA. *See* Pl.'s Mem. at 34–36. Moreover, the fact that the Assistant Secretary has approved compacts, such as the Lac du Flambeau compact, which require the State to indemnify a tribe for competitive losses, further demonstrates that the 2014 Amendment should have been found permissible.

iii) The Federal Defendants' Interpretation of Section 2710(d)(3)(C)(vii) Is Overly-Restrictive and Lacking Any Authority.

The Federal Defendants and Menominee also argue that the disapproval was proper because unlike other exclusivity provisions, the 2014 Amendment includes "impermissible subjects in its definition of revenue like Class II gaming, hotels, entertainment, and food and

beverage, which [are] beyond the scope of a Class III gaming compact." Fed. Mem. at 26–27; *see also* Men. Mem. at 27. This argument is based on an overly-narrow interpretation of the phrase "directly related to the operation of gaming activities" under Section 2710(d)(3)(C)(vii), which has no support in the express language of the statute, the purpose of this provision, or the case law.

As explained in the Community's Motion, Section 2710(d)(3)(C)(vii) has been construed broadly by the Courts to permit a wide range of compact provisions that have a connection to gaming activity. Pl.'s Mem. at 30 (citing *In re Indian Gaming Related Cases*, 331 F.3d at 1113-16; *Chemehuevi Indian Tribe v. Brown*, No. ED CV 16–1347–JFW (MRWx), 2017 WL 2971864 at *6 (C.D. Cal. Mar. 30, 2017); *Flandreau Santee Sioux Tribe v. Gerlach*, 269 F. Supp. 3d 910, 926 (D.S.D. Sept. 15, 2017)). These cases demonstrate that it was permissible for the 2014 Amendment to define the Mitigation Payments to include revenues that are related to its Class III gaming operations, such as Class II gaming, hotels, and restaurants. The decision in *Flandreau Santee Sioux Tribe*, for example, supports this interpretation of the statute because it found that "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)." 269 F. Supp. 3d at 926.[5] In contrast, the Federal Defendants do not cite *any* case law adopting their narrow reading of Section 2710(d)(3)(C)(vii).

[5] The Federal Defendants and Menominee attempt to distinguish the *Flandreau Santee Sioux Tribe* case, but the court's core reasoning was that "the only significant purpose" of these other amenities was to facilitate gaming, and thus they fell within Section 2710(d)(3)(C)(vii). 269 F. Supp. 3d at 924, 925. Similarly, the ancillary revenues included in the Mitigation Payment calculations are all for amenities located at the Community's hotel/casino facility and they all facilitate gaming activities at the Community's casino. *See* BIA_002960 (defining these payments to be from revenue "earned at the Milwaukee Facility"). This provision also specifically excludes revenues from "ancillary activity such as retail activity from other locations outside of the Milwaukee facility." *Id.* The court in *Flandreau Santee Sioux Tribe* did note that the casino in that case was in a rural area and that "[w]ithout a hotel or RV park, the Casino simply could not operate in order to further the self-sufficiency of the Tribe." *Id*. at 925. But even in a big city, casinos must

As explained in the Community's Motion, a broad reading of Section 2710(d)(3)(C)(vii) is particularly appropriate in this case because the Mitigation Payments are payments from the State *to a tribe*. Pl.'s Mem. at 41–42. Reading this provision broadly to permit a wider range of payments to tribes would be beneficial to the Community and to tribes generally, which is one of the primary factors the Assistant Secretary would ordinarily weigh in *favor* of approving a compact, and which is also consistent with the goals of IGRA. *Id.* The categories of permissible subjects for compacts in IGRA were also intended to *protect* tribes from state jurisdiction, and thus it would not be consistent with this purpose to read these provisions narrowly to restrict the payments that tribes could receive from the states. *Id.* In this case it would be particularly perverse to narrowly restrict the permissible payments the State could make to the Community because the Assistant Secretary deemed-approved the 2003 Compact, which required the Community to make over $83 million in lump sum payments to the State to alleviate a state budget crisis, without applying any comparable restrictions to those payments. *Id.* at 5–7. The Assistant Secretary's decision to restrict the types of payments that the Community could receive from the State but not the payments that the Community is required to make to the State is precisely the opposite of the purpose of Section 2710(d)(3)(C)(vii) and IGRA.

