IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Forest County Potawatomi Community, a federally-recognized Indian Tribe, Plaintiff, v. **The United States of America**; et al., Defendants, **Menominee Indian Tribe of Wisconsin**, et al., Defendant-Intervenors	Case No. 1:15-cv-00105-CKK Judge Colleen Kollar-Kotelly

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

Plaintiff's consolidated response and reply (ECF No. 86) ("Pl. Reply") fails to show that the Assistant Secretary–Indian Affairs' ("Assistant Secretary") disapproval of a 2014 Amendment to the Class III gaming compact between Forest County Potawatomi Community ("FCPC") and the State of Wisconsin was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. The Assistant Secretary's well-reasoned Decision disapproved the 2014 Amendment based on two key findings. First, the Assistant Secretary found the Amendment was designed to protect FCPC's revenues at the expense of another tribe. This finding is supported by the record and entitled to deference under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA"). Second, the Assistant Secretary concluded the Amendment violated the Indian Gaming Regulatory Act ("IGRA") because the Amendment addressed subjects beyond the permissible scope of a Class III compact. In light of IGRA's purposes and plain language, the Assistant Secretary properly concluded the 2014 Amendment could not be approved.

FCPC claims the Assistant Secretary misinterpreted IGRA and the 2014 Amendment itself. In making its argument, FCPC continues to obscure the fact that the burden of the 2014

Amendment would have fallen on an unrepresented, unconsenting tribe. Similarly, FCPC refuses to acknowledge the extent to which the 2014 Amendment departed from prior compacts that have been approved or "deemed approved" by the Department. The Assistant Secretary's Decision here was appropriate, supported by the record, and fully in accordance with law. Thus, the Court should deny FCPC's motion for summary judgment and grant summary judgment in Federal Defendants' favor.

I. The Assistant Secretary Properly Found That The 2014 Amendment Sought To Shift The Burden Of Protecting FCPC's Revenue Losses To Another Tribe.

The Assistant Secretary appropriately concluded that the 2014 Amendment would burden a separate, unrepresented tribe. FCPC's opposition merely repeats its assertion that the Assistant Secretary incorrectly interpreted the 2014 Amendment to require the Menominee Tribe ("Menominee") to make Mitigation Payments to FCPC. Pl. Reply 12-15. Specifically, FCPC claims that the Assistant Secretary's conclusion was arbitrary because "the 2014 Amendment did not impose any legal obligations on the Menominee, nor could it have because Menominee was not a party to the agreement." *Id.* at 13. FCPC misses the point. The Assistant Secretary never concluded that the 2014 Amendment created any legal obligations for Menominee. Rather, the Assistant Secretary found that the Amendment sought to protect FCPC's revenues by fully anticipating that Menominee would be called upon to make FCPC whole. That conclusion was reasonable, entitled to deference, and should be upheld.

"Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record." *Fuller v. Winter*, 538 F. Supp. 2d 179, 186 (D.D.C. 2008). The court's role, by contrast, is deferential and limited to determining "whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Cottage Health Sys. v. Sebelius*, 631 F. Supp. 2d 80, 89-90 (D.D.C. 2009). "In matters implicating predictive judgments," courts are "particularly deferential" to agency findings. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009). "When an

agency's decision is primarily predictive . . . [courts] require only that the agency acknowledge factual uncertainties and identify the considerations it found persuasive." *Id.*

FCPC cannot overcome this deferential standard. As detailed in Federal Defendants' Memorandum (ECF No. 81-1) ("U.S. Mem."), the Assistant Secretary extensively reviewed the 2014 Amendment and the record as a whole and concluded that, "[a]lthough the 2014 Amendment purports to make the State ultimately responsible for collecting the Mitigation Payments, the plain language of the 2014 Amendment and the supporting documents from [FCPC] and the State demonstrate that, in fact, Menominee would be responsible for making all of the Mitigation Payments intended to protect [FCPC's] revenue." FCPCAR001464; *see* U.S. Mem. 20-24. Contrary to FCPC's claims, at no point did the Assistant Secretary suggest that the 2014 Amendment in and of itself would impose a *legal* obligation on Menominee. *See* Pl. Reply 13-15; 26. Instead, the Assistant Secretary determined that the Amendment's intent—and likely effect—was to make Menominee the guarantor of FCPC's monopoly profits through the use of annual mitigation payments. U.S. Mem. 21-23.

The record supports the Assistant Secretary's finding.[1] The 2014 Amendment provides that if the State concurs in the Assistant Secretary's two-part determination for a gaming facility ("Applicant Facility") within fifty miles of FCPC's Milwaukee facility, then "an annual mitigation payment to [FCPC] . . . is required." FCPCAR000029. The 2014 Amendment states

