Nos. 19-1661/19-1857

UNITED STATES COURT OF APPEALS
For the First Circuit

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AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC.; TOWN OF AQUINNAH,

Plaintiffs - Appellees/Cross – Appellants,

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff – Appellee,

v.

THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH); THE AQUINNAH WAMPANOAG GAMING CORPORATION; and THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC.,

Defendants – Appellants/Cross – Appellees,

CHARLIE BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts; MAURA HEALEY, in her capacity as Attorney General of the Commonwealth of Massachusetts; CATHY JUDD-STEIN, in her capacity as Chair of the Massachusetts Gaming Commission,

Third Party Defendants – Appellees.

_____

Nos. 19-1729/19-1922

AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC.; TOWN OF AQUINNAH,

Plaintiffs – Appellees/Cross – Appellants,

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff – Appellee,

v.

THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH); THE AQUINNAH WAMPANOAG GAMING CORPORATION; and THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC.,

Defendants – Appellants/Cross – Appellees,

CHARLIE BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts; MAURA HEALEY, in her capacity as Attorney General of the Commonwealth of Massachusetts; CATHY JUDD-STEIN, in her capacity as Chair of the Massachusetts Gaming Commission,

Third Party Defendants.

On Appeal from the
U.S. District Court for the District of Massachusetts
(CASE NO: 1:13-cv-13286-FDS)

AQUINNAH TRIBE'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

The Wampanoag Tribe of Gay Head (Aquinnah); the Wampanoag Tribal Council of Gay Head, Inc.; and the Aquinnah Wampanoag Gaming Corporation pursuant to Fed. R. App. P. 26.1, certify that it has no parent corporation and certifies that it has no stock and therefore no publicly held corporation owns 10% or more of its stock.

s/ Scott D. Crowell
SCOTT D. CROWELL

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Appellant Aquinnah Tribe, pursuant to 1st Cir. R. 34.0(a), requests that the Appeals Court permit oral argument because (i) this is a matter a great importance to the Tribe and its members; (ii) the District Court's Order requires the application and interpretation of two prior decisions of this Court, which reached different results; (iii) the exceptions set forth in Local Rule 34(a)(2)(A) and (C) do not apply; and (iv) most importantly, the Tribe believes that the decisional process would be significantly aided by oral argument.

January 21, 2020

s/ Scott D. Crowell
SCOTT D. CROWELL

I. JURISDICTIONAL STATEMENT

This lawsuit originated by the Commonwealth of Massachusetts (the "Commonwealth") against Appellants/Cross-Appellees the Wampanoag Tribe of Gay Head (Aquinnah) and the Aquinnah Wampanoag Gaming Corporation (the "AWGC") (together, the "Tribe") in the Supreme Judicial Court for Suffolk County, Massachusetts, and was removed by the Tribe pursuant to 28 U.S.C. §§ 1331, 1441 and 1446. The District Court's federal subject matter jurisdiction is based on 28 U.S.C. § 1331 and supplemental jurisdiction to the Commonwealth's state law claims pursuant to 28 U.S.C. § 1367.

The Initial Final Judgment (the "IFJ") was entered by the District Court on January 5, 2016. A Notice of Appeal was timely filed by the Tribe on February 1, 2016. This Appeals Court (this "Court") vacated the IFJ and remanded with instructions to enter judgment in favor of the Tribe:

> For the foregoing reasons, the opinion of the district court is reversed and the case is remanded to the district court for entry of judgment in favor of the Tribe.

Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah), 853 F.3d 618, 629 (1st Cir. 2017)("2017 Opinion").

Nearly two years later, on April 4, 2019, Appellee/Cross-Appellant, Town of

Aquinnah ("Town") filed a Motion for Entry of Final Judgment (Doc. 181)[1] (not in compliance with this Court's mandate), and Appellee/Cross-Appellant, Aquinnah Gay Head Community Association ("AGHCA") filed a separate joinder to the Town's motion (Doc. 183)[2]. Ultimately, the Town's motion lead to three amended judgments. First, on June 19, 2019, the District Court entered its Memorandum Opinion and Order (Add. 30-41) and the Amended Final Judgment (Add. 42-45) adverse, in part, to the Tribe. The Tribe timely filed on June 28, 2019 its Notice of Appeal (App.Vol.IV, 1137-1139). The Commonwealth, thereafter, filed a Motion to Alter or Amend or, in the Alternative, Correct the June 19, 2019 Amended Final Judgment, seeking to remove "the Commonwealth" from ¶ 5 of the Amended Final Judgment (Doc. 205). The District Court agreed and on July 19, 2019 entered the Second Amended Final Judgment (Add. 48-51). The Tribe thereafter filed its Emergency Motion to Alter or Amend or, In the Alternative, Correct the Second Amended Final Judgment, seeking in part to replace the

[1] References to the record below, when included in the Appendix, refer to the Appendix by volume and bates stamp page number, e.g., "App.Vol.I, 1137"; when included in the Addendum, refer to the bates stamp number, e.g., "Add. 23"; and when not included in either the Appendix or Addendum, refer to the District Court's docket numbering, e.g. "Doc. 205."

[2] The Appellee Commonwealth and Third-Party Defendants Charlie Baker, Cathy Judd-Stein and Maura Healy did not join in the Town's Motion for Entry of Final Judgment or in the Town's and AGHCA's appeals and cross-appeals in this matter.

reference to the Commonwealth in ¶ 5 with Third-Party Defendants Charlie Baker, Cathy Judd-Stein and Maura Healy. (Doc. 221). The District Court agreed and on August 19, 2019 issued its Third Amended Final Judgment ("TAFJ") (Add. 56-59). The Tribe timely filed on August 23, 2019, its Notice of Appeal (App.Vol.IV, 1357-1358) of the TAFJ.

This Court has jurisdiction over the Tribe's appeals pursuant to 28 U.S.C. §§ 1291 and 1295(a)(1) (appeal from Final Judgment). This appeal is from a final judgment that disposes of all parties' claims.

The Town and AGHCA have filed cross-appeals (App.Vol.IV, 1189-1192) to both the Amended Final Judgment and the Second Amended Final Judgment. On September 25, 2019, the Tribe filed an Assented to Motion to Consolidate Related Appeals (Doc. 00117494183), which was granted by this Court on October 10, 2019 (Doc. 00117500973).

The Tribe does question whether the Town and AGHCA can invoke this Court's jurisdiction over the cross-appeals, as they are appeals from rulings on remand of which the Cross-Appellants Town and AGHCA prevailed. At this juncture, it would be appropriate for this Court *sua sponte* to enter an Order directing the Town and AGHCA to show cause why the cross-appeals should not be dismissed for lack of jurisdiction. *See Neverson v. Farquharson*, 366 F.3d 32, 39 (1st Cir. 2004); *Alberty-Valex v. Corporacion de Puerto Rico Para La Difusion Publica*, 361

F.3d 1, 5 n.4 (1st Cir 2004) ("A party may not appeal from a favorable judgment").

This jurisdictional statement is qualified by the Tribe's position, discussed in greater detail in Section V(C)(3)(i) below, that its sovereign immunity from unconsented suit bars claims over matters preempted by IGRA, which is jurisdictional and cannot be waived.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the District Court erred in ruling that Commonwealth and local laws and regulations regarding the construction, occupancy and operation[3] of the Tribe's gaming facility remain in effect, despite the preemptive effect of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA"), on all such local laws that are repugnant with the comprehensive, sophisticated regulatory scheme established in IGRA.

B. Whether the District Court erred in concluding that it had jurisdiction to enter judgment adverse to the Tribe despite this Court's clear instruction to the contrary.

C. Whether the District Court erred in refusing the Tribe's request to reconsider the issue of the Tribe being required to obtain local building permits in light of this

[3] Discussed in greater detail in Section V(B) below, the Town's and Martha's Vineyard Commission's regulations expand their jurisdiction far beyond the construction, occupancy and operation of facilities, to condition or deny construction permits for any reason short of an unconstitutional taking of property.

Court's opinion in *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618 (1st Cir. 2017).

D. Whether the District Court erred in finding that the Tribe, in the context of the earlier appeal, waived the issue of the Tribe being required to obtain local permits regarding construction, occupancy and operation of the Tribe's gaming facility despite IGRA's preemptive effect.

III. CONCISE STATEMENT OF THE CASE

In 2015, on cross motions for summary judgment, the District Court denied the Tribe's motion and granted judgment in favor of the Commonwealth, Town and AGHCA, upon concluding both that IGRA did not impliedly repeal the Massachusetts Indian Land Claims Settlement Act, formerly codified at 25 U.S.C. §§ 1771-1771i ("MILCSA (Aquinnah)")[4], and that IGRA did not apply to the Settlement Lands because the Tribe had failed to demonstrate sufficient exercise of governmental power over those lands. *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 144 F. Supp. 3d 152, 177 (D. Mass. 2015). This Court reversed on both grounds. *Wampanoag*, 853 F.3d at 618.

This Court ruled that IGRA's comprehensive and sophisticated regulatory scheme, rather than the laws of the Commonwealth and local laws, governed gaming activities on the Tribe's Indian lands. *Id.* at 618. Reaffirming *Rhode Island v.*

[4] The 2017 Opinion refers to MILCSA(Aquinnah) as the "Federal Act."

Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994), this Court reasoned that the District Court misapprehended *Narragansett's* federal preemption analysis in ruling against the Tribe, and "remanded to the district court for entry of judgment in favor of the Tribe." *Wampanoag*, 853 F.3d at 627-29.

The District Court, however, never entered judgment in favor of the Tribe as instructed by this Court. Instead, the District Court waited. And waited. And waited.

Nearly two years after the issuance of this Court's mandate, the Town made its Motion for Entry of Judgment, arguing that even though this Court had held that the Tribe could conduct gaming under IGRA, this Court "[did] not authorize the commencement of construction without the Tribe first obtaining a building permit and other required permits from the Town." (Doc. 181, 2.) The District Court agreed. Consequently, and contrary to this Court's clear instruction for "entry of judgment in favor of the Tribe," the District Court entered judgment in favor of the Tribe with respect to state statutes and local regulations that prohibit or regulate games of chance, but then also entered judgment in favor of the Commonwealth, Town, and AGHCA with regard to state statutes and local regulations that govern the construction, occupancy, and operation of a gaming facility on the Settlement Lands. (Add. 58).

The TAFJ, if allowed to stand, will eviscerate the United States' and Tribe's jurisdiction over the Tribe's Indian lands, devastating the Tribe's ability to generate employment opportunities for its Tribal members and the community, and its ability to generate governmental revenue from gaming, which revenue is desperately needed in order for the Tribe to fulfill Congress' intended goals of promoting tribal economic development, self-sufficiency, and strong tribal government. 25 U.S.C. § 2702(1).

The crux of this appeal is whether IGRA preempts Commonwealth and local laws and regulations regarding the construction, occupancy and operation of the Tribe's gaming facility, which laws and regulations are repugnant to the comprehensive, sophisticated regulatory scheme established in IGRA. Congress' enactment of IGRA, and its comprehensive provisions of federal law governing gaming on Indian lands, impliedly repealed those provisions of the MILCSA (Aquinnah), which had previously applied such Commonwealth and local laws and regulations (as of 1983) to the Tribe's Indian lands.

A. Factual Summary

The Tribe is a federally-recognized Indian Tribe with trust lands located within the exterior boundaries of Dukes County, Massachusetts. The Tribe's members are direct descendants of the Wampanoag people, who have occupied the area since time immemorial.

On September 28, 1983, the Wampanoag Tribal Council of Gay Head, Inc.[5] entered into the Memorandum of Understanding Concerning Settlement of Gay Head, Massachusetts Indian Land Claims (the "1983 MOU") (App.Vol.I, 137) with the Town (formerly Town of Gay Head) and the Taxpayers' Association of Gay Head, Inc., resolving a multi-year litigation over aboriginal title to lands located on Martha's Vineyard. The Tribe achieved its federally-recognized status on April 11, 1987 through the formal process administered by the Department of the Interior (the "DOI") (App.Vol.I, 123-24, ¶¶ 14-17). Four months later, on August 18, 1987, Congress enacted MILCSA(Aquinnah) (App.Vol.I, 124, ¶ 18), which resulted in the Settlement Lands as defined in the MILCSA(Aquinnah) (the "Settlement Lands") being set aside for the benefit of the Tribe, but requiring the Tribe to extinguishing its aboriginal title, otherwise preserved pursuant to the Non-Intercourse Act, 25 U.S.C. § 177, to other lands on Martha's Vineyard. However, the MILCSA(Aquinnah) also imposed other aspects of concurrent state and local jurisdiction upon the Tribe.

In 1988, slightly more than a year after enactment of the MILCSA(Aquinnah), Congress enacted IGRA, establishing a comprehensive and complete regulatory scheme for Indian gaming for all tribes in the United States, and creating the National

[5] Wampanoag Tribal Council of Gay Head, Inc. was a corporation chartered under the laws of the Commonwealth, not a federally recognized Indian Tribe, and did not possess any governmental authority.

Indian Gaming Commission ("NIGC"), an independent federal regulatory agency within the DOI, to oversee IGRA's administration. In compliance with IGRA, the Tribe in 2012 adopted Gaming Ordinance 2011-01, authorizing gaming activities on the Settlement Lands, as conducted in accordance with IGRA and its implementing regulations (App.Vol.I, 126, ¶¶ 37-39). The United States thereafter approved the Tribe's Gaming Ordinance and issued two legal opinions confirming the Tribe's authority to conduct gaming on the Settlement Lands. First, on August 23, 2013, the Tribe received an opinion letter from the DOI's Office of the Solicitor concluding that the 1983 MOU, effectuated in part as MILCSA(Aquinnah), did not prohibit the Tribe from conducting Indian gaming on the Settlement Lands pursuant to IGRA (App.Vol.I, 127, ¶¶ 52 & 53). Subsequently, on October 25, 2013, the Tribe received an additional opinion letter from the NIGC's Office of General Counsel concluding that the Settlement Lands were eligible for gaming under IGRA (App.Vol.I, 127-28, ¶¶ 58 & 59).

When the Tribe informed the Commonwealth that it would proceed under IGRA with the establishment of a Class II gaming facility on the Tribe's Indian lands, the Commonwealth responded by filing the action against the Tribe, which was eventually decided in favor of the Tribe by this Court.

After the United States Supreme Court denied the Petitions for Certiorari filed by the Commonwealth, the Town and AGHCA, and after this Court issued its

Mandate to the District Court, the Tribe began making judicious, and expensive, decisions about how to proceed with the development of a gaming facility on its Indian lands, including the development of a Tribal Building Department and the hiring of one of Massachusetts' most experienced and qualified building inspector firms, the primary designated inspector of which has a critical role in updating the Commonwealth's building codes and currently serves as a building inspector for one of the towns on Martha's Vineyard. App.Vol.IV, 1122-1128. The Tribe engaged the Chickasaw Nation's Global Gaming Solutions, which successfully operates over 20 casinos including the largest casino in the United States, as a development partner for the project. The Tribe hired a first-class architect and construction company. After years of opposition and protracted litigation, construction finally commenced on the Tribe's designated gaming site. App.Vol.IV, 1122-1128. Nevertheless, upon learning that the Tribe was proceeding with construction, the Town's leadership began a public campaign of vocal and vociferous opposition to the development of the gaming facility, including the Town's refusal to approve a routine electrical permit for the Tribe, and the Town's direction to the local electric company to shut off electricity to the construction site. App.Vol.IV, 1310-1314, 1315-1322. In an additional attempt to block the Tribe's efforts to construct its gaming facility, in February of 2019, the Town referred the project to the Martha's Vineyard Commission ("MVC"), which has state regulatory jurisdiction over any

"Development of Regional Impact" ("DRI") on Martha's Vineyard. The Tribe began friendly, informal discussions with the MVC, which were unfortunately suspended once the Town filed its motion at the District Court asserting regulatory jurisdiction over the Tribe's project. Docs. 180 and 181. Subsequently, on July 19, 2019, the MVC issued a decision[6], formally rejecting the project and prohibiting the Town's authorities from issuing any permits for any project involving the Tribe's gaming facility.

