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

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

INTRODUCTION

The Seneca Nation ("Nation"), a federally recognized Indian Nation, brings this appeal to vacate an arbitration award issued in "manifest disregard of the law." *See Westerbeke Corp. v. Daihatsu Motor Co. Ltd.*, 304 F.3d 200, 208 (2d Cir. 2002) ("[A]n arbitral decision may be vacated when an arbitrator has exhibited a manifest disregard of law." (quotation marks omitted)). While stringent standards apply to such a challenge, the award in question is exceptional in its direct and open disregard of the requirements of a governing federal statute. The stakes here – in terms of core legal principles and the financial consequences for the Nation's governmental budget – are likewise extraordinary.

The matter stems from a dispute between the Nation and the State of New York ("State") over a Class III gaming compact ("Compact") executed in 2002 pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"). The Compact – which the Secretary of the Interior ("Secretary") reviewed and approved (as mandated by IGRA) – required the Nation to share a substantial portion of its gaming revenues with the State for the first fourteen years of gaming operations in exchange for a limited measure of "exclusivity," with the State restricting some forms of competitive gaming in a defined geographic region in western New York. Under those terms, the Nation paid the State over $1.4 billion between 2002 and 2017. These payments were made at the highest rate ever sanctioned since IGRA's enactment in 1988.

When the Nation's fourteen-year payment obligation ended, the State asserted that the Nation was required to continue making payments through the end of the Compact term. However, IGRA prohibits tribes from making revenue-sharing payments to states that have not been reviewed and approved by the Secretary to ensure their compliance with IGRA. The payments sought by the State not only lacked any basis in the text of the Compact, they also had never been reviewed and approved by the Secretary. The Nation therefore disputed the State's claim for those payments and the matter proceeded to arbitration in front of a three-member panel, where the Nation contended that (1) the Compact cannot reasonably be interpreted to require such payments; and (2) the payments cannot be imposed absent Secretarial approval.

The panel majority concluded that the text of the Compact is so ambiguous that it cannot be read to impose the payment obligation claimed by the State. The majority nevertheless held in favor of the State based on extrinsic evidence, none of which was before Secretary Gale Norton when she approved the Compact in 2002. The majority made no finding that the Secretary had affirmatively reviewed and approved the payment obligation it imposed on the Nation, yet it went ahead and imposed that obligation of its own accord. Arbitrator Kevin Washburn, a former Assistant Secretary of Indian Affairs in the Department of the Interior ("Department") whose responsibilities in that position included compact review and approval, dissented, concluding that the Compact text unambiguously defeats the State's argument for additional payments, that the extrinsic evidence corroborates the text, and that under neither the majority's reading of the Compact nor his can the Secretary be said to have approved the disputed payments.

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.

The district court, which declined to hold oral argument despite the legal and financial stakes in this case, affirmed the majority's ruling. It held that because the Secretary had reviewed and approved the Compact in 2002, that approval extended *by implication* to any subsequent obligations imposed by an arbitration panel under the Compact. But settled law and policy forbid inferring Secretarial approval in this way. The Secretary must review compact revenue-sharing requirements with "great scrutiny" to ensure "that Indian tribes, not states," are the "primary beneficiaries of Indian gaming revenues."[1] This stems from the Department's affirmative "trust obligation to Indian tribes to ensure that the benefit received by the State . . . is appropriate in light of the benefit conferred on the tribe."[2]

The Nation urged the district court that, to the extent it harbored any doubt as to whether the Secretary had approved the continuing payments and rendered them lawful, it should refer the question to the Department under the primary jurisdiction doctrine, as the Department is best positioned to clarify that threshold issue and has expressed its willingness to do so. The district court declined to make the referral, thereby depriving itself (and this Court) of the views of the expert agency.

In the end, the panel majority imposed, and the district court upheld, substantial additional revenue-sharing payments without establishing (whether through the Compact text, record evidence, or a primary jurisdiction referral) that the Secretary had reviewed and approved such payments as mandated by the governing federal statute. The manifest disregard standard is a stringent one, but it

[1] Letter of Dep't to Mass. ("Letter to Mass.") at 11 (Oct. 12, 2012), https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/oig/webteam/pdf/idc1-028222.pdf.

[2] Letter of Dep't to Pueblo of Santa Clara ("Letter to Santa Clara") at 1 (Nov. 21, 2001), https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-025720.pdf.

is not a mandate for judicial abdication. Vacatur is called for under these extraordinary circumstances.

JURISDICTION

The district court's jurisdiction arose under 28 U.S.C. § 1331 because the dispute involves a gaming compact entered under a federal statute. The district court entered final judgment disposing all parties' claims on November 12, 2019. SPA-31. A notice of appeal was timely filed on December 3, 2019. A-419. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

Whether the arbitration panel majority acted in manifest disregard of the law in imposing substantial additional revenue-sharing payments on the Nation despite a lack of Secretarial approval.

Whether the district court should have referred the issue of Secretarial approval to the Department for its views under the primary jurisdiction doctrine.

STANDARD OF REVIEW

This Court "review[s] *de novo* a district court's review of arbitration awards under the 'manifest disregard of law' standard[.]" *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997). The same is true for its review of the district court's decision "not to apply the primary jurisdiction doctrine." *Ellis v. Tribune Television Co*., 443 F.3d 71, 83 n.14 (2d Cir. 2006).

STATEMENT OF THE CASE

This appeal arises from a judgment by the United States District Court for the Western District of New York (the Honorable William M. Skretny). The district court denied the Nation's June 6, 2019, petition to vacate the arbitration award and granted the State's July 12, 2019, cross-petition to confirm the award. *Seneca Nation of Indians v. New York*, No. 19-CV-735S, 2019 WL 5865450 (W.D.N.Y. Nov. 8, 2019).

I. Statutory Framework

The Nation operates gaming activities on its Territories as an incident of its sovereignty. Congress enacted IGRA in 1988 to provide a framework for such gaming. IGRA calls for the negotiation of a compact between a state and an Indian nation to govern the Indian nation's operation of casino-style (or "Class III") gaming facilities. *See* 25 U.S.C. § 2710(d). Compacts may address matters such as the location and licensing of facilities, game offerings, and "any other subjects that are directly related to the operation of gaming activities." *Id.* § 2710(d)(3)(C). While compacts may include provisions for "the assessment by the State of . . . such amounts as are necessary to defray the costs of [gaming regulation]," *id.* § 2710(d)(3)(C)(iii), states may not impose "any tax . . . or other assessment" on the gaming activity, *id*. § 2710(d)(4).

Since IGRA's enactment, a number of states and Indian nations have included in their compacts revenue-sharing agreements, under which an Indian nation shares a portion of its gaming revenues with a state in exchange for the state's guarantee that the nation will enjoy the exclusive right to conduct certain forms of gaming in the state or within a defined geographic region. The State and the Nation included a revenue-sharing provision in their Compact, and it is central to this dispute.

It is a 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. Section 2710(d)(8)(A) provides that "[t]he Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State[.]" Section 2710(d)(3)(B) provides that a "compact shall take effect *only* when notice of *approval by the Secretary* of such compact has been published by the Secretary in the Federal Register" (emphases added). The corresponding regulations likewise provide that "[c]ompacts [and] . . . . [a]ll amendments . . . are subject to review and approval by the Secretary." 25 C.F.R. § 293.4. Under these requirements, compact provisions that have not been approved by the Secretary may not lawfully be enforced.

Compact provisions calling for the sharing of tribal gaming revenues with a state are subject to particularly exacting Secretarial review because IGRA's core purpose is "to protect [Indian] gaming as a means of generating *tribal* revenue." 25 U.S.C. § 2702(3) (emphasis added). *See Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1034-35 (9th Cir. 2010) (stating that "[t]he only *state* interests mentioned in § 2702 are protecting against organized crime and ensuring that gaming is conducted fairly and honestly" and it is thus "incorrect that pursuit of state general economic interests is consistent with IGRA's purposes"). Thus, the Department has singled out revenue-sharing provisions as demanding "*great scrutiny*, in accordance with the principle that Indian tribes, not states or other parties, should be the primary beneficiaries of Indian gaming revenues."[3] Revenue-sharing provisions are also

> *carefully scrutinized* . . . . because the IGRA does not authorize states to impose a tax . . . on Indian tribes to engage in class III gaming. *See* 25 U.S.C. § 2710(d)(4). . . .
>
> To enforce this statutory provision, the Department . . . . examine[s] whether, in exchange for the payment, a state offers . . .

[3] Letter to Mass., *supra* note 1, at 11. *See also* Letter of Dep't to Pueblo of Isleta at 2 (July 21, 2015), https://www.bia.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/as-ia/oig/oig/pdf/idc1-031294.pdf ("We review revenue sharing requirements in gaming compacts with great scrutiny."); Letter of Dep't to Habematolel Pomo Tribe ("Letter to Habematolel") at 3 (Aug. 17, 2010), https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-024698.pdf (The Secretary "review[s] revenue sharing requirements . . . with great scrutiny" to ensure they are "consistent with the purposes of IGRA[.]").

> substantial and quantifiable economic benefits to the Indian tribe. . . . [T]he payment to a state must be appropriate in light of the value of the economic benefits conferred on the tribe.[4]

Congress imposed these safeguards "[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*, 602 F.3d at 1027. Congress thus sought to "set[] boundaries to restrain aggression by powerful states." *Id*. (citing S. Rep. No. 100-446, at 33 (1988)). Secretarial review of revenue-sharing provisions is where those boundaries are drawn and enforced. "Otherwise, States effectively would be able to leverage very large payments from the tribes, in derogation of Congress' intent[.]"[5]

II. The 2002 Nation-State Class III Gaming Compact

The Nation and State executed their Compact on August 18, 2002. A-156. It provided for an initial term of fourteen years (to commence upon publication of the Secretary's approval in the Federal Register), A-115 ¶ 4(a), (b), and that, absent objection by either party, "the term of this Compact shall be renewed automatically for an additional period of seven (7) years," *id*. ¶ 4(c)(1).

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[4] Letter of Dep't to Citizen Potawatomi Nation ("Letter to Potawatomi") at 2 (Jan. 6, 2006), https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-025692.pdf (emphasis added).

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

The Compact also provided for revenue-sharing payments by the Nation in exchange for State promises of exclusivity, as follows:

> 12. EXCLUSIVITY AND STATE CONTRIBUTION.
>
> (a) Exclusivity.
>
> (1) [T]he Nation shall have total exclusivity with respect to the installation and operation of, and no person or entity other than the Nation shall be permitted to install or operate, Gaming Devices, including slot machines, within the [defined] geographic area . . . [in western New York].[6]
>
> . . . .
>
> (b) State Contribution.
>
> (1) In consideration of the exclusivity granted by the State pursuant to Paragraph 12(a), the Nation agrees to contribute to the State a portion of the proceeds from the operation and conduct of each category of Gaming Device for which exclusivity exists . . . in accordance with the sliding scale set forth below ("State Contribution"):
>
> Years 1-4
>
> 18%, with "Year 1" commencing on the date on which the first Gaming Facility established pursuant to this Compact begins operation, and with Payments during this initial period are to be made on an annual basis.
>
> Years 5-7
>
> 22%, with payments during this period to be made on a semi-annual basis.

[6] The geographic "exclusivity zone" includes parts of sixteen counties in Western New York. "Gaming Device" is defined to include two categories of devices: slot machines and video lottery gaming devices. A-109 ¶ 1(m).

Years 8-14

> 25%, with payments during this period to be made on a quarterly basis.

A-138-40.

While the exclusivity provision of paragraph 12(a) applies as long as the Compact is in effect, no provision of the Compact references any payments beyond the defined fourteen-year payment period set forth in paragraph 12(b). "Year 1" of that schedule was to begin on the date the Nation commenced gaming, A-140 ¶ 12(b)(1), which the Nation could do any time within five years after the effective date of the Compact, A-139 ¶ 12(a)(3). The initial fourteen-year term of the Compact and the fourteen-year revenue-sharing period, then, were not defined as coterminous.

III. The Secretary's 2002 Review of the Compact

After executing the Compact, the Nation and the State submitted it to the Department for review as mandated by IGRA. The facts surrounding that approval process are important to this dispute.

On September 30, 2002, after the parties had submitted the Compact, the Department sought "clarification" of several provisions, including the revenue-sharing terms. A-167. The Department stated its understanding of those terms as follows:

Subsection 12(a)(1) of the Compact provides that "the Nation shall

> have total exclusivity with respect to . . . gaming devices, including slot machines, within the geographic area defined . . ." and Section 12(b)(1) further provides that "[t]he Nation agrees to contribute to the State a portion of the proceeds from the operation and conduct of each category . . . years 1-4, 18% . . . years 5-7, 22% . . . and years 8-14, 25%."

Id. (alterations in original). The Department made no mention of a payment obligation extending beyond the "Years 8-14" period. The Department then underscored that

> [i]n order for us to approve such a provision, we need to determine that it does not violate 25 U.S.C. § 2710(d)(4) of IGRA which prohibits the imposition of any tax, fee, charge, or other assessment on an Indian tribe. . . . [T]o date, the Department of the Interior has approved payments to the State only when the State has agreed to provide substantial exclusivity for Indian gaming within the State, *i.e.*, where the compact provides a tribe with substantial economic benefits in the form of a right to conduct Class III gaming activities in the State that are on more favorable terms than any rights of non-Indians to conduct similar gaming activities.

A-167-68.

The Department asked the parties to explain how the Compact revenue-sharing arrangement met these standards. Both the State and Nation responded on October 11, 2002. A-169; A-186. The State declared that

> [t]he Compact provides that the Nation shall pay the State 18% of the net drop from the gaming devices in the first four years after gaming commences pursuant to the Compact, 22% of the net drop in years five through seven and 25% of the net drop in years eight through fourteen.

A-171. Like the Department, the State made no mention of payments beyond the fourteen-year schedule. The Nation similarly limited its discussion of payments to the fourteen-year duration set forth in the Compact text. A-193.

In terms of the value the Nation would be receiving for its payments – a critical consideration under IGRA – the Nation informed the Secretary that it would enjoy "total exclusivity with regard to the operation of VLTs and slot machines" in the exclusivity zone. A-193. The State emphasized that "the exclusivity rights purchased by the Nation effectively establish a Nation monopoly in the zone of exclusivity over the operation of slot machines and [VLTs]," and that "even outside the zone of exclusivity in New York State, no person or entity is authorized to operate slot machines and no non-Indian person or entity is authorized to operate [VLTs]." A-171-72.

