IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CONNECTICUT AND MASHANTUCKET PEQUOT TRIBE, Plaintiffs, v. RYAN ZINKE, in his official capacity as Secretary of the Interior, and the U.S. Department of the Interior, Defendants, and MGM RESORTS GLOBAL DEVELOPMENT, LLC, Defendant/Intervenor.	)	Civil Action No. 1:17-cv-02564-RC

PLAINTIFFS' REPLY IN SUPPORT
OF PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiffs the Mashantucket Pequot Tribe ("Tribe") and State of Connecticut ("State") submit this reply in support of their motion for leave to amend their complaint.

INTRODUCTION

There is a strong public policy in favor of allowing a party to amend its pleadings. In opposing Plaintiffs' request to amend their complaint, the Federal Defendants and MGM both ignore this completely. Instead, they raise a variety of supposed justifications for why the Court should refuse to exercise its discretion to allow Plaintiffs to file an amended complaint. But none of the Defendants' arguments hold water. Indeed, none of them come close to satisfying the burden they must meet—demonstrating that the amendment is not proper. For instance, in arguing that the motion should be denied due to undue delay, Defendants fail to ever argue—let

alone show that they are prejudiced by the delay—which is required to find undue delay. And their arguments regarding futility are similarly misguided, often relying on misunderstandings of both this Court's prior orders and the claims Plaintiffs seek to amend. Defendants have therefore failed to satisfy their burden to show that amendment is not proper. The Court should grant Plaintiffs' motion.

ARGUMENT

As Plaintiffs explained in their memorandum (Pls.' Mem. 6), there is a strong policy in favor of granting a party leave to amend. *See also Davis v. Liberty Mut. Ins. Co.*, 871 F.2d 1134, 1137–38 (D.C. Cir. 1989) ("It is common ground that Rule 15 embodies a generally favorable policy toward amendments."). And it is the non-moving parties' burden to demonstrate why the court should deny leave to amend while considering this policy. *See Morgan v. F.A.A.*, 262 F.R.D. 5, 8 (D.D.C. 2009). In opposing Plaintiffs' motion, Federal Defendants and MGM largely ignore this policy, while failing to demonstrate good reason for the denial of the motion. Instead, both the Federal Defendants and MGM unsuccessfully argue that this Court should deny Plaintiffs' request to amend their complaint because (1) the request is untimely and (2) it is futile. Both arguments are unavailing under the established precedent in the D.C. Circuit.

I. The Federal Defendants and MGM Fail to Satisfy Their Burden to Show the Proposed Amendment Is Untimely or Prejudicial.

A non-moving party can satisfy its burden to show why a motion to amend should be denied if it can show that there was undue delay in seeking the motion. *Forman v. Davis*, 371 U.S. 178, 182 (1962). Because "the text of Rule 15 does not prescribe a time limit on motions for leave to amend," accordingly, "a court should not deny leave to amend based solely on time elapsed between the filing of the complaint and the request for leave to amend." *Appalachian Voices v. Chu*, 262 F.R.D. 24, 27 (D.D.C. 2009). In its brief, Plaintiffs explained why there has

been no undue delay. (Pls.' Mem. 9–11.) The Federal Defendants' and MGM's attempts to contend otherwise fail.

A. Defendants bear the burden of proof.

In its response, MGM argues that Plaintiffs bear the burden to show that the Court should grant a motion to amend, including to explain any delay. (MGM Opp. 6 n.2). But MGM cites solely cases in other circuits that do not control here. Courts in this circuit have *repeatedly* and *consistently* held that the non-moving party bears the burden to show amendment is not proper. *See, e.g.*, *Gudavich v. Dist. of Columbia*, 22 F. App'x 17, 18 (D.C. Cir. 2001) (noting that the non-movant "failed to show prejudice from the district court's action in allowing the [movant's] motion to amend"); *Morgan*, 262 F.R.D. at 8 ("Under Rule 15(a), the nonmovant generally carries the burden in persuading the court to deny leave to amend."); *Paxton v. Wash. Hosp. Center Corp.*, 299 F.R.D. 335, 336 (D.D.C. 2014) (same); *Council on American-Islamic Relations Action Network, Inc. v. Gaubatz*, 891 F. Supp. 2d 13, 22 (D.D.C. 2012) (same); *Abdullah v. Washington*, 530 F. Supp. 2d 112, 114 (D.D.C. 2008) (same); *Nwachukwu v. Karl*, 222 F.R.D. 208, 211 (D.D.C. 2004) (same). Plainly, this is the standard binding here, and the Federal Defendants appear to concede as much since they did not also raise this argument. It is therefore Defendants' duty to show that there is undue delay.

B. Defendants fail to show or even argue any prejudice by the purported delay.

Both the Federal Defendants and MGM fail to satisfy the relevant standard for showing undue delay. In order to deny a motion to amend based on delay, the delay must cause the non-moving party prejudice; this is what makes the delay "undue." *See, e.g.*, *Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080, 1084 (D.C. Cir. 1998) (reversing the district court's denial of a motion to amend based on delay when there was no showing of prejudice,

even though the motion was filed over three years after litigation commenced); *Atchison v. Dist. of Columbia*, 73 F.3d 418, 426 (D.C. Cir. 1996) ("Consideration of whether delay is undue, however, should generally take into account the actions of other parties and the possibility of any resulting prejudice."); *Carmona v. Toledo*, 215 F.3d 124 (1st Cir. 2000) (holding that delay that is neither intended to harass nor causes any ascertainable prejudice is not a permissible reason, in and of itself, to disallow an amendment of a pleading); Charles Alan Wright, *et al.*, 6 Fed. Prac. & Proc. Civ. § 1488 (3d ed. 2018) ("In most cases, delay alone is not a sufficient reason for denying leave. However, an amendment clearly will not be allowed when the moving party has been guilty of delay in requesting leave to amend and, as a result of the delay, the proposed amendment, if permitted, would have the effect of prejudicing another party to the action.").

In their oppositions, however, neither the Federal Defendants nor MGM make any showing—or even argue—that allowing Plaintiffs to amend would cause them prejudice. And as Plaintiffs explained previously, there is no resulting prejudice. (Pls.' Mem. 11.) This litigation had been pending for less than a year when Plaintiffs filed their Motion. There has been no discovery in the case. The additional counts do not change the core theory on which the case has proceeded thus far, nor have the statutes of limitations on any of these counts run. The Federal Defendants have not even filed the certified contents of the administrative record, a preliminary requirement in virtually all Administrative Procedure Act (APA) cases and certainly a rule that would apply in this one. The Defendants have not filed an opposition to Plaintiffs' Motion for Summary Judgment.[1] MGM was not even officially a party to this litigation until the Court's September 29 order, so it is nonsensical to even contend MGM was prejudiced. In short,

[1] In fact, Defendants resisted Plaintiffs' attempts to proceed with its Motion for Summary Judgment so that Defendants would not have to file the administrative record or address the arguments contained in the Motion. *See* First Joint Status Report Doc. 41 at 4-5; MGM Statement re: First Joint Status Report Doc. 43 at 2.