Upon the District Court issuing the Amended Final Judgment on June 19, 2019, the Tribe stopped construction and began to safely secure the construction site. However, the Town insisted that the site was safe and demanded that the Tribe immediately cease all activities. After several weeks of contentious communications between the Town and Tribe, and three separate hearings before the District Court, the District Court eventually agreed with the Tribe and its experts that the site was unsafe in its current condition. The Town and Tribe then entered into a Stipulation agreeing to the completion of the certain work necessary to safely secure the construction site and protect existing work pending resolution of this appeal as initially proposed by the Tribe.

[6] Decision of the Martha's Vineyard Commission, DRI 690, Add. 99-104.

B. Procedural Summary

In the 2017 Opinion, this Court properly summarizes the proceedings below that resulted in the Tribe's initial appeal, *Wampanoag*, 853 F.3d at 623-24, and this Court reverses the District Court's judgment and instructs the District Court to enter judgment in favor of the Tribe. *Wampanoag*, 853 F.3d at 618. Subsequently, the Commonwealth filed a Petition for Certiorari at the Supreme Court on August 8, 2017. (Doc. 169). That Petition was denied on January 8, 2018. (Doc. 175). On May 19, 2018, the District Court received this Court's Mandate. (Doc. 176). The subsequent procedural history is set forth in the Jurisdictional Statement, Section I, above.

IV. SUMMARY OF ARGUMENT

The dispositive legal issue on appeal is whether the District Court properly concluded that the Tribe's gaming facility is subject to the Commonwealth's and Town's (and MVC's) "General Regulatory Laws," including all local regulations regarding "construction, occupancy and operation," despite IGRA's preemption of the MILCSA(Aquinnah). The argument below establishes that Commonwealth, Town and local laws and regulations regarding the construction, occupancy and operation of the Tribe's gaming facility are repugnant to IGRA's comprehensive and sophisticated regulatory scheme. This Court's decision in *Narragansett,* which decision was reaffirmed by this Court's 2017 Opinion,

established the proper paradigm for determining whether a state or local law or regulation regarding environmental, public health and safety matters, including construction, occupancy or operation of the Tribe's gaming facility, survives IGRA's preemptive scope. The TAFJ contravenes this Court's guidance in numerous material respects. The TAFJ, if allowed to stand, will deprive the Tribe of those rights and privileges which IGRA affords other Indian tribes, and will destabilize the jurisdictional structure of Indian gaming throughout the United States. Moreover, allowing the decision to stand will violate the United States' jurisdiction over the land it holds in trust for the Tribe, by requiring the United States to be subordinate to state and local laws. This Court should conclude that Commonwealth, Town (and MVC) and local laws and regulations that interfere with or impede IGRA's comprehensive regulatory scheme, including those regarding the "construction, occupancy and operation" of the Tribe's gaming facility, fall within IGRA's preemptive scope.

The District Court was wrong to even address the substantive legal issue, but in doing so made three fatal procedural errors in reaching its erroneous determination on the dispositive legal issue. All three errors exacerbate the District Court's failure to follow the law articulated by this Court in its reaffirmation of *Narragansett.* The District Court opened the door for the Town and the Commonwealth to interfere with the Tribe's rights under IGRA by merely framing their interference as restrictions on the construction, occupation

and operation of the gaming facility, rather than framing their interference as restrictions on games of chance. First, the District Court erred by finding jurisdiction to hear the Town's motion despite the fact that this Court's Mandate that judgment be entered in favor of the Tribe became effective, by operation of law, after the passage of 150 days from the District Court's docketing of the Mandate. Second, the District Court erred in that it violated the mandate rule. Third, the District Court erred in finding that the Tribe has waived its arguments regarding the applicability of General Regulatory Laws – the Tribe has not waived its arguments nor its sovereign immunity from suit in this matter.

V. ARGUMENT

A. Standard of Review

The TAFJ at issue here was entered as the result of the District Court granting the Town's procedural "Motion for Entry of Final Judgment." The bulk of the analysis herein regards questions of law, which are subject to *de novo* review. *Sierra Fria Corp. v. Donald J. Evans, P.C.*, 127 F.3d 175, 180-181 (1st Cir. 1997). The only analysis of the District Court that may be considered a mixed question of fact and law is whether the Tribe waived an argument in the earlier appeal, for which the applicable standard of review varies depending upon the nature of the mixed question; the more fact-dominated it is, the more likely that deferential, clear-error review will apply, and the more law-dominated it is, the more likely that non-

deferential, *de novo* review will apply. *Id.; In re IDC Clambakes, Inc*., 727 F.3d 58, 64 (1st Cir. 2013).

This Court should be cognizant of two critical principles of federal Indian law as it considers the issues on appeal. First, traditional canons of construction regarding statutes intended for the benefit of Indian tribes, and the application of such statutes to particularized circumstances, compel the federal courts to interpret any ambiguities in such statutes in favor of tribal interests. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *Penobscot Indian Nation v. Key Bank*, 112 F.3d 538, 547 (1st Cir. 1997). Second, statutes intended for the benefit of Indian tribes should be interpreted and applied in a manner that affords all tribes in similar circumstances the same rights and privileges, consistently applied. *Akiachack Native Community v. United States*, 935 F.Supp.2d 195, 210 (D.C. Dist. 2013), appeal dismissed for want of jurisdiction, 827 F.3d. 100 (D.C. Cir. 2016).

B. The District Court Erred in its TAFJ and its Opinion and Order of June 19, 2019 in Ruling that the Commonwealth's and Town's Laws and Regulations Regarding Construction, Occupancy and Operation of the Tribe's Gaming Facility are Not Preempted by IGRA

This Court, in both the 2017 Opinion, *Wampanoag*, 853 F.3d at 622, and in *Narragansett,* 19 F.3d at 689 and 705, recognizes that Congress set forth in IGRA a comprehensive and sophisticated regulatory scheme. IGRA does not simply delineate the forms of gaming which a tribe may offer on its Indian lands. Rather, IGRA's provisions expressly govern a myriad of matters necessary to advance IGRA's express purpose of promoting tribal economic development, self-sufficiency, and strong tribal governments, 25 U.S.C.§ 2701(1), including but not limited to (i) restrictions on ownership; (ii) the manner in which employees are to be licensed; (iii) the manner in which the operations and outside contractors are to be audited; (iv) the manner in which revenue from gaming operations may be used; (v) the manner in which Indian lands are determined to be eligible for gaming; and (vi) most germane to the instant appeal, the manner in which gaming facilities are to be constructed and operated such that a tribe protects the environment, public health and safety. 25 U.S.C. §§ 2710(b), 2719. IGRA created the NIGC as an independent regulatory agency within the DOI, with broad oversight authority to ensure and enforce tribal compliance with all aspects of IGRA, including tribal gaming ordinances, tribal/state gaming compacts and NIGC's own duly-promulgated

regulations. 25 U.S.C. §§ 2704-06; 25 C.F.R. §§ 501-585. In the early stages of the litigation below, the District Court understood this:

> The present dispute, however, does not concern local zoning regulations or state public records laws, which principally involve matters of local and state law. Instead, *the issue is gaming on Indian lands*, a matter that is subject to extensive federal legislation and regulation."

Doc. 31, (order reported at 36 F. Supp. 3d 229, 235) (emphasis added);

> "This lawsuit is not . . . about the proper course of land development on Martha's Vineyard, or how best to preserve the unique environment and heritage of the island."

App.Vol.IV, 1067-1106, (order reported at 144 F. Supp. 3d 152, 155).

On remand, however, the District Court manufactures a bright line between "the gaming laws" and "the General Regulatory Laws" of the Town and Commonwealth. The District Court very narrowly defines "the gaming laws" to mean:

> the laws, regulations and ordinances of the Commonwealth of Massachusetts and the Town of Aquinnah that prohibit or regulate the conduct of bingo or any other game of chance.

Doc. 201, 2-3, and very broadly defines "the General Regulatory Laws" to mean:

> the laws, regulations, and ordinances of the Commonwealth of Massachusetts, the Town of Aquinnah, and other state and local governmental authorities other than the Gaming Laws, including but not limited to any state and local permitting requirements.

Doc. 201, 3. The District Court then erroneously concludes that the Tribe must comply with all "General Regulatory Laws" of the Commonwealth, the Town

and other state and local governmental authorities "in connection with the construction, occupancy, and operation of a gaming facility on the Settlement Lands." Doc. 201, 3. In other words, the Town, with its longstanding vehement opposition to the Tribe's gaming efforts, and motivated to interfere in any way possible (including utilizing the MVC to prevent the Town from issuing permits) with the Tribe's exercise of its rights under IGRA, may indeed interfere, so as long as the interference occurs in the context of the construction, occupancy or operation of the Tribe's gaming facility.

The District Court has given the Town a road map and the tools to stop or unduly interfere with the Tribe's gaming facility by merely framing the Town's ordinances and regulations, and its permitting decisions, as restricting "construction, occupancy and operation", rather than as illegally restricting the Tribe's full right to develop and conduct gaming operations. The absurd reality of how this can come to pass was demonstrated by the Town in its own pleadings in support of the initial preliminary injunction, when confronted with the fact that Town law is silent on the legality of bingo despite the Town's repeated representations to the District Court to the contrary. The Town reasoned that its laws "prohibit" a casino because its laws prohibit all commercial uses except for businesses on certain parcels owned by the Town and small home-based business uses (Doc. 138, 2, and App,Vol.III, 978). The Town asserts that it may in its unbridled discretion issue a special permit (Vol.III, 977-79) exempting the

prohibition. More recently, the Town referred the Tribe's project to the MVC, another political subdivision of the Commonwealth, resulting in the MVC, on August 12, 2019, mandating that the Town not issue any permits relative to the proposed site of the Tribe's gaming facility until the MVC dictates, in its sole discretion, how the Tribe must address *inter alia*: (1) scenic values; (2) character; (3) identity; (4) impact on abutters; (5) burden on existing public facilities; (6) impact on municipal general plan; (7) providing housing for employees; and (8) impact on land development objectives by regional or state agencies.[7] Such requirements are in addition to a further requirement that the MVC determine the Tribe's project to be "consistent with the land development objectives of the MVC."

Looking to both the broad scope of the MVC's statutory authority, Chapter 831 of Acts of 1977, St.1977, c. 831, as amended St. 2017, c. 831[8], (included in addendum), and to the Town's exemption to its prohibition of commercial development by "special permit," both the MVC and the Town have such broad discretion that either can deny virtually any project for virtually any reason. *See Kitras v. Eccher*, 2013 WL 5636619 at * 6-7 (Mass. Land Court 2013) ("The court is solely concerned with the validity but not the wisdom of the board's action," citing *Wolfman v. v. Board of Appeals of Brookline*, 15 Mass.App.Ct. 112, 119 (1983);

[7] *See* footnote 9.
[8] Statute included in Addendum hereto.

"where the court's findings of fact support any rational basis for the municipal board's decision, that decision must stand", citing *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 639 (1970)).

1. Commonwealth, Town and local laws and regulations regarding the construction, occupancy and operation of the Tribe's gaming facility are repugnant to IGRA's comprehensive and sophisticated regulatory scheme

IGRA envisions that environmental, public health and safety matters, which necessarily include all matters related to the construction, occupancy and operation of a tribe's gaming facility, are to be resolved by tribal law as approved by the NIGC, with regulation and enforcement authority residing in the NIGC. IGRA mandates that the NIGC disapprove a tribal gaming ordinance unless that ordinance requires that the construction and maintenance of the gaming facility be conducted in a manner which adequately protects the environment and the public health and safety. 25 U.S.C. § 2710(b)(1)(E). The NIGC has promulgated and enforces 25 C.F.R. Part 559 to effectuate IGRA's requirements for adequate protection of the environment and the public health and safety, including specifically 25 C.F.R. § 559.4:

> A tribe shall submit to the Chair with each facility license an attestation certifying that by issuing the facility license, the tribe has determined that the *construction* and maintenance of the gaming facility, and the *operation* of that gaming, is conducted in a manner *which adequately protects the environment and the public health and safety. This means that a tribe has identified and enforces laws, resolutions, codes, policies, standards or procedures applicable to each gaming place, facility, or location* that protect the environment and the public health and safety, including standards under a tribal-state compact or

> Secretarial procedures.

(emphasis added). The Tribe's NIGC-approved Gaming Ordinance requires:

> Each Gaming Facility must obtain a Facility License from the Tribal Council as required by IGRA and its implementing regulations ensuring that the *construction* and maintenance of the Gaming Facility and the *operation* of Gaming, shall be conducted in a manner which adequately protects the environment and the public health and safety and for that purpose shall comply with the requirements of all applicable health, safety and environmental standards enacted by the Tribe and any applicable federal and state laws.

(App.Vol.II, 609) (emphasis added). The Tribe's Gaming Commission (the "Commission"), as a matter of both federal and tribal law, acts independently of the Tribal Council and the AWGC, and is comprised of experienced, highly-qualified professionals. (App.Vol.IV, 1141-1150) The Commission provides, in accordance with tribal law, an independent level of regulatory oversight that will not allow the facility to open to the public if it is not constructed to code or otherwise poses a threat to public health and safety. (App.Vol.IV 1125). Moreover, the Tribe has retained a highly qualified professional building inspection firm, discussed in greater detail in section III(A) above, comprised of inspectors certified to inspect the construction of buildings on non-Tribal land on Martha's Vineyard[9] and elsewhere

[9] In contrast, the Town's contracted inspector is not even available for regular hours of business. (App.Vol.IV, 1129-1131).

in the Commonwealth and surrounding states[10], and any construction must satisfy the inspectors in order for the Commission and the NIGC to allow the facility to open to the public. *Id*. at ¶¶ 10-12. A tribe *may* address issues of public health and safety through intergovernmental agreements with sister governments for services, but a tribe should not *be forced* to submit to dictates from a non-Indian, non-federal entity that is openly hostile to a tribe or its gaming project and the intent of Congress.

This Court rejected the District Court's analysis and instead found that IGRA and the MILCSA(Aquinnah) are in a repugnant clash, and cannot coexist. *Wampanoag,* 853 F.3d. at 627. In doing so, this Court expressly noted that allowing IGRA and the MILCSA(Aquinnah), to coexist "would do great violence to the structure and purpose of IGRA*." Id.* Allowing the Town to now impose upon the Tribe the Town's laws and regulations regarding the construction, occupancy and operation of the Tribe's gaming facility would create the very violence that this Court's earlier decision avoids, interfering with IGRA's *comprehensive regulatory scheme*, as opposed to merely interfering with the Tribe's ability to offer certain

[10] Indeed, the Tribe, through its retention of the building inspection firm, its adoption of building codes that meet state standards (App.Vol.II, 645-647, App.Vol.IV, 1151-1173) and its retention of one of the most experienced gaming companies in the nation as its developer, all with oversight by the Commission and the NIGC, is far more capable and qualified than the Town (which outsources its building inspectors) to ensure that the facility is constructed in a manner that protects the environment, public health and safety.

types of gaming activities. The NIGC has express jurisdiction over the same subject matter over which the Town now wishes to exercise jurisdiction; namely, ensuring that gaming facilities are constructed in a manner that protects the environment, public health and safety.