The Secretary responded on November 12, 2002. A-157. Reflecting the representations of both parties, the Secretary again expressed her understanding of the payments as limited to a fourteen-year schedule:

> Section 12(a) of the Compact grants the Nation the exclusive right to operate specifically defined gaming devices within a [defined geographic zone]. In exchange for this geographic exclusivity right, Section 12 requires the Nation to make graduated revenue-sharing payments to the State (from 18% to 25% of net drop, less a local share) over the course of the 14-year duration of the Compact.

A-159 (footnote omitted).

Like the State and Nation, the Secretary made no mention of any additional revenue-sharing obligation. She declared (based on "the economic analysis provided by the Nation," A-160, which estimated the State's total receipts under the agreement at $825 million, A-193) that "the State would receive less than one billion dollars" over the duration of the payment obligation. A-160. Weighing this amount against the parties' descriptions of the effective monopoly the Nation would enjoy, she concluded that "the revenue sharing is justified," *id.*, and "consistent with IGRA," A-161.

The Secretary then determined that a separate concern not relevant here (about the potential effects of the Nation's exclusivity rights on other tribes) "counsel[ed] against an affirmative-approval" of the Compact while not compelling its rejection. A-163. She therefore allowed the Compact to go into effect, deeming it approved "but only to the extent the compact is consistent with the provisions of [IGRA]." A-163-64 (brackets in original).[7]

The Compact took effect on December 9, 2002, *see* 67 Fed. Reg. 72,968, and the Nation opened its first facility (on its Niagara Falls Territory) on December 31, 2002, A-227, commencing "Year 1" of the fourteen-year revenue-sharing period.

[7] IGRA provides a forty-five-day Secretarial review process. The Secretary may affirmatively approve or disapprove a compact within that time. Alternatively, if after review the Secretary has concerns about provisions of the compact but those concerns do not warrant affirmative disapproval, the Secretary may let the review period expire without an affirmative decision, in which case the compact will be deemed to have been approved by the Secretary, "but only to the extent the compact is consistent with [IGRA]." 25 U.S.C. § 2710(d)(8)(C).

IV. The Nation's Compact Payments to the State

When the Compact took effect in 2002, its twenty-five-percent revenue-sharing rate for the "Years 8-14" period was the highest rate ever approved by the Department since the enactment of IGRA in 1988, and the Department has yet to approve a higher rate.[8] The Nation made in excess of $1.4 billion in exclusivity payments to the State through 2016. A-284 ¶ 16; A-228.

The Nation's payment rates are based on a percentage of the "net drop" of its slot machines, defined as "money dropped into machines, after payout but before expense[.]" A-140 ¶ 12(b)(1). In other words, the payments are made without taking into account the many significant expenses associated with the operation of the Nation's gaming facilities, including labor, infrastructure, and all operating costs. A-228-29. When those expenses are factored in, the Nation's payments to the State

> accounted for 42.6% of the Nation's adjusted net income from its Class III gaming operations during the 14-year State Contribution term; and in the past three fiscal years [2014-2016], the State's cut has averaged more than 46%, with a high in 2015 of almost 49%.

A-229 (quoting sworn witness statement of Chief Financial Officer of Seneca Gaming Corporation). The State receives these payments while bearing none of the risk, operating costs, or capital expenditures associated with the Nation's

[8] Over 700 compacts, amendments, and Secretarial review letters are available at https://www.indianaffairs.gov/as-ia/oig/gaming-compacts.

gaming facilities. *Id*.

In addition, the Nation's exclusivity rights are bifurcated between slot machines and video lottery gaming devices (commonly referred to as video lottery terminals ("VLTs")). *See* A-140 ¶ 12(b)(1) (requiring revenue sharing only for each category of gaming device "for which exclusivity exists"). Thus, the State – which informed the Secretary in 2002 that the Nation would enjoy a "monopoly in the zone of exclusivity" over VLTs, A-171 – has collected slot machine revenue-sharing payments from the Nation while authorizing directly competitive VLT gaming within the Nation's exclusivity zone beginning in 2004. Three State-licensed VLT facilities (Finger Lakes Gaming & Racetrack, Batavia Downs, and Hamburg Gaming) opened in the exclusivity zone in 2004 and 2005 and continue successfully operating today. A-229. VLTs have become indistinguishable from slot machines.[9] And while the State informed the Secretary in 2002 that "even

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[9] Since 2002, the technological advances in State-licensed VLTs have resulted in a gaming device that, from a player's perspective, replicates the Nation's slot machines. The former Deputy Secretary for Gaming and Racing in Governor Cuomo's administration wrote in 2010 that

> New York State now has over 12,500 video lottery terminals at eight racetracks. These video lottery terminals play in the same manner as slot machines. . . . [The State] has machines denoted as video lottery machines that look, smell, play, and sound like slot machines to the general public.

See A-229 & n.2 (quoting Bennett Liebman, *Gambling and the New York State Constitution*, 12 Gov't L. & Pol'y J. 46, 47-48 (2010)).

outside the zone of exclusivity in New York State, no person or entity is authorized to operate slot machines," A-172, the State amended its Constitution in 2013 to permit the operation of full-fledged casinos (with slot machines) in regions across the State, *see* N.Y. Const. art. I, § 9(1). One of these lies at the very edge of the Nation's exclusivity zone.

The Nation's gaming operations have resulted in substantial benefit to the State economy. The Nation has invested over $1.2 billion in its three casino properties and is one of the largest employers in Western New York. A-230. The Nation pays more than $150 million in wages and benefits annually to approximately 3,700 gaming employees and spends $75-$80 million annually in purchases from New York vendors. *Id.* These contributions to the livelihood of employees and vendors, and the approximately 7.8 million customer visits yearly to the Nation's facilities, *id.*, yield significant economic development in the region, with concomitant benefits to the tax base for the State and local governments. Consequently, the State continues to receive substantial benefits from the Compact even in the absence of direct revenue-sharing payments.

V. The Present Dispute and Arbitration

The initial term of the Compact concluded on December 9, 2016. A-230. Because neither Party had objected, the Compact renewed on that date for an additional seven years, which will conclude on December 9, 2023. *Id.* In accordance with paragraph 12's schedule, the Nation made payments to the State based on slot machine revenues earned through December 31, 2016, or fourteen years after opening its first gaming facility. A-227. Thereafter, the State insisted that payments should continue to the conclusion of the Compact in 2023. After attempts at a resolution failed, the State commenced arbitration on September 7, 2017. A-280.

On January 7, 2019, a majority of the three-member arbitration panel, over the dissent of former Assistant Secretary of Indian Affairs Washburn, issued a Partial Final Award in the State's favor. A-24-79. On April 12, 2019, it then issued a Final Award requiring the Nation to continue making twenty-five-percent exclusivity payments beyond the "Years 8-14" period set forth in paragraph 12 and through what the majority coined a "Years 15-21" payment period. A-22-23. The majority did so despite finding that the text of the Compact's revenue-sharing provision does not expressly provide for such payments. Indeed, it found the Compact as a whole utterly ambiguous on this point. A-47. It further found that neither party had raised a "Years 15-21" payment obligation as a possibility when presenting the Compact to the Secretary for review in 2002. A-65. Finally, the majority made no claim that such an obligation was explicitly considered and approved by the Secretary as required by IGRA.

The Dissent viewed the Compact terms as "fixed and clear" in limiting the

Nation's revenue-sharing payment obligation to fourteen years. A-84. It concluded therefore that "[i]n awarding hundreds of millions of dollars of Indian gaming revenues to the State, the Panel has essentially written a new provision into the Compact" that "provides an unjustified windfall to the State." A-85. It found that the record lacked "even a modest glimmer" of evidence supporting the majority's decision. A-87. Most relevant here, the Dissent emphasized that "[i]f, as the Panel admits, the Compact is ambiguous as to the [disputed] revenue share . . . DOI [Department of the Interior] cannot be said to have considered and reviewed or approved this key provision. . . . [T]he Panel's decision has the effect of enforcing an agreement that goes beyond what was approved by DOI, thus potentially undermining DOI's important regulatory role." A-102.

VI. The Nation's Application to the Department

Prior to concluding its payment obligations in late 2016, the Nation asked for the Department's views on the Compact's payment terms and the scope of the Secretary's approval. In a Technical Assistance letter dated January 19, 2017, the Department confirmed the accuracy of the Nation's position, stating that

> our understanding of the revenue sharing provision in the Compact [in 2002] was that *its duration was for 14 years*. We understand that the Compact has now been automatically extended for an additional 7 years. . . . *In our view, the Nation's 14-year revenue sharing obligation granted the Nation 21 years of exclusivity*.

A-165-66 (emphasis added). The Department further stated that "an extension of the revenue sharing requirement beyond the 14-year Compact duration would be tantamount to an increase in revenue sharing, requiring additional meaningful concessions from the State with corresponding substantial economic benefit to the Nation." A-166; *see also Rincon*, 602 F.3d at 1036-40 (revenue-sharing absent these circumstances constitutes a prohibited tax under IGRA).

The Department provided this information because "[w]e find that ensuring tribes and states have accurate information about the Department's past decisions, regulatory requirements, and current policies is critical." A-165. On December 15, 2017, the Department withdrew the letter. A-212. It did so based not on any reconsideration of its views, but rather because the parties were "engaged in arbitration." *Id*.

On April 16, 2019, the Nation submitted the Final Award and accompanying materials for Secretarial review on the basis that the Award operated to amend the Compact and Secretarial review and approval was necessary to eliminate "any further legal controversy as to [the Nation's] obligations thereunder." A-213. On June 3, 2019, the Department responded that it could not yet review the submission because it "lacks a certification from the Governor or other State representative that he or she is authorized under State law to enter into the compact or amendment[.]" A-291. However, the Department added that "[w]hile we regret that we must return the proposed Arbitration Award, we look forward to receiving a new submission that includes a complete set of documents in compliance with the requirements of 25 C.F.R. Part 293." *Id.* Because the State refused to supply such a certification, the Department was unable to conduct a formal review of the revenue-sharing obligation imposed by the panel majority as a compact amendment under 25 C.F.R. Part 293.

VII. The District Court Proceedings

The Nation filed an action to vacate the majority's decision in the district court. A-7. It asserted that by imposing a payment obligation never approved by the Secretary as required under IGRA, the majority had issued its decision in manifest disregard of the law. *Id.* Given the applicable standard for review of arbitral decisions, the Nation did not challenge the panel majority's interpretation of the Compact, though it made clear that, like the Dissent, it strongly disagreed with it. A-11 ¶ 15. The Nation limited its arguments for judicial review to the panel majority's disregard of IGRA's Secretarial review requirement, *id.*, and urged the district court that, in the event it harbored any uncertainty as to whether the Secretary had lawfully approved the disputed payments, it should refer that question to the Department under the primary jurisdiction doctrine, A-12 ¶ 21.

The district court held against the Nation. In its view, when the Secretary reviews and approves a compact with an arbitration provision, that approval implicitly and prospectively applies to the enforcement of any interpretation of the compact subsequently rendered by an arbitration panel, without further consideration of IGRA's requirements. For this same reason, the district court declined to refer to the Department the question whether the Secretary had or would approve the additional payment obligations under the primary jurisdiction doctrine.

This appeal followed.

SUMMARY OF THE ARGUMENT

IGRA requires that the Secretary review and approve gaming compact provisions before they may lawfully be enforced. 25 U.S.C. § 2710(d)(3)(B) and (d)(8)(A); 25 C.F.R. § 293.4. Compact revenue-sharing arrangements are singled out for "great scrutiny," both to fulfill Congress's purpose of generating and protecting tribal gaming revenues and to fulfill the United States' trust obligation to Indian nations to ensure that any payments made to a state are justified by the benefits received by the Indian nation in return.

Here, the arbitration panel majority imposed a "Years 15-21" revenue-sharing payment obligation on the Nation despite finding that neither the text of the Compact nor any other surrounding evidence placed such an obligation before the Secretary during her review of the Compact in 2002. In doing so, the majority acted in manifest disregard of the law. It was well aware of IGRA's clear and explicit Secretarial review requirement, and indeed acknowledged that mandate, but nevertheless ignored it. Its award should therefore be vacated. *See N.Y. Tel. Co. v. Commc'ns Workers of Am. Local 1100*, 256 F.3d 89, 91 (2d Cir. 2001).

The district court repeated the panel majority's errors and provided no plausible basis for upholding the award. The district court did not dispute that the text of the Compact failed to place a "Years 15-21" payment obligation before the Secretary during the 2002 Compact review process. Nor did the district court conclude that the Secretary was otherwise made aware of such an obligation during the review process – indeed, the State never even argued, let alone established, as much. The district court instead premised its ruling on the theory that when the Secretary approves a compact providing for arbitration of disputes, that approval implicitly attaches to any subsequent compact obligations imposed by an arbitration panel regardless of whether the Secretary in fact approved such obligations and regardless of whether such obligations would comply with IGRA. This approach renders illusory the Secretarial review requirement of IGRA and writes the manifest disregard standard out of the law.

Rather than so holding, the district court should at the very least have referred the issue to the Department under the primary jurisdiction doctrine. The Department is in position to provide instructive guidance as to whether it in fact approved the extended payment obligation and, if not, whether it is consistent with the core policies animating IGRA to infer such approval. The district court's decision, if left to stand, instead forces the Nation to make hundreds of millions of dollars of additional revenue-sharing payments to the State without the faintest indicia of Secretarial sanction.

ARGUMENT

I. The Panel Majority's Award Was Issued in "Manifest Disregard" of IGRA's Clear, and Critically Important, Requirement for Secretarial Review.

An IGRA tribal-state gaming compact differs from an ordinary bilateral contract. Both an ordinary contract and an IGRA compact require the agreement of the parties. But an IGRA compact *further* requires – as a matter of federal law – the approval of the Secretary. *See* 25 U.S.C. § 2710(d)(3)(B) and (d)(8)(A); 25 C.F.R. § 293.4; *see also*, *e.g.*, *MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 43 (2d Cir. 2017) ("Under [IGRA] . . . compacts . . . [are] subject to the approval of the Secretary of the Interior."); *New York v. Oneida Indian Nation of N.Y.*, 90 F.3d 58, 60 (2d Cir. 1996) (approval of compacts by Department is "required by" IGRA); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 493 (7th Cir. 2005) ("The Secretary must independently approve the [compact.]").