Defendants have not shown how they would be harmed by Plaintiffs' additional claims, other than the fact that they would be facing additional claims. This is not prejudice. Defendants have therefore failed to satisfy their burden to show that there is undue delay.

C. Defendants fail to show that the delay is inappropriate or undue.

Defendants also argue that it was improper to seek to amend after the Court dismissed the complaint, claiming that this delay is not appropriate. (MGM Opp. 1, 6–7; Fed. Def. Opp. 9–11.) Defendants are wrong for several reasons.

First, the cases Defendants rely on are easily distinguishable. For example, in its introduction, MGM contends three cases support denial of the motion to amend. (MGM Opp. 1.) In *Cameron v. Thornburgh*, 983 F.2d 253, 258 (D.C. Cir. 1993), the court found that the plaintiff waited too long to move to dismiss "in light of the purposes of qualified immunity 'expeditiously to weed out' insubstantial *Bivens* claims," a consideration that is not applicable here. In *Wilderness Society v. Griles*, 824 F.2d 4, 19 (D.C. Cir. 1987), the court upheld a denial of a motion to amend after the parties had each filed and opposed dispositive motions, including cross-motions for summary judgment, and the court had granted the defendant's motion for summary judgment. Here, the Court has only decided on a motion to dismiss. And in *James Madison Project v. Dep't of Justice*, 208 F. Supp. 3d 265, 277 (D.D.C. 2016), the court similarly denied a motion to amend after discovery and after the defendant filed a motion for summary judgment. Here, the Court has only ruled on a motion to dismiss. Defendants have not even filed oppositions to Plaintiffs' Motion for Summary Judgment, and the Court has not considered or ruled on that motion. Nor have Defendants (unlike the defendants in *Wilderness Society*) prevailed on, or even filed, a motion for summary judgment. None of these are similar to the

situation here, where discovery has yet to commence, the administrative record has not been produced, and the parties have not completed briefing on summary judgment.

In fact, courts often allow parties to amend their complaint with much more passage of time than in this case. In *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 301 F.R.D. 5, 9 (D.D.C. 2013), for example, the court held that there was no undue delay when the plaintiff moved to add a claim while a motion for partial summary judgment was pending and discovery was ongoing. The plaintiff had known of the claim since before the motion to dismiss was denied, but the court allowed the amendment because it would not cause any party prejudice, even though it would require expending additional resources. *Id.* at 9–10.

Instances where courts have found undue delay are a far cry from the record here. For instance, in *Bode & Grenier, LLP v. Knight*, 808 F.3d 852, 860 (D.C. Cir. 2015), the D.C. Circuit affirmed a denial of a motion to amend four years after litigation began, one year after summary judgment motions were decided, eight months after filing an amended answer, and only days before trial, finding that "[t]hat is the very picture of undue delay." *See also Elkins v. Dist. of Columbia,* 690 F.3d 554, 565 (D.C. Cir. 2012) (finding undue delay when a motion to amend arrived "five years after the initial complaint and after discovery had closed"); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.,* 810 F.2d 243, 247 (D.C. Cir. 1987) (finding undue delay on a motion to amend filed seven years after litigation began, when discovery had closed and the court had decided summary judgment motions); *Doe v. McMillan,* 566 F.2d 713, 720 (D.C. Cir. 1977) (affirming a denial to amend a pleading thirty-eight months after the filing of the complaint). Here, by contrast, there has been no lengthy delay (Plaintiffs' motion was filed less than a year after the litigation commenced) and no showing of prejudice to Defendants.

Second, Defendants argue that Plaintiffs' justifications for the delay in seeking to amend are not sound. (MGM Opp. 7–9; Fed. Def. Opp. 7–9.) But this argument turns the burden of proof on its head. Plaintiffs are not obligated to explain why the delay is sound; rather, as Plaintiffs previously demonstrated, *see supra* at 3, Defendants are obligated to explain why the delay is undue and thus prejudicial. *See Caribbean Broad. Sys.*, 148 F.3d at 1084.

In any event, Defendants are simply wrong that Plaintiffs should have added these claims earlier. As Plaintiffs explained, it was not until this Court accepted the arguments proffered by Defendants[2]—which were not raised until their motions to dismiss, and contradicted positions previously taken by the Federal Defendants—that it became necessary for Plaintiffs to add these new claims. And most critically, there has been no demonstration whatsoever that Plaintiffs waited until now to achieve some tactical advantage.[3]

Perhaps Plaintiffs could have moved to amend to add Count II (undue political influence) sooner. But there is no obligation to move to amend at the soonest possible point when a new claim arises. This is especially true for claims involving secretive misconduct, which are inherently difficult to uncover, allege, and prove.[4] Rather, the test is whether there was undue

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[2] While the Plaintiffs respectfully disagree with the Court's decision and have reserved the right to appeal such decision pending the outcome of this litigation, Plaintiffs acknowledge that the Court's holding that the procedures prescribed by the Secretary do not enjoy the benefit of the 45 day time period for deemed approvals by the Secretary in accordance with 25 U.S.C. § 2710(d)(8)(C) is binding on the parties.

[3] MGM makes the argument that Plaintiffs should have known that Federal Defendants would assert that the law regarding the 45-day rule did not apply to amendment to procedures. (MGM Opp. 7 n.3.) This argument is bizarre since the sole support for the contention that MGM points to is a September 2017 *internal* Interior email for which there is no evidence Plaintiffs were ever privy to.

[4] This is precisely why in cases where a plaintiff establishes a *prima facie* case of undue political influence, courts routinely permit supplementation of the administrative record and provide an opportunity for discovery. *See Sokaogaon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 961 F. Supp. 1276, 1280 (W.D. Wis. 1997) (When "inferences … [are]

delay and resulting prejudice. And here there was no *undue* delay and no prejudice. Indeed, facts that support this claim continue to come to light even after Plaintiffs filed this motion. *See, e.g.*, Juliet Eilperin & Josh Dawsey, *Zinke's own agency watchdog just referred him to the Justice Department*, The Washington Post, October 31, 2018 (discussing that Interior's Inspector General referred a possible criminal case to DOJ potentially regarding "Zinke's involvement in his department's refusal to sign off on a proposed casino deal in Connecticut involving the Mashantucket Pequot and Mohegan tribes").[5] Finding that Plaintiffs acted with undue delay here would only encourage future plaintiffs to assert new claims at the first inkling of misconduct, before they are certain of the viability of such claims, leading to excessive litigation and fishing expeditions.