Neither the Town's restrictions on commercial activity, nor the MVC permitting regulations, authorize, regulate or prohibit a form of gaming activity. In other words, the Town has never looked to its "gaming laws" to stop the Tribe; rather, the Town has always looked to "General Regulatory Laws" to stop the Tribe's gaming facility. The District Court's decision eviscerates the Tribe's right to conduct gaming, and does so with zero regard for Congress' clear intent when enacting IGRA. 25 U.S.C. § 2702(1) ("the purpose of this chapter is 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").

2. The First Circuit's decision in *Narragansett,* which decision was reaffirmed by the 2017 Opinion, established the proper paradigm for determining whether a state or local law or regulation regarding the construction, occupancy or operation of the Tribe's gaming facility survives IGRA's preemptive scope

Fortunately, the District Court's manufactured bright line between "gaming laws" and "General Regulatory Laws" is not the law of the First Circuit. In its 2017 Opinion vacating the District Court's IFJ, this Court reaffirmed its

decision in *Narragansett. Wampanoag,* 853 F.3d at 625, n.5, 627-629. The *Narragansett* Court cautioned the state that any attempt to assert residual jurisdiction remaining under the Rhode Island Indian Land Claims Settlement Act is substantially narrowed by both IGRA's preemptive scope and the Tribe's retained sovereignty:

> Despite this holding—a holding that resolves the case before us—it would be disingenuous to pretend that all the relevant questions have been answered. While the Tribe retains all aspects of its retained sovereignty, as that term is commonly comprehended in our jurisprudence, Congress, after having granted to the state non-exclusive jurisdiction over the settlement lands via the Settlement Act, impliedly withdrew from that grant, via the Gaming Act, the state's jurisdiction over gaming. Yet, the withdrawal of jurisdiction over gaming cannot be interpreted to signify a withdrawal of all residual jurisdiction.
>
> This means that the state continues to possess a quantum of regulatory authority. Of course, any effort by the state to exercise this residual authority is hedged in by barriers on both sides: on one side, by the Tribe's retained rights of sovereignty; on the other side, by the Tribe's congressionally approved authority over a specific subject matter, namely, gaming.

Narragansett, 19 F.3d at 705. The *Narragansett* Court provides explicit guidance on the proper legal paradigm to address where those barriers preclude state jurisdiction:

> Testing the sturdiness of one or the other of these barriers in a given case will require "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). . . . In parting, we offer a few words of guidance. The crucial questions which must yet be answered principally deal with the nature of the regulable activities which may—or may not—be subject to state control, e.g., zoning, traffic control, advertising, lodging. It is true that nondiscriminatory

> burdens imposed on the activities of non-Indians on Indian lands are generally upheld. See, e.g., *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 151 (1980) (discussing tax burdens). But it is also true that a comprehensive federal regulatory scheme governing a particular area typically leaves no room for additional state burdens in that area. See, *White Mountain Apache Tribe*, 448 U.S. at 148 (finding state timber regulation to be preempted). Which activities are deemed regulable, therefore, will probably depend, in the first instance, on which activities are deemed integral to gaming. Although the core functions of class III gaming on the settlement land are beyond Rhode Island's unilateral reach, the distinction between core functions and peripheral functions is tenebrous, as is the question of exactly what Rhode Island may and may not do with respect to those functions that eventually are determined to be peripheral.

Narragansett, 19 F.3d at 705-06. The *Narragansett* Court went further to discourage litigation *ad infinitum*, noting that Congress provided the state with a proper forum, the negotiation of tribal/state compacts governing the operation of Class III gaming facilities, in which to address the limits of state and local jurisdiction:

> If these criss-crossing lines prove agonizingly difficult to decipher, let alone to administer, they "are no more or less so than many of the classifications that pervade the law of Indian jurisdiction." *Washington v. Yakima Nation*, 439 U.S. 463 (1979). And in all events, the jurisdictional issues remain subject to further judicial intervention, pursuant to the Gaming Act, in a more fact-specific context, if the parties' compact negotiations collapse.
>
> We can go no further at this time. We add, however, that although our opinion today answers some questions and raises others, we do not mean to encourage the protagonists to litigate *ad infinitum*. The parties' baseline power need not be defined with exactitude by judicial decree where, as here, they are compelled to enter negotiations out of which will emerge a new balance of power. The next step in the allocation of jurisdiction over gaming is in the hands of the parties, through negotiations designed to produce a

> tribal-state compact as contemplated by the Gaming Act, see 25 U.S.C. § 2710(d). If cool heads and fair-minded thinking prevail, that step may be the last.

Narragansett, 19 F.3d at 706. The proper venue for the Town, a political subdivision of the Commonwealth, to air and address its grievances is with the Governor of the Commonwealth, who has it within his authority under both state and federal law to accept this Tribe's long-standing request to negotiate a Class III gaming compact with the Commonwealth in good faith.

3. The TAFJ contravenes this Court's guidance in numerous material and significant respects

The TAFJ contravenes this Court's guidance in numerous material respects.

First, the District Court requires the construction, occupation and operation of the Tribe's gaming facility to comply with all "General Regulatory Laws" of the Commonwealth and the Town. While the *Narragansett* Court considered that such a bright line might be drawn ("It is true that nondiscriminatory burdens imposed on the activities of non-Indians on Indian lands are generally upheld"), 19 F.3d at 705, it also expressly rejected that paradigm, noting "[b]ut it is also true that a comprehensive federal regulatory scheme governing a particular area typically **leaves no room for additional state burdens in that area.**" *Id* (emphasis added). The Supreme Court recently reaffirmed the latter as the proper scope of federal preemption:

> Field preemption occurs when federal law occupies a "field" of regulation "so comprehensively that it has left no room for supplementary state legislation." (citing *R.J. Reynolds Tobacco Co. v Durham County*, 479 U.S. 130, 140 (1986))" The Court's decision in *Arizona v. United States*, 567 U.S. 387 (2012) shows how this works. Noting that federal statutes "provide a full set of standards governing alien registration," we concluded that these laws "reflect[ ] a congressional decision to ***foreclose any state regulation in the area, even if it is parallel to federal standards***." *Id*. at 401. What this means is that the federal registration provisions not only impose federal registration obligations on aliens ***but also confer a federal right to be free from any other registration requirements***.

Murphy v. N.C.A.A., 138 S.Ct. 1461, 1480-81 (2018) (emphasis added). Congress intended for IGRA to be precisely such a comprehensive regulatory scheme:

> [W]here the Federal Government has preempted a field affecting Indians or Indian tribes, there should be no balancing of state public policy and interests when they conflict with tribal rights…"

S. Rep. No. 100-446 at 35. Notably, three very recent cases, two from the Eighth Circuit on September 6, 2019, *Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d 941 (8th Cir. 2019) and *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928 (8th Cir. 2019), and one from the Oklahoma Supreme Court on December 17, 2019, *Video Gaming Technologies Inc. v. Rogers County Board of Tax Roll Collections*, 2019 Ok. 83, 2019 WL 6877909 (Okla. 2019), are instructive. At issue was whether (1) a state sales tax on amenities sold in the tribal casino *(Noem),* (2) a state excise tax on contractors *(Haeder), and (3*) a state ad valorum tax on gaming equipment *(Video Gaming Technologies)* were preempted by

IGRA. *Noem* and *Haeder* were decided by the same panel on the same day, finding that the state sales tax was preempted, *Noem*, 938 F.3d at 937 and that the excise tax on contractors was not, *Haeder*, 938 F.3d at 945. The Eighth Circuit upheld the state's imposition of the excise tax on contractors because it did not interfere with the tribe's construction, occupancy or operation of the gaming facility:

> We conclude that this IGRA provision does not expressly nor by plain implication preempt the State's contractor excise tax, a tax *which does not regulate or interfere with the Tribe's design and completion of the construction project, or its conduct of Class III gaming.*

Haeder, 938 F.3d at 945 (emphasis added). In sharp contrast, the District Court here is explicitly allowing the Town to "interfere with the Tribe's design and completion of the construction project." Citing *Noem* and *Haeder*, the Oklahoma Supreme Court rejected Oklahoma's attempts to collect an ad valorium tax on gaming equipment rented to Oklahoma's Indian Tribes:

> "Gaming equipment is not peripheral to gaming. Based off the U.S. Supreme Court's interpretation of gaming in IGRA and its further admonishment to interpret federal statutes regarding tribes generously, we find that gaming equipment is a *sine qua non* for gaming and thus under IGRA. The comprehensive regulations of IGRA occupy the field with respect to ad valorem taxes imposed on gaming equipment used exclusively in tribal gaming. The state remedy for non-payment also acts as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 98,(1992). Due to the comprehensive and pervasive nature of IGRA, the number of federal policies threatened, Nation's sovereignty, and County's lack of justification other than as a generalized interest in raising revenue, we find that taxation of gaming

equipment used exclusively in tribal gaming is preempted."

Video Gaming Technologies, *2019 WL* 6877909 at *10. These three cases also provide good examples of courts applying the direction of the *Narragansett* Court where an in-depth inquiry as to where the line is drawn between preempted matters and residual jurisdiction is warranted. In cases such as the one presented here, however, where state or local laws and regulations interfere with IGRA's regulatory scheme as expressed in the statute and as in-fact applied by the NIGC, governing environmental, public health and safety matters, including the construction, occupancy and operation of gaming facilities, the state and local laws are clearly preempted.

IGRA does not merely provide that tribes may offer certain games of chance, but instead establishes a sophisticated regulatory framework, including requiring tribes to adopt, implement and enforce their own building, environmental, public health and safety codes, *see, e.g.*, App.Vol.II, 645-647, App.Vol.IV, 1151-1173, with regulatory oversight and enforcement vested in the NIGC. 25 U.S.C. §§ 2702(1), 2710(b)(1)(E); 25 C.F.R. § 559.4. Accordingly, "state regulation in the area" is foreclosed, "even if it is parallel to federal standards." *Murphy*, 138 S.Ct. at 1481. In fact, IGRA does contemplate tribes working with state and local jurisdictions, but *only* within the confines of a negotiated Class III

gaming[11] compact. *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1177 (10th Cir. 1991); *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498, 1504 (S.D. Cal. 1992); S.Rep. No. 446, 100th Cong.2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-76 ("[U]nless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities."). There is no such authorization for tribes working with state and local jurisdictions in the context of Class II gaming – the type of gaming to be offered by the Tribe and contemplated here. The District Court's conclusion that this Court's 2017 Opinion did not include a preemption of the Town's permitting authority is illogical when viewed in the context of the carefully-crafted regulatory scheme established in IGRA. Moreover, Congress clearly intended to exclude state and local jurisdiction over Class II gaming:

> "The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of state jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-state compact. In no instance does [IGRA] contemplate the extension of state jurisdiction or the application of state laws for any other purpose".

S. Rep. No. 100-446 at 6.

[11] Class III gaming is defined by IGRA to include traditional casino games, such as slot machines and banked card games, but does not include Class II gaming, defined by IGRA as bingo, games similar to bingo, and non-banked card games. 25 U.S.C. §§ 2703(7) and (8) (Add. 82).

Second, the bright line between "gaming laws" and "General Regulatory Laws" now imposed by the District Court is certainly not "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." Rather, the District Court undertook the inquiry in the "abstract" and issued an arbitrary, sweeping grant of jurisdiction to both the Town and the Commonwealth, to the exclusion of the Tribe's retained jurisdiction and to the exclusion of the United States' jurisdiction as the owner in trust of the Tribe's Indian lands, generally, and as vested in the federal government by IGRA, specifically. There may still be areas of concurrent residual jurisdiction that require an in-depth inquiry, but here, where federal law explicitly vests the NIGC and the Tribe with regulatory authority over environmental, public health and safety matters, which include construction, occupation and operation of a Class II gaming facility, no such inquiry is either required or necessary. 25 U.S.C. § 2710(b)(1)(E); 25 C.F.R. §559.4.

Third, the *Narragansett* Court noted that there are likely circumstances where state and local "zoning, traffic control, advertising, [and] lodging" laws and regulations will apply, and other circumstances where they will not, depending on the particularized circumstances. 19 F.3d at 705-706. Under the TAFJ, Commonwealth, Town and local zoning, traffic control, advertising, and lodging laws and regulations will apply in all circumstances. Not only does the TAFJ nullify federally-mandated tribal law, it nullifies a cornucopia of federal law applicable to federal lands, such as the National Environmental Policy Act.

Despite the Town's repeated assertions and the District Court's misapprehension to the contrary, *Narragansett* did not conclude that zoning, traffic control, advertising and lodging are "likely" peripheral functions. IGRA's comprehensive regulatory scheme clearly and explicitly addresses environmental, public health and safety matters, including the construction, occupancy and operation of gaming facilities, while IGRA's regulatory scheme does not clearly and explicitly address zoning, traffic control, advertising and lodging. From this critical distinction, it is far more "likely" that the environmental, public health and safety matters, including construction, occupancy and operation of a gaming facility, as matters explicitly covered by IGRA's regulatory scheme, are core functions, and not peripheral functions.

Fourth, the TAFJ's gaming law/General Regulatory Law paradigm eviscerates the *Narragansett* Court's paradigm, which requires an assessment of whether the Commonwealth or Town law, regulation or permit at issue is "integral" to the Tribe's ability to proceed with the exercise of its rights under IGRA. Depending on the particular circumstances, such a paradigm may require the "tenebrous" analysis of distinguishing between core functions and peripheral functions of gaming. 19 F.3d at 705-706. The two paradigms yield radically different results and cannot co-exist. The District Court's gaming law/General Regulatory Law paradigm allows for the imposition of Commonwealth, Town and local laws and regulations regarding environmental, public health and safety

matters, including construction, occupancy and operation of the Tribe's gaming facility, without regard to whether the law, regulation or permit at issue is integral to the exercise of the Tribe's rights under IGRA. 25 U.S.C. § 2710(b)(1)(E); 25 C.F.R. §559.4

Most notably, the Commonwealth, as a matter of state law, acknowledges that the regulation of construction of the gaming facility is integral to gaming. The Massachusetts Expanded Gaming Act, MGL c. 23K, allows for the Commonwealth to enter into gaming compacts with tribal governments. The compact ("Mashpee Compact") between the Commonwealth and the Mashpee Wampanoag Tribe (the "Mashpee Tribe") requires the Mashpee Tribe to adopt building codes similar to those of the Commonwealth, but leaves it up to the Mashpee Tribe to apply and enforce its codes (Doc. 185, 23 and n.12). The Tribe here embraces the same regulatory scheme in the exercise of its right to gaming pursuant to tribal and federal law. Additionally, the Massachusetts Expanded Gaming Act identifies building codes as one integral subject, which any applicant must address in the context of securing approvals from the Massachusetts Gaming Commission. MGL c. 23K s, 15(12) (an applicant must comply with Commonwealth and local building codes, ordinances and bylaws). The irony is not lost on the Aquinnah Tribe that the Commonwealth is agreeable to allowing the Mashpee Tribe to adopt *and enforce* its own building codes in the context of Class III gaming, where IGRA provides a role for the

Commonwealth, but the Town and MVC, as mere political subdivisions of the Commonwealth, are insistent on interfering with a similar regulatory scheme regarding the adoption and enforcement of tribal building codes in the context of Class II gaming, where IGRA provides that regulatory oversight is done by the Tribal government and the NIGC, to the exclusion of state and local governments. The Mashpee Tribe is in a materially different circumstance from the Aquinnah Tribe in that it seeks to operate a Class III gaming facility, which requires a compact with the State, while the Aquinnah Tribe seeks to operate a Class II gaming facility, which does not require a compact. That distinction, however, only underscores the District Court's error in ruling that the Town has broader jurisdiction over the construction, occupancy and operation of the Tribe's Class II gaming facility, where Congress intended for state and local government to have no jurisdiction, than the Commonwealth or the Town of Taunton have regarding the Mashpee Tribe's Class III gaming facility, where Congress intended for the Commonwealth to have a significant role, subject to a compact negotiated in good faith.