The Federal Defendants also repeatedly assert that the 2014 Amendment was improper because it sought to "protect" the Community's "revenue" stream. Fed. Mem. at 1; *see also id.* at 2, 11, 20, 21, 23, 27; Men. Mem. at 26, 27. But Section 2710(d)(3)(C)(vii) cannot be read so narrowly as to prohibit provisions that protect a tribe's revenue. *All* exclusivity agreements are designed to protect a tribe's revenue from competition, and the Assistant Secretary's approval of

provide a variety of amenities related to the casino, including restaurants, hotels, and entertainment to attract customers, and "increases in patronage at one amenity is directly tied to increases in gaming activity." *Id.* at 924.

other such agreements clearly demonstrates that the catch-all provision permits provisions with this purpose. Pl.'s Mem. at 30–36. Notably, the Federal Defendants do not cite a single decision in which the Assistant Secretary has *disapproved* an exclusivity agreement on the grounds that it was not "directly related to the operation of gaming activities" under Section 2710(d)(3)(C)(vii).

It is also important to recognize that compacts may include provisions that benefit the state. Exclusivity provisions, for example, frequently provide increased revenue sharing payments to the state in exchange for the promise of exclusivity, and the Assistant Secretary has approved such provisions as permissible under IGRA. *See* Pl.'s Mem. at 30–33. IGRA also specifically contemplates that the state's interests, including "the public interest, public safety, criminality, financial integrity, *and adverse economic impacts on existing gaming activities*," will be part of the negotiations. 25 U.S.C. § 2710(d)(7)(B)(iii)(I) (emphasis added). The legislative history of IGRA further shows that Congress intended that "the use of compacts between tribes and state is the best mechanism to assure that the interests of both sovereign entities are met with respect to 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; *see also id.* ("A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens."); *id.* at 14 ("[IGRA] allows States to consider negative impacts on existing gaming activities."). Thus, the mere fact that provisions in the 2014 Amendment were intended to benefit the State would also not mean that the agreement fell outside the permissible subjects for a gaming compact under IGRA.

Menominee's narrow interpretation of Section 2710(d)(3)(C)(vii) is similarly unpersuasive and unsupported by authority. Menominee argues that the Mitigation Payments under the 2014

Amendment "may be related (in part) to the class III revenue loss that FCPC may face in the event of competition from the Menominee Kenosha casino, but that is a step removed from determining that those payments are directly related to FCPC's class III gaming activities." Men. Mem. at 30. In other words, Menominee is arguing that the Court should construe "class III gaming activities" to not include *revenue* from Class III gaming. That argument is directly repudiated by the Assistant Secretary's repeated approval of exclusivity agreements for other tribes, because such agreements are specifically designed to protect tribes' Class III gaming *revenue*. *See* Pl.'s Mem. at 30–34. It is also contrary to the case law interpreting Section 2710(d)(3)(C)(vii) broadly. *Id.* at 30. Menominee cites no authority that has adopted its narrow interpretation of Section 2710(d)(3)(C)(vii).

Menominee's reliance on the Ninth Circuit's *Rincon Band* case is also misplaced. In that case, the court found that a state's demand for substantial revenue-sharing payments was an impermissible tax under IGRA because the benefits provided to the tribes in exchange for these payments were "illusory." *See Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1033–37 (9th Cir. 2010). In reaching this result, the court rejected the State's argument that the revenue-sharing provisions were "directly related to the operation of gaming activities," and thus permissible under 2710(d)(3)(C)(vii), merely because they were paid out of income from gaming revenues. *Id.* at 1033–34. This argument would essentially permit any revenue sharing provision that was paid out of gaming revenues, and the court rejected it as "circular," given IGRA's restrictions on allowable payments to states. *Id.* The court further found that the fact the funds were paid into the state's general fund that could be used for any purpose meant that these funds could not be said to be directly related to gaming. *Id.*