[1] Federal Defendants do not respond to FCPC's factual allegations because the "Court's review is confined to the administrative record[.]" *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006). FCPC claims the factual allegations put forth in its opening motion and memorandum, ECF No. 79, 79-1, should be treated as admitted. Pl. Reply 3 (citing *Hinson ex rel. New Hampshire v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 91–92 (D.D.C. 2008)). FCPC is incorrect. In *Hinson*, this Court explained under Local Civil Rule 7(h), in resolving motions for summary judgment, the "Court 'assume[s] that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.'" *Id.* at 91 (citing LCvR 7(h)(1)). But, Local Civil Rule 7(h) "does not apply in cases such as this one in which judicial review is based solely on the administrative record." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. CV 16-1534, 2018 WL 1385660, at *4 (D.D.C. Mar. 19, 2018) (citing *All. for Nat. Health U.S. v. Sebelius*, 775 F. Supp. 2d 114, 118 (D.D.C. 2011). Here, the Court's review must be based on the administrative record alone, and the Court cannot treat FCPC's "facts" as admitted. *See id.*

that Menominee's proposed Kenosha facility is an Applicant Facility. *Id*. While the State is the only entity legally obligated to make mitigation payments, the plain language of the 2014 Amendment anticipates that the State will fulfill this obligation by shifting those payments to the Applicant. U.S. Mem 9-10; 21-22. The context surrounding the 2014 Amendment, *see* U.S. Mem. 23-24, as well as the Amendment's specific references to Menominee, led the Assistant Secretary to conclude that Menominee was the contemplated Applicant that would be inevitably saddled with the mitigation payments, even though Menominee was not a party to the agreement.

While FCPC continues to rely on the argument that the 2014 Amendment did not impose a legal obligation on Menominee, that simply has nothing to do with whether the Amendment would have ultimately burdened an unrepresented tribe. *See* FCPAR001466 ("The 2014 Amendment contemplates that the State is ultimately is [sic] obligated to make mitigation payments to [FCPC], but may pass its payment obligation to the Menominee."); *see also* Mem. Op. 9, ECF No. 41 (recognizing the 2014 Amendment would "as a practical matter, impede the Menominee's efforts to obtain a gubernatorial concurrence and would thereby impede their efforts to develop a gaming facility in Kenosha."). The record demonstrates that both FCPC and the State contemplated that Menominee would ultimately bear responsibility for the mitigation payments. *See* FCPCAR000031. FCPC itself stated in a support letter for the Amendment that "[FCPC] anticipates that the State and the Menominee Tribe will submit a separate compact amendment to the Assistant Secretary reflecting their agreement as to any additional financial obligations regarding the Kenosha Casino." BIA_02947; *see also* BIA_02951. Even members of Congress that lobbied for the Amendment's approval noted their expectation that "any required Mitigation Payments will in fact be fully covered by the Menominee and that Wisconsin taxpayers will not be required to cover any of these costs." FCPCAR001462.

The inescapable reality is that the 2014 Amendment expected the mitigation payments to come from Menominee. Moreover, if Menominee did not agree to assume these payments, the State's governor was unlikely to concur with the Assistant Secretary's favorable two part determination for Menominee's Kenosha facility. *See* FCPCAR001466 (explaining "[i]f

Menominee did not consent to make the Mitigation Payments, for example, the Governor may decline the Secretary's two part-determination for Kenosha."). FCPC's attempt to paint this as a free choice by Menominee as to whether to make the mitigation payments simply ignores the practical reality of how the 2014 Amendment came to be. U.S. Mem. 23-24. In the Decision, the Assistant Secretary identified the considerations he found persuasive and reached a reasonable conclusion. *Rural Cellular*, 588 F.3d at 1105. That conclusion should be upheld.

II. The Assistant Secretary's Disapproval Was Appropriate Because The 2014 Amendment Violates IGRA.

IGRA provides that the Assistant Secretary may disapprove a Class III gaming compact if such compact violates 1) any provision of IGRA; 2) any other provision of federal law that does not relate to jurisdiction over gaming on Indian lands; or 3) the trust obligations of the United States to Indians. 25 U.S.C. § 2710(d)(8)(B). Here, the Assistant Secretary disapproved the 2014 Amendment because it violated IGRA. Because the Assistant Secretary's disapproval was supported by IGRA's plain language and purpose, it should be affirmed.

A. The 2014 Amendment Contains Subjects Outside The Permissible Scope Of A Class III Gaming Compact.

The Assistant Secretary concluded that the 2014 Amendment "violates IGRA because it includes provisions involving subjects that exceed the permissible scope of a Class III gaming compact." FCPCAR001466. IGRA limits the permissible subjects of a Class III compact. *See* U.S. Mem. 5. If a provision does not clearly fall within one of the permissible subject areas, the Assistant Secretary evaluates whether the provision falls into the "catch-all" category for subjects "directly related to the operation of gaming activities." *Id.* at 5-6 (quoting 25 U.S.C. § 2710(d)(3)(C)(vii)).

The Assistant Secretary found the 2014 Amendment addressed two subjects that were beyond the scope of this catch-all provision. FCPCAR001464. First, as detailed above, the Assistant Secretary concluded that the 2014 Amendment sought to protect "[FCPC's] revenues fully by anticipating that the Menominee will bear the burden of making [FCPC] whole . . . ."

FCPCAR001460. Second, the Amendment allowed FCPC to receive mitigation payments for revenue losses from "Class II gaming, food and beverage, hotel, and entertainment activities, which fall outside the permissible subjects of negotiation under IGRA." *Id.* at 001466. The Assistant Secretary correctly concluded that these two topics do not fall within 25 U.S.C. § 2710(d)(3)(C)(vii)'s unambiguous language.[2]

FCPC's arguments to the contrary misconstrue the statute. FCPC argues that the Assistant Secretary's reading of 25 U.S.C. 2710(d)(3)(C)(vii) is "overly-restrictive and lacking any authority." Pl. Reply 30. FCPC cites, among others, *In re Indian Gaming Related Cases,* 331 F.3d 1094, 1113-16 (9th Cir. 2003), to support its claim that 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. Reply 31. While certain courts have construed §