Fifth, the *Narragansett* Court noted that the proper forum for resolution of such issues is in the context of negotiating a compact for Class III gaming. *Id.* at 705-706. *See also United Keetoowah Band*, 927 F.2d at 1177; *Sycuan Band* 788 F.Supp. at 1504. The TAFJ devastates the Tribe's right to any meaningful compact negotiated in good faith under IGRA by eliminating the

Commonwealth's incentive to negotiate in good faith with the Tribe, as the Commonwealth and the Town can utilize the TAFJ to impose their respective wills through the passage and enforcement of their own laws and regulations.

The District Court wrongfully asserts that the Tribe contends "the First Circuit implicitly decided that all Commonwealth and local permitting authority was preempted by the IGRA," (Doc. 200, 8) and the District Court rejects the Tribe's Proposed Form of Final Judgment (the "Proposed Judgment") submitted to the District Court (App.Vol.IV, 1135-1136) as overreaching, resulting in no residual Commonwealth and local jurisdiction:

> The Court will not read into the (First Circuit's) silence a ruling that would essentially overrule *Narragansett*, void significant portions of the Settlement Act, and divest the Town of regulatory jurisdiction of any kind. The Tribe's interpretation would destroy- not "leave. . . . intact"- the jurisdiction over the Settlement Lands granted to the State and the Town by the Settlement Act.

Doc. 200, 9. That conclusion is blatantly wrong. The Tribe's Proposed Judgment submitted to the District Court (App.Vol.IV, 1135-1136) simply requires the Tribe to proceed in a manner consistent with this Court's opinion in this case, which opinion embraces and reaffirms *Narragansett*, placing the Commonwealth and the Tribe in the exact same position as Rhode Island and the Narragansett Tribe at the time *Narragansett* was decided. Notwithstanding the District Court's opinion to the contrary, all parties acknowledge that this Court held that the provisions of IGRA and the MILCSA(Aquinnah) cannot be

reconciled with each other and consequently those statutes are repugnant to each other. Accordingly, the MILCSA(Aquinnah) *was* preempted, and thus the Commonwealth and Town *have been* divested of regulatory jurisdiction over matters integral to gaming on the Tribe's Indian lands. *Wampanoag*, 853 F.3d at 627-629. The District Court's June 19, 2019 Opinion and TAFJ fail to address the repugnancy of allowing the MILCSA(Aquinnah) to create conflicting results regarding the construction, occupancy and operation of the Tribe's gaming facility (Doc. 196, 6-7). The Tribe, in its pleadings, acknowledges[12] that there are non-gaming circumstances where, in the past, the Tribe has sought and received Town permits, such as for the completion of the Tribe's Community Center. The applicability of state sales taxes, contractor's excise taxes and ad valorum taxes to tribal gaming activities at issue in *Haeder*, *Noem*, and *Video Gaming Technologies,* discussed above, provide additional examples where residual jurisdiction pursuant to MILCSA(Aquinnah) may be found. Where

[12] Not at issue in this appeal, the Tribe maintains that the 1983 MOU is no longer valid because it violates the 1994 amendments to the Indian Reorganization Act, 25 U.S.C. § 5123(g) (formerly codified at 25 U.S.C. §§ 476(g)) and because conditions precedent in the 1983 MOU have never been met. Nothing herein is intended to negate that position. Additionally, the 1983 MOU, at ¶ 16, requires the Tribe's consent to changes to zoning laws that change the Land Use Plan then in effect. The District of Critical Planning Concern, upon which both the Town and MVC rely, was not in place in 1983. The MVC, established prior to the Tribe's federal recognition, was expressly divested with jurisdiction over those federal lands on the island at the time. Accordingly, the Tribe reserves the right to challenge the Town's or MVC's attempts to base any decision regarding the construction, occupancy and operation of the gaming facility on changes to its zoning laws subsequent to 1983.

federal law (in the form of IGRA and NIGC regulations) and tribal law set forth the applicable standards for environmental, public health and safety matters, including construction, occupancy and operation of the gaming facility, the jurisdiction of the Commonwealth or Town otherwise provided in the MILCSA(Aquinnah) is preempted. It is the District Court's interpretation, not the Tribe's interpretation, that "would essentially overrule *Narragansett*."

4. The TAFJ, if allowed to stand, will deprive the Tribe of those rights and privileges afforded other Indian tribes, and will undermine the jurisdictional structure of Indian gaming throughout the United States

The Tribe seeks only to be on equal footing regarding the governance of gaming on its Indian lands with other federally-recognized Indian tribes subject to IGRA. If the TAFJ is allowed to stand, the Tribe will be the only Indian tribe under IGRA, amongst hundreds, which must comply with state and local regulations regarding the construction, occupancy and operation of Class II gaming facilities on Indian lands. Even in the context of Class III gaming, most tribal-state compacts have provisions similar to the Mashpee Compact discussed above, which Compact requires the Mashpee Tribe to adopt and enforce, as a matter of tribal law, building codes at least as restrictive as state law, rather than subjecting the Mashpee Tribe to the regulatory and enforcement schemes of the Commonwealth and local jurisdictions. Doc. 185, 16-17. If allowed to stand, and become precedent for the many federally-recognized Indian tribes subject to

similar language in statutes regarding the applicability of state and local laws on Indian lands, the TAFJ decision will open the door for other states to assert jurisdiction over other tribes and the United States with regard to Class II gaming on Indian lands, unraveling IGRA's thirty-year history of stable jurisdictional jurisprudence, and destabilizing the most significant source of revenue, by far, funding tribal governments.

The TAFJ also violates the two principles of federal Indian law set forth in subsection A above. First, traditional canons of construction regarding statutes intended for the benefit of Indian tribes, and the application of such statutes to particularized circumstances, compel the federal courts to interpret any ambiguities in such statutes in favor of tribal interests. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *Penobscot Indian Nation v. Key Bank*, 112 F.3d 538, 547 (1st Cir. 1997). To interpret IGRA in a manner that subjects the Tribe, but not other tribes, to local laws and regulations regarding the construction, occupancy or operation of gaming facilities, would be inconsistent, creating an ambiguity in IGRA by applying the exact same language to different tribes and yielding different results. The Indian canon of construction mandates that such ambiguity be interpreted in favor of the Tribe. Second, statutes intended for the benefit of Indian tribes should be interpreted and applied in a manner that affords all tribes in similar circumstances the same rights and privileges, consistently applied. *Akiachack*, 935 F. Supp. 2d at 195. The Tribe, as a tribe whose gaming activities

are governed by IGRA, is similarly situated to other tribes governed by IGRA. To interpret IGRA in a manner that renders the Tribe to be a second-class tribal government, and deprives the Tribe of the rights and privileges that IGRA affords other tribes, would violate the principles of federal Indian law articulated in *Akiachack.* This incongruous and unjust result can be avoided only by reversing the June 19, 2019 Memorandum Opinion and Order and the TAFJ. That affirmance of the District Court's opinion and judgments would create such an unjust disparity underscores the gravamen of the District Court's errors set forth above.

C. The TAFJ and Opinion and Order of June 19, 2019 erred on three critical procedural legal issues

The District Court erred in three critical respects regarding the procedural context of the Town's Motion for Entry of Final Judgment. All three errors exacerbate the District Court's failure to follow the law articulated by this Court in its reaffirmation of *Narragansett.*

1. The District Court erred by finding jurisdiction to hear the Town's motion

The District Court was divested of jurisdiction as of October 6, 2018, at the latest, to enter a separate document regarding final judgment. Accordingly, the District Court lacked the capacity to hear the Town's new motion. The District Court lodged the Mandate issued by this Court, directing it to enter judgment in favor of the Tribe, on May 9, 2018. Doc. 176. Fed.R.Civ.P. 58(c)(2)(B) provides that if a court fails to enter a separate document setting

forth final judgment within 150 days from entry in the civil docket, judgment is deemed to have been issued and in effect. Under the District Court's own Local Rule 58.2(d) "an order or judgment of an appellate court in a case appealed from this court shall, if further proceedings are not required, become the order or judgment of this court and be entered as such on receipt of the mandate of the appellate court." Accordingly, the District Court's docketing of this Court's mandate serves as the docketing of the final judgment for purposes of Rule 58. *See Retained Realty Inc. v. Estate of Jack Spitzer*, 2010 WL 4683861 at *2 (D. Conn. 2010) ("In this case, the Second Circuit's Mandate was docketed on July 30, 2010 as a separate document, and therefore July 30, 2010 is the date judgment entered"). In the context of determining timeliness of appeals where the District Court provides a docket entry of judgment but fails to provide a separate document, applying Rule 58, the clock is deemed to have run 150 days from the docket entry plus the ordinary 30 days (or 60 days if the United States is a party) in which to file the appeal. *See, e.g., Powell v. Independent Inventory Service*, 516 Fed. Appx.907, 911 (11th Cir. 2013); *Strope v. Cummings*, 653 F.3d 1271, 1275-76 (10th Cir. 2011); *Salazar v. Berryhill*, 2018 WL 3586180 at *1(S.D. Fla. 2018). Although framed as a Motion for Entry of Judgment, the Town is essentially appealing or seeking to alter the straightforward judgment directed by this Court's Mandate. Accordingly, judgment was entered in favor of the Tribe, and against the Town, the Commonwealth and the AGHCA, by

operation of law, on October 6, 2018 at the latest, such date being 150 days from the District Court's docketing of the Mandate it received from this Court. Accordingly, the Town's motion was moot and untimely because final judgment, as directed by the Mandate, was already entered as of October 6, 2018.

2. The District Court erred in that it violated the Mandate Rule

The District Court violated the mandate rule. The law of the case doctrine has two branches. *Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002). One concerns the mandate rule, which forbids a lower court from re-litigating issues that were decided by a higher court at an earlier stage of the same case. *Id.* It should be noted that a primary purpose of the law of the case doctrine is to discourage a later tribunal from deviating from the decisions made in an earlier tribunal. The orderly functioning of the judicial process requires that judges coordinate jurisdiction, honor one another's orders, and revisit them only in special circumstances. *Id.* Judges who too liberally second-guess their co-equals effectively usurp the appellate function. *Id*.

The mandate rule requires a court to 'scrupulously and fully' carry out a higher court's order after remand, and forecloses the lower court from reconsidering matters determined in the appellate court. *Diaz v. Iiten Hotel Mgmt., Inc*., 741 F.3d 170, 175 (1st Cir. 2013). When a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial

court on remand. If there is an appeal from the judgment entered after remand, the decision of the first appeal establishes the law of the case to be followed on the second. *Arizona v. California*, 460 U.S. 605, 618 (1993); *Rivera-Martinez*, 931 F.2d 148, 150 (1st Cir. 1991)*; Ms. M. v. Falmouth School Dept.*, 875 F.3d 75, 78 (1st Cir. 2017)("we did not remand the case to the district court for further proceedings"); *United States v. Carta*, 690 F.3d 1, 5 (1st Cir. 2012); *United States v. Velez Carrero*, 140 F.3d 327, 329-30 (1st Cir. 1998); *DeCotiis v. Whittemore*, 842 F.Supp.2d 354 (D. Maine 2012)(despite merit to movant's argument, "The fact remains that the First Circuit affirmed the dismissal of Defendant Whittemore and, as a result, Defendant Whittemore is not before this Court on remand"); *Situation Management Systems, Inc. v. Lamoco Consulting LLC*, 2011 WL 1226114 at *2 (D. Mass. 2011); 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.404[1] (2d ed. 1991).

The District Court in this case erred in not honoring and implementing this Court's direction, which was simply to enter judgment in favor of the Tribe. The Tribe's 2016 appeal included an appeal of the IFJ permanently enjoining the Tribe from proceeding with the development of its Class II gaming facility without Town-issued permits. *Wampanoag*, 853 F.3d at 624. Even if this Court were to accept the Town's argument that the Tribe only appealed the question of the applicability of Commonwealth and local "gaming laws," (as first defined by the District Court on

June 19, 2019), this Court's 2017 Opinion reaffirmed *Narragansett*, which sets forth the governing guidance for determining whether a general regulatory law or regulation applies. 19 F.3d at 705-06. The mandate rule precludes the District Court from departing from decisions that were "by reasonable implication" decided by the higher court. *Ellis*, 313 F.3d at 346. Because IGRA definitively strips a state of any jurisdiction over Class II gaming, the issue was implicitly decided in the 2017 Opinion; accordingly, the District Court violated the mandate rule when issuing the amended final judgments.

The District Court erred in reasoning that the Mandate issued by this Court provided latitude to enter judgment in favor of the Town, the Commonwealth and the AGHCA. To the contrary, the mandate rule requires a district court to read an appellate court's disposition of an appeal against the backdrop of the prior proceedings in the case. *U.S. v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993); s*ee United States v. Cornelius*, 968 F.2d 703, 706 (8th Cir.1992) (explaining that a remand does not automatically rejuvenate the entire case); *United States v. DeJesus*, 752 F.2d 640, 643 (1st Cir.1985) (per curiam); *see also Kotler v. American Tobacco Co*., 981 F.2d 7, 13-14 (1st Cir.1992) (outlining rules governing an appellate court's power to reconsider an issue on remand from the Supreme Court).

The District Court recognized that *Hynning v. Partridge*, 359 F.2d 271, 273 (D.C. Cir. 1966), a case involving a mandate similarly worded to the one at

issue here, where the losing party tried to resurrect a counterclaim on remand asserting that it was not addressed in the appellate opinion, supports the Tribe's position. The D.C. Circuit reasoned:

> While we did not discuss in our opinion the District Court's denial of the counterclaim, the judgment we entered included these words: "the judgment of the District Court appealed from is reversed, and this cause is remanded to the District Court with directions to enter judgment in favor of Partridge." As we have seen the 'judgment appealed from' was the entire judgment of the District Court. We think that when an appellate decision is without limitation as to how much of the trial court's decision is set aside, all is set aside. Moreover, the judgment we entered makes it clear that the District Court's first ruling was reversed in its entirety.

Hynning, 359 F.2d at 273. The District Court attempts to distinguish *Hynning*, however, by noting that opinions and judgments should be read together "and there is nothing inconsistent or irrational in denying the Tribe's claims as to the application of permitting regulations." Doc. 200, 10. The Tribe agrees that the Mandate and opinion should be read together, but to read them in a manner that disrupts *Narragansett*, as the District Court has done, in the many ways identified above is both inconsistent and irrational, and contrary to law.

The District Court never addresses the argument that IGRA's comprehensive regulatory scheme, which governs environmental, public health and safety matters, including construction, occupancy and operation of gaming facilities on Indian lands, is repugnant to local or Commonwealth jurisdiction over the precisely same subject matter. For the Town to now claim that

permitting was not an integral issue in this litigation is deliberately disingenuous, at best. That issue, if not specifically identified in this Court's Mandate, was absolutely implied, and the District Court had no power or authority to deviate from it. *Briggs v. Pa. R.R. Co*., 334 U.S. 304, 306 (1948).