Thus, for the Nation to be lawfully required to make revenue-sharing payments during what the majority coined the "Years 15-21" period of the Compact, two things must be true. First, the Parties must have agreed to such payments. Second, the Secretary must have approved them. As to the first requirement, the majority found the Compact language ambiguous but interpreted the Compact to include a "Years 15-21" revenue-sharing term based on its view of the extrinsic evidence. The Nation disagrees with the majority's interpretation of both the text and the extrinsic evidence but did not challenge that interpretation in the district court, and does not do so here, given the constrained scope of judicial review of arbitration decisions.

The majority's treatment of the Secretarial review issue was, however, a bridge too far. As discussed below, the majority expressly found that the Compact text did not place a "Years 15-21" payment obligation before the Secretary. It further acknowledged that neither Party presented such an obligation to the Secretary during the review process in 2002 and that the Secretary made no mention of such an obligation during her consideration of the Compact. The majority nevertheless issued an award imposing the "Years 15-21" payments. This blatant disregard of IGRA's Secretarial approval mandate places this case in the small but clearly recognized class of cases where an arbitration panel has acted in manifest disregard of the law.

A. The Manifest Disregard Standard

This Court has made clear that

> [t]o modify or vacate an award on [manifest disregard,] a court must find both that (1) the arbitrators knew of a governing legal principle yet

> refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.

N.Y. Tel., 256 F.3d at 91 (second brackets in original) (quoting *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998)).

The Court has found this standard met where, for example, an arbitrator "expressly disregarded" controlling Circuit precedent. *Id.* Similarly, in *Hardy v. Walsh Manning Securities, L.L.C.*, 341 F.3d 126 (2d Cir. 2003), the Court found the standard met where the arbitrator's decision was contrary to "well-defined and explicit" governing law and where the arbitrator "was made aware of" that law in the parties' briefing. *Id*. at 130. While the manifest disregard standard requires "more than a simple error in law," *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003), it "is not confined to that rare case in which the arbitrator [makes] explicit acknowledgment of wrongful conduct," *Westerbeke*, 304 F.3d at 218; *see also Halligan*, 148 F.3d at 204 (It is not "necessary for arbitrators to state that they are deliberately ignoring the law."). The standard is amply satisfied here.

B. IGRA's Secretarial Review Mandate Is Well-Defined, Explicit, and Clearly Applicable.

IGRA, its implementing regulations, and longstanding Department policy prohibit the enforcement of gaming compacts absent review and approval by the Secretary. Section 2710(d)(8)(A) provides that "[t]he Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State[.]" Section 2710(d)(3)(B) provides that a "compact shall take effect only when notice of *approval by the Secretary* of such compact has been published by the Secretary in the Federal Register" (emphases added). *See also*, *e.g.*, *MGM Resorts*, 861 F.3d at 43 (same); *Oneida Indian Nation*, 90 F.3d at 60 (same). The corresponding regulations likewise provide that "[c]ompacts [and] . . . . [a]ll amendments . . . are subject to review and approval by the Secretary." 25 C.F.R. § 293.4. Under these requirements, compact provisions not approved by the Secretary may not lawfully be enforced.

Secretarial review is not a formality. The Department reviews compacts in detail to ensure their provisions – on subjects ranging from term definitions, authorized games, and state and tribal regulatory authority, to land status, law enforcement, facility location, and more – are consistent with IGRA's statutory scheme.[10]

As noted, revenue-sharing provisions in particular are singled out for "great scrutiny" to ensure that they do not constitute disguised taxes and are otherwise "consistent with the purposes of IGRA[.]"[11] The Department "carefully

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[10] *See*, *e.g.*, Letter to Habematolel, *supra* note 3; Letter to Mass., *supra* note 1.
[11] Letter to Habematolel, *supra* note 3, at 3; *see also*, *e.g.*, Letter to Mass., *supra* note 1, at 11 (Department reviews revenue-sharing provisions "with great scrutiny" to ensure "that Indian tribes, not states . . . [are] the primary beneficiaries of Indian gaming revenues.").

scrutinize[s]" such provisions to determine "whether, in exchange for the payment, a state offers . . . substantial and quantifiable economic benefits to the Indian tribe. . . . [T]he payment to a state must be appropriate in light of the value of the economic benefits conferred on the tribe."[12] Such exacting Secretarial review is necessary to fulfill the Department's "trust obligation to Indian tribes."[13]

Thus, in 2002, when the Secretary examined whether "[t]he payment to the State . . . [is] appropriate in light of the exclusivity right conferred on the tribe," A-159, she did so intently. She assessed the Nation's expert economic and market forecasts for its proposed gaming operations; parsed the details of how the geographic exclusivity zone was structured; estimated the revenues the Nation would likely earn and the total payments the State would receive; and examined the arrangement for its implications for other tribes, for federal Indian gaming policy, and for the State's compliance with its own laws. Indeed, after her initial review the Secretary asked the parties for clarification on a number of these matters and conducted a second review. A-157.

All of this reflects the Department's rigorous fidelity to IGRA's Secretarial review mandate and the clear applicability of the mandate here. Consistent with the statutory dictates, an arbitrator simply cannot impose revenue-sharing

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[12] Letter to Potawatomi, *supra* note 4, at 2.
[13] Letter to Santa Clara, *supra* note 2, at 1.

obligations that were not reviewed and approved by the Secretary. Indeed, there is not a single compact revenue-sharing provision in effect in the country today the specific terms of which were not reviewed and approved by the Secretary as required by IGRA.[14]

C. The Panel Was Aware of IGRA's Secretarial Review Mandate.

In addition to requiring that the law underpinning a manifest disregard challenge be well-defined and explicit, this Court also "look[s] to . . . the knowledge actually possessed by the arbitrators." *Duferco*, 333 F.3d at 390. This criterion for vacatur is again met here. In its briefing to the panel, the Nation underscored IGRA's Secretarial review mandate, emphasizing that

> of critical importance . . . the Secretary did not address, *and therefore did not approve*, a stream of 25% payments flowing from the Nation to the State after the "Years 8-14" period and continuing for the remainder of the 21-year life of the Compact. Under IGRA, approval and disapproval of Compact provisions are the exclusive province of the Secretary. 25 U.S.C. § 2710(d)(8). What the State is asking this Panel to do is to usurp that role and bless a Compact term that the Secretary never considered and clearly did not bless.

A-269; *see also* A-271-72 (same).

No question exists, then, that the panel "was made aware," *Hardy*, 341 F.3d at 130, of the Secretarial review requirement. The district court concluded likewise. *See* SPA-21 ("[T]he panel was actually aware of the IGRA Secretary-

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[14] *Supra* note 8.

approval provisions[.]").

D. The Panel Majority Refused to Adhere to IGRA's Secretarial Review Mandate.

The majority conceded that explicit Secretarial approval was required, but imposed the "Years 15-21" payment obligation despite making no finding that the Secretary was cognizant of such an obligation when she reviewed and approved the Compact in 2002. The majority's reasoning for how its approach squared with IGRA is meritless.

1. <u>The Majority Found that the Compact Text Did *Not* Place a "Years 15-21" Payment Obligation Before the Secretary</u>.

The majority nowhere claimed that the Compact text reviewed by the Secretary placed a "Years 15-21" payment obligation before the Secretary in 2002. Had it interpreted that text to impose such an obligation, this would be a very different case, as the majority would have concluded that the Secretary did *in fact* review and approve the disputed payments, as required by IGRA, when she reviewed the text. But according to the majority, the text imposes a "payment obligation in Years 1-14, *but is silent regarding the renewal period of Years 15-21*." A-47-48 (emphasis added); *see also* A-48 (text "does not expressly address revenue sharing payment obligations during Years 15-21"); A-75 (revenue-sharing terms in Compact text do "not expressly mandate" payments in "Years 15-21" period); A-59 (same).

Instead, the majority deemed the Compact thoroughly "ambiguous as to whether [payment] is owed upon renewal." A-29; *see also*, *e.g.*, A-47 (same); A-59 (same); A-74 n.17 (same). In fact, the panel chair and author of the majority opinion viewed the text as so ambiguous as to render the panel's $1 billion decision essentially a coin flip. *See* A-278-79 (stating that Compact text left him in "utter bafflement, because we . . . have a contract here that is dysfunctional. . . . [The arbitral award is] going to be an ad hoc decision").

In sum, by the majority's own admission, the "Years 15-21" payment obligation *nowhere appears in the Compact that the Secretary reviewed.* As the Dissent aptly stated, "[i]f, as the Panel admits, the Compact is ambiguous as to the revenue share during the renewal period, DOI cannot be said to have considered and reviewed or approved this key provision. . . . [T]he Panel's decision has the effect of enforcing an agreement that goes beyond what was approved by DOI[.]" A-102.

2. <u>The Panel Majority Likewise Found that the Parties' Written Explanations of the Compact Did Not Place a "Years 15-21" Payment Obligation Before the Secretary</u>.

The majority also found that the Parties' 2002 submissions to the Secretary likewise did not suggest a "Years 15-21" payment obligation. This is telling, as neither the majority nor the State pointed to anything reviewed by the Secretary in 2002 other than the Compact and the Parties' submissions regarding it.

Both the State and the Nation limited their October 2002 explanations of the Nation's revenue-sharing obligation to the fourteen-year schedule. As the State declared:

> The Compact provides that the Nation shall pay the State 18% of the net drop from the gaming devices in the first four years after gaming commences pursuant to the Compact, 22% of the net drop in years five through seven and 25% of the net drop *in years eight through fourteen*.

A-171 (emphasis added). Indeed, the majority specifically found that "the State's letter to the DOI . . . *fails to mention* [the State's] belief that revenue sharing payments continue into any renewal of the Compact." A-64 (emphasis added). Likewise, the Nation limited its discussion of the payment obligation (in language quoted by the majority, A-39) to "the 14-year term of the Compact." A-193.[15]

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[15] The majority drew a negative inference from the Nation's purported failure to alert the Secretary to the *absence* of a "Years 15-21" payment obligation. A-66-67. But that absence, as the majority concedes, is apparent in the text reviewed by the Secretary. And as the Dissent explained, it was *the State* that was obligated to alert the Secretary to the *presence* of an obligation (worth hundreds of millions of dollars) provided nowhere in the text, if such an obligation was indeed contemplated:

> [T]he State failed to tell DOI that it expected to earn a revenue share during the renewal period. . . . [T]his omission is compelling. If the State believed that it was entitled to revenue sharing during the renewal period, it should have come clean with the federal regulatory agency that was reviewing the transaction and not hidden this expectation. . . . The two obvious explanations are: (1) the State was deliberately misleading the federal regulatory agency, or (2) the State's letter fully explains the revenue sharing anticipated from the Compact. . . . I am more inclined to think that the State was being honest with the federal regulator and that the [14-year] revenue sharing periods carefully

These 2002 party statements square with the Secretary's own 2002 characterization of the text as requiring the Nation "to make . . . revenue-sharing payments to the State . . . over the course of the 14-year duration of the Compact." A-159. They also square with the Department's more recent description of what it approved in 2002. *See* A-165 ("[O]ur understanding of the revenue sharing provision in the Compact was that its duration was for 14 years.").

In sum, the majority pointed to nothing reviewed by the Secretary – neither text nor party submission – suggesting that she was approving anything beyond what she expressly identified as a fourteen-year payment obligation.

3. The Majority Adopted a "Years 15-21" Payment Obligation Based on Extrinsic Evidence that Did Not Place That Obligation Before the Secretary.

After finding the Compact ambiguous, the panel majority interpreted the Compact to include a "Years 15-21" payment term based on six factors extrinsic to the Compact text. While the Nation (like the Dissent) disagrees with the

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> explained in the State's letter are the entirety of the revenue sharing contemplated under the Compact. This is the simpler answer. But if this is true, and the State officials were being forthcoming with the regulator, the Nation's central assertions in this case are correct and the Nation must prevail.

A-89-90.

majority's analysis of that evidence, that is not the basis for the Nation's argument to this Court. The salient point here is that, with the exception of the Parties' written submissions (which, as just discussed, identified only a fourteen-year payment schedule), *none of this evidence* was addressed by (or even within the cognizance of) the Secretary when she reviewed the Compact's revenue-sharing terms in 2002, and hence none of it can be said to have placed a "Years 15-21" payment obligation before the Secretary.[16]

First, the majority found support for its conclusion in the parties' Compact negotiations. *See* A-60-63. The Nation, like the Dissent, disagrees with the majority's view of that evidence.[17] But even were that view defensible, *no aspect* of the parties' negotiations was brought to the attention of the Secretary. Neither the panel majority nor the State claimed otherwise.

Second, the majority relied on two sets of "Post Execution

[16] In analogous circumstances, the Third Circuit has explained the problem of relying on extrinsic evidence to interpret agreements subject to prior court approval or authorization: "If the parties' agreements could be discerned only by consulting extrinsic evidence, then a . . . court might unknowingly . . . 'approve' or 'authorize' a contract with hidden promises. . . . [H]ow could a judge 'authorize' [a contract term] . . . if he or she did not recognize the parties had agreed to [that term]?" *In re Nortel Networks Inc.*, 737 F.3d 265, 272 (3d Cir. 2013).

[17] *See*, *e.g.*, A-90-91 (discussing negotiation evidence showing that the State had proposed to replace the "Years 8-14" final payment period with an open-ended "Years 7+" payment period and arguing, consistent with accepted principles of contract interpretation, that the parties' ultimate rejection of that proposal should have been dispositive of the dispute in the Nation's favor).

Communications" – the parties' submissions to the Department (discussed above), and statements the Nation made to its members about the Compact. A-64-68. The latter (which made no reference whatsoever to a "Years 15-21" payment obligation) were not shared with the Secretary, and neither the majority nor the State claimed otherwise.

Third, the majority addressed the context of the negotiations but conceded that this factor did not support a "Years 15-21" payment obligation. A-68-70.

Fourth, as noted above, the Compact provides for a fourteen-year initial term and, absent objection by either party, that "*the term* of this Compact shall be renewed automatically for an additional period of seven (7) years." A-115 ¶ 4(c)(1) (emphasis added). The majority found this provision "ambiguous" as to "whether the term 'renew' means that the State Contribution payments continue[.]" A-59; *see also*, *e.g.*, A-29 (same). It nevertheless relied on unidentified "extrinsic evidence" to infer that the Parties' "essential bargain" called for continuing payments. A-70-71. But no such extrinsic evidence was presented to the Secretary, and neither the majority nor the State suggested to the contrary.