[2] At least two courts have concluded that § 2710(d)(3)(C)(vii) plain language is unambiguous. *See In re Indian Gaming Related Cases,* 331 F.3d at 1111; *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger,* 602 F.3d 1019, 1028 n.9 (9th Cir. 2010). Federal Defendants and FCPC agree the provision is unambiguous, but disagree on the outcome of the plain language. *See* Pl. Reply 8. Nonetheless, FCPC continues to argue that, should the Court find ambiguity in § 2710(d)(3)(C)(vii), the Court should construe ambiguities in FCPC's favor under the canon articulated in *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759 (1985). As explained in Federal Defendants' memorandum, the *Blackfeet* canon has no place here, where its application would benefit one tribe at the expense of another. U.S. Mem. 14-18. If the Court were to find ambiguity in § 2710(d)(3)(C)(vii), it is *Chevron* deference that should apply to the Assistant Secretary's interpretation, not the *Blackfeet* canon. *See* U.S. Mem. 18-20. In *Artichoke Joe's Cal. Grand Casino v. Norton*, the court noted "[i]n interpreting IGRA the court has given [*Chevron*] deference to the Secretary's understanding of IGRA as expressed in her approval of [Class III gaming] compacts." 216 F. Supp. 2d 1084, 1126 (E.D. Cal. 2002), *aff'd,* 353 F.3d 712 (9th Cir. 2003). The court explained that *Chevron* deference is appropriate because compact approval letters are not merely opinion letters, but rather "final, albeit informal, adjudication[s] on the merits." *Id.* (citations omitted). The same is true of the Assistant Secretary's disapproval letter here, which as detailed below, is based on a permissible, if not required, construction of IGRA. *Chevron*, 467 U.S. at 843. Even if the Court were to rule that the statute is ambiguous, and *Chevron* deference does not apply, the Court should still afford deference and uphold the Assistant Secretary's interpretation of IGRA under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), just as the courts did in Plaintiff's cited authorities. *Fort Indep. Indian Cmty. v. California,* 679 F. Supp. 2d 1159, 1176-77 (E.D. Cal. 2009); *Chemehuevi Indian Tribe v. Brown,* No. ED CV 16–1347–JFW (MRWx), 2017 WL 2971864 (C.D. Cal. Mar. 30, 2017); *see also* U.S. Mem. 18.

2710(d)(3)(C)(vii) broadly, those cases involved entirely dissimilar circumstances. Here, there is no permissible reading of § 2710(d)(3)(C)(vii) that would encompass the 2014 Amendment.

"IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are related to gaming and are consistent with IGRA's stated purposes. . . ." *Rincon*, 602 F.3d at 1028-29. When assessing whether a particular compact provision is permissible under § 2710(d)(3)(C)(vii), courts consider not only whether the provision directly relates to the operation of Class III gaming, but also whether the provision is "consistent with the purposes of IGRA." *Id.* at 1032-33. The purposes of IGRA, as set forth in 25 U.S.C. § 2702, include "promoting tribal economic development, self-sufficiency, and strong tribal governments"; as well as "shield[ing] [Indian gaming] from organized crime and other corrupting influences, . . . ensur[ing] that the Indian tribe is the primary beneficiary of the gaming operation, and . . . assur[ing] that gaming is conducted fairly and honestly by both the operator and players." *Id.*

When a proposed compact provision does not support these purposes, courts read the plain language of § 2710(d)(3)(C)(vii) narrowly to disallow inconsistent provisions. *See Rincon*, 602 F.3d at 1034. As the *Rincon* Court explained, § 2710(d)(3)(C)(vii) breadth varies based on the circumstances. In weighing various proposed revenue sharing provisions contained in Class III gaming compacts there, the court explained:

> In [*In re Indian Gaming Related Cases*] we construed the meaning of subjects "directly related to the operation of gaming" in § 2710(d)(3)(C)(vii) broadly to include revenue sharing because the [revenue sharing provision there was] consistent with the plain language of § 2702 (listing tribal economic self-sufficiency as one of IGRA's purposes). By contrast, we cannot read § 2710(d)(3)(C)(vii) broadly here to include general fund revenue sharing because none of the purposes outlined in § 2702 includes the State's general economic interests.

Rincon, 602 F.3d at 1034 (citing *In re Indian Gaming Related Cases*, 331 F.3d at 1111). Hence, the fact that § 2710(d)(3)(C)(vii) has been construed broadly in the past has little to do with whether it should be so construed here. *See* Pl. Reply 31.

This Court cannot interpret § 2710(d)(3)(C)(vii) to encompass the provisions of the 2014 Amendment at issue here. As explained in detail below, neither § 2710(d)(3)(C)(vii)'s plain language nor IGRA's purposes allow the types of provisions contained in the 2014 Amendment. Thus, the Assistant Secretary appropriately disapproved the 2014 Amendment, and the Court should grant summary judgment in Federal Defendants' favor.

i. IGRA does not allow FCPC to use the compacting process to impose a financial burden on another, unrepresented tribe.

The Assistant Secretary correctly concluded that the 2014 Amendment does not fall within IGRA's catch-all because, while "IGRA identifies in great detail what is allowable for negotiation in a tribal-state Class III gaming compact, [] it does not authorize states and tribes to negotiate to shift the burden of loss [sic] revenues from existing gaming operations to another tribe without the consent of the other tribe." FCPCAR001464. FCPC disputes this conclusion, but its arguments are unconvincing.