Third, the Federal Defendants' argument that amendment is improper because this Court's ruling was on the merits is baseless. The Federal Defendants do not point to any case where an order on a motion to dismiss was considered "on the merits" and thus sufficient to deny a motion to amend. And Plaintiffs are not seeking reconsideration of any of this Court's rulings in its dismissal order. Nor are Plaintiffs seeking to circumvent the effects of this Court's order. The cases the Federal Defendants rely on discuss denying motions to amend *after summary judgment in the context of bad faith*—a contention no Defendant advances here. For example, in *Hoffmann v. United States*, 266 F. Supp. 2d 27, 34–35 (D.D.C. 2003), the court rejected the motion to amend because the plaintiffs acted in bad faith by moving *twenty years* after filing their initial complaint and were "attempting to resuscitate previously-rejected claims," a far

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drawn in plaintiffs' favor, … there is sufficient reason to suspect that improper political influence affected plaintiffs' application so as to allow plaintiffs an opportunity to further uncover evidence of that influence.").

[5] *Available at* https://www.washingtonpost.com/energy-environment/2018/10/30/zinkes-own-agency-watchdog-just-referred-him-justice-department/?utm_term=.c28fb6b06041.

different scenario from Plaintiffs here who are bringing new claims within weeks of receiving the decision on the motion to dismiss.

Defendants have therefore failed to satisfy their burden to show there is undue delay.

II. The Federal Defendants and MGM Fail to Satisfy Their Burden to Show the Proposed Amendment Is Futile.

The Federal Defendants and MGM also argue that the Court should deny Plaintiffs' motion to amend because the amendment would be futile. An amendment is futile when it would not survive a motion to dismiss. *Sodexo Operations, LLC v. Not-for-Profit Hosp. Corp.*, 210 F. Supp. 3d 138, 143 (D.D.C. 2016). But to survive a motion to dismiss, a complaint must simply "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This same standard applies here. Defendants fail to satisfy their burden to show that any of Plaintiffs' claims would not survive a motion to dismiss.

A. The Complaint alleges final agency action.

The Federal Defendants argue that Plaintiffs' claims are all futile under the APA on the ground that there is no allegation of a final agency action. (Fed. Def. Opp. 12–13.) This argument is baseless. The claims alleged in the amended complaint are based on the "return" of the Tribal-State Agreement and the failure to approve the Agreement. This failure to act constitutes a final agency action subject to judicial review.

It is well-established that there is a "strong presumption that Congress intends agency action to be reviewable," and the presumption can only be overcome by "clear and convincing evidence of a contrary legislative intent." *Accrediting Council for Indep. Colleges & Sch. v. DeVos*, 303 F. Supp. 3d 77, 95 (D.D.C. 2018) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 671-72 (1986)). The APA thus generally permits judicial review of agency action, including the failure to act. *See* 5 U.S.C. §§ 551(13), 702; *Pub. Citizen, Inc. v.*

Fed. Energy Regulatory Comm'n, 839 F.3d 1165, 1172 (D.C. Cir. 2016); *Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 103 F. Supp. 3d 113, 121 (D.D.C. 2015) ("Judicial review is authorized 'when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, because an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief.'").

The D.C. Circuit has determined that APA review of inaction is appropriate under three circumstances: (1) where agency inaction is final action having the same impact as agency action; (2) where agency inaction represents "agency recalcitrance ... of such magnitude that it amounts to an abdication of statutory responsibility," and (3) where the inaction may constitute, in reality, an unreasonable delay in final action which may under some circumstances be reviewable (*e.g.*, pursuant to APA § 706(1), which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed"). *Sierra Club v. Thomas*, 828 F.2d 783, 793–794 (D.C. Cir. 1987).

Here, the Department's failure to approve the Tribal-State Agreement and purported "return" of the Agreement meets the first circumstance, because it has the same legal impact as a disapproval. *See Her Majesty the Queen in Right of Ontario v. U.S. EPA*, 912 F.2d 1525, 1531 (D.C. Cir. 1990) ("When administrative inaction has the same impact on the rights of the parties as an express denial of relief, judicial review is not precluded."). By failing to affirmatively approve the Tribal-State Agreement and publishing it in the Federal Register, Federal Defendants have deprived the Tribe and State of the benefits of the Tribal-State Agreement in identical fashion than had they disapproved it.

Moreover, Section 17(c) ("amendment and modification") of the Tribe's gaming procedures—which were approved and issued by Federal Defendants—state: "The terms and

conditions of this Compact shall not be modified, amended or otherwise altered except by written agreement of both parties and enactment as set forth in sub-section (a).” Sub-section (a) (“effective date”), in turn, incorporates the IGRA approval process into the gaming procedures: “This Compact shall be effective upon publication of notice of approval by the Secretary of the Interior of the United States in the Federal Register in accordance with 25 U.S.C. § 2710(d)(3)(B).” Section 2710(d)(3)(B) provides that a compact shall only take effect “when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.”

Under the terms of IGRA and Section 17(c) (and because, per the Court’s order, it cannot be deemed approved under 25 U.S.C. § 2710(d)(8)(c)), the Tribal-State Agreement cannot take effect unless the Federal Defendants act on it when submitted. By failing to affirmatively approve or disapprove the Tribal-State Agreement as it was required to do, Federal Defendants have effectively rejected the Tribal-State Agreement.

The fact remains, when Federal Defendants purported to “return” the Tribal-State Agreement, this had the precise legal effect as rejecting the amendment. This is, accordingly, textbook agency inaction constituting reviewable final agency action. *Fort Sill Apache Tribe*, 103 F. Supp. at 121 (“Judicial review is authorized when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, because an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief.”); *see also Amador Cty., Cal. v. Salazar*, 640 F.3d 373, 377 (D.C. Cir. 2011) (holding that a compact that became effective after the Secretary failed to take action within the 45-day window was an agency action subject to judicial review).

B. Count I would survive a motion to dismiss.

Defendants argue that Plaintiffs' claim alleging that Federal Defendants purported "return" of the Tribal-State Agreement to Plaintiffs was arbitrary and capricious and would not survive a motion to dismiss because of the Court's prior order. They also argue that the disparate treatment of the Mohegan Compact and Mashantucket Procedures is justified. Taking Plaintiffs' allegations as true and drawing all inferences in Plaintiffs' favor, Defendants are wrong on both counts.