Fifth, the majority contended that if the State had understood the payments to conclude at the end of the "Years 8-14" period, then as a matter of "common sense" it would have objected to renewal of the Compact and sought to renegotiate it in 2013 when the parties settled a separate dispute. A-72-73. This is simply a deduction about the subjective views of one party based on conduct that self-evidently was not within the Secretary's cognizance *eleven years earlier* in 2002.

Finally, the majority asserted that "the nearly $1 billion in consideration that the State would not receive under the Nation's interpretation" renders that interpretation "commercially unreasonable." A-76. Aside from again showing clear bias in favor of the State,[18] the majority's concern for the State's commercial interests cannot plausibly (or permissibly) be imputed to the Secretary in 2002, and the majority and the State sensibly did not claim otherwise. *See Rincon*, 602 F.3d at 1034-35 (stating that "[t]he only *state* interests mentioned in [IGRA] are protecting against organized crime and ensuring that gaming is conducted fairly and honestly" and that it is thus "incorrect that pursuit of state general economic interests is consistent with IGRA's purposes"). Nor would the Secretary logically have shared those concerns even if permissible; for the revenue-sharing arrangement she reviewed (and raised substantial questions about) was on its face extraordinary. As former Assistant Secretary Washburn noted in dissent, under that arrangement, "[l]ess than one half of one percent of tribal state gaming compacts provide for such a large amount [of] revenue sharing to a state." A-101.

In sum, none of the extrinsic evidence or other factors cited by the majority

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[18] The majority, for example, ignored that the Nation "would not receive" that same "nearly $1 billion" of its own hard-earned revenues under the State's interpretation.

as supporting its interpretation of the Parties' agreement placed the possibility of a "Years 15-21" payment obligation before the Secretary. Had the majority identified extrinsic evidence in this vein, this would again be a different case (just as it would had the majority found the Compact text to provide for an extended payment obligation), as the majority would then have concluded that the Secretary in fact *did* review and approve a "Years 15-21" payment obligation. But the majority identified neither text nor extrinsic evidence to that effect. Its entire analysis necessarily leads to one conclusion: The payment obligation was never in fact considered and approved by the Secretary as required by IGRA. *See* A-102 ("DOI cannot be said to have considered and reviewed or approved this key provision.").

4. <u>The Panel Majority's Discussion of IGRA Confirms that It Acted in Manifest Disregard of the Statute</u>.

The majority acknowledged that "the Panel has no legal authority to . . . enforce a Compact term that the Secretary did not approve[.]" A-65. The district court held that the majority therefore cannot be said to have disregarded the Secretarial approval requirement. SPA-21. But as this Court has recognized, it is not "necessary for arbitrators to state that they are deliberately ignoring the law," *Halligan*, 148 F.3d at 204, or that they offer "explicit acknowledgment of wrongful conduct," *Westerbeke*, 304 F.3d at 218, in order to run afoul of the manifest disregard standard. Such disregard "may be found . . . if the arbitrator understood and correctly stated the law but proceeded to ignore it." *Willemijn*, 103 F.3d at 12 (ellipses in original) (quotation marks omitted). And it may be found where the arbitrator's explanation of how its award purports to comply with the law "strains credulity," *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 407 (2d Cir. 2009) (quotation marks omitted), or where there is "no reading of the Award that resolves its apparent contradiction with the law," *Hardy*, 341 F.3d at 132. These are precisely the circumstances present here.

In its fifty-six-page opinion, the majority devoted a single paragraph to the Nation's Secretarial review argument. It did not claim there that the Secretary had in fact approved a "Years 15-21" payment obligation. It instead provided three reasons for rejecting the Nation's contention that IGRA precluded the majority's imposition of a "Years 15-21" payment term. A-65. None of these reasons remotely suggests that the Secretary in fact approved the "Years 15-21" payment term, as required by IGRA.

The majority first asserted that

> while it 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, <u>see</u> 25 U.S.C. § 2710(d)(8) (approval and disapproval of Compact provisions are the exclusive province of the Secretary under IGRA), the Panel does have the duty and authority to determine whether the terms of the Compact *already provide for* revenue sharing payments upon renewal.

Id. (emphasis added).

The failure of this reasoning is clear. To be sure, the panel had the authority to determine whether the Compact terms reviewed by the Secretary in fact "already provide[d] for" the disputed payments. *But the majority determined that they did not*. *See*, *e.g.*, A-47; A-59; A-75. It instead imposed the payments based on factors independent of the text and wholly outside the cognizance of the Secretary in 2002. *See supra* pp. 33-37.

The majority's next justification for avoiding Secretarial review fares no better:

> Second, the Nation's contention that enforcement of revenue sharing in the renewal period is beyond the Panel's authority assumes that the DOI interpreted the Compact in the same way that the Nation advocates in this arbitration . . . . There is no evidence in the record to suggest that the DOI shared the view now asserted by the Nation.

A-65. Even accepting the majority's view of the evidence, this statement demonstrates just how far off the mark its analysis was. IGRA requires evidence not that the Secretary shared the Nation's view, but rather that she "shared the view" asserted by the majority, *because that is the view the majority sought to enforce*. And the majority identified nothing of this sort in the record. To the contrary, as the Dissent explained (in an uncontroverted statement), the record contains "not a whit" of evidence that the Secretary shared the majority's interpretation of the payment obligation. A-89. In thus turning the relevant burdens on their head, the majority betrayed a complete lack of regard for the nature of the Secretarial approval requirement.

The majority's final rationale is similarly misguided: "Third, whether or not the Parties addressed any terms of renewal in their respective letters to the DOI, renewal was part of the Compact that was reviewed and deemed approved." A-65. But the Compact's renewal provision speaks only to renewal of "the term of this Compact," A-115 ¶ (4)(c)(1), and the majority's assertion here is impossible to reconcile with a foundational premise of its opinion – that "the Compact is in fact ambiguous as to whether or not the Nation's obligation to share revenue ends after fourteen years or whether it continues on renewal of the Compact." A-47. This premise pervades the opinion. *See*, *e.g.*, A-59 ("[I]t is ambiguous whether the term 'renew' means that the State Contribution payments continue[.]"); A-29 ("[T]he Panel finds that the Compact is ambiguous as to whether State Contribution is owed upon renewal."); A-74 n.17 ("[T]he Compact is ambiguous as to the Nation's revenue sharing payment obligations upon renewal."). If the panel itself was admittedly unable to discern a continuing payment obligation in the Compact's renewal mechanism, it certainly had no plausible basis to argue that the Secretary somehow did and that IGRA's approval requirement was satisfied through such clairvoyance.

In sum, while the majority acknowledged IGRA's Secretarial review requirement, it then evaded that requirement through transparently invalid post hoc reasoning. Under IGRA, Secretarial approval of a compact's terms is evidenced by Secretarial approval, not through backfilling by an arbitration panel. In engaging in various contortions to conjure approval where none exists, the majority usurped the Secretary's authority and acted in manifest disregard of a critical requirement in the governing federal statute. Its attempts to frame its ruling otherwise "strain[] credulity," *Telenor*, 584 F.3d at 407 (quotation marks omitted), as there simply is "no reading of the Award that resolves its apparent contradiction" with IGRA's express Secretarial review mandate, *Hardy*, 341 F.3d at 132.

In *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 854-55 (8th Cir. 2001), the Eighth Circuit vacated an award where the arbitrator had added a term to a tribal contract subject to federal approval under IGRA and 25 U.S.C. § 81. The Circuit held that in doing so the arbitrator "effectively overrode" those statutes. *Id.* at 855. The same is true here, where the panel has imposed a payment obligation – amounting to hundreds of millions of dollars nowhere called for by the Compact's text – without any indication that the Secretary has sanctioned such payments. The panel lacked authority to override IGRA's Secretarial approval requirement in this manner. Vacatur of the Final Award is called for under these rare circumstances.

II. The District Court Compounded the Panel Majority's Errors in Affirming the Imposition of Compact Payments Nowhere Approved by the Secretary.

As noted above, this Court reviews the district court's decision de novo. *Willemijn*, 103 F.3d at 12. The district court identified no plausible basis to uphold the panel's decision. Instead, it repeated the majority's errors and added others.

A. The District Court Misconstrued the Nation's Argument.

The district court first found it "questionable whether the Nation even presented the panel with a clearly governing legal principle that it allegedly decided to ignore." SPA-24 (quotation marks omitted). In support of this contention, the district court asserted that

> [t]he Nation's position is premised on a proposition that it has provided no authority for – that the arbitration award *is an amendment* to the Compact that requires the Secretary's approval under the IGRA. . . . [T]he Nation has provided no legal authority holding that a contract interpretation resulting in an arbitration award . . . *constitutes an amendment* to the compact subject to further Secretary approval.

SPA-23-24 (emphases added).

However, the Nation never argued that an arbitral interpretation of a compact "constitutes an amendment" under IGRA. The Nation straightforwardly premised its argument to the panel on IGRA's Secretarial review mandate, emphasizing that

> of critical importance . . . the Secretary did not address, *and therefore did not approve*, a stream of 25% payments flowing from the Nation to the State after the "Years 8-14" period . . . . Under IGRA, approval and

> disapproval of Compact provisions are the exclusive province of the Secretary. 25 U.S.C. § 2710(d)(8). What the State is asking this Panel to do is to usurp that role and bless a Compact term that the Secretary never considered and clearly did not bless.

A-269. It made the same argument to the district court. *See* Nation's Br., Dist. Ct. Docket #2-1, at 12 (quoting same) and *id.* at 11 ("Consistent with IGRA . . . an arbitration panel simply cannot impose payment obligations that were not reviewed and approved by the Secretary.").

The Nation, then, made its position clear to the district court just as it had to the panel: Under IGRA, revenue-sharing terms may not be imposed absent Secretarial approval. As the Secretary never approved a "Years 15-21" payment obligation, the panel could not lawfully impose it on the Nation. Nothing about this argument turns on a technical classification of arbitral interpretations of compacts as *actual* compact amendments under IGRA.[19]

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[19] The Nation asserted to the district court that the majority's decision "*acts* to amend the Compact to impose a payment obligation that has not been reviewed and approved by the Secretary." Nation's Br., Dist. Ct. Docket #2-1, at 8 (emphasis added). This cannot reasonably be construed as an assertion that the majority's decision *is* technically a compact amendment under IGRA. Any time an arbitrator or court adds, by construction, a term to a contract not included in the contract at its formation, the arbitrator or court can be said to have "in effect" amended the contract, and its enforcement can be said to "act" to amend the contract. Those descriptive terms simply mean the court or arbitrator overstepped. *See*, *e.g.*, *Law Debenture Tr. Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 468 (2d Cir. 2010) ("[C]ourts may not by construction add or excise terms . . . and thereby make a new contract for the parties under the guise of interpreting the writing." (quotation marks omitted)).

The district court's misapprehension of the Nation's argument originated with the State. *See* State's Br., Dist. Ct. Docket #9-2, at 18 (stating that the Nation premised its manifest disregard argument on "the alleged requirement under IGRA for Secretarial review of the Final Award as an amendment to the Compact"). In its reply, the Nation expressly disavowed the State's framing of its argument:

> The State appears either to misunderstand or to intentionally misconstrue the Nation's Motion. While the Nation believes, and has stated, that *the effect* of the majority's decision is to amend the Compact to impose a new revenue-sharing obligation nowhere specified by its terms, the Nation's Motion focuses not on the effect of the majority's decision . . . . *[T]he Nation has consistently and correctly asserted that the majority imposed a new revenue-sharing obligation not reviewed and approved by the Secretary in 2002, rendering its decision non-compliant with IGRA*.

Nation's Reply, Dist. Ct. Docket #10, at 13 (emphases added).

The district court (which, despite the high stakes in this case, declined to hear oral argument that could have cleared up any confusion it had on the subject) nevertheless characterized the Nation's argument precisely as the State had framed it. This approach allowed the district court, like the State, to focus on the red herring of what technically constitutes a compact amendment under IGRA (for which there is no settled legal answer), and thereby to avoid the straightforward question raised by the Nation's argument – *i.e.*, whether IGRA's Secretarial review requirement permits enforcement of a compact revenue-sharing obligation never subject to Secretarial review (for which there *is* a settled legal answer, which is no).

This district court, then, flatly misconstrued the Nation's principal argument for vacatur, which by itself warrants reversal. *See*, *e.g.*, *Charles v. Orange Cty.*, 925 F.3d 73, 81 (2d Cir. 2019) (vacating decision where "district court misconstrued" a party's claim); *Dobson v. Hartford Fin. Servs. Group*, 389 F.3d 386, 393 (2d Cir. 2004) (vacating in part where "district court misconstrued [plaintiff's] theory and, as a result, never ruled on what may be plaintiff's strongest argument").

B. The District Court Erred in Reasoning that the Secretary Had *Implicitly* Approved the Payment Obligation Imposed by the Panel Majority.

The district court next concluded that the panel majority did not, in fact, impose a revenue-sharing payment obligation beyond that approved by the Secretary in 2002. SPA-24. The district court reasoned as follows:

> It is undisputed that the Secretary of the Interior reviewed and approved the Compact. In doing so, the Secretary approved the "Party Dispute Resolution" provision (§ 14), which provides that if the parties are unable to resolve "*any* dispute . . ." then the dispute is to be resolved through binding arbitration. . . .
>
> It is against this backdrop that the parties submitted their dispute to the panel. . . . The panel was . . . charged with interpreting the Compact's renewal provision . . . *a provision that the Secretary approved*. . . . [I]n finding that the [compact] required payment of the State Contribution during the renewal period, the majority simply

> construed the parties' *existing, approved compact*. . . . [I]ts Compact interpretation is not reviewable under the manifest disregard standard."

SPA-24-25 (second and third emphases added) (footnote omitted).

Notably, nowhere here does the district court suggest that the Secretary in fact contemplated the possibility of a "Years 15-21" payment obligation. Nor does the court question the majority's conclusion that the Compact was "silent" with respect to that obligation. Rather, the district court's contention is this: Once the Secretary approves the terms of a Compact containing an arbitration provision, it has implicitly and prospectively approved the enforcement of *any* subsequent arbitral interpretation of those terms. And such an interpretation must be enforced by a court because it is "not reviewable under the manifest disregard standard," SPA-25.

