19-4022-cv

United States Court of Appeals

for the

Second Circuit

SENECA NATION OF INDIANS,

Plaintiff-Appellant,

– v. –

STATE OF NEW YORK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

Three key facts underpin the Nation's manifest disregard argument, and the State does not (and reasonably could not) challenge any of them. Hence, there exists no dispute that the arbitration panel majority: (1) determined that the Nation-State Gaming Compact is "silent" regarding a "Years 15-21" revenue-sharing obligation; (2) identified no extrinsic evidence reviewed by the Secretary in 2002 that addressed the topic; and (3) made no claim that the Secretary explicitly considered and approved such an obligation. Nation Br. 30-37. That the panel majority nevertheless imposed a "Years 15-21" payment requirement on the Nation with full awareness of IGRA's Secretarial review mandate forms the crux of the Nation's case.

Unable to attack these key underpinnings, the State seeks to reframe the Nation's position as a challenge to the panel majority's interpretation of the Compact. But the Nation's argument (as made both to the district court and here) is not remotely susceptible to the State's charge. The Nation accepts the panel majority's contractual interpretation for purposes of this judicial challenge, but steadfastly maintains that the majority, in manifest disregard of IGRA, went beyond interpretation to impose a payment obligation on the Nation that had not first been reviewed and approved by the Secretary. While the State spills a great deal of ink responding to arguments the Nation has not made, its sole rebuttal to

the Nation's actual (and entirely straightforward) contention distills down to the proposition that "the Secretary *approved … the ambiguity*" that the panel majority found to inhere in the Compact regarding the disputed payment obligation. State Br. 37 (emphasis added). But the notion that the Secretary (apparently unwittingly, and with nary a word on the subject) approved an ambiguity flies in the face of IGRA's bedrock requirement that the Secretary must expressly consider and approve revenue-sharing provisions. The State's admission that she did not leaves no doubt that the panel majority acted in manifest disregard of the law in nevertheless imposing a "Years 15-21" payment obligation on the Nation. The district court had an obligation to rectify that disregard of the law and committed reversible error in declining to do so.

ARGUMENT

I. The Panel Majority Acted in Manifest Disregard of IGRA's Secretarial Approval Requirement, and the State Has Offered No Credible Argument to the Contrary.

A. The Nation Does Not Challenge the Majority's Compact Interpretation, and Its Argument Is Not Predicated on the Notion that the Majority Amended the Compact.

Given the State's repeated efforts to reframe the Nation's arguments, it is necessary at the outset to confirm what the Nation does not argue, before turning to the State's failure to provide any valid counter as to what the Nation does contend.

The State repeatedly makes two claims about the Nation's position. First, the State maintains that "the Nation's theory … presupposes that the Panel committed an error of contractual interpretation," which cannot support a manifest disregard challenge. State Br. 2-3. But as the Nation emphasized in its opening brief:

> While the Nation disagrees with the panel majority's interpretation of both the Compact text and the extrinsic evidence, it understands the limitations on judicial review of arbitration awards and has not sought to relitigate those issues. The Nation limits its challenge here, as it did in the district court, to the legality of the majority's order requiring it – in manifest disregard of IGRA – to make continuing payments to the State even though the Secretary has yet to approve them.

Nation Br. 3. Hence, while the State repeatedly portrays the Nation as challenging the majority's construction of the Compact, in its forty-nine-page brief the State identifies not a single instance of the Nation doing so.

The Nation's acceptance of the majority's contractual construction for purposes of its manifest disregard claim renders entirely beside the point the State's repeated protestations that the panel used "orthodox methods of contractual interpretation," State Br. 24, and produced "a well-reasoned decision supported by clearly applicable principles of contract law," *id.* at 31. For even if the majority's construction of the Compact amounted to a textbook model of contractual analysis, its decision to then impose that construction on the Nation absent Secretarial approval would be in manifest disregard of IGRA. IGRA did not preclude the

majority from interpreting the Compact, but it certainly governed the scope of its authority to enforce an interpretation falling outside of the Secretary's cognizance.

Analogously, an arbitration panel could accurately interpret an IGRA compact as calling for a tribe to pay a state gaming tax. But even if its contractual interpretation were flawless, it still could not *impose* that tax burden on the tribe because doing so would be in manifest disregard of IGRA's prohibition against state taxation of tribal gaming, 25 U.S.C. § 2710(d)(4). Similarly, a panel could accurately interpret a services contract to require racial discrimination in employment, but it could not *impose* such a requirement on a party to that contract without manifestly disregarding Title VII. In both examples, there would exist no colorable basis for the panel to impose an unlawful outcome, regardless of the accuracy of its contract interpretation. Such is the case here, where the panel majority imposed a payment obligation that the Secretary, by the majority's own accounting, had not approved, rendering the State's persistent extolling of the quality of the majority's contract interpretation irrelevant.

