IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOREST COUNTY POTAWATOMI COMMUNITY, *Plaintiff,* v. UNITED STATES, et al. *Defendants,* MENOMINEE INDIAN TRIBE OF WISCONSIN, MENOMINEE KENOSHA GAMING AUTHORITY, *Defendants-Intervenors.*	)	Case No. 1:15-cv-00105-CKK Judge Colleen Kollar-Kotelly

MENOMINEE INDIAN TRIBE OF WISCONSIN'S AND MENOMINEE KENOSHA GAMING AUTHORITY'S REPLY IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS-INTERVENORS' CROSS-MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

The Consolidated Reply of Plaintiff Forest County Potawatomi Community ("FCPC") in Support of its Motion for Summary Judgment and Response in Opposition to the Defendants' and Defendant-Intervenors' Cross-Motions for Summary Judgment, ECF No. 86 ("FCPC Reply"), fails to establish that Assistant Secretary Washburn's disapproval of the 2014 Amendment was contrary to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq*. (the "IGRA"). FCPC has not refuted the Assistant Secretary's factual conclusion that Menominee would be responsible for making all of the Mitigation Payments required under the Amendment. Instead, FCPC's entire case rests on the unsupported assertion that the Assistant Secretary was not permitted to consider this fact in making his decision.

FCPC's argument that it was inappropriate for Assistant Secretary Washburn to consider what FCPC and the State intended or anticipated must be rejected. The 2014 Amendment itself stated that the parties anticipated that Menominee would agree to make the Mitigation Payments. Further, as shown in Menominee's opening brief and not refuted by FCPC, the 2014 Amendment itself created circumstances under which the Governor would not concur in Menominee's two-part determination without a commitment from Menominee to make the Mitigation Payments. FCPC cites no legal authority to support its illogical claim that the Assistant Secretary cannot consider record evidence—including FCPC's own submissions—regarding the intent and impact of proposed compact terms in evaluating the key statutory question in this case, namely: whether the 2014 Amendment includes provisions relating to "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii).

FCPC's continued reliance on "approvals" by the Secretary of other gaming compacts is likewise misplaced. Only one compact that it relies upon (Lac du Flambeau) was affirmatively approved by the Secretary, and that compact is distinguishable on its face because it does not

impose mitigation payments on another tribe without that tribe's consent. The Assistant Secretary considered that distinction important, based on his construction of the scope of the IGRA's catch-all provision. Other compacts relied upon by FCPC are not only distinguishable (for the same reason, as well as others), but they were only "deemed approved," and so do not bear the imprimatur of the Secretary that they comply with IGRA. FCPC also ignores that the Assistant Secretary refused to approve the earlier exclusivity provision it negotiated in 2003, demonstrating that the Assistant Secretary does not always find that exclusivity provisions necessarily fall within the IGRA's "directly related" catch-all provision.

The Assistant Secretary correctly found that the catch-all provision at section 2710(d)(3)(C)(vii) did not provide authority for the 2014 Amendment because the amendment did not address the regulation or actual operation of FCPC's class III gaming activity, and rather sought to protect FCPC's profits at Menominee's expense. The Assistant Secretary's reading of the catch-all provision is subject to *Chevron* deference, but even if it is not, the Assistant Secretary correctly construed and applied the provision. The broad construction of the provision urged by FCPC is contrary to the language and application of the provision by both the Secretary and the courts; worse, it would expand the subjects that states may require tribes to negotiate in order to obtain a compact. Mitigation payments to cover lost profits are not directly related to the operation of the gaming activities. Accordingly, this Court should grant Menominee summary judgment as to Count I of FCPC's Complaint.

FCPC does not contest that Menominee is also entitled to summary judgment on Count II of the Complaint, in which FCPC asserts that the Secretary had a "ministerial duty" to approve the 2014 Amendment because it was the product of arbitration pursuant to the 2005 Amendment to FCPC's gaming compact. Contrary to FCPC's assertion, however, Count II does put the 2005 Amendment's arbitration provision at issue, as it provides the basis for that count.

Finally, if the Court were to decide that the Assistant Secretary's Decision was arbitrary and capricious, it should remand for further action, which is the usual and appropriate remedy in Administrative Procedure Act ("APA") cases. Remand would enable the Assistant Secretary to approve the compact or consider other possible grounds for disapproval that were raised but not previously decided.

ARGUMENT

I. FCPC Has Not Met Its Burden to Show That the Assistant Secretary's Decision Should Be Overturned

A. The Assistant Secretary Correctly Concluded That Menominee Would Have to Make the Mitigation Payments, and Correctly Considered That Conclusion in His Decision

In its initial memorandum, Menominee showed that the Assistant Secretary's factual conclusion that "in fact, Menominee would be responsible for making all of the Mitigation Payments," Decision at FCPCAR001464, was supported by the administrative record, including the terms of the 2014 Amendment itself, and the submissions of FCPC, the Governor, and parties supporting the 2014 Amendment. Men. P. & A. Supp. Mot. Summ. J. 22–25, ECF No. 82-1. Rather than refuting his finding, FCPC argues that it was inappropriate for Assistant Secretary Washburn to consider what FCPC and the State intended or anticipated—notwithstanding the record evidence—because the 2014 Amendment does not in and of itself impose any legal obligation on Menominee. FCPC Reply 14–18, ECF No. 86. In fact, FCPC's entire case rests on the argument that the Assistant Secretary could not consider the impacts to Menominee of the 2014 Amendment. FCPC's argument is not supported by the law or the record, primarily because the 2014 Amendment itself does implicate Menominee's interests, but also because it was fully appropriate for the Assistant Secretary to consider evidence in the record regarding the intent and impacts of the Amendment's terms.