This reasoning writes the manifest disregard standard out of the law. For example, IGRA unquestionably renders it illegal for a state to impose "any tax . . . upon an Indian tribe . . . to engage in a class III activity." 25 U.S.C. § 2710(d)(4). Yet under the district court's approach (like that of the panel majority), if a tribe and state enter a compact that is approved by the Secretary, and if an arbitrator later interprets an ambiguous provision in the compact to require the tribe to pay fifty percent of its revenues as a "tax to engage in a class III activity," then that interpretation may lawfully be imposed by the arbitrator as implicitly preapproved by the Secretary. And because the interpretation is "not reviewable," SPA-25, it must be enforced by a federal court despite its patent violation of IGRA and regardless of what the Secretary would say about it.

This confuses the authority to interpret with the authority to enforce. An arbitrator or court with full power to construe a contract may accurately interpret it to require unlawful acts, but that does not mean that it has the authority to enforce such a construction. *See*, *e.g.*, *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982) ("[I]llegal promises will not be enforced in cases controlled by the federal law."); *Navajo Nation v. Dalley*, 896 F.3d 1196, 1205 n.4 (10th Cir. 2018) ("[T]he negotiated terms of the Compact cannot exceed what is authorized by the IGRA." (quotation marks omitted)).

This is precisely the situation here. The majority's interpretation of the Compact need not be assailed to hold that neither the majority nor the district court could lawfully *enforce* it against the Nation where by their own admission the terms to be enforced cannot be discerned from the text of the Compact and were not contained in the submissions made to the Secretary. The only basis provided by the majority and the district court for claiming otherwise is the untenable theory that such approval can be inferred from text the majority concluded was impenetrably ambiguous (a conclusion the district court did not disturb). This approach patently circumvents, and thus manifestly disregards, IGRA's mandate for Secretarial review.

III. Under the Primary Jurisdiction Doctrine, Any Doubt About Whether the Panel Majority's Resolution of the Secretarial Approval Issue Complies with IGRA Should Be Referred to the Department.

The Nation urged the district court that, to the extent it harbored any uncertainty as to whether the requisite Secretarial approval had lawfully been obtained for the "Years 15-21" payment obligation imposed by the majority, it could stay the proceedings under the primary jurisdiction doctrine and refer that question to the Department. The district court declined to make the referral, inexplicably robbing itself of the views of the expert agency in the process.

As the Supreme Court has explained, the primary jurisdiction doctrine is

> specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a "referral" to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling. 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) (footnote and citations omitted). Such a referral would be highly appropriate in this case.

A. The Secretarial Approval Issue Is Particularly Suited to a Primary Jurisdiction Referral Given the Important Legal and Policy Issues Presented Here.

As a threshold matter, the district court mischaracterized the Nation's argument for referral. According to the district court:

> The arbitration question was not whether the Secretary explicitly approved State-Contribution payments during the renewal period, but rather, whether the terms of the Compact that the Secretary *did approve*

> provide for payment of the State Contribution during that term. Resort to the primary-jurisdiction doctrine is not necessary to assess the propriety of the panel's resolution of that question.

SPA-26-27. But the Nation did not request referral to the Department to interpret what "the terms of the Compact . . . provide for[.]" It limited its referral argument to the question "whether the requisite Secretarial approval was obtained for the 'Years 15-21' payment term imposed by the Panel majority." Nation's Br., Dist. Ct. Docket #2-1, at 24. That question is particularly suited to referral under the primary jurisdiction doctrine.

The Secretary's review of compacts is undertaken in fulfillment of duties imposed upon it by Congress, *see* 25 U.S.C. § 2710(d)(8), pursuant to a comprehensive regulatory scheme established by the Department to implement that authority, *see* 25 C.F.R. §§ 293.1-296.15. These factors render "deference to the primary jurisdiction of the agency appropriate." *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60 (2d Cir. 1994). In particular, the doctrine applies where a claim would be "materially aided by . . . the resolution of threshold issues . . . within the special competence of the administrative body." *Id*. at 58-59; *see also Ellis*, 443 F.3d at 81 (same). The Department possesses precisely such competence to advise the courts as to the scope of its Compact consideration in 2002, including whether, as a matter of law and policy, the Secretary's decision to deem the Compact approved "to the extent the compact is consistent with the provisions of [IGRA]," A-163-64 (quotation marks omitted) (brackets in original), can be said to have implicitly endorsed all subsequent interpretations of its terms, as the majority's opinion suggests and the district court held.

As discussed above, the Department's compact review determinations (numbering in the hundreds over the course of several decades, *see supra* note 8) evidence the "great scrutiny" applied by the Department to revenue-sharing arrangements. This scrutiny extends not only to the financial implications of a compact's provisions for the tribe and state involved, but also to the implications Department approval or disapproval of such provisions may have (1) for future compacts, involving other tribes and states, in light of IGRA's requirements; (2) for the balance struck by Congress between giving states a voice in gaming and ensuring tribes remain the primary beneficiaries of gaming revenue; and (3) for federal Indian law and policy in general. As the Secretary pointedly stated in reviewing the Nation-State Compact in 2002, "I do not have the luxury of reviewing any compact without considering the trends that will emerge with each successive compact . . . [and] concerns regarding IGRA and the interplay with other aspects of Indian policy[.]" A-158.

Neither the courts nor arbitrators are charged with balancing the same array of considerations or are as well-suited as the Department to undertake it (indeed, as noted above, the one arbitrator with any experience with and expertise on these issues, former Assistant Secretary Washburn, dissented sharply from the approach sanctioned by the panel majority and the district court). Referral to the Department is a ready and efficient means for the important issues presented here to be addressed with clarity and in light of the broader legal and policy context. The district court chose instead to adopt the panel majority's novel logic that the Secretary's approval of compact terms the majority viewed as impenetrably ambiguous (a view the district court did not question) implicitly carried with it prospective approval of any interpretation of those terms an arbitrator might someday render – a logic that, as discussed above, writes both the manifest disregard standard and IGRA's Secretarial review mandate out of the law.

Should this Court harbor any doubts as to whether the approach upheld by the district court lawfully accounts for the Secretary's compact review duties under IGRA, it should do what the district court ought to have done and refer the question to the Department. In its letter of June 3, 2019, A-291, the Department indicated its willingness, upon a proper submission by the parties, to provide its views as to whether the panel majority's imposition of a "Years 15-21" payment term complies with IGRA's Secretarial review requirement. It would undoubtedly do the same if this Court were to ask.

B. Referral of the Secretarial Approval Question to the Department Is Likewise Appropriate Given the Significant Practical Stakes in This Case.

As Dean Washburn noted, "Congress enacted IGRA 'to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments[.]' 25 U.S.C. § 2702." A-101 (brackets in original). The Nation's payment obligations under the Compact were extraordinarily high by national standards even before the panel majority's delivery of what could amount to an additional $1 billion in Nation revenues to the State, a fact that takes on especial significance when viewed in light of the statutory purpose:

> When a tribe is forced to pay such a substantial portion of its revenue to state governments, it challenges the very foundations of IGRA. *Less than one half of one percent of tribal state gaming compacts provide for such a large amount [of] revenue sharing to a state.* At a minimum, such a provision is controversial.

A-101 (brackets in original) (emphasis added) (footnote omitted).

The Nation notes this not to contest the appropriateness of the payments it has already made but instead to highlight the critical importance of IGRA's Secretarial review mandate as it pertains to the *additional* payments imposed by the panel majority. The Secretary was explicit in 2002 that, in reviewing the Compact revenue-sharing arrangement, she was carrying out the Department's trust responsibility to ensure that "[t]he payment to the state . . . [is] appropriate in light of the exclusivity right conferred on the tribe." A-159. She carefully reviewed the Compact's fourteen-year payment schedule, and the parties' submissions seeking to justify it, through that lens.

In its submission to the Secretary, the Nation argued that the extraordinary level of payments called for over fourteen years was warranted because it would enjoy "total exclusivity with regard to the operation of VLTs and slot machines" in the exclusivity zone. A-193. The State was even more emphatic, assuring the Secretary that

> the Compact grants sweeping exclusivity rights to the Nation with respect to the operation of . . . slot machines and [VLTs] . . . .
>
> . . . .
>
> [T]he exclusivity rights purchased by the Nation effectively establish a Nation monopoly in the zone of exclusivity over the operation of slot machines and [VLTs] . . . . Indeed, the economic benefits to the Nation from the exclusivity rights are significantly enhanced by the fact that even outside the zone of exclusivity in New York State, no person or entity is authorized to operate slot machines and no non-Indian person or entity is authorized to operate [VLTs]. . . .
>
> [T]he economic benefits to the Nation of these exclusive rights . . . are truly extraordinary.

A-171-72.

These favorable competitive circumstances, then, were the express basis on which the Secretary evaluated and approved the revenue-sharing arrangement in 2002. *See, e.g.,* A-159 (premising analysis on the parties' "arguments that the geographic exclusivity . . . is substantial and meaningful" and concurring in same). But those circumstances are long gone. Today, VLTs (which were introduced in 2004 and by the State's own account provide the identical playing experience as slot machines, *see supra* note 9) permeate the State of New York, including three highly profitable State-licensed facilities in the heart of the Nation's exclusivity zone, *see supra* p. 15-16. Further, while the State in 2002 justified the high revenue-sharing payments by noting that "even outside the zone of exclusivity in New York State, no person or entity is authorized to operate slot machines," A-172, the State amended its Constitution in 2013 to permit the operation of full-fledged casinos in regions across the State, *see* N.Y. Const. art. I, § 9(1). The State authorized one of those casinos (the del Lago Resort & Casino) at the very edge of the Nation's exclusivity zone, within just a few hours' drive of all three Nation facilities. *See supra* p. 16-17. The State did so with full knowledge of del Lago's "potential cannibalization of revenue from existing . . . Native American facilities[.]"[20]

Thus, as a result of the State's steady withdrawal of the competitive protections that the parties touted to the Secretary, the competitive landscape in

[20] Report and Findings of the New York Gaming Facility Location Board at 9, (Feb. 27, 2015), https://www.gaming.ny.gov/pdf/02.27.15.GFLBFinalAppendicesWebSmall.pdf, (last visited Mar. 14, 2020).

which the Nation conducts its gaming today bears little resemblance to the landscape carefully surveyed by the Secretary in 2002 in evaluating the permissibility of the parties' proposed revenue-sharing arrangement. Yet according to the majority and the district court, the Secretary somehow implicitly preapproved "Years 15-21" payments under current conditions despite the fact that the relative *absence* of that competition in 2002 was an important predicate of the Secretary's approval, and despite the fact that the Secretary deemed the Compact approved "only to the extent the compact is consistent with [IGRA]." 25 U.S.C. § 2710(d)(8)(C).

The dubiousness of the majority's and the district court's logic is further underscored by the fact that by 2002, the Department was already finding analogous competitive circumstances to foreclose even lower rates of revenue-sharing payments under IGRA. In 1997, for example, the Secretary had deemed a payment rate of sixteen percent of net win impermissible under IGRA because the compact in question did "not provide substantial exclusivity," where it permitted (as is true in the Nation's zone) "a state lottery" and "the operation of electronic gaming devices [VLTs] at horse tracks[.]"[21] And in 1999, the Secretary could not conclude that an eight-percent revenue-sharing rate was permissible under IGRA

[21] Letter of Dep't to Mescalero Apache Tribe at 2 (Aug. 23, 1997), https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc-038382.pdf.

where the State of Michigan had recently passed a law authorizing casinos in Detroit, *several hundred miles* from the tribal gaming facilities in question (the del Lago facility is significantly closer to each of the Nation's facilities). According to the Secretary, in "allowing non-Indian gaming to compete with and draw customers from Indian gaming," the law "may make *de minimis* the promised exclusivity."[22]

These examples, of course, do not definitively establish how the Secretary would view the payments imposed by the majority in light of the circumstances existing today with respect to the Nation's facilities. But they do underscore that, absent intervention by this Court, the majority's bypassing of Secretarial review, as sanctioned by the district court, will have robbed the Department of the opportunity to carry out its trust responsibilities by advising as to whether it preapproved the disputed payments in 2002, and if not whether it would do so now. If left in place, these decisions will nullify a critical safeguard of the statutory scheme designed by Congress to protect tribal gaming revenues from overreach by states.

Enforcing statutory requirements where an arbitration panel has failed to pay them heed is a core function of judicial review, and a primary jurisdiction

[22] Letter of Dep't to Little Traverse Bay Bands of Odawa Indians at 2 (Feb. 9, 1999), https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-025948.pdf; *see also* Letter to LRB, *supra* note 5, at 2 (same).

referral to the Department would restore the statutory balance disrupted by the majority's decision. *See Shearson /Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) ("judicial scrutiny of arbitration awards" enables courts "to ensure that arbitrators comply with the requirements of the statute"); *Mo. River Servs.*, 267 F.3d at 854-55 (vacating arbitration award where arbitrator "effectively overrode" IGRA). If, as the State asserts, the "Years 15-21" payments imposed by the majority and upheld by the district court were approved by the Secretary consistent with IGRA, then the State should have no hesitation in allowing the Department to confirm that through such a referral. This approach would fully honor the statutory scheme and ensure that any resulting decision by this Court would do the same.

CONCLUSION

The district court's decision should be reversed and remanded with instructions to vacate the panel majority's award. Alternatively, the matter should be referred to the Department under the primary jurisdiction doctrine.

Dated this 16th day of March, 2020

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 13,688 words and thus complies with Local Rule 32.1(a)(4)(A).

Respectfully Submitted,

/s/ Riyaz A. Kanji, Esq.

Date: March 16, 2020

SPECIAL APPENDIX

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

DECISION AND ORDER
19-CV-735S

I. INTRODUCTION

The underlying dispute here concerns whether the Seneca Nation of Indians is required to pay the State of New York hundreds of millions of dollars in revenue-sharing payments under the terms of a 2002 gaming compact. A controlling majority of arbitrators recently held that the compact requires such payments. While this binding determination has widespread, directly inverse ramifications for the citizens of each party, the correctness of the decision is not now at issue. Rather, the exceedingly narrow question before this Court is whether the panel majority "manifestly disregarded" governing law in reaching its determination. Because this Court finds that it did not, the State's cross-petition to confirm the arbitration award must be granted, and the Nation's petition and motion to vacate the award must be denied.

II. BACKGROUND[1]

A. The Compact and the Underlying Dispute

1 The relevant facts, which are undisputed unless otherwise noted, are drawn from the parties' petitions and the evidence submitted in support thereof.