FCPC argues the Assistant Secretary's conclusion was erroneous because "IGRA does not allow the Assistant Secretary to disapprove a compact amendment based upon a legal obligation that the amendment does not actually impose." Pl. Reply 15. As discussed, the Assistant Secretary never purported to disapprove the 2014 Amendment based on a nonexistent legal obligation. Instead, the Assistant Secretary evaluated the Amendment and found it "seeks to guarantee [FCPC's] profits by shifting the costs of any impact to the Menominee." FCPCAR001460. FCPC's sustained misrepresentation of the Decision does not support its claim.

FCPC also asserts that the Assistant Secretary's disapproval was arbitrary because "IGRA does not permit the Assistant Secretary to disapprove a compact based on the 'intent' of the agreement." Pl. Reply 15. According to FCPC, a compact must "be evaluated based on its express terms and the legal obligations that it imposes upon the parties, rather than the 'intent' of the parties." Pl. Reply 16. FCPC cites no authority to support its stilted reading of the Assistant Secretary's role in the compact approval process. Nothing in IGRA requires the Assistant

Secretary to follow a hyper-technical textual approach when evaluating a compact provision.[3] Nor does IGRA limit the Assistant Secretary to disapproving a compact based only on its express, legal enforceable terms. The Assistant Secretary is limited in the circumstances under which he can disapprove a compact. *See infra.* at 4. But it does not follow that the Assistant Secretary is only permitted to consider a compact's legally enforceable obligations, and cannot assess whether the compact as a whole, when taken in its context, violates IGRA.[4] FCPC is asking the Court and the Assistant Secretary to ignore what FCPC and the State explicitly

[3] When courts assess whether a compact provision falls within § 2710(d)(3)(C)(vii), they do not look merely at the compact's plain terms. Instead, courts conduct a broader inquiry to ensure the compact is consistent with IGRA. The discussion in *Rincon* demonstrates this point:

> [I]n [*In re Indian Gaming Related Cases*] we did not conclude that § 2710(d)(3)(C)(vii) authorized the [revenue sharing funds there] because "revenue sharing" is a subject directly related to gaming. Rather, we held that fair distribution of gaming opportunities and compensation for the negative externalities caused by gaming are subjects directly related to gaming, and the [revenue sharing funds there] were the means chosen by the parties to the 1999 compacts to deal with those issues.

602 F.3d at 1033 (citing *In re Indian Gaming Related Cases*, 331 F.3d at 1111, 1114). It would be incongruous for this Court to find courts are permitted to conduct this sort of sensitive inquiry, but the Assistant Secretary is not.

[4] FCPC also argues it was "improper for the Assistant Secretary to disapprove the 2014 Amendment based on his own uncertain predictions about a hypothetical separate agreement" between Menominee and the State. Pl. Reply 38. FCPC cites no authority to support that statement, and undercuts its argument by relying on uncertain predictions to support its own claims. *See* Pl. Reply 27 (predicting that it was "extremely likely that the Community and State would agree to a [revenue-sharing reduction] 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."). FCPC further claims the Assistant Secretary could not disapprove the 2014 Amendment based the fact that Menominee would likely agree to assume the mitigation payments because "the Assistant Secretary had the ability to protect Menominee from assuming any obligations that violated IGRA." Pl. Reply 21. This argument ignores the fact that the 2014 Amendment put Menominee in a double bind—Menominee could either 1) refuse to make the mitigation payments, which could readily result in the Governor refusing to concur in Menominee's two part determination, or 2) accept the mitigation payments, and face likely disapproval of their own Class III gaming compact by the Assistant Secretary. *See* U.S. Mem. 6-10; *see also* FCPCAR001466. The Assistant Secretary's ability to disapprove a future compact, thus, does not cure the problem with the 2014 Amendment.

acknowledged – that Menominee would have likely ended up making the mitigation payments under the proposed amendment.

Congress delegated the role of reviewing compact provisions to the Department of Interior, and did not intend that review to be merely a rubber stamp. *See* FCPCAR001464 n.29 ("The Department closely scrutinizes tribal-state gaming compacts that disapproves compacts that do not squarely fall within the topics delineated in IGRA") (quoting Assistant Secretary Washburn's testimony to Congress). FCPC claims that it is "not arguing that the Assistant Secretary must consider compacts in a vacuum or that he cannot apply his experience or expertise in making his decision." Pl. Reply 18. But FCPC plainly wants just that. *See* Pl. Reply 19 (claiming "[t]he use of the words 'such compact' [in 25 U.S.C. § 2710(d)(8)(B)] makes clear that the violation must be in the compact under consideration."). By insisting that the Assistant Secretary is only permitted to consider a compact's strict, legally enforceable terms, FCPC seeks to limit the Assistant Secretary's role in a manner that IGRA does not contemplate.

Furthermore, FCPC misapprehends how the Assistant Secretary actually reached the Decision. The Assistant Secretary did not base the disapproval on some unmoored exploration of FCPC and the State's intent. *See* Pl. Reply 16. Instead, the Assistant Secretary carefully evaluated the 2014 Amendment and found that, by its express terms, the Amendment unambiguously anticipated "that the State *will* enter into agreements under which the applicant *will* agree to pay the Mitigation Payment . . . ." quoting FCPCAR000031 (emphasis added); *see also* U.S. Mem. 21-22. Menominee is the only Applicant referenced in the 2014 Amendment. FCPCAR000029. This fact, taken together with the 2014 Amendment's plain language and context, *see* U.S. 7-10; 23-24, supports the Assistant Secretary's conclusion that the Amendment sought to impose the burden of protecting FCPC's monopoly profits on Menominee. FCPCAR001460.