The *Rincon Band* decision does not support the narrow interpretation of the catch-all provision advocated by Menominee. As explained above, Section 2710(d)(3)(C) was intended to protect tribes from state jurisdiction and thus it made sense for the Ninth Circuit to more carefully scrutinize the revenue-sharing payments to the state in that case to ensure they were directly related to the operation of gaming activities. The Mitigation Payments under the 2014 Amendment, which are from the State to the Community, do not raise that same concern. Rather, such payments are consistent with the purpose of IGRA to benefit tribes, which the *Rincon Band* court found to be a factor that weighed in favor of finding a provision permissible under IGRA. 602 F.3d at 1033. Moreover, the Mitigation Payments in the 2014 Amendment *are* directly related to the Community's gaming operations at its Milwaukee casino because they are calculated primarily based on Class III revenue, and also because they compensate the Community for gaming revenue lost at the facility due to a competitor.[6] Menominee's attempt to distinguish the *In re Gaming Related Cases* and *Chemehuevi Indian Tribe* are also unpersuasive because the small technical distinctions it raises ignore the key fact that those cases read Section 2710(d)(3)(C)(vii) to broadly permit a wide range of provisions that had some relationship to a tribe's gaming activities. *See* Men. Mem. at 32; Pl.'s Mem. at 30.

Lastly, Menominee argues that Section 2710(d)(3)(C)(vii) should not be read to permit the inclusion of Class II gaming in the definition of the Mitigation Payments. Men. Mem. at 33–34. But the Assistant Secretary did not claim to disapprove the 2014 Amendment based upon the

[6] The Community also notes that to the extent *Rincon* suggests that a State must use its revenue-sharing payments for gaming-related purposes, the Assistant Secretary did not apply that standard to the lump-sum payments the Community made to the State under the 2003 and 2005 Amendments, which were intended to help alleviate a State budget crisis. *See* Pl.'s Mem. at 5. It would be improper and backwards under IGRA for the Assistant Secretary to apply a higher standard of scrutiny to the payments made from a state to a tribe than the payments made from a tribe to a state.

inclusion of Class II gaming in the Mitigation Payments; rather, he mentioned Class II gaming only in a brief statement distinguishing other approved compact amendments. *See* Fed. Mem. at 41. Moreover, contrary to Menominee's argument, Class II gaming revenues are directly related to Class III gaming because the Community's Class II gaming is offered at the same facility as its Class III gaming, and the revenues from one type of gaming directly affect the revenues of the other. The Community's Class II gaming is *also* directly related to Applicant tribe's Class III gaming activities under the 2014 Amendment, because if the Applicant's casino draws customers away from the Community's casino, that directly impacts the revenues from both Class III and Class II gaming. Indeed, the reason that Class II revenues are included in the calculation of the Mitigation Payments is precisely because the Community and the State anticipated that an Applicant tribe's casino could have a competitive impact on these revenues. Moreover, Section 2710(d)(3)(C)(vii) also refers only to "gaming activities," rather than "class III gaming activities," and the use of the more specific phrase elsewhere in IGRA indicates that Congress did not intend to restrict gaming activities to Class III gaming in this provision. Pl.'s Mem. at 42.[7] This narrow interpretation is particularly unpersuasive in this case, where construing this provision to limit the payments that a state can make to a tribe would not be consistent with the goals of IGRA or the purposes of Section 2710(d)(3)(C)(vii) to protect tribes from state jurisdiction. *Id.* at 41–42. Furthermore, the Assistant Secretary did not provide *any* explanation in the disapproval letter for

[7] Menominee overstates the authority finding this provision limited to Class III gaming. Men. Mem. at 34. Both the Assistant Secretary and the D.C. Circuit have inserted "[Class III]" before "gaming activities" when quoting Section 2710(d)(3)(C)(vii), but neither addressed why Congress did not use that more specific phrase, as it has elsewhere in the statute, and neither was addressing the question at issue here of whether this provision permits payments that are being made *from a state to a tribe.*

why the inclusion of Class II revenues in the mitigation payments would mean that the provision fell outside 2710(d)(3)(C)(vii). *See id.*

For all of the above reasons, the Federal Defendants and Menominee's arguments that the 2014 Amendment fell outside the permissible subjects of IGRA are incorrect and must be rejected.

D. The Cross-Motions Highlight Additional Errors in the Assistant Secretary's Disapproval.

The Cross-Motions highlight a number of additional errors in the Assistant Secretary's disapproval, which further demonstrate the impropriety of his decision.