Seventeen years ago, the Seneca Nation of Indians ("the Nation") and the State of New York ("the State") entered a compact setting forth the terms and conditions under which the Nation could conduct certain casino-style gaming in New York ("the Compact"). Essentially, the State agreed to provide the Nation exclusive rights to conduct gambling operations in a large portion of Western New York in exchange for graduated revenue-sharing payments from gaming devices[2] for which exclusivity existed ("the State Contribution"). (See Compact, Docket No. 2-6, § 12 (b)(1).)

The Compact became effective December 9, 2002, see Dep't of the Interior Indian Gaming Notice, 67 Fed. Reg. 72968-01 (Dec. 9, 2002), and provided for an initial term of 14 years, with automatic renewal for an additional seven years, unless either party objected to renewal in writing. (Id.) The Nation's obligation to pay the State Contribution began on December 31, 2002, the date the Nation first began gaming operations under the Compact. (Id.) For years 1-4, the State Contribution was 18%. (Id.) For years 5-7, it was 22%. (Id.) For years 8-14, it was 25%. (Id.) The Compact is silent with respect to the terms of any State Contribution in the 7-year renewal period.

During the initial 14-year period, the parties performed under the Compact: the State ensured exclusivity; the Nation paid the State Contribution.[3] Toward the conclusion of the 14-year term, neither party delivered written objections to renewal to the other, resulting in automatic renewal of the Compact for an additional seven years on

2 The Compact defines "gaming devices" as slot machines and video lottery games, as those devices are further defined in § 9 (a) of Appendix A to the Compact. (See Compact, § 1 (m).)

3 To provide some context, the Nation represents that it paid the State more than $1.4 billion over the initial 14-year term of the Compact. (Memorandum of Law, Docket No. 2-1, p. 7.)

December 9, 2016. (See Compact, § 4 (c)(1).)

The dispute underlying the present action arose shortly thereafter when, on March 31, 2017, the Nation notified the State that its State Contribution for the last quarter of 2016 would be its final payment under the terms of the Compact. (See Declaration of Gregory M. Starner, Docket No. 9-3, Exhibit B.) In the Nation's view, the Compact required only 14 years of State Contribution under § 12 (b)(1), with no State Contribution due during the renewal period. The State, on the other hand, viewed the terms of the Compact as requiring a continuation of the State Contribution during the 7-year renewal period. Unable to resolve this dispute themselves, the parties submitted it to binding arbitration in accordance with § 14 of the Compact.

B. The Arbitration Proceedings

The parties submitted their dispute to a panel of three arbitrators as required under § 14 of the Compact: Hon. William G. Bassler, United States District Judge (ret.); Attorney Henry Gutman; and Dean Kevin Washburn, Dean of University of Iowa College of Law. By agreement of the parties, the panel bifurcated its consideration of liability and remedy after conducting full arbitration proceedings on December 12 and 13, 2018, resulting in a January 7, 2019 Partial Final Award (liability) (Docket No. 2-4), with Dissent (Docket No. 2-5); and an April 12, 2019 Final Award (remedy) (Docket No. 2-3). The panel heard testimony and received a written witness statement from Robert Williams, Deputy Secretary in the Office of New York Governor Andrew M. Cuomo; and received witness statements from Todd Gates, President of the Seneca Nation of Indians, and David Sheridan, Chief Financial Officer of the Seneca Gaming Corporation. (Partial Final

Award, Docket No. 2-4, p. 5.) It also received other documentary evidence. (Id. at pp. 4-5.)

1. The Partial Final Award

Judge Bassler and Attorney Gutman formed the panel majority.[4] They first found that the relevant terms of the Compact were ambiguous as it concerned the Nation's obligation to pay the State Contribution during the 7-year renewal period. (Partial Final Award, p. 6.) They then turned to the extrinsic evidence to resolve the ambiguity, interpreting the Compact "to require the Nation to make revenue sharing payments in the renewal period (Years 15-21) at 25% of net drop of each category of gaming device for which exclusivity exists." (Id. at p. 6.) Essentially, the majority found that the State Contribution and exclusivity were directly linked, making the State Contribution due during all periods of exclusivity. (See, e.g., id. at p. 44 ("The essential bargain of the Parties' agreement is a commercial agreement wherein exclusivity payments are made in consideration for exclusivity.").)

Regarding ambiguity, the majority found that the Compact terms were ambiguous as to whether the Nation's obligation to share revenue ended after the fourteenth year of the Compact or whether it continued upon renewal for the 7-year renewal period. (Id. at p. 24.) First examining the purpose of the Compact (§ 12 (b)), the majority found that it was intended to provide the Nation with an "exclusive franchise" in exchange for a revenue share to the State for each category of gaming device for which exclusivity existed. (Id. at pp. 24-27.) Second, the majority found that the term of the compact (§

4 As discussed further herein, Dean Washburn dissented in a separate opinion. (Dissent, Docket No. 2-5.)

4 (b)) was 14 years, with a 7-year renewal option, as opposed to the straight 21-year term advocated by the Nation. (Id. at pp. 27-30.) Finally, after examining the renewal (§ 4 (c)) and other provisions of the Compact, the majority concluded that "it is ambiguous whether the term 'renew' means that the State Contribution payments continue at the 25% rate in effect when the initial 14-year term ended, or whether 'renew' means to continue with the original terms that did not expressly provide for any State Contribution payments in Years 15-21." (Id. at pp. 30-36.)

Regarding the extrinsic evidence, the majority found that it supported the State's position. It held that "'renewal' of the Compact means that the Nation's obligation to pay State Contribution in consideration for exclusivity rights continues in the renewal period for as long as exclusivity exists." (Id. at pp. 47-48.) In reaching this determination, the majority considered the parties' prior negotiations (id. at pp. 37-41), their post-execution communications (id. at pp. 41-45), and the surrounding facts and circumstances (id. at pp. 45-47).

As directly relevant here, the majority addressed the Nation's argument that the State's position could not stand because the Secretary of the Interior did not approve revenue sharing upon renewal of the Compact, as required by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710 (d)(8). (Id. at pp. 42-43.) Affirmatively recognizing that it had no authority to usurp the Secretary's approval authority, the majority found that it was nonetheless empowered to determine whether the terms of the already-approved Compact provided for revenue-sharing payments upon renewal. (Id. at p. 42.) And in that regard, the majority found no evidence that the Secretary understood the Compact to contain a State Contribution-free 7-year renewal period at the time of approval. (Id.) The majority was further unpersuaded that its adoption of the State's position would be "approving" an additional seven years of payments without legal or economic warrant to do so, finding instead that "it would simply be finding that the terms of renewal in the Compact deemed approved by the Secretary included revenue sharing payment obligations." (Id. at p. 43.)

Finally, in addition to examining the extrinsic evidence, the majority weighed the parties' positions in terms of common sense, absurdity, and commercial reasonableness, concluding that each favored the State's interpretation. (Id. at pp. 49-53.)

Consequently, after examining the Compact as a whole and finding the renewal provision ambiguous, the majority found that "'renewal means that the Compact was continued on the same terms and conditions that were in place immediately prior to expiration of the Compact's initial term which entailed revenue sharing for exclusivity." (Id. at p. 54.) It therefore held that "the Nation is obligated to make State Contribution payments of 25% of net drop payable on a quarterly basis during the seven-year renewal period." (Id. at pp. 54-55.)

2. The Dissent

Taking the opposite view of the Compact terms and extrinsic evidence, Dean Washburn dissented. He viewed the terms of the Compact as unambiguously providing for only 14 years of State Contribution, with no State Contribution due in the 7-year renewal period. (Dissent, Docket No. 2-5, pp. 4-5.) He further viewed the extrinsic evidence, the context of the negotiations, and the intent of the parties as failing to support the State's position that the parties meant for the Compact to provide for State-Contribution payments during the renewal period. (Id. at pp. 5-19.)

As it relates to the application of the IGRA, Dean Washburn found the majority's holding inconsistent with federal law and policy. First, he noted that if the Compact is indeed ambiguous, it should be interpreted liberally in the Nation's favor and to its benefit. (Id. at p. 19 (citing Oneida Cty., N.Y. v. Oneida Indian Nation of N.Y. State, 470 U.S. 226, 247, 105 S. Ct. 1245, 84 L.Ed.2d 169 (1985) ("it is well established that treaties should be construed liberally in favor of the Indians, . . . with ambiguous provisions interpreted to their benefit").) Second, he viewed the majority's construction of the Compact and award of hundreds of millions of dollars to the State as directly counter to the purpose of the IGRA, which is to promote tribal economic development, self-sufficiency, and strong tribal governance. (Id. at p. 19 (citing 25 U.S.C. § 2702).) Finally, Dean Washburn suggested that if the Compact is ambiguous, the Secretary of the Interior "cannot be said to have considered and reviewed or approved this key [renewal] provision," thereby giving the majority's ruling "the effect of enforcing an agreement that goes beyond what was approved by the DOI,[5] thus potentially undermining DOI's important regulatory role." (Id. at p. 20.)

3. The Final Award

On April 12, 2019, the majority issued the Final Award resolving the remedy portion of the proceedings. First, it held that "the Nation is obliged under [§§] 4(c)(1) and 12(b) of the Compact to continue to pay the State Contribution during the Compact renewal

5 Referring to the United States Department of the Interior.

period at a rate of 25% of Net Drop of each category of Gaming Device for which exclusivity exists payable on a quarterly basis." (Final Award, Docket No. 2-3, p. 1.) Second, it directed the Nation to specifically perform its obligation "by paying the State Contribution currently owed to the State, including all past due payments, and by making all future payments in accordance with the Compact." (Id. at p. 2.) Third, by agreement of the parties, the majority found that the State Contribution owed by the Nation to the State for the period January 1, 2017, to December 31, 2018, is $255,877,747.44, with the amount attributable to the fourth quarter of 2018 due and payable by March 31, 2019. (Id.) Finally, the majority directed the parties to each bear their own respective costs and expenses (including attorney's fees) of the arbitration and to split evenly the fees and expenses due the American Arbitration Association and the arbitrators. (Id.)

C. Procedural History

On June 6, 2019, the Nation filed a petition and motion to vacate the Final Award under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10. (Docket Nos. 1, 2.) The State cross-petitioned to confirm the Partial Final and Final Awards under the FAA, 9 U.S.C. § 9, on July 12, 2019. (Docket No. 9.) The parties completed briefing on August 27, 2019. (Docket Nos. 10-12.) Thereafter, on September 11, 2019, this Court determined upon preliminary review that oral argument was unnecessary and took the petitions and motion under advisement. (Docket No. 13.)

III. DISCUSSION

The Nation instituted this action seeking vacatur of the Final Award under § 10 of the FAA. It maintains that the majority's award requiring it to pay State Contribution during the 7-year renewal period was issued in "manifest disregard" of the IGRA, since the Secretary of the Interior never approved such revenue-sharing payments. Alternatively, the Nation suggests that the question of whether the Secretary approved such payments should be referred to the Department of the Interior under the primary-jurisdiction doctrine to assist in resolution of the cross-petitions.

The State, on the other hand, seeks to confirm the majority's Partial Final and Final Awards under § 9 of the FAA. It first argues that the Nation's petition and motion to vacate are untimely because they were filed more than three months after the Partial Final Award resolving liability was issued. Second, it argues that no basis for vacatur exists, statutorily or otherwise, and that the primary-jurisdiction doctrine does not apply. Finally, it seeks to recover its attorney's fees and costs incurred in this action.

For the reasons set forth below, this Court finds that the Partial Final and Final Awards must be confirmed and that each party should bear its own attorney's fees and costs.

A. This Court has Proper Subject-Matter Jurisdiction.

Each party seeks relief under the FAA. But the FAA itself does not confer federal jurisdiction. See Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581-82, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008) ("As for jurisdiction over controversies touching arbitration, the [FAA] does nothing, being 'something of an anomaly in the field of federal-court jurisdiction' in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis.") (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25, n.32, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). An independent basis for jurisdiction must therefore exist. See id.; Vaden v. Discover Bank, 556 U.S. 49, 59, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009); see also 9 U.S.C. § 4 (requiring independent basis for jurisdiction under Title 28). In the Second Circuit, "the existence of federal-question jurisdiction over an FAA petition turns on whether the district court would possess jurisdiction over the underlying dispute under the standards of [28 U.S.C.] § 1331." See Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372, 388 (2d Cir. 2016).

Because the underlying dispute here involves the terms and conditions of a gaming compact entered into and approved pursuant to the federal IGRA, this Court has proper subject-matter jurisdiction under 28 U.S.C. § 1331 (federal question), and neither party argues otherwise. See id.

B. The Petitions are Timely.

An application for judicial confirmation of an arbitration award must be made within one year of the date the award is made. See 9 U.S.C. § 9. Here, the State's July 12, 2019 Cross-Petition to confirm the January 7, 2019 Partial Final Award and April 12, 2019 Final Award is made within one year of the dates those awards were made. The State's petition is therefore timely, and there is no argument to the contrary.

The State, however, challenges the timeliness of the Nation's petition and motion. A motion to vacate, modify, or correct an arbitration award must be served within a shorter window than an application to confirm an award: within three months after the award is filed or delivered. See 9 U.S.C. § 12. This deadline is "not subject to extension." Barclays Capital, Inc. v. Hache, No. 16 Civ. 315 (LGS), 2016 WL 3884706, at *2 (S.D.N.Y. July 12, 2016) (relying on Florasynth, Inc. v. Pickholz, 750 F.2d 171, 175 (2d Cir. 1984));

Triomphe Partners, Inc. v. Realogy Corp., No. 10 Civ. 8248, 2011 WL 3586161, at *2 (S.D.N.Y. Aug. 5, 2011) (holding motion to vacate served three months and one day after receipt of arbitration award untimely). The Nation filed its petition and motion to vacate the Final Award on June 6, 2019. This is within three months of the April 12, 2019 Final Award, but more than three months after the January 7, 2019 Partial Final Award.

The State contends that the Nation ultimately seeks to vacate the determination that it is liable for State-Contribution payments during the renewal period of the Compact, which the majority made in the Partial Final Award, not the Final Award. In its view, the Partial Final Award is a final arbitration award subject to confirmation or vacatur under the FAA because the parties agreed to bifurcate liability and remedy. See Trade & Transport, Inc. v. Nat. Petroleum Charterers, Inc., 931 F.2d 191, 195 (2d Cir. 1991) (finding a partial final award resolving liability to be "final" for purposes of the FAA). Viewed in this manner, the Nation's filings seeking vacatur would be untimely under § 12 of the FAA.