1. *The Court's Order does not foreclose proposed Count I.*

The Federal Defendants first argue that the proposed amendment of Count I is futile because that Court has purportedly "already held that IGRA's provisions requiring the Secretary to approve or disapprove a tribal-state compact do not apply to Secretarial procedures" and Plaintiffs' argument is "based on a purported violation of inapplicable provisions that do not apply." (Fed. Def. Opp. 13–14.) They also claim that the Court held that 25 U.S.C. § 2710(d)(8)(D) "appl[ies] only to tribal-state compacts, not the Secretarial procedures at issue here." (Fed. Def. Opp. 14.)

The Federal Defendants misunderstand Plaintiffs' allegations. In putative Count I, Plaintiffs do not allege that the Federal Defendants' purported return of the Tribal-State Agreement was a procedural violation of IGRA, but instead challenge the *substantive basis* on which the Federal Defendants "returned" the submitted Tribal-State Agreement. (Doc. 60-2 at 14–15). In other words, notwithstanding any timing requirements in 25 U.S.C. § 2710(d)(8)(c), the Department should have approved the Tribal-State Agreement.

Under IGRA and the accompanying regulations, the Secretary may disapprove a compact or amendments only if it violates (1) IGRA, (2) any provision of Federal law that does not relate

to jurisdiction over gaming on Indian lands, or (3) the United States' trust obligation to Indians. *See* 25 U.S.C. § 2710(d)(8)(B); 25 C.F.R. § 293.14. These restrictions apply to the Tribal-State Agreement at issue here because, as discussed above, Section 17 of the Pequot Tribe's Secretarial Procedures incorporate IGRA's approval provisions—citing to publication in the Federal Register under 25 U.S.C. § 2710(d)(3)(B), which in turn points to 25 U.S.C. § 2710(d)(8). The amendment process in Section 17, including the incorporation of IGRA's approval provisions, was approved by Secretary Manuel Lujan Jr. when he originally prescribed the procedures and referenced in his publication in the Federal Register. 56 FR 24996-01 ("We conclude that the preferred method for dealing with the State recommendations is through negotiations between the Mashantucket Pequot Tribe and the State and amendment of the procedures as provided for in section 17 of the procedures.").

In failing to articulate proper grounds for denying the Tribal-State Agreement, Plaintiffs allege that the Federal Defendants' inaction was arbitrary and capricious. This allegation is based on the absence of any legitimate basis for Federal Defendants denying approval of the Agreement. 5 U.S.C. § 7076(2)(A). (Doc. 60-2 ¶¶ 62, 64). The letter purporting to "return" the Agreement did not approve or disapprove it, and no permissible reason for the "return" was provided. (*See* Doc. 9-8 at 2). Federal Defendants simply alleged that the Department had "insufficient information" upon which to make a decision, but did not specify what additional information if any would be necessary and, prior to the "return," notified the Plaintiff on repeated occasions that no additional information was necessary. *Id.* This argument is distinct

from the claim that the Secretary was subject to a procedural requirement under IGRA to approve or disapprove the Tribe's amendment to its mediator-selected Compact within 45 days.[6]

Moreover, the Federal Defendants misconstrue the Court's Order. In interpreting the IGRA provisions and implementing regulations at issue, the Court held that unlike tribal-state compacts, Secretarial Procedures were not subject to the requirements of 25 U.S.C. § 2710(d)(8)(C), which set forth the 45-day deadline for the Secretary to approve or disapprove the compact. Thus, it specifically found that "*the timing provisions* underlying Plaintiffs' complaint fall under the IGRA subsection governing the approval of tribal-state compacts, but not the IGRA subsection governing the imposition of secretarial procedures." (Doc. 59 at 38 (emphasis added).) The Court reiterates this while summarizing its findings, stating that "[i]n sum, 25 U.S.C. §§ 2710(d)(7) and 2710(d)(8), read together, dictate that the Secretary must disapprove tribal-state compacts and compact amendments within a certain time period from their submission or else deem them approved, but that *those timing requirements* do not apply to secretarial procedures and amendments to those procedures." (Doc. 59 at 55 (emphasis added).) The Court's Order therefore made the limited conclusion that the 45-day requirement applied to approving or disapproving compact amendments, but not to amendments to secretarial procedures.

Defendants have conceded the more limited scope of the Court's Order, acknowledging in their opposition that "[t]his Court held that 25 U.S.C. § 2710(d)(8)(C) applies to tribal-state

[6] As noted in their Motion for Leave to Amend, for purposes of the First Amended Complaint Plaintiffs are not re-alleging their claim that amendment to its mediator-selected Compact required approval or disapproval within 45 days under IGRA, although Plaintiffs preserve their right to appeal the decision. (*See* Doc. 60-1 at 8 n.3.) Instead, Plaintiffs now assert in Count III that the Tribal-State Agreement that Plaintiffs submitted meets the definition of "compact" under IGRA's implementing regulations and was therefore subject to the 45-day deemed approved deadline in 25 CFR § 293.12. (*Id.*)

compacts," and that the Court's opinion "focused on the timing provisions in these subsections," but nonetheless argue that "the same logic applies to the subsections as a whole." (Doc. 62 at 14.) But despite Federal Defendants' attempt to broaden its application, the Order does not extend to rejecting the application of 25 U.S.C. §§ 2710(d)(8)(B) or (D) to secretarial procedures. Plaintiffs' argument is not "based on a purported violation of inapplicable provisions that do not apply," and they are not foreclosed from arguing that the Federal Defendants' failure to either approve or disapprove the Tribal-State Agreement as required by IGRA was arbitrary and capricious in violation of the APA.

Further, Defendants' argument fails to consider the effect of Section 17 of the Pequot Tribe's Secretarial Procedures. Section 17, which was approved by the Department, instructs the Tribe and State to amend in a certain way. The Tribe and State followed that procedure with precision. And because the Tribal-State Agreement was in accordance with Section 17, the Federal Defendants' "returning" it, which was effectively a denial, was necessarily arbitrary and capricious, since there was no legitimate basis to do so. Indeed, otherwise Section 17 loses all meaning.