At various points in the Federal Defendants' Cross-Motion, they repeat the Assistant Secretary's assertion that the 2014 Amendment would impose a "substantial financial burden" upon Menominee. Fed. Mem. at 21; *see also id.* (referring to the "enormous burden" and "significant financial burden" of the amendment), which they assert would continue for the life of the Community's compact, *id.* at 10. In the two-part determination for the Kenosha casino, however, the Assistant Secretary stated that he anticipated that the Kenosha casino would have only "modest economic effects" on the Community's Milwaukee Casino, BIA_003086, and would be short term, stabilizing within "a few years," BIA_003137. These conflicting statements show how the Assistant Secretary interpreted the same facts in different ways in order to support his preferred outcome. When deciding whether to approve of the Kenosha casino, which he strongly supported, he found the competitive impact to be "modest" and short, but when considering the 2014 Amendment, which he strongly opposed, he found the competitive impact to be "enormous" and long. This manipulation of the facts to justify his disapproval and advance his personal policy preferences is not permitted by IGRA. *See* Pl.'s Mem. at 28.

Menominee's Cross-Motion also attempts to defend the disapproval based on the Assistant Secretary's prediction that Menominee would be required to assume the Mitigation Payments as a

condition of the Governor's concurrence with its Kenosha casino. *See* Men. Mem. at 23–24; *see also* 43 (asserting that the Mitigation Payments "would make concurrence on the two-part determination all but impossible.").[8] As explained in the Community's Motion, however, it was improper for the Assistant Secretary to disapprove the 2014 Amendment based on his own uncertain predictions about a hypothetical separate agreement or in order to influence the Governor's concurrence decision. Pl.'s Mem. at 26–28. IGRA gives the Governor unfettered discretion to concur or not concur with the two-part determination, and it does not allow the Assistant Secretary to use the compact approval process to influence that decision or to advance his own personal policy preferences. *Id.* at 28; *see also Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 697 (9th Cir. 1997) (upholding the constitutionality of a governor's concurrence authority and ruling that: "When the Governor exercises authority under IGRA, the Governor is exercising state authority. If the Governor concurs, or refuses to concur, it is as a State executive, under the authority of state law."). Moreover, as part of this unfettered discretion, the State can choose to impose conditions or restrictions upon its concurrence decisions, as occurred in the Lac du Flambeau compact and the other Wisconsin compacts. Pl.'s Mem. at 33–34. The Assistant Secretary's affirmative approval of the Lac du Flambeau compact shows that such conditions and restrictions are permissible under IGRA. *Id.* Here, the State chose to limit the Governor's concurrence authority in the compact amendments it entered into with the Community and other Wisconsin tribes between 2003 and 2014, and in exchange these tribes have paid hundreds of millions of dollars in lump sum payments to the State. *See* Section II, *supra*. The State

[8] The Federal Defendants do not address the Governor's concurrence authority in the argument section of their Cross-Motion, nor do they contest the Community's arguments that it was improper for the Assistant Secretary to use his disapproval to interfere with or influence the Governor's concurrence decision. *See* Pl.'s Mem. at 28

was permitted under IGRA to limit the Governor's discretion in this manner and such limitations did not provide a legal basis for the Assistant Secretary to disapprove the 2014 Amendment.

In response to the Community's argument that the Assistant Secretary failed to consider the benefits of the 2014 Amendment to the Community, the Federal Defendants argue that he did make such a consideration when he applied Interior's "long-standing revenue sharing test." Fed. Mem. at 35–36. The Federal Defendants have misread this portion of the Assistant Secretary's disapproval letter. When the Assistant Secretary considered the long-standing revenue sharing test he was actually considering whether a hypothetical agreement *between the State and Menominee* would satisfy the test. FCPCAR001467. This is evident when he says he is "unable to determine whether the State would be making any concession *to the Menominee*," making clear that it was Menominee's interests he was considering, not the Community's interests. *Id.* (emphasis added). At no point in the disapproval letter did he ever consider the benefit of the 2014 Amendment to the Community, which is a conspicuous deficiency of his decision given the great importance that the Assistant Secretary has placed on such considerations when evaluating other exclusivity agreements. *See, e.g.*, Pl.'s Mem. at 41. Relatedly, the Community's Motion argued that the Assistant Secretary deprived the Community of the benefit of its bargain with the State. Pl.'s Mem. at 43. In response the Federal Defendants and Menominee argue IGRA requires the Assistant Secretary to disapprove compacts that violate IGRA, but neither shows that the Assistant Secretary took into account the Community's interests when making this decision, which is ordinarily one of the paramount considerations in the approval process. *See* Fed. Mem. at 36–37; Men. Mem. at 41–42. Menominee also argues that "[a]ny time the Secretary disapproves a compact, he is of course depriving the tribe of the benefit of its bargain with the state." Men. Mem. at 42. But unlike

other disapprovals, the Community has paid the State $234.3 million over the past ten years in reliance on the market protections it had negotiated to receive from the State. Pl.'s Mem. at 43.