The State construes the Nation's filings as seeking vacatur of the Partial Final Award for several reasons. First, the State views the Final Award as a purely remedial order that does not contain the liability reasoning and determination that the Nation contests. Second, the State couches the Nation's arguments as attacking the majority's finding that the Compact requires the Nation to pay the State Contribution during the renewal period, which is a determination made in the Partial Final Award. Third, the State notes that the Nation's only basis for vacatur—that the majority reached its decision in manifest disregard of the IGRA's Secretary-approval requirement—is directed at the

Partial Final Award, which is where the majority considered and rejected that argument. Finally, the State highlights that the majority designated the Partial Final Award as "a PARTIAL FINAL AWARD ON LIABILITY" and deemed it "final as to liability only." (Partial Final Award, p. 55 (emphasis in original).) The State therefore contends that the Nation's petition and motion, construed as seeking to vacate the Partial Final Award, are untimely.

The Nation, on the other hand, maintains that it timely seeks to vacate the Final Award—not the Partial Final Award—because that is the award that mandates payment of the disputed State Contribution through specific performance. It specifically disclaims challenging the majority's Compact interpretation, noting that its arguments are instead focused on the legal propriety of the specific-performance order in light of the IGRA's Secretary-approval requirements. According to the Nation, until the majority ordered specific performance in the Final Award, its liability determination was not subject to challenge.

The Nation also maintains that by its plain terms, the Partial Award was not a final arbitration award: it was "final as to liability only" and disclaimed that "[t]his partial final award does not include a determination of all issues submitted to the Panel." (Id. at pp. 55, 56.) The Final Award, on the other hand, expressly states that "this decision is a Final Award and includes a determination of all issues submitted to the Tribunal." (Final Award, p. 2.) Thus, according to the Nation, the arbitrators themselves did not intend the Partial Final Award to be a final arbitration award under the FAA. See Michaels v. Mariforum Shipping, S.A., 624 F.2d 411, 413-14 (2d Cir. 1980) ("In order to be 'final,' an arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted to them. Generally, in order for a claim to be completely determined, the arbitrators must have decided not only the issue of liability of a party on the claim, but also the issue of damages.") (citations omitted). Viewed in this light, the Nation insists that its petition and motion to vacate the Final Award are timely.

Having considered the parties' arguments, this Court agrees with the Nation's position and finds that its petition and motion are properly construed as timely seeking to vacate the Final Award. The Final Award is the one that contains the remedy that the Nation finds unpalatable: the order of specific performance requiring payment of the State Contribution during the Compact's renewal period. The Nation views this award as made in manifest disregard of the law because it impermissibly amends the Compact to impose a payment obligation that the Secretary of the Interior neither reviewed nor approved. And while the State correctly notes that the reasoning for the award is contained in the Partial Final Award,[6] the Nation's challenge is at bottom to the remedy of specific performance ordering payment. Since that remedy is contained in the Final Award, that is where the Nation's challenge lies.

This Court further finds that the Final Award is the final arbitration award for purposes of the FAA. Federal courts may only review arbitration awards that are final. See Schreiber v. Friedman, 15-CV-6861 (CBA)(JO), 2017 WL 5515853, at *2 (E.D.N.Y. Mar. 30, 2017) (citing Michaels, 624 F.2d at 414). To be final, an arbitration award "must

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6The State also rightly notes that the Partial Final Award contains what reads as an order of specific performance. (See Partial Final Award, p. 55 ("The Nation is ordered to specifically perform its obligation under ¶¶ 4(c)(1) and 12(b) by paying the State Contribution currently owed to the State, including all past due payments, and by making all future payments in accordance with the Compact[.]") But because the Partial Final Award was limited to liability by the express agreement of the parties, the majority's specific performance order did not become effective until awarded as a remedy in the Final Award. (See Procedural Order No. 4, Docket No. 9-8.)

resolve all the issues submitted to arbitration, and . . . must resolve them definitively enough so that the rights and obligations of the two parties, *with respect to the issues submitted*, do not stand in need of further adjudication." Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc., 157 F.3d 174, 176 (2d Cir. 1998) (per curiam) (emphasis in original); see Kerr-McGee Refining Corp. v. M/T Triumph, 924 F.2d 467, 471 (2d Cir. 1991) (finding a "Partial Final Award" not final under the FAA because it "did not finally dispose of an independent claim because it left open the question of damages"). And a final award must be intended by the arbitrators to resolve all claims submitted to them. See Michaels, 624 F.2d at 413-14.

The State relies heavily on Trade & Transport, a case in which the Second Circuit found a partial final award to be final for purposes of the FAA. There, the parties asked their arbitrators to make an immediate determination on a liability issue so that they could immediately proceed with a related district court action. See Trade & Transport, 931 F.2d at 192. The arbitrators acceded to the parties' request and rendered an immediate partial final award the same day. Id. at 193. When the losing party subsequently sought reconsideration of the partial final award, the arbitrators denied the request, finding that their decision was final as to liability and that they were therefore without power to modify it (*functus officio*). Id. The district court confirmed the award over objection. Id. at 194.

On appeal, the Second Circuit rejected the argument that the partial final award was not final for purposes of the FAA. Noting the general rule that an arbitration award lacks finality unless it resolves every point included in the parties' submissions, the court nonetheless held that when parties explicitly agree to bifurcate their arbitration proceedings through a limited submission, a partial award may be deemed final, despite the fact that other issues, such as damages, remain unresolved. Id. at 195.

The Court reached this determination for three principal reasons. First, citing the principle that the parties' submission defines the scope of the arbitrators' authority, see Ottley v. Schwartzberg, 819 F.2d 373, 376 (2d Cir. 1987), the court noted that "the parties modified their original submission to the arbitrators in order to cause a bifurcated decision," Trade & Transport, 931 F.2d at 195. That is, the parties carved out liability as a separate, independent issue intended for immediate resolution. See id. Second, citing the principle that arbitrators lose their authority over a given issue once they have finally decided it (again, *functus officio*), see Ottley, 819 F.2d at 376, the court found that the parties asked the arbitrators to decide the issue of liability immediately and finally, see Trade & Transport, 931 F.2d at 195. Finally, the court noted that the "panel understood that this was to be a final decision as to liability" and that their award "did conclusively decide every point required by and included in the first part of the parties' modified submission." Id. at 195; see Michaels, 624 F.2d at 413-14 (noting that a final award must be intended by the arbitrators to resolve all submitted claims).

As a result, Trade & Transport recognizes an exception to the general arbitration-finality requirement when parties expressly request immediate determinations in bifurcated proceedings. See Pearl Seas Cruises, LLC v. Irving Shipbuilding, Inc., Civil No. 3:10-CV-1294 (JBA), 2011 WL 577333, at *7 (D. Conn. Feb. 9, 2011). Here, however, Trade & Transport does not apply for several reasons.

First, the State and Nation did not modify their submission to the panel or bifurcate the proceedings to address liability only, as was done in Trade & Transport. See Ins. Co. of N. Am. v. Pub. Serv. Mut. Ins. Co., 609 F.3d 122, 129 (2d Cir. 2010) ("In Trade & Transport, the parties and arbitrators agreed to bifurcate the arbitration proceedings so the first stage would determine liability and the second damages."). Rather, the panel conducted the full arbitration proceeding on December 12 and 13, 2018, after which the parties agreed to have the panel resolve liability first, and then, if necessary, proceed to remedy. (See Procedural Order No. 4, Docket No. 9-8.) The arbitration proceeding itself was not bifurcated.

Second, despite the panel majority's notation that its Partial Final Award "is final as to liability only," the parties expressly agreed that the panel's liability determination would be a final award *only if* the panel found no liability, which it did not. (Id. ("If the Panel finds no liability, then that award will be the final award in this matter.") Thus, the parties' own agreement defeats the State's finality argument.

Third, because the parties did not limit their arbitration submission to the issue of liability, the panel did not resolve all issues submitted to it, as expressly noted in the panel majority's decision. (Compare Partial Final Award, p. 56 ("The Panel reserves jurisdiction to issue a later final award on the remaining issues. This partial final award does not include a determination of all issues submitted to the Panel.") with Final Award, p. 2 ("[T]his decision is a Final Award and includes a determination of all issues submitted to the Tribunal.").

Consequently, Trade & Transport does not apply. Under the general rule, this Court finds that it was upon issuance of the Final Award that the proceedings became subject to review under the FAA. See Michaels, 624 F.2d at 414. That is the award that finally settled the rights and obligations of the parties and all issues submitted to the panel. See Rocket Jewelry Box, 157 F.3d at 176. Further, it is the award that the parties and arbitrators expressly agreed would be the final award in this matter. See Michaels, 624 F.2d at 413-14. Accordingly, because the Nation brought its petition and motion within three months of the Final Award, they are timely.

C. The Arbitration Award Must be Confirmed.

Turning to the arbitration award[7] itself, this Court finds that it must be confirmed. Arbitration awards are not self-enforcing; judicial orders are required to give them force and effect. D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 104 (2d Cir. 2006). Under the FAA, which was enacted to overcome judicial resistance to arbitration and instill a national policy favoring it, see Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006), a court may confirm, vacate, modify, or correct an award, see 9 U.S.C. §§ 9-11.

Confirmation of an arbitration award is usually "'a summary proceeding that merely makes what is already a final arbitration award a judgment of the court,' and the court 'must grant' the [motion to confirm] unless the award is vacated, modified, or corrected." D.H. Blair, 462 F.3d at 110 (citing Florasynth, 750 F.2d at 176). "[A]n extremely deferential standard of review" applies "[t]o encourage and support the use of arbitration by consenting parties." Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC, 497 F.3d 133, 139 (2d Cir. 2007); see also Landau v. Eisenberg, 922 F.3d 495, 498 (2d Cir. 2019)

7 Because the State seeks confirmation of both the Partial Final Award and Final Award, this Court will refer to them collectively as "the arbitration award" for ease of reference.

(per curiam) ("The FAA creates a strong presumption in favor of enforcing arbitration awards and courts have an extremely limited role in reviewing such awards.") (citations and quotation marks omitted); Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993) ("Arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.").

The burden of proof required to avoid confirmation of an arbitration is therefore very high, since courts afford great deference to arbitration decisions. See Ottley, 819 F.2d at 376; Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 388 (2d Cir. 2003) ("A party petitioning a federal court to vacate an arbitral award bears the heavy burden of showing that the award falls within a very narrow set of circumstances delineated by statute and case law."). Indeed, "an arbitration award should be enforced, despite a court's disagreement with it on the merits, if there is 'a barely colorable justification for the outcome reached.'" Landy Michaels Realty Corp. v. Local 32B-32J, Serv. Emps. Int'l Union, AFL-CIO, 954 F.2d 794, 797 (2d Cir. 1992) (quoting Andros Compania Maritima, S.A. v. Marc Rich & Co., 579 F.2d 691, 704 (2d Cir. 1978)).

Consequently, "[v]acatur of arbitral awards is extremely rare." Hamerslough v. Hipple, No. 10 Civ. 3056 (NRB), 2012 WL 5290318, at *3 (S.D.N.Y. Oct. 25, 2012). Nonetheless, four statutory grounds exist to vacate, modify, or correct an arbitration award. See 9 U.S.C. § 10 (a); Weiss v. Sallie Mae, Inc., 939 F.3d 105, 108-109 (2d Cir. 2019). And a court may also vacate an arbitration award if it is rendered in "manifest disregard of the law."[8] Id. at 109 (citing Schwartz v. Merrill Lynch & Co., Inc., 665 F.3d 444, 451 (2d Cir. 2011) (internal quotation marks omitted)).

1. There are No Statutory Grounds to Vacate the Arbitration Award.

Section 10 (a) of the FAA sets forth four statutory grounds for vacatur of an arbitration award:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

None of these grounds are apparent from the face of the arbitration award or the evidence regarding the arbitration proceedings, nor does the Nation assert any of them as cause for vacatur. This Court therefore finds no statutory basis to vacate the arbitration award.

2. The Arbitration Award is Not in Manifest Disregard of the Law.

"To vacate an award on the basis of a manifest disregard of the law, the court must

8 In Weiss, the Second Circuit declined to resolve the "epistemological debate" over whether the "manifest disregard" paradigm is an independent basis for judicial review or simply "judicial gloss" on the enumerated grounds for vacatur in § 10 (a). 939 F.3d at 109 (citing Schwartz v. Merrill Lynch & Co., 665 F.3d 444, 451-52 (2d Cir. 2011)). Either way, "manifest disregard" remains a valid ground for vacating an arbitration award. See id.

find 'something beyond and different from mere error in the law or failure on the part of the arbitrators to understand or apply the law.'" Jock v. Sterling Jewelers Inc., 646 F.3d 113, 121 n. 1 (2d Cir. 2011) (quoting Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 208 (2d Cir. 2002)); see T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 339 (2d Cir. 2010) (errors of law and fact insufficient to vacate arbitration award). Rather, the challenging party "must clearly demonstrate[ ] 'that the panel intentionally defied the law.'" STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC, 648 F.3d 68, 78 (2d Cir. 2011) (quoting Duferco, 333 F.3d at 389); see, e.g., N.Y. Tel. Co. v. Commc'ns Workers of Am. Local 1100, 256 F.3d 89, 93 (2d Cir. 2001) (per curiam) (finding manifest disregard standard satisfied where arbitrator explicitly rejected controlling Second Circuit authority in favor of applying an out-of-circuit rule). Notably here, "[w]ith respect to contract interpretation, this standard essentially bars review of whether an arbitrator misconstrued a contract." T.Co Metals, 592 F.3d at 339.

Just weeks ago, the Second Circuit articulated the manifest disregard standard as follows:

> A litigant seeking to vacate an arbitration award based on alleged manifest disregard of the law bears a heavy burden, as awards are vacated on grounds of manifest disregard only in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent. We will uphold an arbitration award under this standard so long as the arbitrator has provided even a barely colorable justification for his or her interpretation of the contract. Vacatur is only warranted, by contrast, when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice.

Weiss, 939 F.3d at 109 (citations and quotation marks omitted).

A two-part inquiry applies. First, the court must consider "whether the 'governing law alleged to have been ignored by the arbitrators [was] well defined, explicit, and clearly applicable.'" Westerbeke, 304 F.3d at 209 (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 934 (2d Cir. 1986) (alteration in original)). Second, the court must determine whether the arbitrators knew of "the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it." Id.