Nevertheless, even if Plaintiffs were to accept Defendants' position regarding the applicability of the IGRA provisions limiting the grounds for disapproval, the Secretary would not have carte blanche to approve or disapprove amendments to gaming procedures as he sees fit. First, Congress has indicated its intent that in making decisions under IGRA, the Federal Defendants should act in furtherance of tribal economic development and self-governance by supporting tribal gaming, particularly where a tribe and state have already come to an agreement for Class III gaming. *See, e.g.*, *City of Roseville v. Norton*, 348 F.3d 1020, 1027 (D.C. Cir. 2003) ("Congress' purpose in enacting IGRA includes the promotion of tribal economic self-

sufficiency"). Second, the Department holds a trust responsibility to the Pequot Tribe. *Oneida Cnty. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985).

Irrespective of which specific provisions of IGRA and the implementing regulations apply or do not, the question remains, was it lawful for Federal Defendants to "return" the Tribal-State Agreement—an action that had the same legal effect of disapproving of the Tribal-State Agreement without any basis, let alone a reasonable one. Especially where, as here, such a decision would unjustifiably harm the Pequot Tribe (and Mohegan Tribe), such a decision is in direct contravention of IGRA's stated purpose and the Department's trust responsibility. It is, accordingly, arbitrary and capricious.

2. *There is no reasonable basis for the disparate treatment of Mohegan's Compact and Pequot's Tribal-State Agreement*.

The Federal Defendants also contend that the Mohegan Tribe's compact amendment was reasonably subject to disparate treatment because IGRA's provisions are different for approval of tribal-state compacts and secretarial procedures, and there is no "deemed approved" provisions for secretarial procedures under IGRA. (Fed. Def. Opp. 14–15.) MGM makes the similar argument that tribal-state compact and secretarial procedures "are two different types of documents, subject to two different review processes." (MGM Opp. 10.) MGM also argues that approval of the Mohegan compact amendment "was, in fact, not an approval at all" because it was only "deemed approved" to the extent it is consistent with IGRA which "leaves unclear whether, and to what extent, it has *any* legal effect." (MGM Br. 11 (emphasis original)). Each of these arguments fails.

As an initial matter, regardless of Defendants' attempts to distinguish the Tribal-State Agreement from Mohegan's compact amendment, the practical effect is that Federal Defendants

are treating two substantively identical agreements differently for no ascertainable reason. These two agreements have or would have identical impacts on the Mohegan and Pequot Tribes.

In any event, the Federal Defendants again misstate or misapprehend Plaintiffs' allegations. Plaintiffs' proposed Count I alleges that the Federal Defendants' inaction was arbitrary and capricious based on their failure to "affirmatively approve" the Tribal-State Agreement. (Doc. 60-2 ¶ 62.) Affirmative approval does not, as Federal Defendants seem to imply, operate under 25 U.S.C. § 2710(d)(8)(C); instead, that provision simply allows tribal-state compacts to be "considered to have been approved by the Secretary." In other words, §2710(d)(8)(C) operates by default. Here, Plaintiffs are arguing that the Federal Defendants' inaction in failing to expressly approve the Tribal-State Agreement upon receipt and review was arbitrary and capricious.

The fact that the Mohegan Compact amendment was ultimately approved, even though it is substantively identical to the Tribal-State Agreement, further illustrates the arbitrary and capricious nature of the Federal Defendants' inaction. *See Fed. Election Comm'n v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) ("[A]n agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard."); *Kort v. Burwell*, 209 F. Supp. 3d 98, 112 (D.D.C. 2016) ("[W]here an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld."). Further, the Mohegan Compact's amendment provision is materially identical to Section 17 of the Pequot Tribe's Secretarial Procedures. The Mohegan Tribe submitted its Compact amendment using the same process as the Pequot Tribe, based on the same technical assistance from the Department. Despite all these similarities, only the Mohegan

Tribe's Compact amendment was approved and published in the Federal Register. Thus, regardless of whether or not the deemed approved provision in IGRA applies with the same force to tribal-state agreements and secretarial procedures, the Federal Defendants' failure to affirmatively approve the Tribal-State Agreement while also approving a functionally identical compact amendment violated the APA and provides Plaintiffs a basis for relief under Count I.

With respect to MGM's claim that the Mohegan Compact amendment was not actually approved, that argument is defeated both by the Court's existing Order and the absence of any factual support. The Court has already determined that "[i]n mid-2018, the Secretary approved Plaintiffs' proposed amendments to the Mohegan Compact and published that approval in the Federal Register." (Doc. 59 at 9 (emphasis added)). That approval, as the Court acknowledges, is the reason that Mohegan is no longer a party to this litigation. *Id.* ("Because Mohegan has received the relief sought in the complaint, the parties stipulated to the dismissal of Mohegan's claims."). MGM's contention that the approval was "in fact, not an approval at all" therefore contradicts the Court's Order.

Further, the fact that the Mohegan Compact amendment was "deemed approved" "only to the extent the [amendment] is consistent with the provisions of [IGRA]" is purely a function of the statutory language of 25 U.S.C. § 2710(d)(8)(C), which specifically states that a compact submitted but not approved or disapproved within 45 days of submission for approval shall be "considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter." Regardless, that section of IGRA also requires the Secretary to publish in the Federal Register notice of any tribal-state compact that "is approved, or considered to have been approved." 25 U.S.C. § 2710(d)(8)(D) (emphasis added). Approval of the Mohegan Compact amendment was published in the Federal Register, with the notice which

"announces that the Tribal-State Class III Gaming Compact Amendment entered into between the Mohegan Tribe of Indians of Connecticut and the State of Connecticut *is taking effect*." 83 Fed. Reg. 25,484 (June 1, 2018) (emphasis added). It is therefore not "unclear whether, and to what extent" the compact has legal effect; Mohegan's Compact amendment has been approved by law, and MGM's argument fails.[7]

Federal Defendants' argument boils down to one simple but extraordinary proposition that the Federal Defendants have no obligation whatsoever to approve or disapprove the Tribal-State Agreement and can simply deny it by inaction and such action is essentially unreviewable. This is not the law. *Accrediting Council for Indep. Colleges & Sch.*, 303 F. Supp. at 95 (There is a "strong presumption that Congress intends agency action to be reviewable," so that presumption can only be overcome by "clear and convincing evidence of a contrary legislative intent."); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (Judicial review under the APA is permitted where there is "no showing of clear and convincing evidence of a legislative intent to restrict access to judicial review." (internal quotations and citations omitted)). It is particularly absurd when implementing a law Congress expressly intended to expand tribal economic development and tribal self-sufficiency such as IGRA.

The Federal Defendants and MGM have therefore failed to meet their burden to show that Plaintiffs should not be granted leave to amend Count I on the basis of futility.