By its express terms and provisions, the 2014 Amendment itself implicates Menominee's interests both explicitly and implicitly. First, the 2014 Amendment expressly states that the parties anticipated that Menominee would agree to make the Mitigation Payments. 2014 Amendment § XXXVII.E.1, BIA_002961. The Assistant Secretary was not required to ignore this provision (which the parties deemed important enough to expressly memorialize in the Amendment) or its broader implications merely because it is not in itself legally binding on Menominee. Second, and as Menominee showed in its initial brief, the terms of the 2014 Amendment create a scenario that, as a practical matter, would leave Menominee with no choice but to agree to make the Mitigation Payments as the price of the Governor's concurrence in Menominee's two-part determination. Men. P. & A. Supp. Mot. Summ. J. 23–25, ECF No. 82-1. The 2014 Amendment itself, and not some potential future agreement between the State and Menominee or any other entity, creates these adverse circumstances for Menominee.

The burden imposed on Menominee is clear on the face of the 2014 Amendment and the most basic understanding of the context in which it was proposed. In any event, however, the Assistant Secretary's review of compact provisions under the IGRA is not so cramped an exercise that he was required to look only at the text of the compact under review and ignore all other factual evidence in the administrative record before him.

FCPC argues that the scope of the Secretary's review is constrained to the express language of the compact, to the exclusion of the parties' "intent" or any other evidence, because IGRA allows the Secretary to disapprove a compact "only if *such compact* violates" IGRA. FCPC Reply 19, 20, ECF No. 86 (quoting 25 U.S.C. § 2710(d)(8)(B) (emphasis by FCPC)). *See also id*. at 16 (citing 25 U.S.C. § 2710(d)(3)(C) (listing what "provisions" may be included in a compact)). It is true, of course, that the Assistant Secretary's job is to determine whether or not the proposed compact or compact amendment violates the IGRA. 25 U.S.C. § 2710(d)(8)(B). But

in this case, the answer to that question hinges on whether the proposed compact provisions "relat[e] to … subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii).[1] FCPC cites no authority, and we are aware of none, establishing or even suggesting that the Assistant Secretary may not consider record evidence of the intent or, more importantly, the obvious impact of a proposed compact provision in determining whether the subject matter of the provision meets this "directly related" standard. To the contrary, regulations governing submissions of compacts to the Secretary for review pursuant to IGRA provide for consideration by the Secretary of "documentation …that is necessary to determine whether to approve or disapprove the compact…." 25 C.F.R. § 293.8(d).[2]

As Menominee has previously argued (and FCPC has not rebutted), the Assistant Secretary's review of the 2014 Amendment in light of the parties' submissions as well as the factual context in which they would be applied is the kind of "real world" analysis that agencies are empowered to make in their experience and expertise in administering complex regulatory schemes like the IGRA. *See Pension Ben. Guar. Corp. v. LTV Corp*., 496 U.S. 633, 651–52 (1990). The Assistant Secretary's Decision was properly based on the 2014 Amendment's provisions themselves, as well as the record evidence regarding the impact to Menominee.

FCPC vainly attempts to distract from this simple fact with a series of red herring arguments. First, FCPC argues the Assistant Secretary's Decision was improper because "he

[1] The statutory language states that a compact "may include provisions relating to… any other subjects that are directly related to the operation of the gaming activities." *Id*. It is the subject of the provisions that must be "directly related." In evaluating whether this statutory requirement is met, it is clearly appropriate for the Assistant Secretary to consider the "subject of the provision" and its actual effect and not just the language of the provision itself.

[2] For example, when a compact provides tribes "substantial exclusivity for Indian gaming" in exchange for revenue sharing payments, the Secretary reviews financial projections submitted by the tribe to determine whether the "compact provides [the] tribe with substantial economic benefits" justifying the revenue sharing payments, as it did in regard to FCPC's 2003 compact amendment. FCPCAR000325.

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[.]" FCPC Reply 19, ECF No. 86. That argument wrongly posits that the Assistant Secretary's Decision was "based on the mere possibility that such an agreement [between Menominee and the State] would not comply with IGRA[,]" *id*. at 19–20, when in fact it was not; rather, it was based on the burden that the 2014 Amendment itself placed on Menominee.

FCPC then attempts to explain away the 2014 Amendment's express reference to Menominee, arguing that the statement of anticipation in the 2014 Amendment merely reflected what Menominee had said in press releases, and so "was thus an accurate acknowledgement of the factual circumstances that existed at the time." *Id*. at 20–21. This assertion ignores the reality that FCPC had placed Menominee in the position of having to agree to make such payments as a condition of obtaining the Governor's concurrence. Regardless, the assertion does nothing to establish that the Secretary should not have considered the 2014 Amendment's statement of anticipation as evidence that the effect of the 2014 Amendment would be to burden Menominee with the Mitigation Payments if the Governor concurred in the Kenosha two-part determination.

It is also irrelevant whether the Assistant Secretary could have "protected" Menominee by disapproving a Menominee compact amendment to make the Mitigation Payments if such amendment violated IGRA. *Id*. at 21. Such disapproval would make it impossible for Menominee to obtain the Governor's concurrence, thus protecting FCPC's profits at Menominee's expense—the very purpose of the 2014 Amendment. The possibility of such disapproval thus fails to establish that Menominee would not be unfairly burdened by the 2014 Amendment or that the Assistant Secretary could not consider that fact in making his Decision.

Finally, FCPC argues that Assistant Secretary Washburn somehow wrongly "used his decision on the 2014 Amendment to help advance the Kenosha casino project or to influence the

Governor's concurrence decision," *id*. at 22, but that is simply not true. The Assistant Secretary made a decision on the 2014 Amendment based on that Amendment and related submissions before him, and FCPC has not met its burden to show otherwise. Further, in no way did the Assistant Secretary's Decision constrain the Governor's concurrence decision.