Second, while it is not entirely clear why the State believes this to be fatal, it repeatedly ascribes to the Nation the position (as did the district court) that because the panel majority resolved an ambiguity in the Compact, it amended the Compact terms, and for that reason went astray. *See*, *e.g.*, State Br. 1-3, 17, 29, 34-35; SPA-13, SPA-22-24. The Nation's argument, however, is that the majority went off

course in enforcing its resolution of the perceived Compact ambiguity where it was clear that the Secretary had not approved the term imposed by the majority.

Hence, as the Nation stated in its opening brief, this would be a different case had the panel majority resolved what it viewed as the ambiguity over renewal period payments by pointing to extrinsic evidence establishing that the Secretary actually understood that payments would continue during the "Years 15-21" period. What ran afoul of IGRA's Secretarial mandate is not that the majority resolved an ambiguity in the Compact (and hence purportedly amended it). It is that the majority found no language in the Compact that would have placed the disputed payment obligation before the Secretary, and then resolved the ambiguity on the basis of extrinsic evidence that also indisputably was not before the Secretary, and hence cannot be said to have satisfied the Secretarial approval mandate. The Nation's case, in sum, is about approval, not about amendment.

B. IGRA's Secretarial Approval Requirement Is Clearly Applicable Law.

The State next claims that "the Nation has not even identified a specific law that clearly conflicts with the Panel's determination, much less demonstrated how the Panel totally disregarded it." State Br. 30 n.6. In fact, in its opening brief, the Nation explained, as it did to both the district court and the panel, the "well-defined and explicit requirement of IGRA, its implementing regulations, and settled Department policy that compact terms may not lawfully be enforced unless

they have been reviewed and approved by the Secretary," Nation Br. 7 (citing 25 U.S.C. §§ 2710(d)(8)(A) and 2710(d)(3)(B) and 25 C.F.R. § 293.4).

The State argues that these provisions "are not implicated by the Panel's interpretation of the Compact or issuance of the Awards" because "by their plain terms [the provisions] apply only to the approval of new compacts or amendments to existing compacts," State Br. 25-26, and "the Panel neither created a new compact nor amended the existing Compact," *id.* at 43-44.

But IGRA's Secretarial review mandate is not so readily evaded. Tribes may lawfully conduct Class III gaming on Indian lands "only" under a compact "that is in effect," 25 U.S.C. § 2710(d)(1)(C), and a compact "shall take effect only" after approval by the Secretary, *id.* § 2710(d)(3)(B). *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1097 (9th Cir. 2003) ("IGRA makes class III gaming lawful on Indian lands only if such activities are … conducted in conformance with a Tribal-State compact … approved by the Secretary[.]"); *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1553 (10th Cir. 1997). No compact terms are exempt. Thus, if a term purports to be part of an IGRA compact – *and to draw its legal force therefrom* – it may not be lawfully imposed on a party to the compact (that is, it may not "take effect") unless it has been subjected to Secretarial review and approval.

The question, then, is not whether the arbitral decision qualifies as an amendment or a new compact. Rather, the question is whether the panel majority enforced the "Years 15-21" payment obligation as a term of an IGRA compact drawing its force from the legal effect of that compact. It surely did. *See*, *e.g.*, A-22 ("the Nation *is obliged under ¶¶ 4(c)(1) and 12(b) of the Compact*" to make Years 15-21 payments (emphasis added)). The Secretarial review mandate, then, is clearly applicable to this controversy – and indeed, the panel majority fully recognized this to be the case. *See* A-65 ("[I]t is beyond dispute that the Panel has no legal authority to usurp the Secretary's role and *enforce a Compact term* that the Secretary did not approve[.]" (emphasis added)). The dissent did as well. *See* A-102.

The State's (and district court's) contrary position that Secretarial approval is required "*only* if the Awards constituted an amendment to the Compact (or a new compact)," State Br. 48 n.14 (emphasis added), would undermine the critical role that Secretarial review plays in the statutory scheme. For example, suppose a tribe and a state reach a side agreement conditioning the tribe's Class III gaming activities on a revenue-sharing rate double that which appears in their compact. According to the State's position, this could lawfully be enforced without Secretarial involvement because the agreement was not submitted as "an amendment to the Compact (or a new compact)," *id*. In other words, states and

tribes need bother with Secretarial approval only for terms formally submitted to the Secretary and embodied in an amendment or a new compact. Terms that purportedly draw their legal force from a compact but are embodied elsewhere – whether in an arbitration award, a side agreement, or a secret handshake – are not subject to the Secretarial review mandate at all.