The Assistant Secretary properly concluded that such an arrangement exceeds the permissible scope of a Class III gaming compact. *See* U.S. Mem 24-30.

First, the arrangement is not directly related to FCPC's gaming activities within the plain meaning of § 2710(d)(3)(C)(vii), because it "does not address the regulation or the actual operation of [FCPC's] Class III gaming activity at its Milwaukee casino." FCPCAR001464. Instead, it seeks to protect FCPC's revenue stream "from any losses due to competition from the proposed Menominee casino at Kenosha" by imposing the burden of those losses not on the State, but on Menominee. FCPCAR001464. FCPC contends "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." Pl. Reply 26. The explanation is obvious. IGRA contemplates that the compacting tribe (here FCPC) and the State will use the compact process to address legitimate regulatory concerns related to Class III gaming. FCPCAR001464. But IGRA does not contemplate that the compacting tribe and the State will use the compact process to pressure a separate, unrepresented tribe into making the mitigation payments envisioned here for the purpose of protecting the first tribe's monopoly. *See* FCPCAR001466 n.36 (citing S. Rep. No. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083); *see also* U.S. Mem. 26. The purpose of 2014 Amendment and the means chosen to accomplish that purpose are simply not directly related to the operation of FCPC's Class III gaming. *See Rincon*, 602 F.3d at 1033; *see also infra.* n.5. As the Assistant Secretary noted, "[h]ad the State alone without reference to the Menominee as the 'Applicant,' agreed to a reduction in revenue sharing, for example," then the decision might have been different.

Second, the 2014 Amendment is not only in conflict with the plain language of § 2710(d)(3)(C)(vii), but also inconsistent with IGRA's purposes. As the Assistant Secretary explained, "[n]othing in IGRA or its legislative history suggests that Congress intended compacts to be used for the purpose of insuring the profitability of a tribe's casino at the expense of another tribe's rights under IGRA or fairness in inter-tribal gaming competition, at least without the consent of the other tribe." FCPCAR001466. FCPC argues it was "contrary to IGRA to disapprove a compact based on considerations of 'fairness,' because the statute does not

permit disapproval on such grounds." Pl. Reply 40. FCPC misunderstands. By referencing fairness, the Assistant Secretary was not "advance[ing] his personal policy goals." Pl. Reply 40. Rather, the Assistant Secretary was reacting to the 2014 Amendment's clear purpose of coercing an anticipated inter-tribal gaming competitor (Menominee) into assuming the burden of insuring FCPC's profits. FCPCAR001460. The 2014 Amendment would have not only hindered Menominee's entry to the market, *id.*, but also imposed a long term exaction on Menominee's operation in the form of payments that could have continued for up to 40 years. FCPCAR001463 n. 24. IGRA's purposes simply do not envision that the compact process will be used for this sort of inter-tribal revenue shifting. FCPCAR001466 n.36; *see also* 25 U.S.C. § 2702; *Rincon*, 602 F.3d at 1035.

Overall, the 2014 Amendment is "an anathema to basic notions of fairness in competition [and] inconsistent with the goals of IGRA." U.S. Mem. 34 (citing BIA_003184). Courts consider IGRA's goals and purposes when assessing a compact provision's permissibility, and it was entirely appropriate for the Assistant Secretary's analysis to reflect those purposes here. *See Rincon*, 602 F.3d at 1034; *see also* Pl. Reply 35-36 (conceding IGRA's purposes are relevant to whether a compact provision falls within § 2710(d)(3)(C)(vii)). As the Assistant Secretary explained, a primary reason for IGRA's "state-tribal compact process is to ensure that state governments have an opportunity to engage with tribes as to legitimate regulatory concerns about the conduct of gaming." FCPCAR001464. In attempting to use the compact process to foist a financial burden on another, unrepresented tribe, the 2014 Amendment did not address legitimate regulatory concerns,[5] nor did it further IGRA's purposes. *See* 25 U.S.C. 2702. The

[5] FCPC also argues "the mere fact that provisions of the 2014 Amendment were intended to benefit the State would also not mean that the agreement fell outside the permissible subjects . . .," Pl. Reply 33, and contends "a broad reading of Section 2710(d)(3)(C)(vii) is particularly appropriate in this case because Mitigation Payments are payments from the State *to a tribe*." Pl. Reply 32. On both counts, FCPC continues to ignore the truly problematic parts of the 2014 Amendment. The Assistant Secretary did not disapprove the 2014 Amendment because it benefited the State, or because it involved payments from the State to FCPC. Instead, the 2014 Amendment anticipated the State would shift the burden of those payments to the Menominee.

Assistant Secretary properly found the 2014 Amendment did not fall within § 2710(d)(3)(C)(vii), and the Decision should be affirmed.

ii. IGRA does not permit revenue reimbursement for Class II gaming or other activities not directly related to FCPC's Class III gaming operation.

The Assistant Secretary also correctly concluded that the 2014 Amendment fell outside § 2710(d)(3)(C)(vii) because it allowed FCPC to receive mitigation payments not only for revenue losses from Class III operations, but also revenue losses from Class II gaming, food and beverage sales, and hotel and entertainment activities. FCPCAR001465. FCPC continues to argue IGRA permits the 2014 Amendment to address these disparate subjects. *See* Pl. Reply 31. FCPC's argument remains unpersuasive.