Ultimately, FCPC's arguments all fail because the Assistant Secretary did rely on the provisions of the proposed compact amendment in his disapproval of that amendment. The amendment itself, by its provisions, imposed the Mitigation Payments if the Governor concurred in the Menominee two-part determination; anticipated that Menominee would assume the obligation; and created the situation where Menominee would have to agree to make the payments in order to obtain a concurrence from the Governor. The factual conclusions underlying the Assistant Secretary's decisions are thus supported by the Amendment's provisions as well as the record evidence, all of which was properly considered by the Assistant Secretary in making his final Decision.[3]

B. Exclusivity Clauses in Other Compacts Are Distinguishable and Do Not Support FCPC's Arguments

In the Decision, the Assistant Secretary addressed provisions in other compacts that were brought to his attention by FCPC, and distinguished them from the 2014 Amendment. Decision at FCPCAR001465–66. In its opening brief, Menominee showed that these compacts, and the Secretary's decisions on them, were in fact distinguishable from the 2014 Amendment. Men. P. & A. Supp. Mot. Summ. J. 35–41, ECF No. 82-1. Menominee also showed that an agency "need not be elaborate" when distinguishing past decisions and may do so "by merely reciting the

[3] As noted in Menominee's prior brief, these factual conclusions must be upheld because "the evidence in the administrative record permitted the agency to make the decision it did." *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 944 F. Supp. 2d 71, 77 (D.D.C. 2013).

factual differences," *Hall v. McLaughlin*, 864 F.2d 868, 873 (D.C. Cir. 1989), and that the Decision met this standard when it distinguished these other compacts.[4]

The primary distinction between the 2014 Amendment and the compacts that FCPC relies upon is, in the words of the Assistant Secretary, that "none of these other compact provisions involved specific guarantees of profitability or revenues for one tribe without the prior consent of another tribe or tribes." Decision at FCPCAR001466. FCPC's reliance on other compacts is based first and foremost on its fundamentally flawed argument that the Assistant Secretary erred in determining that the 2014 Amendment in fact would compel Menominee to make the Mitigation Payments. FCPC Reply 23, ECF No. 86. As shown above, the Assistant Secretary's conclusion on this point is supported by the 2014 Amendment itself and by evidence in the administrative record, and thus FCPC's argument must be rejected. The compacts relied upon by FCPC did not compel another tribe to make mitigation payments, and so they are distinguishable. *See* Decision at FCPCAR001464–65 ("Had the State alone … agreed to a reduction in revenue sharing … rather than the Mitigation Payment …, our decision might be different.").

FCPC complains that neither Menominee nor the Federal Defendants explained why this distinction matters under the statutory criteria, but Menominee demonstrated in its opening brief why the Secretary permissibly concluded that the imposition of mitigation payments on another tribe without its consent is not a subject matter "directly related to the operation of gaming activities." Men. P. & A. Supp. Mot. Summ. J. 27–33, ECF No. 82-1. The Assistant Secretary

[4] Nowhere in its reply brief does FCPC contest this legal standard. FCPC's reply brief implies that Menominee and the Federal Defendants need to explain in great detail the legal distinctions between the 2014 Amendment and other compacts—even those which had only been "deemed approved" through inaction—but that is simply not the law. Further, decisions on other compacts are not before the Court.

was permitted to treat this distinction as meaningful under his permissible construction of the catch-all provision and the Department's case-by-case approach to compact review. *Id*. at 28.

Further, as Menominee previously showed, FCPC's reliance on other compacts is undermined by the fact that most of these compacts were not affirmatively approved, but were only approved "to the extent the compact is consistent with the provisions of [IGRA]," 25 U.S.C. § 2710(d)(8)(C), "thus leaving open" the legality of provisions contained in the compact. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1041–42 (9th Cir. 2010). FCPC does not address this issue in its briefs. Nor does FCPC address the Assistant Secretary's refusal to approve its own 2003 compact amendment while it contained a provision that would have relieved FCPC of its obligation to make revenue-sharing payments to the State, and would have required that some past payments be returned to FCPC, if the State "enters into or authorizes an agreement permitting Class III gaming under the [IGRA] within 50 miles of the Potawatomi Bingo and Casino[.]" FCPCAR000107–08, ¶ 15.B.3 ("2003 Amendment"). *See* Men. P. & A. Supp. Mot. Summ. J. 8–9, ECF No. 82-1.

Of the compacts relied upon by FCPC, only one, the Lac du Flambeau compact, was approved by the Secretary. That compact required that the State (not an applicant tribe) either agree to indemnify LDF for reductions in class III gaming revenues in the event the State approved a competing tribal gaming facility within a certain distance, or arbitrate in the event of an impasse. BIA_003171, ¶ 41. As noted in Menominee's prior brief, nothing in the compact provides that failure to agree to mitigation payments constitutes a breach entitling Lac du Flambeau to an arbitration award, or requires arbitrators to compel the State to make such payments. Men. P. & A. Supp. Mot. Summ. J. 37, ECF No. 82-1. FCPC contests Menominee's view of the indemnification provision as "ephemeral," FCPC Reply 24 n.3, ECF No. 86, but it does not actually dispute Menominee's reading of the compact.

The compacts relied upon by FCPC are distinguishable for the reasons stated above and in Menominee's prior brief. FCPC's reply brief does not offer any coherent rebuttal to the distinctions we have shown. Relying on the deemed-approved Ho-Chunk Nation ("HCN") compact, FCPC posits that it could reach a similar agreement with the State to reduce revenue-sharing payments by an amount equal to the Mitigation Payments. FCPC Reply 27, ECF No. 86. However, it is the 2014 Amendment that was before the Assistant Secretary, and not some hypothetical replacement provision first revealed in FCPC's brief. Further, FCPC's speculative hypothetical replacement provision does not address the possibility that the Mitigation Payments pursuant to the 2014 Amendment could exceed the revenue sharing payments. By comparison, mitigation payments pursuant to the HCN compact were essentially capped at the amount of the revenue sharing payments. Men. P. & A. Supp. Mot. Summ. J. 38 n.21, ECF No. 82-1.

The Seneca Nation compact relied upon by FCPC did not involve a situation, as here, where a tribe actually had a two-part determination pending at the time. Further, the tribes impacted by the Seneca Nation compact had nearby trust lands that were excluded from the exclusivity provision, and the Secretary noted that "the State is required to negotiate in good-faith [for a gaming compact] with all Indian tribes and it has assured us that it understands its obligation under law…." BIA_003184.