The District Court compounds its error by citing *Biggens v. Hazen Paper Company*, 111 F.3d 205 (1st Cir. 1997), for the general proposition that, on remand, a court is free to use its own judgment on all matters not addressed by the appellate decision. *Biggens*, however, remanded with instructions to proceed with the case, not with instructions to enter judgment. *Id.* at 209, and this Court did decide that IGRA's comprehensive scheme preempts state and local jurisdiction. The District Court's suggestion that the Tribe's Proposed Judgment "eviscerates" *Narragansett* is just wrong. The Tribe's Proposed Judgment embraces *Narragansett.* In such context, this Court's 2017 Opinion and its reaffirmation of *Narragansett* provide guidance to the appropriate answer where there are particularized circumstances worthy of tenebrous inquiry. In contrast, the TAFJ subjects the Tribe to every Commonwealth, Town and local law and regulation except those prohibiting specific games of chance, without regard to the disruption to IGRA's comprehensive regulatory scheme. Even if *Biggens* applies to mandates with specific instructions to enter judgment in favor of the appellant, which it does not, the District Court is not free to issue a decision inconsistent with *Narragansett*, which it has done.

3. The issue of whether IGRA preempts Commonwealth, Town and local laws regarding environmental, public health and safety matters, including construction, occupancy and operation of the Tribe's gaming facility, is properly before this Court – it has not been waived

(i) The issue of whether IGRA preempts Commonwealth, Town and local laws regarding environmental, public health and safety matters, including construction, occupancy and operation of the Tribe's gaming facility, is jurisdictional and cannot be waived

The District Court erroneously found that the Tribe waived its sovereign immunity regarding claims for breach of the 1983 MOU, but as set forth above and in this Court's 2017 Opinion, the 1983 MOU (App.Vol.I, 137-201) is preempted where it is repugnant to IGRA's comprehensive regulatory scheme. Because IGRA, rather than the 1983 MOU, governs gaming activities on the Settlement Lands, there is no basis on which to find the Tribe has waived its sovereign immunity. The 1983 MOU does not negate the fact that the Tribe is immune to claims by the Town or Commonwealth that fall within IGRA's preemptive scope, and issues regarding jurisdiction cannot be waived and can be raised at any time, even if raised for the first time on appeal. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997); *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974); *Larson v. United States*, 274 F.3d 643, 648 (1st Cir. 2001); *Rhode Island Dept. of Env. Mgmt. v. U.S.*, 304 F.3d 31, 40 (1st Cir. 2002). Here, the Tribe has not waived its sovereign immunity and is immune from suit.

(ii) The Tribe properly sought reconsideration of the permitting language in the IFJ

In the proceedings below, the Tribe expressly argued that if the District Court found that the Tribe had waived the permitting issue in its 2016 appeal, the District Court should then reconsider the issue in light of this Court's intervening 2017 Opinion (*See* Docs. 185, 14-20 and 196, 6-8.). Even if the District Court was correct that the Tribe waived the issue on appeal, which it did not, the Tribe asked the District Court to reconsider its injunction against the Tribe in light of this Court's intervening analysis. *Id.* If the District Court has jurisdiction to amend or modify the final judgment, it has jurisdiction to entertain the Tribe's request for reconsideration in light of this Court's opinion, and erred in failing to do so. Reconsideration is particularly appropriate where a district court has yet to enter final judgment, as was the circumstance here. *Union Mut. Life Ins. Co. v. Chrysler Corp.*, 793 F.2d 1, 15 (1st Cir. 1986). *See also Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800, 817 (1988); *Harlow v. Children's Hosp*., 432 F.3d 50, 56 (1st Cir. 2005); *United States v. Riviera-Martinez*, 931 F.2d 148, 150-51 (1st Cir. 1991). In *United States v*. *Matthews*, 643 F.3d 9 (1st Cir. 2011), relied upon by the Town (Opposition Brief at 20-21), the court noted that the party raising the issue did *not* seek reconsideration upon remand. *Id.* at 14.

Reconsideration is particularly appropriate when a court makes an error of misapprehension. *Villanueva v. United States*, 662 F.3d 124, 128 (1st Cir. 2011);

Ruiz Rivera v. Pfizer Pharm. LLC, 521 F.3d 76, 82 (1st Cir. 2008). Similarly, reconsideration is appropriate where there is an intervening change in the law, *Ms. S. v. Regional School Unit 72*, 916 F.3d 41, 48 n.3 (1st Cir. 2019); *Ellis*, 313 F.3d at 648; the initial decision would work a manifest injustice, *Ellis*, 313 F.3d at 648; or the rendering court committed a manifest error, *Puerto Rico Police Dep't.*, 675 F.3d 88, 95 (1st Cir. 2012); *United States v. Allen*, 573 F.3d 42, 53 (1st Cir. 2009).

The intervening development of this Court's 2017 Opinion meets all of the above criteria for reconsideration. The District Court's misapprehension of *Narragansett* was indisputably the basis for this Court's 2017 Opinion reversing the District Court's IFJ; thus, the District Court was presented with a clarified legal standard. Stripping the Tribe and the United States of the exclusive jurisdiction each possesses by virtue of IGRA's preemption of the MILCSA(Aquinnah) works a manifest injustice and commits manifest error. That the Tribe sought reconsideration preserved the substantive issue on this appeal for review on the merits.

(iii) The District Court's abandonment of its narrowly-defined injunctive language and replacement with new, broadly defined injunctive language entitles the Tribe to appellate review

Even if the District Court was correct that the Tribe waived the issue on appeal, which it did not, the significant modifications made by the District Court between the IFJ and the TAFJ allow for this appeal to be heard on the merits.

The District Court, on June 19, 2019, manufactured for the very first time in this litigation, its own alternative definition of "gaming laws" to mean only those state statutes and local regulations that prohibit or regulate games of chance, and not to mean general regulatory laws and regulations that would apply to the construction, occupancy and operation of the Tribe's gaming facility. The Town then applies the District Court's new and erroneous definition of "gaming laws" to argue that the Tribe only appealed in 2016 the question of whether IGRA preempts "gaming laws" as first defined by the District Court in 2019.

The very fact that the District Court did not define and create the "gaming laws/General Regulatory Laws" false paradigm until June 19, 2019, when it issued the first of three amended final judgments, eviscerates the contention that the Tribe waived the argument in 2016. The District Court did not simply reinstate its prior injunction, which was reversed by this Court's 2017 Opinion – the District Court created in the amended final judgments issued in 2019, for the first time, a definitional paradigm to conclude that all Commonwealth, Town and local laws and

regulations that would apply to the construction, occupation and operation of any gaming facility by any entity, would also apply to the Tribe, without exception and without regard to any preemption by IGRA. Despite this Court's admonition in its 2017 Opinion of the District Court's failure to acknowledge the Tribe as a sovereign government (e.g., failure to acknowledge that the laws and regulations duly promulgated by the Tribe, and that the experience, qualifications and availability of individuals in the Tribe's Building Department, are superior to the Town's), the District Court continues to ignore such governmental status, and subjects the Tribe to the same standards as a private company doing business in the Commonwealth.

(iv) The Tribe did not fail to appeal the injunctive language in the IFJ

Third, the District Court erred in finding that the Tribe has waived its arguments regarding the applicability of General Regulatory Laws – the Tribe did not waive the arguments. The Tribe appealed from the IFJ in its entirety (Doc. 159), which included the language enjoining the Tribe from proceeding without local building permits. The District Court concedes that the Tribe appealed whether IGRA preempts the MILCSA(Aquinnah) regarding gaming, and whether IGRA applies to the Tribe's Indian lands. Doc. 200, 6. The District Court characterizes this Court's opinion as "focused entirely on the parenthetical in the statute, which directly addressed Commonwealth and local regulation," Doc. 200, 8. It would be far more appropriate to characterize the decision as focused on the

correctness of this Court's decision in *Narragansett*, and the District Court's error in failing to apprehend or to follow *Narragansett.* The Tribe clearly appealed the District Court's errant preemption analysis, which analysis includes the District Court's decision in the IFJ that the Tribe must comply with local permitting laws. The District Court's belief that there is no dispute that the Tribe failed to appeal the issue underscores its misapprehension of Congress' repeal of the MILCSA(Aquinnah) when IGRA became law.

The District Court's failure to acknowledge that IGRA is a comprehensive regulatory scheme entailing a far more particularized inquiry than merely whether a particular Commonwealth or Town law or regulation prohibiting a game of chance applies to a tribe, also leads to its error in concluding that the Tribe failed to appeal the issue of whether local building permits are required.

The Tribe made clear in its briefing in the earlier appeal that its reference to "gaming laws" was not limited to simply those laws authorizing, regulating or prohibiting specific games of chance, but rather "gaming laws" is a contextual reference to IGRA's comprehensive and sophisticated regulatory scheme:

> IGRA still remains as the more specific statute providing extensive detail as to the place, manner, scope and regulation of gaming on Indian lands, imposing an exclusive tribal/NIGC regulatory scheme for the Class II gaming at issue here.

May 25, 2016 Opening Brief in earlier appeal at 30.[13] *See also id.* at 3,

[13] Document #00117013566 in prior appeal to this Court, No. 16-1137.

("comprehensive provisions of federal law governing gaming on Indian lands"); *Id.* at 28 ("comprehensive statute to occupy the field and govern gaming activities on Indian lands."); October 3, 2016 Reply Brief at 16[14] ("comprehensive scheme established by IGRA"); *id.* at 18 ("IGRA provides an entirely different framework than MILCSA(Aquinnah) for the Tribe's gaming activities"); *Id.* at 20 ("comprehensive regulatory scheme"); and *Id*. at 23 ("Tribes wishing to engage in Class II gaming (as here) are subject to the robust federal regulatory system under IGRA"). Accord, *Wampanoag* 853 F.3d at 622 ("IGRA sets in place a sophisticated regulatory framework"); *Narragansett*, 19 F.3d at 705 ("a comprehensive federal regulatory scheme governing a particular area typically leaves no room for additional state burdens in that area"); *Id*. at 689 ("the statute sets in place a sophisticated regulatory network"). At no time in the briefing submitted by the Town, the AGHCA or the Commonwealth did any party refute these references to the broad scope of IGRA's preemptive effect, even as it pertains to Class II gaming, or inform this Court that any decision to be issued by this Court should be limited to a more narrow federal preemption applicable only to those state and local laws authorizing or prohibiting specific games of chance.

For these reasons, the Town is wrong to suggest that this Court cannot reach the substantive merits of the Tribe's appeal. It certainly can and should do so.

[14] Document #00117062734 in prior appeal to this Court, No. 16-1137.

VI. CONCLUSION

For the reasons set forth herein and, in the pleadings, below, this Court should reverse the June 19, 2019 Memorandum Opinion and Order, and vacate the TAFJ. In its Mandate to the District Court, this Court should direct the entry of final judgment as follows:

> For the reasons set forth in *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 629 (1s Cir. 2017), Final Judgment is entered in favor of the Wampanoag Tribe of Gay Head (Aquinnah) and the Aquinnah Wampanoag Gaming Corporation (collectively "Tribe"). The Third-Party Defendant Officials of the Commonwealth of Massachusetts, the Town of Aquinnah and the Aquinnah Gay Head Community Association are permanently enjoined from asserting jurisdiction over, or interfering with, the Tribe's exercise of its full rights under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. .

Date: January 21, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Opening Brief complies with the Word Limit of 13,000, containing 12,998 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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Dated: January 21, 2020

/s/ *Scott D. Crowell*
SCOTT CROWELL

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2020, I electronically filed the foregoing documents with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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Dated: February 4, 2020

s/ Scott Crowell
SCOTT CROWELL

ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, **Plaintiff/Counterclaim-Defendant,** **and** **THE AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) and TOWN OF AQUINNAH,** **Intervenors/Plaintiffs,** **v.** **THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION,** **Defendants/Counterclaim-Plaintiffs,** **v.** **CHARLIE BAKER, in his official capacity as GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, et al.,** **Third-Party Defendants.**	**Civil Action No. 13-13286-FDS**

FINAL JUDGMENT

SAYLOR, J.

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, and consistent with the Court's July 1, 2014 Order denying the Commonwealth's motion to remand (Docket No. 31), the Court's February 27, 2015 Order addressing the motions to dismiss (Docket No. 95), the Court's

July 28, 2015 Order entering a preliminary injunction (Docket No. 140), and the Court's November 13, 2015 Order addressing the cross-motions for summary judgment (Docket No. 151), it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

1. Judgment is hereby entered in favor of plaintiff/counterclaim-defendant the Commonwealth of Massachusetts and intervenor-plaintiffs/counterclaim-defendants the Aquinnah/Gay Head Community Association, Inc. ("AGHCA") and the Town of Aquinnah, and against defendants/counterclaim-plaintiffs the Wampanoag Tribe of Gay Head (Aquinnah), the Wampanoag Tribal Council of Gay Head, Inc., and the Aquinnah Wampanoag Gaming Corporation (collectively, "the Tribe") as to the claims for breach of contract and declaratory judgment brought by the Commonwealth of Massachusetts, the AGHCA, and the Town of Aquinnah.

2. Judgment is hereby entered in favor of the Commonwealth of Massachusetts, the AGHCA, the Town of Aquinnah, and third-party defendants Governor Charlie Baker, Attorney General Maura Healey, and Chairman of the Massachusetts Gaming Commission Stephen Crosby, and against the Tribe, as to the Tribe's counterclaims for a declaratory judgment.

3. Judgment is hereby entered declaring that the Tribe may not construct, license, open, or operate any gaming facility at or on the Settlement Lands (as those lands are defined in the Summary Judgment Order) without complying with the laws and regulations of the Commonwealth of Massachusetts and the Town of Aquinnah, including any pertinent state and local permitting requirements.

4. A permanent injunction is hereby entered enjoining and restraining the Tribe from commencing or continuing construction of and/or opening any gaming facility at or on the Wampanoag Community Center building site (as that term is used in the Preliminary Injunction Order) or on any other Settlement Lands (as those lands are defined in the Summary Judgment Order), without complying with the laws and regulations of the Commonwealth of Massachusetts and the Town of Aquinnah, including any pertinent state and local permitting requirements.

So Ordered.

/s/ F. Dennis Saylor IV
F. Dennis Saylor IV
United States District Judge

Dated: January 5, 2016

United States Court of Appeals
For the First Circuit

No. 16-1137

COMMONWEALTH OF MASSACHUSETTS; AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC.; TOWN OF AQUINNAH, MA,

Plaintiffs, Appellees,

v.

THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH); THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC.; THE AQUINNAH WAMPANOAG GAMING CORPORATION,

Defendants, Appellants,

CHARLES D. BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts; MAURA T. HEALEY, in her capacity as Attorney General of the Commonwealth of Massachusetts; STEPHEN P. CROSBY, in his capacity as Chairman of the Massachusetts Gaming Commission,

Third-Party Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. F. Dennis Saylor IV, U.S. District Judge]

Before

Howard, Chief Judge,
Torruella and Kayatta, Circuit Judges.

Scott D. Crowell, with whom Crowell Law Offices-Tribal Advocacy Group, Lael Echo-Hawk and Hobbs Straus Dean & Walker, LLP were on brief, for appellants.

Judy B. Harvey, Attorney, Environment and Natural Resources Division, U.S. Department of Justice, with whom John C. Cruden,

Assistant Attorney General, Sam Hirsch, Principal Deputy Assistant Attorney General, Mary Gabrielle Sprague and Amber Blaha, Attorneys, Environment and Natural Resources Division, Dan Lewerenz, Office of the Solicitor, Department of the Interior, and Maria Getoff, Office of the General Counsel, National Indian Gaming Commission, were on brief, for United States as amicus curiae.

Felicia H. Ellsworth, with whom Claire M. Specht, James L. Quarles, III, and Wilmer Cutler Pickering Hale and Dorr LLP were on brief, for appellee Aquinnah/Gay Head Community Association, Inc.