FCPC claims the 2014 Amendment could address Class II activities because "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." Pl. Reply 36. FCPC also asserts that "the Mitigation Payments in the 2014 Amendment *are* directly related to the [FCPC'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." Pl. Reply 35-36. But FCPC's arguments amount to nothing more than the but-for analysis that was explicitly rejected in the Assistant Secretary's Decision:

> When we apply [§ 2710(d)(3)(C)(vii)] we do not simply ask, 'but for the existence of the Tribe's Class III gaming operation, would the particular subject regulated under a compact provision exist?' If this question were used to provide the standard . . . it would permit states to use tribal-state compacts as a means to regulate a number of tribal activities far beyond that which Congress intended. . . .

FCPCAR001464; U.S. Mem 28-29. As the Assistant Secretary explained, while non-Class III activities are "often located near or adjacent to tribal gaming facilities[,] [i]t does not necessarily

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Hence, it would not make sense to read § 2710(d)(3)(C)(vii) broadly to encompass the 2014 Amendment, when doing so would encumber an unrepresented tribe without its consent.

follow . . . that such ancillary businesses are 'directly related to the operation of gaming activities.'" FCPCAR001464-65 n.32; U.S. Mem. 27-28. [6]

FCPC argues that "Section 2710(d)(3)(C)(vii) . . . 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. Reply 36. But as FCPC concedes, Pl. Reply 36 n.7, the D.C. Circuit has already construed § 2710(d)(3)(C)(vii) to refer to Class III gaming operations alone, not gaming activities generally, and certainly not the secondary activities addressed in the 2014 Amendment. *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 138 (D.C. Cir. 2006). This Court's inquiry should stop there. Nonetheless, FCPC contends the Court should break from the D.C. Circuit and interpret § 2710(d)(3)(C)(vii) to allow the mitigation payments here because it is "in the interests of all tribes because all tribes benefit from being able to receive a broader range of payments . . . ." Pl. Reply 10. FCPC also argues "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." Pl. Reply 32; 36. FCPC is wrong on both points.

First, FCPC erroneously equates its own interests with the interests of all tribes. It is not in Menominee's interests, nor the interests of any other future Applicant tribe, to be expected to

[6] FCPC continues to cite *Flandreau Santee Sioux Tribe v. Gerlach* to support its argument that the non-Class III activities referenced in the 2014 Amendment are "directly related to class III gaming pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii)." Pl. Reply 31 (quoting 269 F. Supp. 3d 910, 926 (D.S.D. Sept. 15, 2017), *appeal docketed*, No. 18-1271 (8th Cir. Feb. 6, 2018). As already explained in Federal Defendant's Memorandum, *Flandreau* is inapposite. U.S. Mem. 28-29. FCPC claims the "'only significant purpose'" of the amenities allowed in *Flandreau* was to facilitate gaming, and that the same is true here. Pl. Reply 31 n.5. But FCPC again ignores the fact the *Flandreau* court found that without the Casino, the other amenities "would not [have] exist[ed] in the sleepy but pleasant little town of Flandreau." FCPC has not shown the same is true of the ancillary activities addressed by the 2014 Amendment. *Flandreau*, hence, does not provide the support FCPC claims.

reimburse FCPC for revenue losses from non-Class III activities. And the 2014 Amendment's anti-competitive provision sets a bad precedent for fairness in inter-tribal gaming writ large. *See* FCPCAR001460. Second, FCPC's argument regarding state jurisdiction is a slippery slope. If a tribe can receive payments for non-Class III activities, future compacting parties may also begin pushing to influence or regulate non-Class III activities through the compact process. Thus, FCPC's arguments collapse on themselves.

The Assistant Secretary has consistently held that "Class II gaming is not an authorized subject of negotiation for Class III compacts." *See* FCPCAR001464 n.29 (quoting Assistant Secretary Washburn's testimony to Congress). The 2014 Amendment seeks reimbursement for activities that are far afield from FCPC's Class III operations, including certain activities that are not even within the exterior boundaries of FCPC's trust lands. FCPCAR001464-65 n.32. The Assistant Secretary properly concluded these activities are not appropriate subjects for FCPC's gaming compact, and the Assistant Secretary's disapproval should be affirmed.

B. The 2014 Amendment Is Unlike Other Valid Exclusivity Provisions.

FCPC rehashes its attempt to analogize the 2014 Amendment to other compacts that have been approved or "deemed approved"[7] by the Department. As explained in Federal Defendants' opening Memorandum, Federal Defendants do not dispute that tribal-state gaming compacts *may* contain exclusivity provisions. U.S. Mem. 25. But the 2014 Amendment far exceeds the scope of other approved agreements by 1) seeking to unilaterally inflict a financial burden[8] on another tribe, and 2) addressing non-Class III activities. *Id.* Thus, FCPC's arguments remain unavailing.

[7] Under IGRA, the Secretary may approve or disapprove a proposed gaming compact within 45 days of its submission. 25 U.S.C. § 2710(d)(8)(C). If the Secretary neither approves nor disapproves a compact within 45 days, the compact is deemed approved, "but only to the extent the compact is consistent with the provisions of [IGRA]." *Id*. In other words, certain sections of deemed approved compacts may be inconsistent with IGRA. When a compact is deemed approved, the Secretary is not required to identify provisions he considers problematic. Thus IGRA leaves it to tribes, states, and, if necessary, courts to resolve disputes that may arise over the validity of particular provisions in deemed approved compacts.