FCPC now relies upon Oklahoma gaming compacts and decisional documents concerning those compacts. FCPC Reply 25, ECF No. 86. These documents are not part of the administrative record, and were not considered by the Assistant Secretary in making his decision, and so cannot be considered in this case.[5] *Banner Health v. Burwell*, 126 F. Supp. 2d 28, 61–62 (D.D.C. 2015) (in APA case, "Plaintiffs cannot evade that strict standard [for consideration of

[5] FCPC's motion to supplement the record did not even include these documents. FCPC Mot. Suppl. Admin. R., ECF No. 63.

documents not in the administrative record] by appealing to the standard for judicial notice."). In any event, the Oklahoma compacts are also distinguishable, as they involve protection of tribal gaming vis-à-vis non-tribal competition, and not, as here, as against tribal competition.[6]

C. The Assistant Secretary's Construction of the Catch-All Provision Is Correct and Supports His Decision

1. The Assistant Secretary's Construction Is Entitled to *Chevron* Deference

The Assistant Secretary's interpretation and application of IGRA's catch-all provision is reasonable, and entitled to *Chevron* deference. The provision is silent as to whether imposing a burden of mitigation payments on another tribe to protect the compacting tribe's profits is within its purview. The meaning of "directly related to the operation of gaming activities" as applied to mitigation payments is at best ambiguous, and was treated by the Secretary as such in his Decision, even if FCPC and the Federal Defendants now argue that it is not.[7]

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[6] As Menominee noted in its opening brief, providing tribes with an exclusive right to conduct gaming vis-à-vis non-Indians is consistent with IGRA's purposes of promoting tribal economic development and ensuring that the tribe is the primary beneficiary of the gaming operation, but where a tribe seeks approval of a compact provision protecting it from competition by other tribes, the policy concerns are different. Men. P. & A. Supp. Mot. Summ. J. 35–36 n.19, ECF No. 82-1. FCPC does not address this distinction anywhere in its briefs.

[7] Although the Federal Defendants' litigation position is that 25 U.S.C. § 2710(d)(3)(C)(vii) is unambiguous, Fed. Defs. Br. 14, ECF No. 81-1, the Decision itself does not state that the catch-all provision is unambiguous. To the contrary, the Decision is best read as treating the catch-all provision as ambiguous, because it construes the catch-all provision in light of the purpose of IGRA, uses legislative history, and notes that the Secretary employs a case-by-case approach in applying the provision. Decision at FCPCAR001463–64. Further, the Decision construes "any other subjects that are directly related to the operation of gaming activities" in § 2710 (d)(3)(C)(vii) to mean "any other subjects that are directly related to the operation of [Class III] gaming activities." *Id*. at FCPCAR001464 n.29. Because the Assistant Secretary did not assert that the catch-all provision was plain and unambiguous, the Court should not assume that he read the statute that way, and it may defer to the reasonable construction of the provision by the Assistant Secretary. *See Braintree Elec. Light Dep't v. F.E.R.C.,* 667 F.3d 1284, 1288–89 (D.C. Cir. 2012) ("As long as the text is ambiguous and the agency [in the decision under review] does not insist that it is clear, a reasonable interpretation will warrant our deference. There is no reason for us to assume that the Commission sees clarity where we do not.").

FCPC argues against *Chevron* deference, arguing that *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007), and *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272 (D.C. Cir. 2004), are distinguishable because of the complex regulatory schemes involved. FCPC Reply 11, ECF No. 86. First, IGRA's regulatory scheme for review and approval of gaming compacts is at least as complex as others found to merit *Chevron* deference, including the Secretary's determination of "initial reservation" status under the IGRA (to which the D.C. Circuit deferred in *Citizens Exposing Truth About Casinos*). 492 F.3d at 466–67.[8] *See also Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 561 (D.C. Cir. 2016) (deferring to agency interpretation of Indian Reorganization Act under *Chevron*). Second, FCPC rests on its attempt to distinguish those cases and fails to squarely address the D.C. Circuit's test for whether an agency's decision carries the "force of law" for purposes of *Chevron* deference. As Menominee established in its initial brief, the D.C. Circuit applies the factors identified by the Supreme Court in *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). Men. P. & A. Supp. Mot. Summ. J. 18–19, ECF No. 82-1. FCPC makes no attempt to respond to, or even acknowledge, Menominee's substantive argument that the *Barnhart* test is satisfied here.

Instead, FCPC continues to rely on *dictum* in *Fort Independence Indian Community v. California*, 679 F. Supp. 2d 1159 (E.D. Cal. 2009), that a compact is not binding on third parties, to support its argument that decisions on individual compact approvals are not deserving of *Chevron* deference because they lack "precedential effect." FCPC Reply 12, ECF No. 86. FCPC asserts that *Fort Independence Community's dictum* "is correct and applicable here," *id*., but FCPC does not address Menominee's argument that the *dictum* is erroneous given the binding

[8] FCPC dismisses this case as involving a land-into-trust decision under 25 C.F.R. Part 151, but the court also expressly deferred to the Secretary's determination that the parcel at issue fell within the "initial reservation" exception under the IGRA. *Id.* at 465–67.

effect of compact decisions on not just the parties, but the legality of gaming operations. *See* Men. P. & A. Supp. Mot. Summ. J. 19–21, ECF No. 82-1 (citing 25 U.S.C. § 2710(d)(6) (prohibition on gambling devices in Indian country does not apply to gaming under compact) and 18 U.S.C. § 1166(c)(2) (state gambling laws do not apply to gaming under compact)). This Court is not bound by, and should not follow, the erroneous conclusion of a district court in another circuit—particularly where that court admits that the parties had not briefed the underlying issue.