As to the first inquiry, the Nation alleges that the panel ignored the Secretary-approval provisions of the IGRA. See 25 U.S.C. § 2710 (d)(3)(B) (providing that a Tribal-State gaming compact "shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register); 25 C.F.R. § 293.4 (providing that compacts and amendments to compacts are subject to review and approval by the Secretary). Assuming that these provisions constitute governing law, there is no dispute that this requirement was well defined and explicit at the time of the panel's decision.

As to the first part of the second inquiry, it is apparent from both the majority decision and the dissent that the panel was actually aware of the IGRA Secretary-approval provisions, because both documents discuss them. (See Partial Final Award, p. 42; Dissent, pp. 19-20.)

It is the remaining part of the second inquiry where the Nation's cause limps: it has made no showing that the IGRA Secretary-approval requirement clearly governs or that the panel simply ignored it. Again, the Nation's burden is to clearly show that the arbitrators intentionally defied the law, STMicroelectronics, 648 F.3d at 78, engaged in egregious impropriety, T.Co Metals, 592 F.3d at 339, or dispensed their own brand of industrial justice, Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 559 U.S. 662, 671, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010) (citations omitted).

The Nation contends that the majority exhibited manifest disregard for the IGRA by consciously amending the Compact to impose a payment obligation that was never reviewed and approved by the Secretary. It argues that, if the Compact's renewal provision is ambiguous, as the majority found, it cannot be said that the Secretary approved the ordered payments. And it further maintains that the Secretary approved only 14 years of State Contribution and never had or reviewed the extrinsic evidence the majority relied on to interpret the meaning of the renewal provision.

In opposition, the State argues that the majority did not consciously act in manifest disregard of the law, but rather, simply resolved the parties' contractual dispute as it related to the Compact provisions. It notes that the majority acted with full jurisdiction, because the parties agreed to submit their disputes arising out of the Compact to binding arbitration, not to the Secretary of the Interior. The State therefore maintains that the majority's arbitration award is not an amendment to the Compact subject to Secretary approval, but rather an interpretation of the Compact's provisions not subject to Secretary review.

The panel addressed these arguments. In rejecting the same Secretary-approval arguments that the Nation lodges here, the majority expressly found that it lacked the legal authority to usurp the Secretary's approval role to enforce a Compact term that the Secretary did not approve. (Partial Final Award, p. 42.) It further found, however, that its decision did not encroach the Secretary's province, and therefore the IGRA did not apply. Rather, it viewed its decision as falling squarely within its mandate—to determine whether the Compact provides for revenue-sharing payments upon renewal. It wrote: "upholding the State's interpretation of the Compact would not be "approving" an additional seven years of payment without legal or economic warrant to do so; rather, it would simply be finding that the terms of the renewal in the Compact deemed approved by the Secretary included revenue[-]sharing payment obligations." (Id. at p. 43) Thus, the majority found that it was interpreting the terms of the already-approved Compact (specifically the renewal portion), not amending the Compact to impose new, unapproved terms. (Id.) In doing so, it highlighted the fact that the Secretary approved the renewal provision being interpreted, with "no evidence" that the Secretary did so sharing the same view of the provision that the Nation now advocates—as providing a State Contribution-free renewal period. (Id.)

Having closely reviewed the record and considered the parties' arguments, this Court finds that the Nation has failed to carry its heavy burden of demonstrating that the panel acted in manifest disregard of the law.

The Nation's position is premised on a proposition that it has provided no authority for—that the arbitration award is an amendment to the Compact that requires the Secretary's approval under the IGRA. Two points bear noting. First, the Nation has provided no legal authority holding that a contract interpretation resulting in an arbitration award, made pursuant to a binding arbitration provision contained in a gaming compact approved by the Secretary, constitutes an amendment to the compact subject to further

Secretary approval. It is therefore questionable whether the Nation even presented the panel with a "clearly governing legal principle" that it allegedly decided to ignore. See Westerbeke, 304 F.3d at 209. Second, even assuming that the Secretary-approval provision of the IGRA is a "clearly governing legal principle" here, it is apparent from the face of the majority's decision that it did not consciously disregard it. Instead, in rejecting the very same arguments that the Nation lodges here, the majority found that its decision did not constitute an amendment to the Compact that would require Secretary approval. The majority considered the Nation's arguments and rejected them. It follows then that the panel did not ignore or pay no attention to the Nation's proffered "clearly governing legal principle." See id. That the Nation may disagree or find error in the majority's determination is not a basis to find manifest disregard. See Jock, 646 F.3d at 121 n.1; T.Co Metals, 592 F.3d at 339.

Relatedly, the majority did not impose a new revenue-sharing obligation as the Nation contends. Rather, it found that the parties' existing, already-approved Compact required revenue sharing during the renewal period. It is undisputed that the Secretary of the Interior reviewed and approved the Compact. In doing so, the Secretary approved the "Party Dispute Resolution" provision (§ 14), which provides that if the parties are unable to resolve "*any* dispute, claim, question, or disagreement arising from or relating to this Compact," then the dispute is to be resolved through binding arbitration. (Compact, § 14 (emphasis added).) The parties further agreed—and the Secretary approved—that the arbitrators would be permitted to order specific performance as a remedy for any breaches.[9] (Id. at § 14 (h).) And notably, the parties contemplated—and the Secretary approved—that an arbitration award could be entered against the Nation for specific performance requiring the payment of money to the State, agreeing that such payments would be satisfied solely from the revenues of the Nation's Class III Gaming conducted under the Compact. (Id.)

It is against this backdrop that the parties submitted their dispute to the panel. The panel's task was "to determine whether upon renewal of the Compact, the Nation must continue to pay to the State a portion of its gaming revenue . . . in exchange for the State granting the Nation exclusive rights to operate slot machines and video lottery games in parts of Western New York." (Partial Final Award, p. 6.) The panel was therefore charged with interpreting the Compact's renewal provision (§ 4 (c)), a provision that the Secretary approved. Consequently, in finding that the renewal provision required payment of the State Contribution during the renewal period, the majority simply construed the parties' existing, approved compact.[10] It did not impose a new revenue-sharing obligation, and its Compact interpretation is not reviewable under the manifest-disregard standard. See T.Co Metals, 592 F.3d at 339; Unite Here Local 100 v. Westchester Hills Golf Club, Inc., 161 F. Supp. 3d 262, 265 (S.D.N.Y. 2016) ("An arbitrator's 'factual findings and contractual interpretation are not subject to judicial

9 The majority found the Nation in breach for failing to pay the State Contribution after the Compact's renewal. (Partial Final Award, p. 55.)

10 The Nation challenges this finding on the basis that, in its view, the Secretary approved only 14 years of payments. But the majority viewed the evidence differently, explicitly finding "no evidence" that the Secretary understood the renewal provision to include no revenue sharing. (Partial Final Award, p. 42.) While the Nation pans the majority's finding as "inverted reasoning," it remains that a tribunal's error is not grounds to find manifest disregard. See Jock, 646 F.3d at 121 n.1.

challenge.'") (quoting Westerbeke, 304 F.3d at 214).

Accordingly, this Court finds no merit in the Nation's contention that the arbitration award must be vacated as made in manifest disregard of the law. The Nation has not shown that the arbitrators intentionally defied governing law, engaged in egregious impropriety, or dispensed their own brand of industrial justice. See STMicroelectronics, 648 F.3d at 78; T.Co Metals, 592 F.3d at 339; Stolt-Nielsen, 559 U.S. at 671. Since the arbitration award is not otherwise subject to vacatur, modification, or correction, it must be confirmed. See 9 U.S.C. § 9; Florasynth, 750 F.2d at 176; see also Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez., 863 F.3d 96, 118 n. 18 (2d Cir. 2017) ("In FAA practice, an order 'confirming' an arbitral award must be issued upon timely application of any party to the arbitration and upon prior notice served upon the adverse party unless the award is vacated, modified, or corrected as provided for by the Act.").

D. Referral to the Department of the Interior is Unnecessary.

The Nation suggests that this Court invoke the primary-jurisdiction doctrine to refer to the Department of the Interior the question whether the Secretary approved State-Contribution payments during the renewal period back in 2002. Even if applicable, application of the discretionary doctrine under the circumstances here would undermine the parties' arbitration agreement and the panel's determination.[11] The arbitration

11 The primary-jurisdiction doctrine, which is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties, may apply in an action that "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." In re KIND LLC "Health & All Natural" Litig., 209 F. Supp. 3d 689, 693 (S.D.N.Y. 2016); see also Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 58-59 (2d Cir. 1994) (finding that the doctrine "applies where a claim is originally cognizable in the courts, but enforcement of the claim requires, or is materially aided by, the resolution of threshold issues, usually of a factual nature, which are placed within the special competence of the administrative body."). The doctrine permits a court to defer to an administrative agency "for advisory findings." Petrosino v. Stearn's Prod.,

question was not whether the Secretary explicitly approved State-Contribution payments during the renewal period, but rather, whether the terms of the Compact that the Secretary *did approve* provide for payment of the State Contribution during that term. Resort to the primary-jurisdiction doctrine is not necessary to assess the propriety of the panel's resolution of that question. See N.Y. State Thruway Auth. v. Level 3 Commc'ns, LLC, 734 F. Supp. 2d 257, 265 (N.D.N.Y. 2010) ("Contract disputes are legal questions within the conventional competence of the courts and thus the doctrine of primary jurisdiction does not normally apply."). Moreover, the Nation's request once again assumes the veracity of its unsupported premise that Secretary approval of the panel's arbitration award is required.[12] There has been no showing that such is the case, particularly since the panel neither created a new compact nor amended an existing one. See 25 C.F.R. § 293.4. Consequently, even if the primary-jurisdiction doctrine could apply, this Court finds no cause to invoke it here as it would not materially assist in the resolution of the relevant issues. See Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 58-59 (2d Cir. 1994).

E. There is no Cause to Award the State Attorney's Fees and Costs.

Along with confirmation of the arbitration awards, the State seeks to recover its

Inc., No. 16-CV-7735 (NSR), 2018 WL 1614349, at *10 (S.D.N.Y. Mar. 30, 2018). Courts consider four factors when determining whether to apply the doctrine: "(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." Ellis v. Tribune Television Co., 443 F.3d 71, 82-83 (2d Cir. 2006).

12 Or as the State puts it, the Nation has not "established that Congress has delegated to the Secretary any authority over arbitral awards pertaining to approved compacts." (Memorandum of Law, Docket No. 12, p. 17.)

attorney's fees and costs incurred in this action. "The general rule in our legal system is that each party must pay its own attorney's fees and expenses." Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 550, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010). Consequently, "in a federal action, attorney's fees cannot be recovered by the successful party in the absence of statutory authority for the award." Int'l Chem. Workers Union (AFL-CIO), Local No. 227 v. BASF Wyandotte Corp., 774 F.2d 43, 47 (2d Cir. 1985).

The FAA does not provide for an award of attorney's fees and expenses for arbitration-confirmation proceedings, but a court remains authorized to enter such an award "[p]ursuant to its inherent equitable powers." Id. In the arbitration confirmation context, "the guiding principle has been stated as follows: when a challenger refuses to abide by an arbitrator's decision without justification, attorney's fees and costs may properly be awarded." Id. Such awards may be made, for example, when a party pursues a frivolous course. See, e.g., Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698, 708 (2d Cir. 1985) (upholding imposition of sanctions where the plaintiff "had presented 'frivolous, unreasonable and groundless' opposition" to confirmation of an arbitration award); Prospect Capital Corp. v. Enmon, No. 08 Civ. 3721(LBS), 2010 WL 907956, at *6-8 (S.D.N.Y. Mar. 9, 2010) (imposing sanctions for a party's "persist[ence] in bringing frivolous arguments that misrepresented the record" in opposing the confirmation of an arbitration award).

The State seeks an award of attorney's fees and costs on the basis that the Nation's effort to vacate the arbitration award is a frivolous delay tactic designed to avoid the panel's binding decision. Though unsuccessful, the Nation's position cannot fairly be said to be frivolous—indeed, it was persuasive to Dean Washburn, see Dissent, pp. 19-20—and there has been no showing that the Nation sought vacatur simply as a dilatory tactic. Cf. Benihana, Inc. v. Benihana of Tokyo, LLC, 15 Civ. 7428, 2016 WL 3913599, at *24 (S.D.N.Y. July 15, 2016) (denying Rule 11 sanctions in arbitration-confirmation proceedings, *inter alia*, because arguments made in support of vacatur were not "at all" frivolous as demonstrated by the dissenting arbitrator advancing the same arguments). This Court therefore finds that the parties should bear their own attorney's fees and expenses under the general American rule.

IV. CONCLUSION

The Nation and State agreed to resolve disputes arising from or related to the Compact through binding arbitration. A majority of the arbitration panel assigned to the dispute definitively held in the State's favor. Whether this Court or any other would interpret the Compact the same way is not at issue, for a federal court must confirm an arbitration award so long as there is a "barely colorable justification for the outcome reached," a standard that is easily met here. See Andros Compania Maritimo, 579 F.2d at 704. Because there exist no grounds to vacate the majority's arbitration award, it must and will be confirmed. The parties will each bear their own attorney's fees and costs.

V. ORDERS

IT HEREBY IS ORDERED, that the Nation's Petition and Motion to Vacate the Final Award (Docket Nos. 1, 2) are DENIED.

FURTHER, that the State's Cross-Petition to Confirm the Partial Final and Final Awards (Docket No. 9) is GRANTED.

FURTHER, that the parties each bear their own attorney's fees and costs.

FURTHER, that the Clerk of Court is directed to enter judgment confirming the Final Award (Docket No. 2-3) and Partial Final Award (Docket Nos. 2-4, 2-5) and then CLOSE this case.

SO ORDERED.

Dated: November 8, 2019
Buffalo, New York

s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

Judgment in a Civil Case

United States District Court
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS,

Petitioner,

v.

STATE OF NEW YORK,

Respondent

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 19-CV-735-S

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: that the Nation's Petition and Motion to Vacate the Final Award (Docket Nos. 1,2) are denied. The State's Cross-Petition to confirm the Partial Final and Final Awards (Docket No. 9) is granted. The parties each bear their own attorney fees and costs. The Final Award (Docket No.2-3) and Partial Final Award (Docket Nos. 2-4, 2-5) are confirmed.

Date: November 12, 2019

MARY C. LOEWENGUTH
CLERK OF COURT

By: s/K.McMillan
Deputy Clerk