This is the inevitable conclusion of the State's and the district court's position, and it flies in the face of the statutory review requirement and of the trust obligations and congressional purpose underpinning it. While the State argues that Secretarial approval is a mere procedural formality, State Br. 37, it is instead, as discussed in the Nation's opening brief, a core feature of a statutory scheme designed to foster the generation of tribal governmental revenues and to protect them from state overreach. Nation Br. 8-9. Congress imposed the Secretarial review mandate "[b]ecause the compact requirement skews the balance of power over gaming rights in favor of states by making tribes dependent on state cooperation[.]" *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010). Congress thus sought to "set[] boundaries to restrain aggression by powerful states." *Id*. (citing S. Rep. No. 100-446, at 33 (1988)). "Otherwise, States effectively would be able to leverage very large payments from the tribes, in derogation of Congress'

intent[.]"[1] Under the position taken by the State and endorsed by the district court, these bedrock protections of IGRA would be rendered meaningless.

IGRA forecloses such a blatant end-run around the Secretarial approval requirement. If a term is to be lawfully enforced – i.e., "take effect" – against a tribe as a purported provision of an IGRA compact, it must have been approved by the Secretary. As discussed next, the "Years 15-21" payment obligation was not.

C. Neither the Panel Majority's nor the District Court's Proffered Rationale Provides a Colorable Basis for the Panel's Imposition of the "Years 15-21" Payment Obligation.

A court may find manifest disregard "if the reasoning supporting the arbitrator's judgment 'strain[s] credulity' … or does not rise to the standard of 'barely colorable.'" *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 218 (2d. Cir. 2002) (quoting *Halligan v. Piper Jaffray*, 148 F.3d 197, 204 (2d Cir. 1998), and citing *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 13 (2d Cir. 1997)); *see also Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 407 (2d Cir. 2009) (manifest disregard can be found where an arbitration decision "strains credulity" (quotation marks omitted)). Such is the case here.[2]

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[1] Letter of Dep't to Little River Band of Ottawa Indians 2 (Feb. 9, 1999), https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-025946.pdf.

[2] The State contends that the Nation's reliance on *Telenor* is "misplaced" because the arbitration award in that case was upheld. State Br. 30 n.6. But the fact that

The panel majority proffered three justifications for imposing a "Years 15-21" payment obligation on the Nation even while acknowledging that the Secretary had not expressly approved or had such an obligation before her. A-65. In its opening brief, the Nation explained why each of these justifications was patently insufficient, Nation Br. 38-41. Before this Court the State defends only the first: "The Panel recognized that, while it had 'no legal authority to usurp the Secretary's role and enforce a Compact term that the Secretary did not approve,' it had 'the duty and authority to determine whether the terms of the Compact already provide for revenue sharing payments upon renewal.'" State Br. 29 (quoting A-65).

Both the quoted statements are correct. But they do not salvage the majority's imposition of an additional payment obligation because it, in fact, found that the Compact did *not* "already" provide for such payments. As the State admits, "the Panel attempted to determine the Parties' intent from the four corners of the Compact, taking into consideration the purpose of the Compact … , the term provision … , the renewal provision … , and other Compact provisions," but could find no language in any of those provisions imposing the disputed revenue-sharing obligation. State Br. 11. To the contrary, the majority found the Compact to be

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the award in question failed to meet the manifest disregard standard in no way undermines the Court's formulation of the standard.

"silent regarding the renewal period of Years 15-21" and to "not expressly address revenue sharing payment obligations during Years 15-21[.]" A-47-48. It likewise found that the extrinsic evidence viewed by the Secretary "fail[ed] to mention" a "Years 15-21" payment obligation. A-64. The inescapable conclusion *from the majority's own reasoning and analysis* is that the payment obligation was not before – and hence was not approved by – the Secretary. No "barely colorable" argument exists under which the Secretary can be said to have blessed a "Years 15-21" obligation that was not presented to her.

Perhaps recognizing this, the district court took a different tack, suggesting that because the Secretary had approved the Compact's dispute resolution provision, she had prospectively approved the interpretation of the revenue-sharing provisions later rendered by the arbitration panel. SPA-24-25. In its opening brief, the Nation explained why this approval-by-inference theory cannot be squared with IGRA's requirement of Secretarial approval. Nation Br. 46-47.