FCPC's argument that the Indian canon should be applied instead of *Chevron* is also incorrect. "[T]he Indian canon of construction does not apply for the benefit of one tribe if its application would adversely affect the interests of another tribe." *Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 75 F. Supp. 3d 387, 396 (D.D.C. 2014) *aff'd*, 830 F.3d 552. *See also GasPlus, L.L.C. v. U.S. Dep't of the Interior*, 510 F. Supp. 2d 18, 34 (D.D.C. 2007) (Indian canon inapplicable where giving broad reading to statute to benefit one tribe "did not benefit the economic interests of Indian tribes generally"); *see also id*. at 33 n.5.[9] FCPC argues that its construction of the catch-all provision is in the interests of tribes generally, FCPC Reply 9–10, ECF No. 86, but again that argument hinges on the flawed assumption that "the Assistant Secretary *erred* in interpreting the 2014 Amendment to impose legal obligations upon Menominee." *Id*. at 10 (also stating that FCPC's interpretations are not adverse to other tribes because "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

[9] As Menominee noted in its opening brief, this is because the canon of construction arises from the federal trust responsibility to all tribes. Men. P. & A. Supp. Mot. Summ. J. 18 n.6, ECF No. 82-1 (citing *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) and *California Valley Miwok Tribe v. U.S.*, 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008)). FCPC responds that "the Assistant Secretary specifically did *not* rely upon his trust obligations as the basis for disapproving the 2014 Amendment." FCPC Reply 11, ECF No. 86. This is a non-sequitur. That the Decision is not based on breach of a trust relationship is simply irrelevant to the basis of the Indian canon.

without the consent of the other tribe[.]'" (second alteration in original)). Because the Assistant Secretary correctly determined that the 2014 Amendment does in fact burden Menominee, the question of statutory interpretation at issue in this case is whether the catch-all provision in the IGRA is so broad as to permit such an agreement. FCPC's arguments that the canon supports its position on that question ignore the interests of Menominee and other tribes seeking to engage in gaming on newly-acquired lands pursuant to 25 U.S.C. § 2719(b), as well as all tribes who have a general interest in narrowing the scope of subjects that states can negotiate over in a compact.[10]

Finally, FCPC's argument that *Chevron* is applied in Indian cases only when its application is consistent with the Indian canon is wrong. In its most recent decision applying *Chevron* to defer to the Department's construction of a statute governing the acquisition of land into trust for tribes, the D.C. Circuit did not even mention the Indian canon. *Stand Up for California! v. U.S. Dep't of Interior*, 879 F.3d 1177 (D.C. Cir. 2018). In an earlier case applying *Chevron* deference to construction of the same statute, the D.C. Circuit stated that it applied *Chevron* "mindful of" the Indian canon, *Confederated Tribes of Grand Ronde*, 830 F.3d at 558, but the Court did not discuss the Indian canon further, and instead employed a straight-forward *Chevron* analysis in deciding the case. *Id*. at 559–64.

2. Whether or Not *Chevron* Deference Applies, the Assistant Secretary's Decision Should Be Upheld, and FCPC's Construction Should Be Rejected

FCPC argues that the catch-all provision "has been construed broadly by the Courts to permit a wide range of compact provisions that have a connection to gaming activity." FCPC

[10] FCPC also argues that the canon supports its interpretation of § 2710(d)(8)(B) as prohibiting the Assistant Secretary from disapproving a compact "based on speculation about the terms of a separate agreement" or based on the "intent" of the agreement. FCPC Reply 9, ECF No. 86. As discussed above, at 3–5, the Assistant Secretary based his decision on the 2014 Amendment itself and the burden it would impose on Menominee, as evidenced by the language of the 2014 Amendment and other record evidence, and not on the potential terms of any separate agreement.

Reply 31, ECF No. 86. Rather than prove that the catch-all provision necessarily encompasses the proposed terms of the 2014 Amendment, however, case law actually supports the cautious case-by-case approach adopted by the Secretary, in which the Department "closely scrutinize[s] whether the regulated activity has a direct connection to the Tribe's conduct of Class III gaming activities." Decision at FCPCAR001464. The Ninth Circuit's decisions in *In re Indian Gaming Related Cases* and *Rincon Band*, for example, reach different results as to different revenue sharing provisions. *Compare In re Indian Gaming Related Cases*, 331 F.3d 1094, 1111–14 (9th Cir. 2003) (revenue sharing payments to State for gaming-related purposes were directly related to gaming), *with Rincon Band*, 602 F.3d at 1033–34 (revenue sharing payments to State's general fund were not directly related to gaming, distinguishing *In re Gaming Related Cases*). *Compare also Wisconsin Winnebago Nation v. Thompson*, 824 F. Supp. 167, 171 (W.D. Wis. 1993) (location of tribal casino is a permissible subject of compact negotiation), *aff'd*, 22 F.3d 719 (7th Cir. 1994), *with N. Fork Rancheria*, 2015 WL 11438206, at *9 (E.D. Cal. Nov. 13, 2015) ("the *Wisconsin Winnebago I* court's determination that the location of a gaming facility falls within the catchall provision … is an oversimplification."). FCPC's argument that a compact provision should be approved if it is "connected to gaming activity" does not comport with the statutory language, which requires that the provision relate to "any other subjects that are directly related to gaming activity." 25 U.S.C. § 2710(d)(3)(C)(vii).

FCPC argues that because the categories for permissible subjects under the IGRA (which include the catch-all provision) are intended to protect tribes from state jurisdiction, they should not be construed to prohibit payments by a state to a tribe, and that FCPC's broader interpretation permitting such payments would benefit tribes. FCPC Reply 32, 35, 36, ECF No. 86. But that is not necessarily the case. Construing the provision broadly to benefit FCPC (or other tribes that seek to protect their territories from tribal competition) would not only deprive

Menominee and other tribes of the opportunity to compete, but would also serve to put states in the position of deciding, through compacting and possibly through a bidding process between compacting tribes, which tribes could game where. In any event, the language of the catch-all provision cannot be read to encompass any conceivable compact provision so long as it does not involve an exercise of state jurisdiction or so long as it benefits the compacting tribe, which is what FCPC's argument implies. *See* FCPC Reply 35, 39, ECF No. 86 (arguing that the Mitigation Payment is permissible because it benefits FCPC). Regardless of the direction of the payments or the party benefitted, the provision must still relate to "subjects that are directly related to gaming activity." 25 U.S.C. § 2710(d)(3)(C)(vii).[11]