Ronald H. Rappaport, with whom Michael A. Goldsmith and Reynolds, Rappaport Kaplan & Hackney, LLC were on brief, for appellee Town of Aquinnah.

Juliana deHaan Rice, Assistant Attorney General, Government Bureau, with whom Bryan F. Bertram, Assistant Attorney General, and Maura T. Healey, Attorney General, were on brief, for appellee Commonwealth of Massachusetts and Third-Party Defendants.

April 10, 2017

TORRUELLA, **Circuit Judge**. Appellant, the Wampanoag Tribe of Gay Head (Aquinnah)[1] (the "Tribe"), a federally recognized Indian tribe, seeks to have gaming pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, on its trust lands in Dukes County, Massachusetts (the "Settlement Lands"). Appellees, the Commonwealth of Massachusetts (the "Commonwealth"), the town of Aquinnah (the "Town") and the Aquinnah/Gay Head Community Association[2] argue that any gaming on the Settlement Lands should be subject to state, rather than federal, laws and regulations. The district court, on summary judgment, found for the Appellees. The district court reasoned that IGRA did not apply, because the Tribe had failed to exercise sufficient governmental power; and that even if the Tribe had exercised sufficient governmental power, the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95 (codified at 25 U.S.C. §§ 1771-1771i) (the "Federal Act"), which provides that the Settlement Lands are subject to state laws and regulations (including gaming laws and regulations), governed. Because we find that the Tribe has exercised more than sufficient

[1] The town of Gay Head was incorporated into the Commonwealth of Massachusetts in 1870, but has since been renamed "Aquinnah."

[2] Because the Town and the Association filed a joint brief, we generally refer to both parties together as "the Town."

governmental power to satisfy the requirements of IGRA, and the Federal Act has been impliedly repealed by IGRA in relevant part, we reverse.

I. Background

A. Factual History

1. The Settlement Agreement and the Federal Act

The Tribe has lived on Martha's Vineyard since before the European colonization of New England, and has continued to reside there to the present day. The Town was incorporated by the Commonwealth in 1870 as the town of Gay Head, and has since been renamed Aquinnah. In 1974, the Tribe sued the Town in federal court, asserting title to certain lands and "seeking ejectment of record title holders." The Commonwealth and the Association intervened.

In November 1983, these parties signed a Memorandum of Understanding (the "Settlement Agreement"). The Settlement Agreement conveyed the Settlement Lands (approximately 485 acres) to the Tribe. In exchange, the Tribe gave up its claims to other lands and dismissed its lawsuit. Before this Settlement Agreement could enter into force, it had to be implemented by Congress.

On August 18, 1987, Congress implemented the Settlement Agreement by passing the Federal Act. See Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987,

Pub. L. No. 100-95 (codified at) 25 U.S.C. §§ 1771-1771i. The Federal Act provides, inter alia, that the Settlement Lands "shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth . . . and the [Town] . . . (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance)." 25 U.S.C. § 1771g.

The parties all agree that "[t]he Commonwealth, the Town, and the Tribe have each exercised jurisdiction over the Settlement Lands pursuant to the provisions of the Federal Act."

2. Cabazon and IGRA

On February 25, 1987 -- approximately six months before Congress passed the Federal Act -- the Supreme Court decided California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), which held that California -- which permitted certain forms of regulated gambling -- could not civilly regulate tribal bingo games because such regulation "would impermissibly infringe on tribal government." Id. at 221-22. This decision did, however, leave space for states that criminally prohibit gaming to prohibit it on Indian lands within their jurisdictions.

In response, on October 17, 1988, Congress enacted IGRA. See, e.g., Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2034 (2014) ("Congress adopted IGRA in response to [Cabazon], which

held that States lacked any regulatory authority over gaming on Indian lands."). IGRA provides, inter alia, "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(1).

IGRA "sets in place a sophisticated regulatory framework" for gambling on Indian lands, dividing gaming into three classes: Class I gaming, which includes traditional Native American gaming, is always permitted; Class II gaming, which includes bingo, is permitted so long as the state does not generally proscribe gaming of that type; and Class III gaming, which includes casino gambling, is permitted only pursuant to a compact between a tribe and the state. Id. § 2710; Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 689-90 (1st Cir. 1994). Congress established the National Indian Gaming Commission ("NIGC") to administer IGRA; its responsibilities include approving Class II gaming ordinances submitted to it by Indian tribes. 25 U.S.C. §§ 2704, 2710(b)(1)(B).

3. The Tribe's Pursuit of Gaming on Settlement Lands

On November 22, 2011, Governor Deval Patrick signed "An Act Establishing Expanded Gaming in the Commonwealth" into law, which allowed gaming in establishments licensed by the Commonwealth. On that same day, the Tribe submitted Gaming

Ordinance No. 2011-01 to the NIGC for approval, which set forth tribal rules governing gaming. On February 4, 2012, the Tribe adopted Gaming Ordinance No. 2011-01, and on February 21, 2012, the NIGC "announc[ed] the approval of Gaming Ordinance No. 2011-01 for gaming on Indian Lands as defined by IGRA." On March 5, 2012, the Tribe began corresponding with the Commonwealth to enter into negotiations for a Class III compact under the newly-enacted law, but no compact was formed.

On May 30, 2013, the Tribe submitted an amended Ordinance No. 2011-01 to the NIGC, which stated the Tribe's intention to pursue Class II gaming on the Settlement Lands. The NIGC sought an opinion from the Department of the Interior ("DOI") as to whether the Federal Act prohibited Class II gaming on the Settlement Lands; the DOI provided an opinion stating that gaming was not prohibited. On August 29, 2013, the NIGC approved the amended Ordinance No. 2011-01. On October 25, 2013, in response to a request by the Tribe, the NIGC provided an opinion that the Settlement Lands were eligible for gaming under IGRA. Consequently, the Tribe has neither applied for nor obtained a license from the Massachusetts Gaming Commission to operate a gaming establishment.

When the Tribe informed the Commonwealth that it would proceed with the establishment of a Class II gaming facility on

the Settlement Lands pursuant to IGRA, the Commonwealth responded, on December 2, 2013, by filing suit against the Tribe in state court. The Commonwealth asserted breach of the Settlement Agreement and sought a declaratory judgment that the Settlement Agreement prohibited gaming on the Settlement Lands. The Tribe removed the case to the district court on December 30, 2013, on grounds of federal question and supplemental jurisdiction.

After some procedural fencing not relevant here, on May 28, 2015, the parties all moved for summary judgment. On November 13, 2015, the district court granted summary judgment for the Appellees.

The district court ruled that the Settlement Lands were not covered by IGRA, and hence were subject to the Commonwealth's gaming regulations. Massachusetts v. Wampanoag Tribe of Gay Head (AQUINNAH), 144 F. Supp. 3d 152, 177 (D. Mass. 2015). First, it found that the Tribe, despite having jurisdiction over the Settlement Lands, failed to exercise sufficient "governmental power" over those lands, as required for IGRA to apply. Id. It recognized that the Tribe had asserted that it was "responsible" for many governmental services in the Settlement Lands, but found that it had not shown sufficient "actual manifestations of [the Tribe's] authority." Id. at 169-70. Second, it ruled that even if the Tribe did exercise sufficient governmental power, IGRA did

not work an implied repeal of the portion of the Federal Act that subjected the Settlement Lands to the gaming laws of the Commonwealth. Id. at 177. The district court relied heavily on the parenthetical language in § 1771g of the Federal Act stating that the "civil or criminal laws" included "those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance." 25 U.S.C. § 1771g. Id. at 170-72 (quoting 25 U.S.C. § 1771g). According to the district court, this language "specifically prohibits gaming on the Settlement Lands." Id. at 172. Because IGRA does not permit Class II gaming if it is "otherwise specifically prohibited on Indian lands by Federal law," the district court ruled that IGRA did not repeal this provision, and that the Federal Act prohibited the Tribe from opening a gaming establishment on the Settlement Lands without the Commonwealth's approval. Id.

On January 5, 2016, the district court entered final judgment, declaring that the Tribe could not operate a gaming facility on the Settlement Lands without complying with the laws of the Commonwealth and the Town, and enjoining the Tribe from opening any such establishment without first obtaining approval from the Commonwealth and the Town. The Tribe filed a timely appeal.

II. Standard of Review

A district court's grant of summary judgment is reviewed de novo. OneBeacon Am. Ins. Co. v. Commercial Union Assurance Co. of Can., 684 F.3d 237, 241 (1st Cir. 2012). Summary judgment should be granted if "there is no genuine dispute as to any material fact" and the movant "is entitled to judgment as a matter of law." Id. (quoting Fed. R. Civ. P. 56(a)).

III. Discussion

We must resolve two issues today. First, we must decide whether IGRA applies to the Settlement Lands. See Narragansett, 19 F.3d at 702-03. Second, we must decide whether IGRA effects a repeal of the Federal Act.[3] See id. at 703-04.

A. The Applicability of IGRA

> [IGRA]'s key provisions [apply] to "[a]ny Indian tribe having jurisdiction over Indian lands," or, stated differently, to "Indian lands within such tribe's

[3] The Tribe also raises a third issue, whether the district court abused its discretion by not including the NIGC as a required party. A party is required to be joined if the absence of that party could "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Fed. R. Civ. P. 19(a)(1)(B)(ii). In determining whether there is a risk of inconsistent obligations under Rule 19(a)(1)(B)(ii), we consider whether there is a "practical" possibility of such an inconsistency, not whether it may be "theoretically possible." Bacardí Int'l. Ltd. v. V. Suárez & Co., 719 F.3d 1, 13 (1st Cir. 2013). Although the Tribe asserts that it may become subject to inconsistent obligations, the Tribe has failed to provide any examples of such inconsistent obligations. We thus find no error, let alone abuse of discretion, in the district court's decision to proceed without the NIGC as a party.

> jurisdiction." See 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1). These are dual limitations, for one element of the definition of "Indian lands" requires that an Indian tribe "exercise[] governmental power" over them. 25 U.S.C. § 2703(4).

Narragansett, 19 F.3d at 701 (third and fourth alterations in original).

1. Having Jurisdiction[4]

In Narragansett, we were satisfied by the fact that Rhode Island did not acquire "exclusive" jurisdiction, and that the Narragansett Tribe retained "that portion of jurisdiction they possess by virtue of their sovereign existence as a people." Id. at 702. In the present case, as the district court noted, the parties stipulated that "the Commonwealth, the Town, and the Tribe have each exercised jurisdiction over the Settlement Lands." Although the Federal Act does contain some language limiting the Tribe's jurisdiction, that language only confirms that the Tribe retains the jurisdiction it has not surrendered in the Federal Act. 25 U.S.C. § 1771e(a) (stating that the Tribe "shall not have any jurisdiction over nontribal members and shall not exercise any jurisdiction over any part of the [S]ettlement [L]ands in contravention of [the Federal Act], the civil regulatory and

[4] The Tribe argues that Appellees have waived arguments on this issue. Because we find for the Tribe on the merits, we need not address its waiver argument.

criminal laws of [the Commonwealth and the Town], and applicable Federal Laws").[5] "Since the Settlement Act does not unequivocally articulate an intent to deprive the Tribe of jurisdiction, we hold that its grant of jurisdiction to the state is non-exclusive. The [Tribe], therefore, [has] made the necessary threshold showing." Narragansett, 19 F.3d at 702.

2. Exercising Governmental Power

> [A] tribe must exercise governmental power in order to trigger [IGRA]. Meeting this requirement does not depend upon the Tribe's theoretical authority, but upon the presence of concrete manifestations of that authority. Consequently, an inquiring court must assay the jurisdictional history of the settlement lands.

Id. at 702-03.

In Narragansett, we noted that this "inquiry into governmental power need not detain us," and concluded that the Narragansett Tribe's "activities adequately evince that the Tribe exercises more than enough governmental power to satisfy the second prong of the statutory test." Id. at 703. To wit, the Narragansett Tribe

[5] The Town observes that in Narragansett we pointed to the Federal Act as an instance where, in contrast to Rhode Island's Settlement Act, Congress placed "stated limits on the retained jurisdiction of the affected tribes." 19 F.3d at 702. However, we made that comment only to highlight that the Rhode Island Act's broad language did not imply exclusivity, not to suggest that the Federal Act somehow conveyed exclusive jurisdiction to the Commonwealth.

> has taken many strides in the direction of self-government. It has established a housing authority, recognized as eligible to participate in the Indian programs of the federal Department of Housing and Urban Development, see 24 C.F.R., Part 905 (1993). It has obtained status as the functional equivalent of a state for purposes of the Clean Water Act, after having been deemed by the Environmental Protection Agency as having "a governing body carrying out substantial governmental duties and powers," 33 U.S.C. § 1377(e) (1988), and as being capable of administering an effective program of water regulation, see 40 C.F.R. § 130.6(d) (1993). It has taken considerable advantage of the Indian Self–Determination and Education Assistance Act (ISDA), a statute specifically designed to help build "strong and stable tribal governments." 25 U.S.C. § 450a(b) (1998). The Tribe administers health care programs under an ISDA pact with the Indian Health Service, and, under ISDA contracts with the Bureau, administers programs encompassing job training, education, community services, social services, real estate protection, conservation, public safety, and the like.

Id.

The Tribe in the present case has taken most of the same steps that the Narragansetts had -- and indeed several more. Therefore, like in Narragansett, the inquiry into governmental power "need not detain us." Id.

In the present case, like in Narragansett, the Tribe: has established a housing program that receives HUD assistance, and has built approximately 30 units of housing under that program; has entered into an intergovernmental agreement with the EPA; operates a health care clinic with the aid of the Indian Health Service; administers a program for education with scholarships

financed with Bureau of Indian Affairs funding; administers social services with a human services director responsible for child welfare work; administers conservation policy (and has two conservation rangers to enforce its conservation policy); and administers a public safety program (the same two rangers enforce tribal laws and can be cross-deputized by the Town).

In addition, the Tribe has passed numerous ordinances and employs a judge. These ordinances deal with such diverse topics as building codes, health, fire, safety, historic preservation, fish, wildlife, natural resources, housing, lead paint, elections, judiciary, criminal background checks, and the reporting of child abuse and neglect. In addition to the inter-governmental agreements already mentioned -- with the EPA and the Bureau of Indian Affairs -- the Tribe has also entered into intergovernmental agreements with the National Park Service, and indeed also with the Commonwealth and the Town. The agreements with the Commonwealth and the Town include agreements whereby the Tribe, for compensation, may rely on state and local law enforcement and firefighting services.

The Town nevertheless urges us to adopt the district court's analysis and find that the Tribe has not exercised sufficient governmental power. The Town points out that some of the Tribe's exercises of governmental power are not full-fledged,

and then proceeds to read our opinion in Narragansett as requiring full-fledged exercise of governmental power for IGRA to apply. For instance, the Town points out that while the Tribe employs a judge -- and indeed maintains a tribal court -- this judge is employed part-time, and presides via teleconference from Washington State; similarly, the Town points out that the Tribe does not have a hospital, but instead maintains a health clinic.