The State responds that "[n]either the Panel nor the District Court needed to 'infer' the Secretary's approval; it is undisputed that the Secretary approved the Compact[.]" State Br. 37. But the question is not whether the Secretary approved the Compact as a whole. It is rather whether she approved the "Years 15-21" payment obligation. And here is where the State's argument runs completely aground. The Secretary "approved the Compact," it asserts, "*including the*

ambiguity identified by the Panel as well as the dispute resolution provision delegating to the Panel the authority to resolve that ambiguity." State Br. 37 (emphasis added). This is plainly an argument to infer – from the Secretary's approval of the Compact's arbitration provision – approval of any and all obligations an arbitrator might subsequently interpret the Compact to require, regardless of whether such obligations were within the cognizance of the Secretary, and regardless of their consistency with IGRA.

But the inference, and the very notion that the Secretary "approved … the ambiguity," strain credulity. A contractual ambiguity, by definition, involves terms reasonably susceptible to multiple interpretations. *Steiner v. Lewmar, Inc.*, 816 F.3d 26, 32 (2d Cir. 2016). In the context of an IGRA compact, if compact terms are, for example, reasonably susceptible to being interpreted to require a tribe to pay a state gaming tax, and conversely not to require the tax, it simply cannot be said that, by virtue of having approved a dispute resolution provision in that same Compact, the Secretary approved a subsequent interpretation favoring the tax.[3]

[3] To be sure, an arbitrator could resolve the ambiguity in favor of requiring the tax, but it could not lawfully enforce that interpretation against the tribe other than in manifest disregard of IGRA's gaming tax prohibition. This is especially evident in the case of compacts deemed approved by the Secretary "only to the extent the compact is consistent with the provisions of [IGRA]," as was the Compact at issue here, A-163-64 (brackets in original).

A purported ambiguity involving revenue-sharing terms is no different and even more aptly illustrates the infirmity of the State's logic. It simply strains credulity to say that the Secretary applied the requisite "great scrutiny" that she devotes to revenue-sharing provisions, Nation Br. 8-9, 27-28, by approving without comment an ambiguity regarding almost seven years of payments totaling nearly $1 billion, especially where that ambiguity took the form of utter contractual silence (matching the Secretary's own).

The infirmity of the district court's reasoning in inferring approval of a contract term subject to a requirement of independent third-party approval is well illustrated by the Third Circuit's decision in *In re Nortel Networks Inc.*, 737 F.3d 265 (3d Cir. 2013). There the Circuit asked the simple question: "[H]ow could a judge 'authorize' [a contract term] … if he or she did not recognize the parties had agreed to [that term]?" *Id*. at 272. That question well distills the Nation's manifest disregard argument and the State does not have a credible answer for it.

The State is left to argue that the Nation did not "cite this case or make this argument" to the panel and "[i]n order to intentionally disregard the law, the arbitrator must have known of its existence[.]" State Br. 27 (quotation marks omitted). This is not a serious argument. The Nation plainly argued to the panel that the Secretary could not have approved a compact term nowhere mentioned in the Compact or in the parties' approval submissions. *See*, *e.g.*, A-238 ("The

Compact makes no reference whatsoever to payments" beyond a fourteen year period.) and A-269 ("[T]he State is asking this Panel to … bless a Compact term that the Secretary never considered and clearly did not bless."). And "the law" on which the Nation's manifest disregard challenge rests is IGRA's Secretarial review mandate, not *Nortel*. *Nortel* simply illustrates (albeit in powerful fashion) the fatal flaw in the State's reasoning, adopted by the district court, that the Secretary can be said to have approved a Compact ambiguity where there is no indication that she was even aware of the ambiguity, and where the panel majority resolved that ambiguity seventeen years later based on extrinsic evidence that was not before her when she reviewed the Compact.

D. The Majority's Acknowledgment of IGRA's Secretarial Review Mandate Does Not Insulate It Against a Manifest Disregard Challenge.

The State (like the district court) asserts that because the majority acknowledged IGRA's Secretarial approval requirement and rejected the Nation's arguments regarding it, the award is therefore insulated from a manifest disregard challenge. State Br. 28-29; SPA-24. But Second Circuit precedent is clear that the standard "is not confined to that rare case in which the arbitrator [makes] explicit acknowledgment of wrongful conduct[.]" *Westerbeke*, 304 F.3d at 218. In *New York Telephone Co. v. Communications Workers of America Local 1100*, 256 F.3d 89 (2d Cir. 2001), this Court affirmed vacatur where the arbitrator explicitly

acknowledged the party's arguments under Second Circuit precedent, *id*. at 91, and then "explicitly rejected" them, *id*. at 93. Nor is it "necessary for arbitrators to state that they are deliberately ignoring the law." *Halligan*, 148 F.3d at 204. In *Hardy v. Walsh Manning Securities, L.L.C.*, 341 F.3d 126 (2d Cir. 2003), the arbitral award was vacated under the manifest disregard standard where the arbitrator disregarded "the same principles [of governing law] that it purported to apply" and "no reading of the facts [could] support the legal conclusion" drawn by the arbitrator. *Id*. at 130. For the reasons explained above, *see supra* Section I.C., that is precisely the case here.