FCPC also argues that "compacts may include provisions that benefit the state[,]" FCPC Reply 33, ECF No. 86, although that observation does nothing to establish that the catch-all provision permits compact provisions like the 2014 Amendment. FCPC cites 25 U.S.C. § 2710(d)(7)(B)(iii)(I), which allows a court to consider "adverse economic impacts on existing gaming activities" in a lawsuit by a tribe against a state for failure to negotiate a compact in good faith. That section does not expand the provisions that may be included in a compact pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii). In any event, the reference to "existing gaming activities" refers to non-tribal gaming previously authorized under state law, such as gaming by state-licensed operations or the state lotteries. S. REP. NO. 100-446, at 13 (1988), *reprinted in* U.S.C.C.A.N. 3071, 3083 ("[T]he bill allows States to consider negative impacts on existing gaming activities. That is not to say that the bill would allow States to reject Indian gaming on the mere showing

[11] FCPC also claims that "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[.]'" FCPC Reply 33, ECF No. 86. FCPC ignores that the Assistant Secretary refused to approve FCPC's own 2003 Amendment until FCPC removed the exclusivity provision it contained. *See supra* at 9.

that Indian gaming will compete with non-Indian games."); *see In re Indian Gaming Related Cases*, 331 F.3d at 1115. Similarly, the legislative history cited by FCPC providing that a state's governmental interest with respect to class III gaming includes "its economic interest in raising revenue for its citizens," FCPC Reply 33, ECF No. 86 (citing S. REP. NO. 100-446, at 13 (1988), *reprinted in* U.S.C.C.A.N. 3071, 3083), refers to the State's interest in revenues to reimburse it for the cost of regulating gaming, permissible under 25 U.S.C. § 2710(d)(3)(C)(iii), and in gaming revenues from its own gaming, such as the lottery. *Rincon Band*, 602 F.3d at 1035.

FCPC further argues that the 2014 Amendment is "directly related" to FCPC's gaming activities because it protects FCPC's gaming revenues, and is calculated based on current revenues, including (but not limited to) class III revenues. FCPC Reply 35, ECF No. 86. FCPC claims that the Menominee's contrary argument (i.e., that relation to class III revenue loss is a step removed from relation to class III gaming activities) is "repudiated by the Assistant Secretary's repeated approval of exclusivity agreements," FCPC Reply 34, ECF No. 86, but the Secretary has not repeatedly approved such agreements. *See supra* at 9. FCPC undermines its own argument on the same page of its brief, when it acknowledges that *Rincon Band* "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 operations." FCPC Reply 34, ECF No. 86 (citing *Rincon Band*, 602 F.3d at 1033–34). *Rincon Band* confirms Menominee's point, which is that the term "gaming revenues" is not the same as "gaming activities." *See also N. Fork Rancheria*, 2015 WL 11438206, at *10 ("gaming revenue... has no direct relationship to the operation of gaming activities."); *Mich. v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2032–33 (2014) ("[N]umerous provisions of IGRA show that 'class III gaming activity' means just what it sounds like—the stuff involved in playing class III games.").

Finally, FCPC's suggestion that the phrase "gaming activities" in the catch-all provision is not limited to class III gaming activities, FCPC Reply 36 n.7, ECF No. 86, is contrary not only to precedent in this Circuit construing the catch-all provision, *see Colorado River Indian Tribes v. National Indian Gaming Commission*, 466 F.3d 134, 138 (D.C. Cir. 2006) ("A compact may contain provisions relating to … 'any other subjects that are directly related to the operation of [class III] gaming activities,' [25 U.S.C.] § 2710(d)(3)(C)(vii)."), but also to the entire structure of the IGRA, which creates a clear distinction between class II and class III gaming activities: "Class II gaming is enforced exclusively by the tribes and the National Indian Gaming Commission, 25 U.S.C. § 2710(b), whereas Class III gaming is regulated pursuant to tribal-state compacts, 25 U.S.C. § 2710(d)." *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1078 (7th Cir. 2015). *See also Colorado River Indian Tribes*, 466 F.3d at 136 ("unlike class II gaming, a tribe conducts class III gaming pursuant to a compact with the state"); *Cabazon Band of Mission Indians v. Nat'l Indian Gaming Comm'n*, 827 F. Supp. 26, 28 (D.D.C. 1993) ("only class III gaming requires such a compact"), *aff'd*, 14 F.3d 633 (D.C. Cir. 1994); 25 U.S.C. § 2710(a)(2) ("Any class II gaming … shall continue to be within the jurisdiction of the Indian tribes…."); 25 U.S.C. § 2710(d)(3)(A) (requiring tribe having jurisdiction over Indian lands "upon which a class III gaming activity is being conducted, or is to be conducted," to request a tribal-state compact "governing the conduct of gaming activities") (emphasis added).[12]

[12] FCPC's assertion that the Decision was not based on the inclusion of Class II gaming losses in the calculation of the Mitigation Payments, FCPC Reply 35–36, ECF No. 86 (Assistant Secretary "mentioned Class II gaming only in a brief statement distinguishing other approved compact amendments") is erroneous. Before the Decision distinguished other compacts, it stated: "Moreover, the calculation of the Mitigation Payment includes revenues from Class II gaming, and food, beverage, [hotel,] and entertainment operations, none of which are directly related to the operation of [FCPC's] Class III gaming activity." Decision at FCPCAR001465 n.33.

D. None of FCPC's Additional Arguments Overcome the Fact That the Assistant Secretary's Findings are Supported By the Record and Legally Sufficient to Justify His Decision

FCPC advances a hodgepodge of additional arguments, but none of them overcome the fact that the Assistant Secretary's conclusion that Menominee would be impermissibly burdened by the 2014 Amendment was supported by the record, or that the Assistant Secretary correctly considered that fact in making his final decision.