Menominee also defends the Assistant Secretary's reliance on vague principles of "fairness" as justification for his disapproval, arguing that "it is not contrary to law to consider fairness when fairness is consistent with the statutory purposes or rules of construction." Men. Mem. at 32. It is, however, contrary to IGRA to disapprove a compact based on considerations of "fairness," because the statute does not permit disapproval on such grounds. *See* 25 U.S.C. § 2710(d)(8)(B); Pl.'s Mem. at 38–39. Indeed, Secretary Norton specifically found that such considerations were not a permissible grounds for disapproval under IGRA in her decision on the Seneca Nation compact. *Id.* at 39–40. The Assistant Secretary's reliance on vague concepts of "fairness" was also part of a broader improper use of the compact approval process to advance his own policy objectives. The Assistant Secretary's role in the compact process is extremely limited. Compacts are negotiated between the tribes and states, and these are the entities that regulate Class III gaming. *See Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 138 (D.C. Cir. 2006) ("Congress intended to leave the regulation of class III gaming to the tribes and the states"). The Assistant Secretary's only has a limited role to ensure that the terms they agree to do not violate IGRA, federal law, or the United States' trust obligations. *See* 25 U.S.C. § 2710(d)(8)(B). Unlike the Assistant Secretary's approval of land acquisitions under the Indian Reorganization Act, 25 U.S.C. § 5108, or approval of a lease of restricted Indian lands under 25 U.S.C. § 415, both of which give the Assistant Secretary discretion in his decision to advance his personal policy goals, IGRA does not give him such latitude when deciding whether to disapprove a compact amendment. The Assistant Secretary's use of the disapproval process to promote his

personal notion of "fairness" among tribes or increase the likelihood of approval of Menominee's Kenosha casino is thus contrary to the narrow role that Congress gave him in the approval process.

Each of these errors further demonstrates the erroneous reasoning and improper grounds upon which the Assistant Secretary's disapproved the 2014 Amendment.

E. The Community Does Not Contest Menominee's Motion for Summary Judgment on the Second Claim for Relief in the Community's Complaint.

Menominee moves for summary judgment on the Second Claim for Relief in the Community's Complaint, ECF No. 1 ¶¶ 82–85, that the Assistant Secretary had a "ministerial duty" to approve the 2014 Amendment. *See* Men. Mem. at 42–43. The Community no longer contends that the Assistant Secretary had a "ministerial duty" to approve the 2014 Amendment, and thus does not contest Menominee's motion for summary judgment dismissing this claim. The Community does not, however, concede Menominee's argument that the Community's 2005 Amendment was invalid under IGRA, *see id.*, but the Court need not and should not address this question because it is not relevant to the other issues in dispute and because the validity of the 2005 Amendment is outside of the scope of the Community's Complaint.[9]

F. The Community is Entitled to Its Requested Relief

Lastly, both the Federal Defendants and Menominee ask that if the Community prevails on its claims that the Court allow additional briefing on the question of whether the Community is entitled to the declaratory and injunctive relief requested in the Motion. Fed. Mem. at 37–38; Men. Mem. at 43–45. This request for additional briefing should be denied.

[9] If the Court does decide to address the question of whether any provision of the 2005 Compact is valid under IGRA, the Community requests the opportunity to provide supplemental briefing on that issue. The Community continues to operate its gaming facilities pursuant to provisions that were deemed-approved under the 2005 Compact, and thus any ruling on the validity of those provisions could substantially affect its gaming operations and contractual obligations to the State.

The Community's Motion requests that the Court vacate the Assistant Secretary's January 9, 2015 disapproval, and either (1) find that the 2014 Amendment is permissible under IGRA, or (2) remand to the Defendants to reconsider their decision, and further order that if the Defendants do not take action within 45-days for remand that the 2014 Amendment be "deemed approved" under 25 U.S.C. § 2710(d)(8)(C). Pl.'s Mot. at 2.