E. Binding Arbitration Agreements Provide No License to Violate Federal Law.

The State argues that "the Nation asked the District Court, and now asks this Court, to overrule the Parties' agreement to final and binding arbitration[.]" State Br. 40. This is yet another response to an argument the Nation has not made. The State's suggestion that the Nation is trying to back out of its agreement to arbitrate ignores the reality that arbitrators, like everyone else, must obey the law.

The scope of a party's contractual consent to arbitrate is limited, like all contractual obligations, by the requirements of existing law. *Resolution Tr. Corp. v. Diamond*, 45 F.3d 665, 673 (2d Cir. 1995) (Contracting parties "are presumed to accept all the rights and obligations imposed on their relationship by state (or federal) law."). This is particularly so when the law in question is the very federal

statute under which the contract was entered. The first sentence of the Compact says it was "made and entered … pursuant to the provisions of the Indian Gaming Regulatory Act," A-106. The requirements of IGRA – including the Secretarial approval requirement – accordingly are baked into the Compact. The arbitral order at issue here fell outside those lawful bounds. The Nation did not consent to such an order by consenting to arbitration, nor could it legally have done so. It was constrained by the limits of IGRA – as were the panel and the State. Nothing about the fact that the Nation "did not object to arbitration," State Br. 10, "freely participated" in it, *id.* at 1, and agreed it was "binding," *id.* at 39, alters those limits in the slightest.

F. Vacatur Presents No Conflict with the Federal Arbitration Act.

The State next seeks refuge in the Federal Arbitration Act, asserting that

> nothing in IGRA or the underlying public policy requires or permits the Secretary to approve an arbitral decision interpreting the scope of an existing compact. Further, any such policy would be directly contrary to and trumped by the FAA, which was enacted to overcome resistance to arbitration and instill a national policy favoring it.

State Br. 33. In support of this proposition the State cites *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1237 (10th Cir. 2018) (noting lack of authority supporting party's "contention that the policies underlying IGRA are more important than the policies underlying the FAA").

Yet again, the State misstates the Nation's argument, this time to erect an illusory conflict between the FAA and the Nation's invocation of IGRA. The Nation's challenge is premised on the Secretary's exclusive authority and obligation under IGRA to approve *revenue-sharing provisions*. The Nation has nowhere suggested that IGRA confers jurisdiction on the Secretary "to approve an arbitral decision." That authority belongs to the courts, as recognized by the FAA, *see* 9 U.S.C. § 10(a), and pursuant to common law doctrines including manifest disregard, *see Westerbeke*, 304 F.3d at 208-09. And the manifest disregard doctrine is designed *precisely* to ensure that the FAA's policy favoring the enforcement of arbitral decisions does not *itself* become a mechanism for insulating arbitral outcomes otherwise prohibited by law from correction by the courts. *See Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 138-39 (2d Cir. 2007) (recognizing "deference appropriately due arbitral awards and the arbitral process" but vacating award and stating that "[a] decision of an arbitrator … is not totally impervious to judicial review" and that "a court may vacate an award if it exhibits a manifest disregard of the law" (quotation marks omitted)); *see also Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121 (2d Cir. 2011) (recognizing FAA's "strong presumption in favor of enforcing arbitration awards" but also that "an arbitral decision may be vacated when an arbitrator has exhibited a manifest disregard of law" (quotation marks omitted)); *Folkways Music*

Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993) (acknowledging both the need "to advance the goals of arbitration" and the ability of courts to vacate awards "for an overt disregard of the law"). So long as the Nation's challenge satisfies the manifest disregard standard – and it does – a decision in favor of the Nation would present no conflict with the FAA's policy favoring enforcement of arbitral decisions. Simply put, the FAA does not countenance, let alone immunize, the enforcement of arbitral decisions issued in manifest disregard of applicable law.

G. The Nation Has Not Sought Vacatur Based on Public Policy.

Finally, the State seeks to recast the Nation's challenge as based on public policy. According to the State, "the Nation cannot salvage its deficient manifest disregard argument on the basis of the purported public policy underlying IGRA" because "an alleged conflict with a purported public policy is not a ground for vacatur in this Circuit." State Br. 32. The State is referring to the Nation's discussion of the Department's interpretation of IGRA as requiring "great scrutiny" of revenue-sharing provisions. *See* Nation Br. 27-28. Here again the State seeks to rewrite the Nation's argument instead of responding to it.