The Town gets it backwards. Pursuant to IGRA, "the operation of gaming by Indian tribes [is] a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. The Town now seeks to put this logic on its head by requiring the Tribe's government to be fully developed before it can have the benefit of gaming revenue. This is not what IGRA requires, nor is it our case law. In Narragansett, we deemed the "many strides in the direction of self-government" -- that is, not the achievement of full-fledged self-governance, but merely movement in that direction -- to "evince that the Tribe exercises more than enough governmental power to satisfy the second prong of the statutory test." 19 F.3d at 703. We have no difficulty drawing the same conclusion here, especially because "[i]n determining [Congressional] intent . . . [d]oubtful expressions are to be resolved in favor of [Indians]." Id. at 691

(citations omitted) (quoting Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586–87 (1977)).[6]

B. The Interface between IGRA and the Federal Act

Having determined that IGRA applies to the Settlement Lands, we must now determine whether IGRA effected a partial repeal of the Federal Act. "The proper mode of analysis for cases that involve a perceived conflict between two federal statutes is that of implied repeal." Id. at 703 (citing United States v. Cook, 922 F.2d 1026, 1033 (2d Cir. 1991)). "[I]mplied repeals of federal statutes are disfavored. In the absence of a contrary legislative command, when two acts of Congress touch upon the same subject matter the courts should give effect to both, if that is feasible." Id. (citing Pipefitters Local 562 v. United States, 407 U.S. 385, 432 n.43 (1972)). "[S]o long as the two statutes, fairly construed, are capable of coexistence, courts should regard each as effective." Id. (citing Traynor v. Turnage, 485 U.S. 535, 547–48 (1988)). But "'if the two [acts] are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first.'" Id.

[6] The Tribe also argues that the determinations the NIGC and DOI made concerning the applicability of IGRA to the Settlement Lands merit our deference. Because we find for the Tribe on the merits of its own legal arguments, we do not reach the question of how much, if any, deference the NIGC and DOI determinations merit.

(quoting United States v. Tynen, 78 U.S. 88, 92 (1870)). Finally, "[e]ven absent outright repugnancy, a repeal may be implied in cases where the later statute covers the entire subject 'and embraces new provisions, plainly showing that it was intended as a substitute for the first act.'" Id. at 703-04 (quoting Tynen, 78 U.S. at 92).

"The doctrine of implied repeal operates without special embellishment in the Indian law context. The rationale for encouraging preemption in the Indian context -- that the federal government is a more trustworthy guardian of Indian interests than the states -- has no relevance to a conflict between two federal statutes." Id. at 704 (internal citations omitted).

Two precedents guide our analysis of the present issue: Narragansett, 19 F.3d 685 (holding that the Rhode Island Settlement Act was impliedly repealed in relevant part by IGRA, id. at 705), and Passamaquoddy Tribe v. Maine, 75 F.3d 784 (1st Cir. 1996) (holding that the Maine Settlement Act was not repealed by IGRA). Because the present case is very close to Narragansett, and readily distinguished from Passamaquoddy, we find for the Tribe on this issue.

The Rhode Island Settlement Act at issue in Narragansett read, in relevant part, "[e]xcept as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and

criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708 (1978). We found that this settlement act and IGRA "are partially but not wholly repugnant." Narragansett, 19 F.3d at 704. The two laws clashed only as to class I and class II gaming (because IGRA permits class III gaming only if the tribe and the state reach a compact), which "leaves largely intact the grant of jurisdiction [to the state] -- but it demands an adjustment of that portion of jurisdiction touching on gaming." Id. We highlighted two reasons why IGRA trumped the Rhode Island Settlement Act:

> First, the general rule is that where two acts are in irreconcilable conflict, the later act prevails . . . . Second, . . . courts should endeavor to read antagonistic statutes together in the manner that will minimize the aggregate disruption of congressional intent. Here, reading the two statutes to restrict state jurisdiction over gaming honors [IGRA] and, at the same time, leaves the heart of the [Rhode Island] Settlement Act untouched. Taking the opposite tack -- reading the two statutes in such a way as to defeat tribal jurisdiction over gaming on the settlement lands -- would honor the Settlement Act, but would do great violence to the essential structure and purpose of [IGRA].

Id. at 704-705 (internal citations omitted).

In Passamaquoddy, we were presented with very different language:

> The provisions of any Federal law enacted after October 10, 1980 [the effective date of the Maine Settlement Act], for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the

> State of Maine . . . shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

25 U.S.C. § 1735(b) (emphasis added). We reasoned that the Maine Settlement Act contained a savings clause that "acts as a warning signal to later Congresses to stop, look, and listen before weakening the foundation on which the settlement between Maine and the Tribe rests," and that "signals courts that, if a later Congress enacts a law for the benefit of Indians and intends the law to have effect within Maine, that intent will be made manifest." Passamaquoddy, 75 F.3d at 789. Because IGRA does not contain any indication that Congress intended it to be specifically applicable within Maine, we concluded that -- given the presence of the savings clause -- there was no conflict between the Maine Settlement Act and IGRA, and IGRA therefore did not alter that settlement act.

The Appellees seek to distinguish the present case from Narragansett because the Federal Act -- otherwise, in relevant part, essentially identical to the Rhode Island Settlement Act[7]

[7] The relevant portion of the Federal Act reads, in full:

> Except as otherwise expressly provided in this subchapter or in the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and

-- ends in a parenthetical that reads, in full, "(including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance)." 25 U.S.C. § 1771g. Appellees argue that this parenthetical operates as a savings clause like the one in Passamaquoddy.

Appellees, however, misread the parenthetical. Unlike the savings clause in Passamaquoddy, the parenthetical in the Federal Act says nothing about the effect of future federal laws on the Federal Act. Rather, the parenthetical merely clarifies that, at the time of the enactment of the Federal Act, state and local gaming law applied to the Settlement Lands. We note that, at the time, there was a reason for adding this clarification (a reason that did not exist nine years earlier when the Rhode Island Settlement Act entered into force). Approximately six months before Congress passed the Federal Act on August 18, 1987, the Supreme Court decided Cabazon, 480 U.S. 202, which created

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> criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).

25 U.S.C. § 1771g. Although the Federal Act is more detailed than the Rhode Island Settlement Act in terms of which lands it applies to and which local laws the Settlement Lands shall be subject to, Appellees do not argue, nor could they, that this added level of detail is relevant to the implied repeal analysis.

considerable uncertainty about Indian law, specifically with respect to gaming. See, e.g., Wisconsin v. Ho-Chunk Nation, 784 F.3d 1076, 1080 (7th Cir. 2015) ("Cabazon led to a flood of activity, and states and tribes clamored for Congress to bring some order to tribal gaming."); see also supra Section I.2. Soon after, on October 17, 1988, Congress enacted IGRA. The Federal Act was thus passed during a period of uncertainty about the status and future of Indian gaming. The parenthetical served to decrease that uncertainty by clarifying that, when the Federal Act was enacted, Commonwealth gaming law applied to the Settlement Lands, but -- just like the Rhode Island Settlement Act nine years before it -- it said nothing about the effect of future federal law.[8]

The fact that the savings clause in the Maine Settlement Act had already been on the books for some seven years when the Federal Act was enacted further confirms that Congress did not intend the Federal Act to contain such a savings clause -- for the Maine Settlement Act leaves no doubt that Congress knew how to

[8] Appellees note that Congress amended the Rhode Island Settlement Act following our decision in Narragansett to include "[f]or purposes of [IGRA], settlement lands shall not be treated as Indian lands." 25 U.S.C. § 1708(b) (1996). Appellees argue that this means that Congress also intended the Settlement Lands in Massachusetts not to be treated as Indian lands for the purposes of IGRA. Appellees ignore an obvious fact: Congress did not amend the Federal Act.

draft a savings clause, and that the parenthetical in the Federal Act is not such a savings clause.[9]

We also reject the Appellees' argument that the Federal Act and IGRA are not in conflict because the latter only allows class II gaming where it "is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. § 2710(b)(1)(A). Contrary to the Appellees' contentions, the parenthetical language included in the Federal Act is neither specific nor a prohibition. The language is hardly specific, as it appears applicable to all types of gaming and references bingo only as an example. Nor does the section prohibit anything. It merely grants Massachusetts jurisdiction over gaming. And, as the Tribe points out, even Massachusetts law does not prohibit gaming altogether. Rather, it merely regulates such gaming (e.g., by requiring a license).

[9] The Maine Settlement Act is by no means the only example that demonstrates that Congress knows how to draft a savings clause. See Passamaquoddy, 75 F.3d at 790 ("the Court regularly has upheld and given effect to [savings clauses]" (citing Warden, Lewisburg Penit. v. Marrero, 417 U.S. 653, 659–60 n.10 (1974) (earlier statute barred repeal of certain penalties "unless the repealing Act shall so expressly provide"); Shaughnessy v. Pedreiro, 349 U.S. 48, 52 (1955) (earlier statute directed that "[n]o subsequent legislation shall . . . supersede or modify the provisions of [the earlier statute] except to the extent such legislation shall do so expressly"); Posadas v. National City Bank, 296 U.S. 497, 501 (1936) (earlier statute directed that subsequent laws "shall not apply to the Philippine Islands, except when they specifically so provide"); Great Northern Ry. Co. v. United States, 208 U.S. 452, 456 (1908) (similar); United States v. Reisinger, 128 U.S. 398, 401–02 (1888) (similar))).

Review of the legislative history confirms that this is not the type of specific prohibition that Congress had in mind. Indeed, "[t]he phrase 'not otherwise prohibited by Federal Law'" was meant to "refer[] to gaming that utilizes mechanical devices as defined in 15 U.S.C. § 1175," which the Appellees concede is not at issue here. S. Rep. No. 100-446, at 12 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3082.

IV. Conclusion

For the foregoing reasons, the opinion of the district court is reversed and the case is remanded to the district court for entry of judgment in favor of the Tribe.

Reversed and Remanded.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 8, 2018

Clerk
United States Court of Appeals for the First Circuit
United States Courthouse
1 Courthouse Way
Boston, MA 02210

Re: Town of Aquinnah, Massachusetts, et al.
v. The Wampanoag Tribe of Gay Head (Aquinnah), et al.
No. 17-216
(Your No. 16-1137)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris, Clerk

United States Court of Appeals
For the First Circuit

No. 16-1137

COMMONWEALTH OF MASSACHUSETTS; AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC.; TOWN OF AQUINNAH, MA

Plaintiffs - Appellees

v.

THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH); THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC.; THE AQUINNAH WAMPANOAG GAMING CORPORATION

Defendants - Appellants

CHARLES D. BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts; MAURA T. HEALEY, in her capacity as Attorney General of the Commonwealth of Massachusetts; STEPHEN P. CROSBY, in his capacity as Chairman of the Massachusetts Gaming Commission

Third Party - Defendants

MANDATE

Entered: May 9, 2018

In accordance with the judgment of April 10, 2017, and pursuant to Federal Rule of Appellate Procedure 41(a), this constitutes the formal mandate of this Court.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Carrie M. Benedon
Bryan F. Bertram
Amber Blaha
Scott David Crowell
John J. Duffy

Lael Ruth Echo-Hawk
Felicia H. Ellsworth
Michael A. Goldsmith
Judy B. Harvey
Sam Hirsch
Elizabeth J. McEvoy
Ronald H. Rappaport
Juliana deHaan Rice
Bruce A. Singal
Oramel H. Skinner III
Claire Specht
Mary Gabrielle Sprague

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, **Plaintiff/Counterclaim-Defendant,** **and** **THE AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) and TOWN OF AQUINNAH,** **Intervenors/Plaintiffs,** **v.** **THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION,** **Defendants/Counterclaim-Plaintiffs,** **v.** **CHARLES BAKER, in his official capacity as GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, et al.,** **Third-Party Defendants.**	**Civil Action No. 13-13286-FDS**

MEMORANDUM AND ORDER ON MOTION FOR FINAL JUDGMENT

SAYLOR, J.

This is a dispute over gaming on Indian lands on Martha's Vineyard. On November 13, 2015, the Court granted summary judgment against the Tribe, concluding that (1) the Indian

Gaming Regulatory Act ("IGRA") did not apply to the tribal lands at issue, and (2) the IGRA did not repeal, by implication, a statute passed by Congress in 1987 that ratified a settlement agreement requiring the Tribe to adhere to state gaming laws. On April 10, 2017, the First Circuit reversed the Court's decision as to those two issues. It subsequently remanded the case for the entry of final judgment.

The present dispute involves the form of that final judgment. The Court's original judgment was not limited to gaming issues, but more broadly provided that the Tribe must comply with "any state and local permitting requirements." That judgment reflected a dispute as to whether the Tribe is subject to state and local permitting requirements (such as building permits, zoning, regional commission approval, and the like) not directly involving gaming. The tribe appealed the judgment as to the two gaming issues; it did not appeal as to the permitting requirements.

The mandate of the First Circuit states that the matter was remanded "for entry of judgment in favor of the Tribe." The question presented is whether that order applies to that portion of the original judgment from which the Tribe did not appeal. In simplified terms, the Tribe lost in the District Court as to three principal issues; it appealed only two of them; its appeal was successful as to those two; and it now seeks judgment in its favor as to all three.

For the reasons set forth below, absent clear direction from the Court of Appeals, the Court will not reverse its judgment as to an issue that was never appealed. The Court will therefore enter a final judgment providing that any gaming facility constructed and operated by the Tribe on the lands at issue is not subject to state and local laws and regulations concerning gaming. The judgment will further provide, however, that any such facility is otherwise subject to state and local regulation, including any applicable permitting requirements.

I. Background

A. The 1983 Settlement Agreement and 1987 Federal Settlement Act

In 1983, the Commonwealth, the Town of Gay Head, the Taxpayers' Association of Gay Head, Inc. and the Wampanoag Tribal Council of Gay Head, Inc. entered into a Settlement Agreement.[1] The Settlement Agreement resolved a land-rights lawsuit that had been filed in 1974. As part of the settlement, the Town and the Taxpayers' Association conveyed to the Wampanoag Tribal Council approximately 485 acres of land (the "Settlement Lands") to be held "in the same manner, and subject to the same laws, as any other Massachusetts corporation." In return, the Tribal Council relinquished all claims to other lands and waters in the Commonwealth. The Settlement Agreement provided that "[u]nder no circumstances, including any future recognition of the existence of an Indian tribe in the Town of Gay Head, shall the civil or criminal jurisdiction of the Commonwealth . . . over the settlement lands . . . be impaired or otherwise altered" and "no Indian tribe or band shall ever exercise sovereign jurisdiction" over those lands. And the Tribe agreed that the Settlement Lands would be "subject to all Federal, State, and local laws, including Town zoning laws."[2]

The Settlement Agreement was approved by the Massachusetts legislature in 1985 and by Congress in 1987. The 1987 federal Settlement Act contained the following language: "Except as otherwise expressly provided in this subchapter or in the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the

[1] In 1997, the town of Gay Head changed its name to Aquinnah.

[2] The Settlement Agreement set forth two exceptions to that provision, specifying that the Settlement Lands would be exempt from state property taxes and hunting regulations.

town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance)." 25 U.S.C. § 1771g.[3]

B. Proceedings in the District Court

On December 2, 2013, the Commonwealth of Massachusetts filed a complaint with the Single Justice of the Supreme Judicial Court for Suffolk County against the Wampanoag Tribe of Gay Head (Aquinnah), the Wampanoag Tribal Council of Gay Head, Inc., and the Aquinnah Wampanoag Gaming Corporation (collectively, "the Tribe"). The complaint asserted a claim for breach of contract and requested a declaratory judgment that the Settlement Agreement allowed the Commonwealth to prohibit the Tribe from conducting gaming on Settlement Lands in Aquinnah.

On December 30, 2013, the Tribe removed the action to this court on grounds of federal-question and supplemental jurisdiction.

On July 10, 2014, both the Aquinnah/Gay Head Community Association, Inc. ("AGHCA") and the Town of Aquinnah filed motions to intervene. This court granted those motions on August 6, 2014.

On October 24, 2014, the Tribe filed counterclaims against the Commonwealth and claims against three third-party defendants, all of whom are government officials of the Commonwealth sued in their official capacity.[4]

[3] As noted, § 1771g applies to "settlement lands" and "any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts." For the sake of convenience, this opinion will refer to all the lands in question as "Settlement Lands."