[8] FCPC purports to highlight an error in the Assistant Secretary's disapproval by claiming the Assistant Secretary interpreted the burden of the mitigation payments on the Menominee to be "substantial," while inconsistently claiming the impact of the Menominee facility on FCPC

FCPC claims the 2014 Amendment is like other valid exclusivity provisions and "Federal Defendants' claimed distinctions . . . have no basis in the relevant legal standard under IGRA." Pl. Reply 25. First, FCPC still maintains that, because the 2014 Amendment does not impose a legal obligation on Menominee, "Federal Defendants' primary distinction between the 2014 Amendment and other exclusivity agreement is . . . based on an incorrect reading of what the agreement actually requires." Pl. Reply 23. The Assistant Secretary did not misread what the 2014 Amendment requires. Rather, the Assistant Secretary correctly determined that the 2014 Amendment anticipated the State would meet its obligations by shifting the burden of compensating FCPC to another, unrepresented tribe, which IGRA does not allow.

The Assistant Secretary compared the 2014 Amendment to other exclusivity provisions that had been approved or deemed approved, and concluded the 2014 Amendment was beyond the pale. FCPCAR001465-66. FCPC continues to cite the exclusivity agreement in a compact amendment for the Lac du Flambeau Band ("LDF") to claim "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. Reply 24. FCPC also states "[u]nder 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." *Id.* But FCPC still ignores the very real differences between the LDF compact amendment and the 2014 Amendment. The LDF compact amendment, unlike the 2014 Amendment, does not explicitly anticipate that the State *will* unload its payment obligations onto another tribe. U.S. Mem 26. Indeed the LDF amendment does not envision that *any* party other than the state will be responsible for making payments. Nor does it include impermissible subjects in its definition of

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would be "modest." Pl. Reply 37. The Assistant Secretary's analysis was correct and well-reasoned. As the Assistant Secretary explained, Menominee has one of the highest poverty rates of any community in the State, while FCPC, by comparison, has been very successful. FCPCAR001460. It was not incongruous for the Assistant Secretary to find that a particular financial impact would be "modest, but not insignificant," for FCPC while concomitantly finding the same impact would impose a substantial burden on the much less wealthy Menominee. *Id.*

revenue like Class II gaming, hotels, entertainment, and food and beverage. *Id.* The LDF amendment provides FCPC no support.

The same problems plague FCPC's continued efforts to rely on four other Wisconsin compacts. Pl. Reply 24 n.6; Pl. Reply 26-27. Like the LDF compact amendment, those other compacts do not seek to impose a financial burden on other tribes not included in the negotiations and do not include Class II gaming and other revenues. U.S. Mem. 27 n.7. With respect to the Ho-Chunk Nation Compact, FCPC claims both the Ho-Chunk Nation Compact and the 2014 Amendment "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." Pl. Reply 26. But again, FCPC ignores the fact that the Ho-Chunk Nation Compact references compensation from the State alone, defines revenues as net win from Class III activities, and was only deemed approved.[9] BIA_003421; BIA_003430. With respect to the Oneida 2003 compact amendment, FCPC again attempts to analogize to the 2014 Amendment by claiming "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." Pl. Reply 28. But as with the LDF compact amendment, the deemed approved Oneida amendment does not contain an explicit process through which the State can shift its payment burden nor openly anticipate that the State's obligations will be fulfilled by another tribe. Once again, FCPC obscures the real distinctions. U.S. Mem. 31.

FCPC's attempt to equate the 2014 Amendment with the Little Traverse Band Compact and North Fork Compact fares no better. Pl. Reply 28. The tribes referenced in and impacted by those agreements were parties to the negotiations, unlike the Menominee here. U.S. Mem. 32. FCPC's persistent reliance on former Interior Secretary Norton's November 12, 2002 letter deeming approved the Seneca Nation compact likewise provides no support. Pl. Reply 28-30; *see* U.S. Mem 31-35. In her letter, Secretary Norton expressed concerns about the Seneca

[9] *See infra.* n.8.

Nation compact's revenue sharing and geographic exclusivity provisions, specifically citing the negative impact those provisions could have on other tribes' ability to game. U.S. Mem. 33-34 (citing BIA_003180-82). FCPC claims 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." Pl. Reply 28. FCPC misreads Secretary Norton's letter. Secretary Norton correctly noted that IGRA limits the reasons for Secretarial disapproval of a compact. BIA_003180. In her letter, Secretary Norton analyzed the Seneca Nation compact's revenue sharing and exclusivity provisions, and concluded those provisions did not violate the United States *trust obligations to the Indians*. BIA_003184. She did not address whether the provisions violated IGRA, and stated "I still find a provision excluding other Indian gaming anathema to basic notions of fairness in competition and, if pushed to its extreme by future compacts, inconsistent with the goals of IGRA." *Id*. Thus, contrary to FCPC's assertion, Secretary Norton's letter specifically contemplated that there might be a situation in which concerns about fairness in inter-tribal gaming could rise to the level of violating IGRA. That is precisely what happened with the 2014 Amendment. The 2014 Amendment goes substantially further than the revenue sharing and exclusivity provisions in the Seneca Nation compact. U.S. Mem. 34-35. FCPC does not dispute this point, but asks the Court to ignore the impact of the 2014 Amendment on Menominee, or any other applicant tribe.