The Nation did not base its motion for vacatur (and does not base this appeal) on public policy grounds; instead, the Nation "brings this appeal to vacate an arbitration award issued in 'manifest disregard of the law.'" Nation Br. 1. The

Nation invoked the requirement of great scrutiny as a core element of that challenge.

As discussed above, the manifest disregard standard requires that the law ignored by an arbitrator be "well defined, explicit, *and clearly applicable to the case.*" *N.Y. Tel. Co.*, 256 F.3d at 91 (emphasis added) (quoting *Halligan*, 148 F.3d at 202). That revenue-sharing provisions such as the one at issue here are singled out for great scrutiny by the Secretary demonstrates the clear applicability, and importance, of the Secretarial review requirement in this case. And that is precisely how the Nation has framed the point both in this Court and the district court. *See* Nation Br. 27-28 (discussing "great scrutiny" requirement and stating that "this reflects the Department's rigorous fidelity to IGRA's Secretarial review mandate *and the clear applicability of the mandate here*" (emphasis added)); Nation Dist. Ct. Br. 11 (W.D.N.Y. Dkt. 2-1).

* * *

In sum, the Nation has established, and the State has not viably refuted, that (1) IGRA's Secretarial review requirement is clearly applicable law; (2) the majority was aware of the requirement and knowingly issued its award while understanding that the Secretary had not considered or approved the "Years 15-21" payment obligation it imposed on the Nation; and (3) the justifications for the majority's decision to do so strain credulity. Under these rare but important

circumstances, the Nation has carried its burden of establishing the manifest disregard of the law that requires vacatur of the arbitration award.

II. The State Offers No Viable Argument Against Referral Under the Primary Jurisdiction Doctrine.

For the reasons stated above, the record establishes that the Secretary did not review and approve the "Years 15-21" payment obligation imposed by the majority and this Court can and should so find without having to invoke the primary jurisdiction doctrine. In the event the Court remains unsure, however, the doctrine provides an eminently sensible and appropriate means to resolve that uncertainty. In arguing to the contrary, the State employs the same approach to the Nation's primary jurisdiction arguments as it takes with the Nation's manifest disregard arguments – namely, to respond to arguments the Nation has not made. And again, the State's responses to the Nation's actual arguments miss the mark badly.

A. A Referral Under the Primary Jurisdiction Doctrine Does Not Require a Court to "Decline Its Jurisdiction."

The State first asserts that "the District Court clearly had jurisdiction" and contends that in invoking the primary jurisdiction doctrine the Nation was asking "the District Court to decline its jurisdiction[.]" State Br. 39-40. But the State's argument simply misconceives a key premise of the doctrine: "Referral of the issue to the administrative agency does not deprive the court of jurisdiction[.]" *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993).

B. Binding Arbitration Agreements Are No Barrier to Referral Under the Primary Jurisdiction Doctrine.

The State also argues that the Nation's request for referral to the Secretary "is directly contrary to the agreed-to (and exclusive) arbitration provisions in the Compact," State Br. 31, and "[t]he Nation cannot now invoke the primary jurisdiction doctrine to circumvent [the] agreement [to arbitrate]," *id.* at 39. But as with any contractual provision, the scope of the Nation's contractual consent to arbitrate was governed by the requirements of existing federal law. *See Resolution Tr. Corp.*, 45 F.3d at 673. Consequently, the agreement to arbitrate did not – because it lawfully could not – encompass any agreement to conduct gaming pursuant to compact terms not reviewed and approved by the Secretary. Referral to the Department of the question whether the "Years 15-21" payment obligation imposed by the panel majority was reviewed and approved by the Secretary is no breach of the arbitration agreement, but rather an avenue for ensuring that the product of that agreement complies with governing federal law.

C. The Nation Has Nowhere Proposed Referral to the Department to Allow It to Interpret the Compact.

The State next asserts that referral to an agency under the primary jurisdiction doctrine is inappropriate for questions of contract interpretation. Here the State invokes several factors that this Court has identified as relevant to the appropriateness of a referral under the doctrine. *See Ellis v. Tribune Television*

Co., 443 F.3d 71, 82 (2d Cir. 2006) (stating that while "[n]o fixed formula exists for applying the doctrine …. our inquiry has generally focused on four factors[.]" (quotation marks omitted)). The four factors discussed in *Ellis* are "(1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made." *Id.* at 82-83.