1. FCPC's Factual Assertions Are Not Deemed Admitted and Record Evidence Supports the Decision

FCPC claims that the Federal Defendants and Menominee did not dispute the factual assertions of FCPC's motion and that they were therefore admitted, citing *Hinson ex rel. N.H. v. Merritt Education Center,* 579 F. Supp. 2d 89, 91–92 (D.D.C. 2008). FCPC Reply 3, ECF No. 86. That case is inapposite, as it was decided under a prior version of Local Rule 7(h) governing summary judgment briefing. That rule has since been amended, and now provides that the requirement to file statements of uncontested and contested facts "shall not apply to cases in which judicial review is based solely on the administrative record." LCvR 7(h)(2). *See Grunewald v. Jarvis*, 930 F. Supp. 2d 73, 81 (D.D.C. 2013), *aff'd*, 776 F.3d 893 (D.C. Cir. 2015). In any event, Menominee discussed the material facts throughout its opening memorandum, and showed that "the evidence in the administrative record permitted the agency to make the decision it did." *Styrene Info. & Research Ctr.*, 944 F. Supp. 2d at 77.

2. Menominee Was Not Involved in the 2014 Amendment Negotiations

FCPC asserts that Menominee was involved in the "underlying negotiations" of the 2014 Amendment, citing its earlier brief on supplementing the administrative record, which in turn relied on non-record evidence for that assertion. FCPC Reply 4, ECF No. 86 (citing, *inter alia*, Pl.'s Mem. P. & A. Suppl. Mot. Suppl. Admin. R. 14, ECF No. 63-1). FCPC's assertion is not supported by record evidence, or by the non-record evidence cited in support of FCPC's motion

to supplement the record. *See* Defs.-Intervs. Resp. in Opp. to Pl. FCPC's Mot. to Suppl. the Admin. R., 18–20, ECF No. 66.[13] It makes no sense to argue that Menominee was involved in the "underlying negotiations" for the 2014 Amendment. The 2014 Amendment was not negotiated, it was chosen by arbitrators. Menominee was not a party to the arbitration proceeding, as FCPC admits. FCPC Reply 4, ECF No. 86. In fact, the core terms of the 2014 Amendment were mandated by FCPC's 2005 compact amendment, FCPCAR000297–98, § XXII.A.11, to which Menominee is not a party.

3. The Assistant Secretary Was Not Inconsistent in Characterizing the Burden That Competition From Menominee Would Present to FCPC, or the Burden the Mitigation Payments Would Impose on Menominee

FCPC wrongly claims that the Assistant Secretary made "conflicting statements" in the Decision and Menominee's Two-Part Determination regarding the impact of competition from Menominee's Kenosha casino on FCPC's Milwaukee casino, and the impact of the Mitigation Payments on Menominee, thus implying an unfair and preferential treatment for Menominee. FCPC Reply 37, ECF No. 86. In fact, statements as to impacts in the Decision and Menominee's Two-Part Determination are entirely consistent. The Two-Part Determination found that revenue losses to FCPC due to Menominee competition would be within "a plausible range of revenue reduction at between 8-20 percent" initially, BIA_003137, which represented a "modest" impact on FCPC's very successful casino. BIA_003086. *See* Men. P. & A. Supp. Mot. Summ. J. 8, ECF No. 82-1 (discussing impact of Menominee Kenosha casino on FCPC). The Decision accurately summarized this finding: "Our decision for the Menominee Tribe created a modest, but not insignificant risk to the [FCPC] gaming operation." Decision at FCPCAR001460. This in turn was consistent with the finding that the Mitigation Payments would impose a "significant

[13] The Court cannot consider non-record evidence in deciding the cross-motions. *See supra* at 10–11.

financial burden" on the start-up casino in Kenosha to be operated by Menominee, which, as the Decision notes, "has among the highest unemployment rates, the highest poverty, and the lowest health indicators of any community in Wisconsin." *Id*.

4. FCPC Cannot Rely Upon Language Provided By the Office of Indian Gaming Management "for Discussion Purposes Only"

In its recitation of facts, FCPC relies upon informal advice provided to FCPC by the Office of Indian Gaming Management ("OIGM") in 2003 and 2004 regarding exclusivity provisions. FCPC Reply 5–6, ECF No. 86. These advice documents were not actions of the Secretary. The draft language provided to FCPC in March 2003 contained this limitation at the top: "This language is for discussion purposes only, and has not been cleared by the Acting Assistant Secretary – Indian Affairs."[14] FCPCAR000157. Shortly after that language was provided, in fact, FCPC and the Governor "agreed to remove the [exclusivity provision in the pending 2003 Amendment] at the insistence of the [Acting] Assistant Secretary … so that notice of the remaining amendments would be [approved]…." FCPCAR000291 ("2005 Amendment"). FCPC and the Governor then removed the provision without a replacement. FCPCAR000114, ¶ 3; Decision at FCPCAR001461; Men. P. & A. Supp. Mot. Summ. J. 9, ECF No. 82-1. In a letter to FCPC, the Acting Assistant Secretary addressed the removal of the anti-competitive provision, stating that "we find a provision excluding other Indian gaming anathema to basic notions of fairness in competition and inconsistent with the goals of IGRA." FCPCAR000326. Under these circumstances, FCPC cannot claim to have reasonably relied upon OIGM's advice.

[14] Further, the 2004 advice from OIGM consists solely of an email from an FCPC attorney to FCPC's Chairman providing his understanding of a telephone call with OIGM regarding the position of the Solicitor's Office—not that of the Assistant Secretary's Office. FCPCAR000149.