C. Count II would survive a motion to dismiss.

In Count II, Plaintiffs allege that the Department's failure to approve the Tribal-State Agreement was a result of undue political influence and is therefore arbitrary and capricious.

[7] MGM's argument is also without merit because the Secretary does not have the authority to rewrite IGRA. In other words, while not explicitly stated in IGRA, even a compact affirmatively approved by the Secretary would not be valid to the extent it contradicts IGRA.

(Doc. 60-2 ¶¶ 67–72.) Defendants argue that Plaintiffs failed to allege a plausible claim of undue political influence. (MGM Opp. 14–21; Fed. Def. Opp. 15–17.) Defendants are wrong.

"Agency action must be set aside, of course, if found to be motivated in whole or in part by political pressures." *Aera Energy LLC v. Salazar*, 691 F. Supp. 2d 25, 33 (D.D.C. 2010), *aff'd*, 642 F.3d 212 (D.C. Cir. 2011); *see also D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1245 (D.C. Cir. 1971) (holding that a decision by the Secretary of Transportation was contaminated by "political pressure … applied by certain members of Congress" and that "the impact of this pressure is sufficient, standing alone, to invalidate the Secretary's action"); *Tex. Med. Ass'n v. Mathews*, 408 F. Supp. 303, 306 (W.D. Tex. 1976) (an "agency action is invalid if based, even in part, on pressures emanating from Congressional sources"). "The test is whether extraneous factors intruded into the *calculus of consideration* of the individual decisionmaker." *Aera Energy*, 691 F. Supp. 2d at 33 (quotation marks omitted) (quoting *Peter Kiewit Sons' Co. v. United States Army Corp. of Eng'rs*, 714 F.2d 163, 170 (D.C. Cir. 1983)). "[A]gencies must make their decisions based strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes." *Id*. (quotation marks omitted). "This rule exists for the obvious reason that '[political] interference so tainting the administrative process violates the right of a party to due process of law.'" *Id.* (alteration in original) (quoting *ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994)).

Plaintiffs here adequately plead a plausible claim of improper political influence. All Plaintiffs were required to plead were facts that showed it plausible that "extraneous factors intruded into the calculus of consideration" of the Department. Plaintiffs alleged that the Department repeatedly notified the Tribe that the Tribal-State Agreement would be approved, even going to so far as to notify the Tribe that the Department "had prepared draft approval

letters." (Doc. 60-2 ¶¶ 27–30, 35–38.) Plaintiffs then alleged that the Department buckled under political pressure from Senator Dean Heller (R-NV) and Representative Mark Amodei (R-NV-02) to deny the Tribal-State Agreement, both of whom intervened to help MGM. (*Id.* ¶¶ 40–56.) Plaintiffs even alleged specific calls made by Heller and Amodei to the Department, meetings among the same, and actions taken by Secretary Zinke. (*Id.*) For example, Plaintiffs alleged that Heller "pressured Secretary Zinke to do what was necessary to stop the Tribes' joint venture casino" (*id.* ¶ 43), and that the Department informed the Tribe that it was being pressured by members of Congress to deny the Tribal-State Agreement (*id.* ¶ 44). These allegations are more than sufficient to show that it is plausible that "extraneous factors intruded into the calculus of consideration" of the Department. Indeed, given that this Court is required to "construe the complaint in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged," *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012), the facts alleged are plainly sufficient.

Defendants make a number of arguments for why the above is not sufficient. None of these arguments have merit.

First, Defendants argue that Plaintiffs failed to show that there was any pressure for the Department to rely on factors outside IGRA and that the Department's decision was actually affected by improper influence. (Fed. Def. Opp. 16–17; MGM Opp. 17–19.) This argument is doubly wrong. For one, this is not the standard. Defendants cite to *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981), for their argument that this is the controlling standard. But *Costle* dealt with the condition that must be "met before an administrative rulemaking may be overturned simply on the grounds of Congressional pressure." *Id.* This case does not deal with administrative rulemaking, but rather a final agency action or reviewable inaction.

Further, even if this standard did apply, it is satisfied. Plaintiffs alleged that the Department was pressured to consider factors not relevant under IGRA. Under IGRA, the Secretary is only permitted to disapprove a compact or amendment if (1) if violates IGRA, (2) it violates another provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or (3) it violates the trust obligation of the United States to Indians. 25 U.S.C. § 2710(d)(8)(B); 25 C.F.R. § 293.14.[8] Plaintiffs allege that the Department "buckled under undue political pressure" when it refused to approve the compact even though "there was widespread acknowledgment among the Department's experts that there was no basis to disapprove the Tribal-State Agreement." (Doc. 60-2 ¶ 40.) Plaintiffs pled that this was a result of pressure by Congressional representatives who were trying to help MGM's interest. (*Id.* ¶¶ 53–56.) And given that Plaintiffs pled that the Department repeatedly told the Tribe that it would approve the Tribal-State Agreement, and only after political pressure did Federal Defendants refuse to approve it, even after approving an almost identical amendment with the Mohegan, it is plausible that the reason they failed to approve was for reasons other than the three statutorily permissible reasons to deny approval of an amendment. Indeed, that this is plausible is supported by the reports that the Inspector General initiated an investigation of Federal Defendants actions in this matter and that the Department of Justice is investigating whether Secretary Zinke violated any criminal laws with respect to Interior's failure to approve the Agreement. *See* Eilperin & Dawsey, *supra.*

Second, MGM argues that it was permissible to exert political pressure on the Department because it was a matter of public importance, members of Congress' political

[8] Even if the Court believed 25 U.S.C. § 2710(d)(8)(B) did not apply to secretarial procedures, the Department would be similarly bound to act in accordance with Section 17 of the Tribe's procedures, its trust responsibility to the Tribe, the purposes of IGRA, and the Administrative Procedures Act.

activity is protected by the First Amendment, and political advocacy is commonplace and proper. (MGM Opp. 14–18.) But this is all beside the point. Plaintiffs do not dispute that MGM and members of Congress have a right to express their views regarding agency action. But Plaintiffs are not bringing claims against any member of Congress. Rather, they are bringing claims against the Federal Defendants. And the Federal Defendants were not permitted to consider any of these political pressures when deciding whether to approve the Tribal-State Agreement. Plaintiffs' claim is premised on the allegations that the Department's decision to not approve the Tribal-State Agreement was based on these political considerations, which is not permitted. (*See* Doc. 60-2, ¶¶ 68–71.) In other words, Count II is not based on the fact that the Department experienced political pressure; rather, it is based on the fact that this pressure impermissibly made the Department *change its mind*.