Under the first *Ellis* factor, the State argues that "it is well established that contract disputes are legal questions within the competence of the courts," State Br. 42, and the Department does not "possess[] 'special competence' to advise the Court as to the Parties' dispute over the meaning of an ambiguous contract term," *id.* at 43 n.9. This simply recycles the State's meritless argument that the Nation's vacatur challenge turns on the majority's interpretation of the Compact. But just as the Nation does not base its motion to vacate on the ground that the majority misinterpreted the Compact, the Nation does not request referral of any contract interpretation question. *See* Nation Br. 49 (explaining that "the Nation did not request [district court] referral to the Department to interpret what 'the terms of the Compact … provide for'").

Referral to the Department of the question whether it approved the Compact as interpreted by the majority (i.e., with a "Years 15-21" obligation) is a factual question that *accepts the majority's interpretation as the very premise of the question referred*. In other words, this appeal does not in the least turn on whether the majority's interpretation of the Compact was correct, but it very much turns on the factual question whether the Secretary approved the specific payment obligation required by that interpretation (and again, the majority made no finding or suggestion that she did). This question is especially appropriate for referral. *See*, *e.g.*, *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 58-59 (2d Cir. 1994) (noting that primary jurisdiction applies to resolve issues "usually of a factual nature"); *Johnson v. Nyack Hosp.*, 964 F.2d 116, 122 (2d Cir. 1992) ("Primary jurisdiction … recognizes that … [an] agency's expertise may … prove helpful to the court in resolving difficult *factual* issues."). Moreover, the Department possesses precisely the "special competence," *Ellis*, 443 F.3d at 81, needed to advise this Court as to the facts of the Secretary's Compact review because the Secretary actually conducted that review, and did so as an aspect of the Department's "particular field of expertise," *id.* at 83 – namely, the implementation of IGRA's review requirements. *See* 25 U.S.C. § 2710(d); 25 C.F.R. § 293.4; *see also*, *e.g.*, *Fulton Cogeneration Assocs. v. Niagara Mohawk Power Corp.*, 84 F.3d 91, 97 (2d Cir. 1996) ("The primary jurisdiction doctrine

applies whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." (quotation marks omitted)).[4]

With respect to the second *Ellis* factor – whether the question at issue is particularly within the agency's discretion – the State concedes that "the Secretary exercises discretion in the *authorization* of IGRA compacts[.]" State Br. 44; *see also* 25 U.S.C. 2710(d)(8)(B). But then the State claims, somewhat remarkably, that Secretarial authorization "is not at issue" in this case. State Br. 44. That is nothing more than wishful thinking. In fact, Secretarial authorization lies at the heart of the Nation's manifest disregard challenge and the question whether the Secretary approved a "Years 15-21" payment obligation constitutes the explicit subject matter of its proposed referral. The State again simply evades these points when it asserts that referral is inappropriate because the Secretary has no "authority

[4] The State cites *Fulton* for the proposition that "the Secretary's authority over the formation of contracts gives it no jurisdiction to adjudicate subsequent breach of contract disputes." State Br. 4; *see also id.* at 44. But the Nation is not seeking referral so that the Department may adjudicate anything, much less a question of breach. And in any event *Fulton* addressed "issues of *contract interpretation*[.]" 84 F.3d at 97 (emphasis added); *see also Natixis Fin. Prods., LLC v. Pub. Serv. Elec. and Gas Co.*, No. 2:13-cv-07076 (WHW), 2014 WL 1691647, at *6 (D.N.J. Apr. 29, 2014) (unpublished) ("[T]he only issue [in *Fulton*] was one of interpretation of a purely contractual term[.]"). As the Nation is not here challenging the majority's "contract interpretation," let alone seeking referral of the validity of that interpretation to the Department, *Fulton* in no way undermines the case for referral.

or discretion to resolve the Parties' underlying contractual interpretation dispute, much less exercise quasi-appellate jurisdiction over the Awards." *Id.* The Nation has made no such claim. It simply contends that, should this Court harbor doubt as to whether the Secretary in fact approved the "Years 15-21" payment obligation imposed by the panel majority, then referral is a sensible and appropriate means to resolve that question. For this same reason, the Nation is not seeking an "'arbitral mulligan[].'" State Br. 40 (quoting *Arrowood Indem. Co. v. Equitas Ins. Ltd.*, No. 13cv7680 (DLC), 2015 WL 4597543, at *5 (S.D.N.Y. July 30, 2015)).

D. Referral Will Eliminate the Risk of Placing the Courts and the Agency at Cross-Purposes.

Finally, the State asserts that referral is inappropriate under the third and fourth factors discussed in *Ellis*: "(3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made." State Br. 42 (quoting *Ellis*, 443 F.3d at 83). According to the State, these factors do not support referral because the Department has already "deferred to the arbitration process and made clear that it does not consider itself the proper authority to decide the Parties' contract-law dispute." State Br. 45.