The Tribe's request for an order vacating the disapproval is proper and is the standard relief that is ordinarily granted in an APA case upon finding that an agency erred. *See* 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."); *City of Duluth v. Nat'l Indian Gaming Comm'n*, 7 F. Supp. 3d 30, 41 (D.D.C. 2013) ("[T]he Supreme Court and the D.C. Circuit have held that vacatur is the presumptive remedy for" violations under the APA) (quoting *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, 818 F. Supp. 2d 214, 238 (D.D.C. 2011)); *New Life Evangelistic Ctr., Inc. v. Sebelius*, 672 F. Supp. 2d 61, 74 (D.D.C. 2009) (vacating and remanding case upon finding error by agency). An order vacating the decision is particularly appropriate in this case because a disapproval on improper grounds is itself a violation of IGRA, and thus should not be allowed to stand. *See* 25 U.S.C. § 2710(d)(8)(B).

If, based on the Community's arguments, the Court made an affirmative determination that the 2014 Amendment fell within the permissible subjects under IGRA, it would also be appropriate for the Court to order that the agency affirmatively approve the 2014 Amendment. *See Zabala v. Astrue*, 595 F.3d 402, 409 (2d Cir. 2010) ("Where application of the correct legal principles to the record could lead only to the same conclusion, there is no need to require agency reconsideration.") (alterations omitted). However, the Community acknowledges that remand is ordinarily the

appropriate remedy in APA cases, except in "rare circumstances." *Cty. of L.A. v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir. 1999).

Thus, if the Court merely finds that the Assistant Secretary erred in his disapproval, it would be appropriate for the Court to remand the decision to the agency to reconsider its decision. *See id.; Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case . . ."); *New Life Evangelistic Ctr., Inc.*, 672 F. Supp. 2d at 74 (vacating and remanding to agency for further consideration consistent with the Court's opinion). A remand would be particularly appropriate in this case because there has been a substantial change in the factual circumstances relating to the 2014 Amendment. Due to the Governor's decision not to concur with the Assistant Secretary's two-part determination for the proposed Kenosha casino, much of the Assistant Secretary's discussion and explanation in the disapproval letter which related to the Kenosha casino is no longer applicable to the amendment, and thus it would be appropriate to have the agency re-consider its decision based on the present circumstances. The Community' request that the 2014 Amendment be "deemed approved" if action is not taken within 45 days of remand is also proper. *See Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993) (remanding to an agency and requiring the agency to reconsider its decision within the applicable 180-day statutory period).

The Federal Defendants argue that in deciding whether to vacate an agency decision, the court must consider (1) "the seriousness of the order's deficiencies," and (2) "the disruptive consequences of an interim change." Fed. Mem. at 38 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993)). In *Allied-Signal*, however, the D.C. Circuit was considering the question of whether a rule promulgated by an agency should be vacated, and

the Court was concerned the vacating the rule could be "quite disruptive" because the agency would need to refund numerous fees that could not be later recovered. *Id.* Here, in contrast, the Community is not requesting that an agency rule be vacated. There would also not be any "disruptive consequences" from an order to vacate the disapproval because the 2014 Amendment would not go into effect unless there was some further action to approve or deem it approved. *See See* 25 U.S.C. § 2710(d)(3)(B) (Class III gaming compacts "shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register"). Moreover, given IGRA's narrow limits on the permissible circumstances for disapproval, as well as the 45-day deemed-approval provision, it would be improper for the Court to allow the Assistant Secretary's disapproval to stand notwithstanding a finding that he erred in reaching this decision.

Menominee, similarly, argues that any remand should be without vacatur, relying on *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 147–48 (D.D.C. 2017). Men. Mem. at 44 n.22. In *Standing Rock Sioux Tribe*, the court noted that vacatur was the "standard remedy" for violations of the National Environmental Protection Act ("NEPA"), but it was concerned that there would be "serious consequences" because such a remedy would require vacating a company's permits and easements and forcing it to cease operations until the agency properly complied with the requirements of NEPA. 255 F. Supp. 3d at 147. There are no similar consequences that would arise from vacatur here because, as described above, the 2014 Amendment would require further action before going into effect. *See* 25 U.S.C. § 2710(d)(3)(B). Further briefing on the appropriate remedy is thus unnecessary.

IV. CONCLUSION

For the foregoing reasons, the Community's Motion for Summary Judgment should be granted and the Cross-Motions should be denied, except as to Menominee's request for dismissal of the Second Cause of Action in the Complaint, which the Community does not contest.

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Respectfully submitted,

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