To bolster this claim, MGM argues that the Plaintiffs also exerted political pressure on the Department. (MGM Opp. 3.) However, Plaintiffs did not exert improper political influence in an effort to gain an approval from the Department it was not otherwise entitled to. Likening Plaintiffs' efforts (asking the Department to approve the Tribal-State Agreement as required under IGRA after the Agreement was improperly returned) with MGM's political efforts (asking the Department to disapprove the Tribal-State Agreement for reasons outside and in contravention of IGRA) is a false equivalency.

Third, MGM argues that there is no authority to support Plaintiffs' claim. (MGM Opp. 19.) But MGM misreads the case law. In *ATX*, the D.C. Circuit first set forth the standard for whether congressional pressure invalidates an administrative adjudication, which is that the adjudication is invalid if the "extraneous factors intruded into the calculus of consideration." 41 F.3d at 1527. The Court then later noted that this standard is heightened in the case of quasi-

judicial proceedings, such that even "the appearance of bias or pressure" may invalidate actions in such proceedings. *Id.* But that is not what Plaintiffs here are alleging. Rather, they allege that the congressional pressure was part of the calculus of consideration.

And in *Aera Entergy LLC v. Salazar*, 642 F.3d 212 (D.C. Cir. 2011), the issue was not whether the administrative law judge was pressured. Rather, the administrative law judge was tasked with reviewing whether the pressure that a decision-maker for the Department of Interior received from California's Governor, other State and local officials, and various Congressional members to oppose requests related to oil and gas leases should be overturned because it was "unduly tainted by impermissible political considerations." *Id.* at 215–216. The same question arises here.

Finally, MGM argues that the assurances Plaintiffs alleged they received were not actual assurances. But this argument is not proper for a motion to dismiss. This Court is required to accept all allegations as true. *Miller v. Dist. of Columbia*, 319 F. Supp. 3d 308, 312 (D.D.C. 2018). The Court must therefore accept as true that Plaintiffs received assurances from the Department.

Further, MGM's argument that Plaintiffs did not receive any assurances is limited solely to a 2016 and 2017 letter from Interior, and there has been no production to date of the administrative record from Federal Defendants. Even if MGM was right that these are not assurances, this ignores that Plaintiffs alleged that there are multiple other instances where the Department assured the Tribes that it would approve the Agreement. (*See, e.g.*, Doc. 60-2 ¶ 30 ("from April 2016 through the summer of 2017, the Tribes' representatives had numerous in-person and telephonic meetings with Department officials . . . in which the Tribes were assured by Department officials that once they submitted the Mohegan Compact Amendment and the

Tribal-State Agreement the Department would approve them"); ¶ 35 ("Department official once again orally notified the Tribes that approval of the Tribal-State Agreement and the Mohegan agreements was forthcoming in the coming days"); ¶ 36 (the Tribe met with ADS Cason who "confirmed that the Department . . . would approve [the Agreement]").) Additionally, the ongoing investigation as to Secretary Zinke's actions with respect to Interior's failure to approve the Agreement further supports Plaintiffs' proposed Count II. *See* Eilperin & Dawsey, *supra.*

Plaintiffs have therefore adequately pled a claim for undue political influence.

D. Count III would survive a Motion to Dismiss.

1. *Plaintiffs allege a claim which is separate and different from their previously-dismissed count.*

The Federal Defendants argue that Plaintiffs' proposed Count III should be dismissed because the Court already considered and rejected a "similar" argument, and the court's logic "applies with equal force to Plaintiffs' new count." (Fed. Def. Opp. 17.) The Federal Defendants are wrong. Plaintiffs have previously argued only that the Pequot Tribe's Secretarial Procedures—entered into in 1991 through the mediation process, and never signed by the State—themselves were a de facto compact, and thus when 25 U.S.C. § 2710(d)(8)(c) refers to "compact" it also included the Pequot Tribe's Secretarial Procedures. (Doc. 27 at 28–30.) Plaintiffs do not dispute that the Court previously held that the Tribe's Secretarial Procedures did not meet the statutory and regulatory definition of a "compact" with respect to the 45-day rule for amendment of compacts. (Doc. 60-1 at 14; Doc. 59 at 48.) But putative Count III is not based on whether the Procedures are considered a Compact; rather, it alleges that the agreement between the Plaintiffs to amend the Procedures—*i.e.*, herein referred to as the Tribal-State Agreement—meets the legal definition of a compact in IGRA and the implementing regulations.

Proposed Count III newly alleges that the Tribal-State Agreement is a "compact" under IGRA and was therefore deemed approved by operation of law after Federal Defendants failed to approve or disapprove it within the timeline set forth in IGRA, 25 U.S.C. § 2710(d)(8)(C) and 25 C.F.R. § 293.12. (Doc. 60-2 ¶¶ 78–80.) As Plaintiffs have emphasized, proposed Count III is distinct from their previous claim because it alleges that the *form* in which the parties are required to amend the procedures—a written agreement between the State and the Pequot Tribe, signed by each party—falls within the legal definition of a compact under 25 C.F.R.§ 293.2. (*Id.* ¶¶ 76–78.) As a compact, Federal Defendants were required under IGRA to approve or disapprove it within 45 days, or the compact would be deemed approved. Arguing the Tribal-State Agreement (an agreement to the Secretarial Procedures) is a compact is a different argument from Plaintiffs' previous claim which asserted that the Secretarial Procedures themselves were a de facto compact.

Despite Defendants' attempt to again impermissibly broaden the Court's earlier Order, the scope of that decision was limited in its application to Plaintiffs' previous claim. As Count III is a new and analytically distinct legal claim, the Court's earlier ruling simply does not apply to foreclose Plaintiffs' proposed allegations.

2. *Plaintiffs' Tribal-State Agreement meets the definition of a "compact" under IGRA and the implementing regulations.*

Despite Defendants' attempts to confuse and complicate proposed Count III, Plaintiffs' argument is simple: under IGRA and the implementing regulations, the Tribal-State Agreement meets the definition of a compact. Because statutory language represents the clearest indication of Congressional intent, courts presume that Congress meant precisely what it said. *Nat'l Pub. Radio, Inc. v. F.C.C.*, 254 F.3d 226, 230 (D.C. Cir. 2001). This presumption is rebuttable only in the rare cases in which literal application of a statute will produce a result demonstrably at odds

with the intention of its drafters. *Id.*; *De Ruiz v. De Ruiz*, 88 F.2d 752, 754 (D.C. Cir. 1936) (holding literal interpretation of statutory language may be rejected when the consequences of such interpretation would be absurd, unjust, or oppressive). The inquiry into the meaning of a statute therefore ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). IGRA, like all statutes, is subject to a plain language reading. *See, e.g.*, *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd*., 531 F.3d 767 (9th Cir. 2008); *Crosby Lodge, Inc. v. Nat'l Indian Gaming Comm'n*, 803 F. Supp. 2d 1198, 1204 (D. Nev. 2011). Administrative regulations should similarly be interpreted according to their plain language, where they are not ambiguous. *See Exportal Ltda v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) ("As applied to agency regulations, then, the plain meaning doctrine is an interpretive norm essential to perfecting the scheme of administrative governance established by the APA.").