First, and again, the Nation does not invoke the primary jurisdiction doctrine to have the Department "decide the Parties' contract-law dispute." It invokes the doctrine to aid judicial resolution of whether IGRA's Secretarial approval requirements have been satisfied. And no reading of the Department's

correspondence or actions related to this matter supports the notion that the Department deferred to the panel majority's determination on that score, or to any arbitral outcome rendered in manifest disregard of IGRA. The Department's trust responsibilities to the Nation and IGRA's Secretarial review provisions would foreclose any such deference.

The State's claim in this regard that the Nation has taken "pains to obscure from this Court" the course of recent correspondence with the Department is highly inappropriate. State Br. 45. The Nation accurately and comprehensively laid out that correspondence both in the district court and in its opening brief here, Nation Br. 19-21. And no amount of charged rhetoric from the State can change the fact that the Department has expressed a willingness to consider the renewal-period payment obligation upon State certification of the submission, and that it would undoubtedly do so in response to a referral from this Court. A-291.

Second, while "[n]o fixed formula exists for applying the doctrine of primary jurisdiction," *Ellis*, 443 F.3d at 82, the very "aim of the doctrine … is to ensure that courts and agencies with concurrent jurisdiction over a matter do not work at cross-purposes," *Fulton*, 84 F.3d at 97; *see also Ellis*, 443 F.3d at 87-88 (primary jurisdiction doctrine operates to avoid the "danger of inconsistent administration of federal policy" between agencies and courts (quotation marks omitted)).

Here, the Department stated in its January 2017 Technical Assistance Letter that when the Secretary reviewed and approved the Compact in 2002, "*our understanding of the revenue sharing provision … was that its duration was for 14 years.*" A-165 (emphasis added). At a minimum, this statement establishes that the district court's conclusion that the "Years 15-21" payment obligation was lawfully approved by the Secretary is in serious tension with the Department's own understanding of its actions. And the stakes are far from the mere procedural formalities the State portrays them to be. In that same letter, the Department explicitly stated that, as a matter of Department policy, requiring additional payments beyond the fourteen-year duration the Secretary approved – i.e., into the "Years 15-21" period – would "be tantamount to an increase in revenue sharing, requiring additional meaningful concessions from the State [e.g., increased exclusivity] with corresponding substantial economic benefit to the Nation." A-166. That is, the Department's stated view is that enforcing the "Years 15-21" payment obligation as imposed by the majority would violate IGRA. *Id*. (discussing *Rincon*).[5]

[5] The State claims that the letter "on its face" disavowed its applicability to compacts "'not formally submitted to this Office for review and approval.'" State Br. 45 n.10 (quoting letter at A-165). But that boilerplate disclaimer is irrelevant because the Compact *was* "formally submitted … for review and approval" in 2002. Indeed, the Department issued the letter because "ensuring tribes and states have accurate information about *the Department's past decisions* … is critical." A-165 (emphasis added). Moreover, as discussed in the Nation's opening brief, while

To the extent, then, that this Court harbors any uncertainty as to whether the Secretary approved the disputed payment obligation in 2002, not seeking the input of the Department would pose a substantial risk that the Nation would thereafter be making payments ordered by the federal courts but deemed unlawful by the very agency charged with making that determination in the first instance. Nor would the risk be confined to this case. The Department could well review other proposed tribal-state compacts in the future, with payment and exclusivity terms similar to those imposed by the majority here, and find them violative of IGRA under the same "regulatory requirements[] and current policies" set forth in its letter to the Nation. A-165. It could likewise do so in technical assistance letters, rulemaking, or other policy guidance mechanisms. The result would be that various tribes and states would be operating under conflicting views of the boundaries of federal law and policy. The primary jurisdiction doctrine is purpose-built to guard against the courts and agencies acting at "cross-purposes" in this fashion, with the resulting "inconsistent administration of federal policy" that the doctrine seeks to avoid. *Fulton*, 84 F.3d at 97; *Ellis*, 443 F.3d at 87-88.

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the Department withdrew the quoted letter in deference to the onset of the arbitration, *see* Nation Br. 20, it has never disavowed the views stated therein, *see id.* at 20-21.

CONCLUSION

The Nation respectfully requests that this Court reverse the district court's decision and remand with instructions to vacate the panel majority's award insofar as it obligates the Nation to make revenue-sharing payments during the "Years 15-21" period. Alternatively, the Nation requests that this Court stay this appeal and refer to the Department the question whether the Secretary in fact approved such a payment obligation as is required by IGRA.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-Point Times New Roman proportional font and thus complies with Rule 32(a)(5)(A) of the Federal Rules of Appellate Procedure. Excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 6,873 words and thus complies with Local Rule 32.1(a)(4)(B).

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