5. FCPC Cannot Rely Upon the 2003 and 2005 Amendments

FCPC's argument that the Decision is erroneous because FCPC has made revenue-sharing payments to the State "in reliance on" the 2003 Amendment and the 2005 Amendment, FCPC Reply 40, ECF No. 86, has no basis in fact or in law. Although FCPC asserts that it has paid the State millions of dollars for "market protections," *id*., FCPC does not dispute that, as shown in Menominee's previous memorandum, FCPC's revenue-sharing payments were in exchange for (1) exclusivity vis-à-vis non-tribal gaming, and (2) the arbitration provision in the 2005 Amendment. Men. P. & A. Supp. Mot. Summ. J. 41–42, ECF No. 82-1. FCPC could not reasonably have relied on the "approval" of either the 2003 Amendment or the 2005 Amendment, for several reasons. Neither amendment was affirmatively approved; rather, each was deemed approved, "thus leaving open" the legality of provisions contained in the compact. *Rincon Band*, 602 F.3d at 1041–42. In addition, FCPC was required to remove the offending anti-competitive provision from the 2003 Amendment prior to its deemed approval. The 2005 Amendment provided only for arbitration to choose a further compact amendment which would itself be subject to secretarial review and approval, as required by IGRA, as noted in the Decision. FCPCAR001465 n.34; *see also* FCPCAR001459 n.1. Finally, nothing in 25 U.S.C. § 2710(d)(8)(B) makes reliance a factor in compact review and approval.[15]

II. Menominee is Entitled to Summary Judgment on Count II and the Validity of the Anticompetitive Provision in the 2005 Amendment Is at Issue in That Count

FCPC "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." FCPC Reply 41, ECF No. 86. Notwithstanding FCPC's

[15] FCPC has not pled or argued estoppel. In any event, "[i]t is … well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984).

concession, the Court is required by Rule 56 to determine whether Menominee is entitled to summary judgment as to this count. *Winston & Strawn, LLP v. McLean*, 843 F.3d 503, 507 (D.C. Cir. 2016); *Loma Linda Kidney Ctr. v. Azar*, No. 15-CV-01717, 2018 WL 993000, at *3 (D.D.C. Feb. 21, 2018). Menominee is entitled to summary judgment on this count for the reasons stated in its previous memorandum. Men. P. & A. Supp. Mot. Summ. J. 42–43, ECF No. 82-1.

Despite conceding this count, FCPC contests that the 2005 Amendment was invalid, as argued by Menominee in support of its motion on this count. FCPC provides no legal argument in support of its position, however, relying solely on its erroneous assertion that that the issue of the validity of the 2005 Amendment is outside the scope of its Complaint. FCPC Reply 41, ECF No. 86. In fact, FCPC put its 2005 Amendment directly at issue in Count II of its Complaint, by asserting that that amendment created the ministerial duty. Compl. ¶ 83, ECF 1; *see also id*. ¶¶ 16, 21, 50, 52, 54, 58.[16]

III. If the Court Determines That the Decision is Arbitrary and Capricious, the Appropriate Remedy Would Be Remand, Without Time Constraint and Without Vacatur

FCPC acknowledges that remand is "ordinarily the appropriate remedy in APA cases, except in 'rare circumstances,'" FCPC Reply 42–43, ECF No. 86 (quoting *Cty. Of L.A. v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir. 1999)), and that remand for further consideration would

[16] FCPC "requests" additional briefing on the validity of the 2005 Amendment should the Court decide to address the issue. FCPC Reply 41 n.9, ECF No. 86. That request should be denied. Such briefing would be out of time, would place FCPC's summary judgment briefs over the applicable page limits, and would delay a decision in this case. FCPC could have briefed the issue, but chose to rest on its argument that the 2005 Amendment was not at issue. FCPC's argument for additional briefing—that it is operating under the 2005 Amendment—does not change the briefing schedule, or page limitations. Further, Menominee does not challenge provisions of the 2005 Amendment other than the provision thereof requiring arbitration in the event the State concurs in a positive two-part determination. FCPCAR000297–98, ¶11.

be the appropriate remedy should the Court grant its motion. *Id*. at 43.[17] Notwithstanding that concession, FCPC also argues that it would be appropriate for the Court to order the agency to "affirmatively approve" the 2014 Amendment. *Id*. at 42. This the Court cannot do because the Assistant Secretary did not address several additional grounds for disapproval that were brought to its attention by Menominee, and that should be considered in the initial instance by the Secretary on remand. *See* Men. P. & A. Supp. Mot. Summ. J. 43–45, ECF No. 82-1.

FCPC requests that any remand be limited to a period of 45 days, with the 2014 Amendment "deemed approved" if not acted upon within that period. FCPC Reply 43, ECF No. 86. Although IGRA provides that any compact not approved or disapproved within 45 days of submission to the Secretary is deemed approved, 25 U.S.C. § 2710(d)(8)(C), IGRA is silent as to any time period upon a remand of a compact decision. Nor does the APA provide any time limit. FCPC has not argued any special circumstances requiring a decision within 45 days, and we know of none. Nothing in IGRA or the APA empowers the Court to order the 2014 Amendment deemed approved if not acted on within 45 days of remand.

In arguing against the positions of Menominee and the Federal Defendants that any remand should be without vacatur, FCPC discusses only one basis for remand without vacatur—disruptive consequences. FCPC Reply 43–44, ECF No. 86. It does not discuss the other basis—namely, the seriousness of the legal error. "[T]he decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied–Signal v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993); *see*

[17] We disagree with FCPC's assertion that the Governor's failure to concur in the Menominee Two-Part Determination constitutes "changed circumstances" that the Assistant Secretary should consider on remand, FCPC Reply 43, ECF No. 86, given Menominee's continued interest in the Kenosha gaming facility. *See* Men. P. & A. Supp. Mot. Summ. J. 7 n.1, ECF No. 82-1.

also Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, No. CV 16-1534 (JEB), 2017 WL 4564714, at *3 (D.D.C. Oct. 11, 2017) (quoting *Allied-Signal*). Thus, any remand should be without vacatur, at least not without the Court first holding another round of briefing and determining that vacatur is warranted due to the seriousness of the legal error. *See Standing Rock Sioux Tribe*, 2017 WL 4564714 at *1 (noting that following grant of summary judgment, and remand order, court ordered further briefing on whether to vacate).

CONCLUSION

For the foregoing reasons, as well as those stated in Menominee's Statement of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants-Intervenors' Cross Motion for Summary Judgment, ECF No. 83, the Court should DENY FCPC's Motion for Summary Judgment and GRANT Menominee's Cross-Motion for Summary Judgment.

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