Here, the language in IGRA and the implementing regulations is clear and unambiguous: a "compact" is an "intergovernmental agreement executed between Tribal and State governments under the Indian Gaming Regulatory Act that establishes between the parties the terms and conditions for the operation and regulation of the tribe's Class III gaming activities." 25 C.F.R. § 293.2. Because a plain meaning construction of the regulation will not result in an absurd, unjust, or oppressive result, it must be construed literally. The Tribal-State Agreement meets every element of this definition: it is an agreement between two governments. It was executed between the Pequot Tribe and the State under IGRA. Further, it sets certain terms and conditions regarding the operation and regulation of the Tribe's Class III gaming (*i.e.*, creating new terms concerning the moratorium contained in Section 15 of the Pequot Tribe's secretarial procedures, which directly affects the Tribe's right to conduct Class III gaming on the reservation). Under a

plain language reading of the regulations and statute, in accordance with the Court's earlier decision, the Tribal-State Agreement is a compact. Although the Tribal-State Agreement is undoubtedly also an amendment to the Procedures, there is nothing in IGRA that mandates these definitions be mutually exclusive, and it is not precluded from being simultaneously properly characterized as an "amendment" and a "compact" where, as here, it meets the legal definition of a compact.

Including the Tribal-State Agreement within the definition of a "compact" is also consistent with the language of the Tribe's Secretarial Procedures. As noted above, under Section 17 of the Procedures, Plaintiffs are permitted to amend them "by written agreement" and "upon publication of notice of approval by the Secretary of the Interior of the United States in the Federal Register in accordance with 25 U.S.C.§ 2710(d)(3)(B)." (Procedures, ¶ 17). The Procedures therefore necessarily require not only that the State and Tribe agree in writing to any amendment, but that the amendment be approved or deemed approved by the Secretary—in exactly the same way that a tribal-state compact would be approved—before the amendment can be published within the Federal Register and effected. *Id.* This process was expressly adopted by the Secretary when the Procedures were published and went into effect in 1991, so Federal Defendants not only are aware of the need for Secretarial approval but expressly endorsed it. *See* 56 Fed. Reg. 24,996. The plain language of the Procedures thus discredits Federal Defendants' claim that "it defies logic to suggest that the proposed amendments to the Pequot Procedures can act as a compact." (Fed. Def. Opp. 18). Indeed, it is entirely logical that they do.

Nothing the Defendants have put forth alters the fundamental point that the Tribal-State Agreement as submitted meets the definition of a "compact" under IGRA and the implementing regulations. Federal Defendants therefore failed to comply with the requirements under IGRA

for compacts, including failing to affirmatively approve or deny the Tribal-State Agreement within the 45-day review period, and subsequently failing to publish in the Federal Register notice that the compact had been considered to have been approved. 25 U.S.C.§ 2710(d)(8)(D). Accordingly, Plaintiffs have established a claim under Count III that is likely to withstand a motion to dismiss.

3. *MGM cannot raise any regulatory deficiency not addressed by Federal Defendants in purporting to "return" the agreement.*

MGM claims that Plaintiffs have not satisfied the regulatory requirements required by IGRA's implementing regulations, and Count III is therefore futile. They raise two such failures: the absence of a "place of adoption" of the amendment on the Tribe's resolution certifying that the Tribe approved the compact; and second, a lack of certification from the Governor stating that he or she is authorized to enter into the compact or amendment. (MGM Opp. 24.) But neither of these alleged failures present legitimate issues. And even if they did, Defendants are estopped from raising them because they were not raised by Federal Defendants at the time Plaintiffs' Agreement was "return[ed]" and they do not present valid grounds for disapproval of the Agreement.

As a preliminary matter, if IGRA's implementing regulations apply to the Tribal-State Agreement, then for purposes of Count III any such deficiencies are irrelevant because the Tribal-State Agreement would have been deemed approved at the end of the 45-day deadline imposed by 25 C.F.R. § 293.12.

With respect to the first alleged deficiency, the Resolution provides the date, the result of the vote taken, and certifies that the Tribe approved the compact or amendment in accordance with applicable tribal law. (Doc. 60-2 at 55–57.) The absence of an expressly-written place of adoption is immaterial. Second, MGM's claim that the Agreement is not properly certified by the

Governor is belied by the handwritten signature of Connecticut Governor Malloy on the Tribal-State Agreement. (Doc. 9-7 at 4.) "Certification" is defined by Black's Law Dictionary as "the act of attesting; esp., the process of giving someone or something an official document stating that a specified standard has been satisfied." (10th ed. 2014). Additionally, the Agreement attests that the "General Assembly of the State," *i.e.*, the State Legislature, "has approved this Agreement and the Mashantucket Pequot Agreement pursuant to C.G.S. Section 3-6c."[9] Here, because the Agreement unambiguously states that the Agreement has been approved and because it is signed by the Governor, MGM's argument that "there is no certification from the Governor" is false.

Finally, even if the Agreement were deficient in both regulatory requirements, neither deficiency forms a basis for disapproval of a submitted Compact. Under IGRA, a compact or amendment may only be disapproved on three grounds: it violates IGRA; it violates other federal law; or it violates the trust obligations of the United States to Indians. 25 U.S.C. § 2710(d)(8)(B). The two alleged regulatory deficiencies asserted by MGM do not fall into those three categories, and therefore neither can be a valid basis for disapproving the Tribal-State Agreement. Moreover, in purporting to return Plaintiffs' Compact, Federal Defendants did not articulate any of the deficiencies now alleged by MGM. Therefore, they have waived the ability to raise those arguments and any newly-claimed deficiencies cannot form the basis for a valid futility objection at this time.

[9] C.F.S. Section 3-6c specifically sets forth the process for approval or rejection of a compact or amendment between the State and an Indian tribe, and allows the Governor to execute a compact or amendment, file that compact or amendment with the House of Representatives and the Senate and then await a vote by the Connecticut General Assembly to approve or reject it.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant it leave to file the First Amended Complaint.

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Respectfully submitted,

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