Finally, FCPC cites, for the first time, "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." Pl. Reply 25. FCPC claims the approval of this compact shows the direction of the payments—from the state to the tribe—should weigh in favor of approving the 2014 Amendment. Pl. Reply 25. But the Assistant Secretary did not disapprove the 2014 Amendment

because it involved payment from the State to FCPC. Instead, the Assistant Secretary disapproved the 2014 Amendment because its subjects exceeded the permissible scope of IGRA.

Overall, none of compacts FCPC cites are analogous to the 2014 Amendment, which goes "well beyond . . . the revenue sharing payments [the Assistant Secretary] ha[s] permitted in other instances." FCPCAR001465. As the Assistant Secretary explained:

> None of these compact provisions involved specific guarantees of profitability or revenues for one tribe without the prior consent of another tribe or tribes. None of these compacts involved a revenue guarantee for a tribe operating gaming on so-called "off-reservation" lands acquired by the Secretary in trust under a two-part determination. Finally, none of the compact provisions define revenue to include Class II gaming, food and beverage, hotel, and entertainment activities, which fall outside the permissible subjects of negotiation under IGRA.

FCPCAR001466. Contrary to FCPC's claim, Pl. Reply 26, these distinctions are relevant under IGRA's legal standard. *See infra*. FCPC seeks to gloss over 2014 Amendment's explicit terms, but it arguments are fruitless, the Assistant Secretary's disapproval should be affirmed.

III. FCPC Was Not Deprived Of The Benefit Of Its Bargain.

The Assistant Secretary's disapproval did not deprive FCPC of the benefit of any bargain, as FCPC continues to suggest. Pl. Reply 39. FCPC claims it "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," and the Assistant Secretary's Decision was arbitrary because it did not consider FCPC's interests. Pl. Reply 39. But the Assistant Secretary could not deprive FCPC of the benefit of any bargain, because the Assistant Secretary cannot approve an amendment that violates IGRA. U.S. Mem. 36-37. The purported "market protection" FCPC negotiated to receive from the State in its prior compact amendment was simply a commitment to submit to binding arbitration in the event a positive two-part determination was issued for another tribe for lands located within 50 miles of FCPC's Milwaukee casino. FCPCAR001461; U.S. Mem. 7-8. FCPC and the State were aware that any proposed compact amendment reached through the arbitration process would be subject to approval by the Assistant Secretary. As the Assistant Secretary explained, it

was his duty "to determine whether the 2014 Amendment complie[d] with IGRA and approval of a compact – either by affirmative action or inaction – cannot bind the Secretary to approve a subsequent amendment to that compact where, as here, the terms of the amendment are unlawful." FCPCAR001465 n.34. Because the Assistant Secretary cannot approve a compact amendment that violates IGRA, the Assistant Secretary properly disapproved the 2014 Amendment and did not deprive FCPC of the benefit of its bargain.

IV. FCPC Is Not Entitled To Its Requested Relief.

FCPC maintains "[i]f, based on [FCPC's] arguments, the Court made an affirmative determination that the 2014 Amendment fell within the permissible subjects under IGRA, it would [] be appropriate for the Court to order that the agency affirmatively approve the 2014 Amendment." Pl. Reply 42. FCPC is not entitled to this relief. Under the APA, a reviewing court's role is to "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." 5 U.S.C. 706(2). It is not, by contrast, to conduct a *de novo* review and reach its own conclusions about the contested matter. Courts are not empowered to conduct their own investigations and "substitute [their] judgment for that of the agency." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Instead, courts must defer to agencies on areas of agency expertise, and if this Court determines that the Assistant Secretary's disapproval was arbitrary or capricious, the proper course would be to remand the Decision to the agency for further review.

If this Court were to conclude that some aspect of the Assistant Secretary's Decision did not comply with the APA, Federal Defendants request the opportunity to provide the Court with additional briefing regarding the scope of the remedy. While FCPC concedes that "remand is ordinarily the appropriate remedy in APA cases, except in 'rare circumstances,'" Pl. Reply 42-43, FCPC asks not just for remand, but also vacatur, claiming "an order vacating the disapproval is proper and is the standard relief." Pl. Reply 42-43. Whether or not vacatur is an appropriate remedy is a separate legal question that depends on the application of a two-part test outlined in

Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n, 988 F.2d 146, 150 (D.C. Cir. 1993). U.S. Mem. 38. If the Court were to determine that remand was appropriate, Federal Defendants respectfully request that the parties be given an opportunity to provide the Court with their fulsome position regarding the scope of any remedy, including whether vacatur would be appropriate under the *Allied Signal* test and facts of this case. *Id.*

V. Conclusion

The Assistant Secretary properly concluded that the 2014 Amendment violated IGRA and could not be approved. The terms of the Amendment exceeded IGRA's catch-all provision by 1) seeking to unilaterally impose the burden of protecting FCPC's revenues on another unrepresented tribe, and 2) allowing FCPC to receive mitigation payments for non-Class III activities. The Amendment is inconsistent with IGRA's plain language and purpose, and far surpasses the scope of other gaming compacts that the Assistant Secretary has approved or deemed approved. The Assistant Secretary's disapproval, therefore, was not arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. Plaintiff's Motion for Summary Judgment should be denied, and summary judgment should be granted in Federal Defendant's favor on all claims.

Respectfully submitted this 13th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 13th day of April, 2018, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ Claudia Antonacci Hadjigeorgiou
CLAUDIA ANTONACCI HADJIGEORGIOU