[4] The original counterclaims named then-Governor Deval Patrick, then-Attorney General Martha Coakley, and Massachusetts Gaming Commission Chairman Stephen Crosby as third-party defendants. Patrick and Coakley no longer serve in the capacities listed, having been replaced by Governor Charles D. Baker and Attorney General Maura Healey. Accordingly, Governor Baker, Attorney General Healey, and Crosby are the third-party defendants as the case currently stands.

On May 28, 2015, the Commonwealth, the Town, the AGHCA, and the Tribe all moved for summary judgment on the issue of whether the 1987 Settlement Act allowed the Commonwealth to prohibit the Tribe from conducting gaming on the Settlement Lands.

On July 14, 2015, after learning that the Tribe planned to commence construction of a gaming facility, the Town moved for a temporary restraining order and/or a preliminary injunction enjoining the Tribe from undertaking any further construction. On July 28, 2015, after a hearing, the Court entered a preliminary injunction enjoining the Tribe from constructing a gaming facility without complying with the permitting requirements of the Town.

Both sides then moved for summary judgment. On November 13, 2015, the Court issued an order granting summary judgment to the Commonwealth, Town, and the AGHCA. The order held that the Indian Gaming Regulatory Act ("IGRA") did not apply to the Settlement Lands, and that in any event, the IGRA did not repeal the 1987 Settlement Act and thus the Commonwealth could regulate the Tribe's gaming activity on the lands.

On January 5, 2016, the Court entered final judgment. In that judgment, the Court "ordered, adjudged, and decreed," "consistent with . . . [its] July 28, 2015 Order entering a preliminary injunction . . . and [its] November 13, 2015 Order addressing the cross-motions for summary judgment" that:

> (1) judgment was entered in favor of the Commonwealth, the AGHCA, and the Town "as to [their] claims for breach of contract and declaratory judgment."
>
> (2) judgment was entered in favor of the Commonwealth, the AGHCA, the Town and the government officials "as to the Tribe's counterclaims for a declaratory judgment."
>
> (3) judgment was entered declaring that the Tribe "may not construct, license, open, or operate any gaming facility at or on the Settlement Lands . . . without complying with" state and local laws and regulations, "including any pertinent state and local permitting requirements."

> (4) a permanent injunction was entered "enjoining and restraining the Tribe from commencing or continuing construction of and/or opening any gaming facility at or on the Wampanoag Community Center building site (as that term is used in the Preliminary Injunction Order) or on any other Settlement Lands (as those lands are defined in the Summary Judgment Order), without complying with the laws and regulations of the Commonwealth of Massachusetts and the Town of Aquinnah, including any state and local permitting requirements."

(Final Judgment at 1-2).

C. The Appeal

The Tribe appealed. The Tribe's brief in the First Circuit raised three specific issues:

> (1) Whether the District Court erred in ruling that MILCSA (Aquinnah)'s application of the Commonwealth's gaming laws remains in effect; IGRA preempts prior legislation regarding gaming on Aquinnah Indian lands;
>
> (2) Whether the District Court erred in concluding that the Tribe's struggling efforts to establish and expand its governmental presence are deficient for the Tribe's Indian lands to qualify under IGRA; Aquinnah exercises sufficient governmental power over its Indian lands; and
>
> (3) Whether the District Court erred in concluding that the Commonwealth's Lawsuit could proceed without the [NIGC] as a party; the United States continues to assert jurisdiction over gaming activities on Aquinnah Indian lands to the exclusion of the Commonwealth.

(Tribe's Opening Brief, 2016 WL 3437627 at *2-3).

On April 10, 2017, the First Circuit issued an opinion that almost exclusively addressed the Tribe's first two issues—that is, "whether [the] IGRA applies to the Settlement Lands," and "whether [the] IGRA effects a repeal of [the Settlement Act]." *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 624 (1st Cir. 2017).[5] Answering both of those questions in the affirmative, the First Circuit reversed the opinion of this court and remanded the case. The judgment states as follows: "The district court's judgment is reversed, and the matter

[5] In a footnote, the First Circuit briefly addressed the third issue and concluded that it had found "no error, let alone abuse of discretion, in [this Court's] decision to proceed without the NIGC as a party." *Id.* at 624, n. 3.

is remanded to the district for entry of judgment in favor of the tribe." April 10, 2017 Judgment at 1.

II. Analysis

The Town has filed a motion for entry of final judgment along with a proposed final judgment. Essentially, the Town contends that the original final judgment required the Tribe to comply with gaming laws *and* state and local permitting requirements; that the Tribe appealed only the portion of the judgment concerning the gaming laws; that the First Circuit's opinion accordingly did not address the portion of the judgment concerning the permitting requirements; and that therefore this Court's decision that the Tribe must comply with those permitting requirements is not affected by the First Circuit's opinion and should be included in the amended final judgment.

As a general matter, a party's objections to any issue not raised on appeal are waived. *See DeCaro v. Hasbro, Inc.*, 580 F.3d 55, 64 (1st Cir. 2009) ("[C]ontentions not advanced in an appellant's opening brief are deemed waived."). When a legal decision goes "unchallenged in a subsequent appeal despite the existence of ample opportunity" to do so, the decision "becomes the law of the case for future stages of the same litigation," and a party normally forfeits its right to "challenge that particular decision at a subsequent date." *United States v. Matthews*, 643 F.3d 9, 12, 14 (1st Cir. 2011), quoting *United States v. Bell*, 988 F.2d 247, 250-51 (1st Cir. 1993). The Tribe, however, offers three reasons why that principle should not apply.

First, the Tribe argues that it appealed from this Court's "[f]inal [j]udgment in its entirety" and raised "three primary errors," two of which (it alleges) were "contentions that directly address whether this Court erred in its reasoning and in issuing a preliminary injunction requiring that the Tribe comply with local permitting law." (Def. Mem. at 9). But that is not an

accurate description of the issues raised on appeal. As noted, the Tribe appealed only three specific issues, none of which even arguably concerned this Court's holding as to non-gaming permitting requirements.

Second, the Tribe argues that even "[i]f the question of local permitting was not expressly decided, it was implicitly decided or inferred by the First Circuit." (Def. Mem. at 13). Essentially, the Tribe contends that the First Circuit "expressly reaffirmed" its reasoning in *Rhode Island v. Narragansett Indian Tribe* "that all local laws that are 'integral' to the exercise of a tribe's gaming laws are preempted by the IGRA." (Def. Mem. at 13, citing 19 F.3d 685, 705 (1st Cir. 1994)). It further contends that because compliance with permitting regulations would be necessary to its ability to proceed with its construction and operation of a gaming facility, the First Circuit implicitly decided that all state and local permitting authority was preempted by the IGRA.

There is no question that the First Circuit did not expressly decide the issue. As noted, the 1987 Settlement Act provided that the Settlement Lands "shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance)." The First Circuit's opinion focused entirely on the "parenthetical" in the statute, which directly addressed state and local regulation of gaming. 853 F.3d at 628-29. The opinion contains no analysis of the other portions of the statute.

In *Narragansett*, the First Circuit made clear that the IGRA "[left] largely intact the grant of jurisdiction [to the state]" granted by the Settlement Act in that case, and instead only "demand[ed] an adjustment of that portion of jurisdiction touching on gaming." *Narragansett*, 19 F.3d at 704. The First Circuit quoted that language in its opinion in this case. *Wampanoag*

Tribe, 853 F.3d at 627 (quoting *Narragansett*, 19 F.3d at 704). There was no discussion as to whether state and local permitting laws are "integral" to gaming. Nor was there any discussion of the "tenebrous" line between those activities that state and local authorities may regulate on tribal Settlement Lands and those it may not. *See Narragansett*, 19 F.3d at 705-06.

In short, because the Tribe did not raise the issue on appeal, the First Circuit said nothing on point. To the extent it made any implicit ruling, it reaffirmed its holding and reasoning in *Narragansett*. This Court will not read into its silence a ruling that would essentially overrule *Narragansett*, void significant portions of the Settlement Act, and divest the Commonwealth and the Town of regulatory jurisdiction of any kind. The Tribe's interpretation would destroy—not "leave . . . intact"—the jurisdiction over the Settlement Lands granted to the Commonwealth and the Town by the Settlement Act.

Finally, the Tribe points to the language of the mandate, which states that "the opinion of the district court is reversed and the case is remanded to the district court for entry of judgment in favor of the Tribe." It contends that the broad language of that statement serves as an order to this Court that its opinion should be reversed in its entirety. (Def. Mem. at 5-6, citing *Wampanoag*, 853 F.3d at 629).

In support, the Tribe relies principally on a 1966 opinion from the District of Columbia Circuit, *Hynning v. Partridge*, 359 F.2d 271, 273 (D.C. Cir. 1966). In *Hynning*, the district court had granted summary judgment for the plaintiff and denied a counterclaim by the defendant for attorney's fees. The appellate court reversed, and directed that the matter be remanded to the district court "with directions to enter judgment in favor of [the defendant]." 359 F.2d at 272.

On remand, the plaintiff contended that because the appellate opinion "did not mention the District Court's denial of [the defendant's] counterclaim, [its] reversal was limited to the

[underlying] issue," and therefore that the court "had affirmed the District Court's denial of the counterclaim." *Id.* at 272-73. The defendant, by contrast, contended that the appellate court had reversed the entire judgment. The district court agreed with the defendant and awarded attorney's fees. *Id.* at 273 (internal citations omitted).

The plaintiff again appealed. The D.C. Circuit affirmed; it stated that because it had reversed the District Court's first ruling "in its entirety," it had "restored" the parties "to the positions they held prior to" the district court's erroneous original judgment. *Id.* Doing so, the court continued, permitted the district court to award the defendant attorney's fees. *Id.*

As first blush, the language of *Hynning* appears to lend support to the Tribe's contention—that is, that an opinion "without limitation as to how much of the trial court's decision is [to be] set aside" has the effect of setting aside all of that decision. *Hynning*, 359 F.2d at 273. However, at least two reasons counsel against following that principle here.

First, as the *Hynning* court itself recognized, "opinion[s] and judgment[s]" are "requir[ed]" to "be read together." *Id.* In *Hynning*, it made sense that if the district court's judgment in favor of the plaintiff were set aside, the court could reconsider defendant's claim for fees, which could only be awarded if defendant prevailed. Here, however, the First Circuit's opinion considered only the issue of gaming laws, and there is nothing inconsistent or irrational in denying the Tribe's claims as to the application of permitting regulations.

Second, and more importantly, the First Circuit has made clear that district courts are generally bound only by what the appellate court actually decided, and retain discretion to decide issues that the opinion leaves open. *See Biggins v. Hazen Paper Co.*, 111 F.3d 205, 206 (1st Cir. 1997). In *Biggins*, the court observed that "[o]n remand, courts are often confronted with issues that were never considered by the remanding court. And although the mandate of an appellate

court forecloses the lower court from reconsidering matters determined in the appellate court, it 'leaves to the [lower] court any issue not expressly or impliedly disposed of on appeal.'" 111 F.3d at 209 (quoting *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986) (internal citations omitted). In other words, the court concluded, "mandates require respect for *what the higher court decided, not for what it did not decide*." *Id.* (emphasis added). Because the issue in question in that case "had certainly not been addressed in the [appellate] opinion," the lower court was free on remand to reconsider that issue. *Id.*

Here, the permitting issue was not addressed in the First Circuit's opinion. This Court therefore remains free to reinstate that portion of its final judgment. A contrary result would grant the Tribe a victory on an issue that it did not appeal, that the parties did not brief, and that the First Circuit did not decide. Such a result would be anomalous, and indeed unfair.

In summary, the Tribe could have appealed those portions of the judgment that provided that it must comply with state and local permitting and other regulatory requirements. Instead, it only appealed those portions addressing gaming issues. An amended final judgment in favor of the Tribe as to the gaming issues is of course required. The remainder of the judgment, however, will be reinstated in substance. If the Tribe seeks to construct and operate a gaming facility, it need not comply with state and local gaming laws, but it must comply with all state and local laws and regulations of general applicability to the construction and operation of a commercial building.

The Court will issue an amended final judgment consistent with this memorandum and order.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: June 19, 2019

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, **Plaintiff/Counterclaim-Defendant,** **and** **THE AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) and TOWN OF AQUINNAH,** **Intervenors/Plaintiffs,** **v.** **THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION,** **Defendants/Counterclaim-Plaintiffs,** **v.** **CHARLES BAKER, in his official capacity as GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, et al.,** **Third-Party Defendants.**	**Civil Action No. 13-13286-FDS**

AMENDED FINAL JUDGMENT

SAYLOR, J.

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, and in accordance with the Court's July 28, 2015 Order entering a preliminary injunction (Docket No. 140); the Court's November 13, 2015 Order addressing cross-motions for summary judgment (Docket No. 151);

the mandate of the United States Court of Appeals for the First Circuit dated January 5, 2016 (Docket No. 176); and the Court's June 19, 2019 Order on the motion of the Town of Aquinnah for final judgment (filed herewith), it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

1. The following definitions shall apply in this judgment:

   a. The term "the Tribe" shall mean defendants/counterclaim-plaintiffs the Wampanoag Tribe of Gay Head (Aquinnah); the Wampanoag Tribal Council of Gay Head, Inc.; and the Aquinnah Wampanoag Gaming Corporation.

   b. The term "the Governmental and Private Parties" shall mean plaintiff/counterclaim-defendant the Commonwealth of Massachusetts; intervenor-plaintiff/counterclaim-defendant the Town of Aquinnah; intervenor-plaintiff the Aquinnah/Gay Head Community Association, Inc.; and third-party defendants Governor Charles D. Baker, Attorney General Maura Healey, and Massachusetts Gaming Commissioner Chairman Stephen Crosby, all acting in their official capacity.

   c. The term "Settlement Lands" shall mean the "settlement lands," as defined in 25 U.S.C. § 1771f(8), and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Aquinnah, Massachusetts.

   d. The term "the Gaming Laws" shall mean the laws, regulations, and ordinances of the Commonwealth of Massachusetts and the Town of Aquinnah that prohibit or regulate the conduct of bingo or any other game

of chance.

e. The term "the General Regulatory Laws" shall mean the laws, regulations, and ordinances of the Commonwealth of Massachusetts, the Town of Aquinnah, and other state and local governmental authorities other than the Gaming Laws, including but not limited to any state and local permitting requirements.

2. Judgment is hereby entered in favor of the Tribe, and against the Governmental and Private Parties, as to (a) the claims brought by the Governmental and Private Parties, to the extent that they seek declaratory and injunctive relief providing that the Tribe must comply with the Gaming Laws on the Settlement Lands, and (b) the counterclaims and third-party claims brought by the Tribe, to the extent that they seek declaratory and injunctive relief providing that such compliance with the Gaming Laws is not required.

3. Judgment is hereby entered in favor of the Governmental and Private Parties, and against the Tribe, as to (a) the claims brought by the Governmental and Private Parties, to the extent that they seek declaratory and injunctive relief providing that the Tribe is subject to the General Regulatory Laws in connection with the construction, occupancy, and operation of a gaming facility on the Settlement Lands, and (b) the counterclaims and third-party claims brought by the Tribe, to the extent that they seek relief providing that such activities by the Tribe are not subject to the General Regulatory Laws.

4. Judgment is hereby entered declaring that (a) the Tribe may construct, occupy, and operate a gaming facility on the Settlement Lands without complying with the

Gaming Laws, and (b) the Tribe's construction, occupancy, and operation of a gaming facility on the Settlement Lands shall otherwise be subject to the General Regulatory Laws.

5. The Commonwealth of Massachusetts and the Town of Aquinnah are permanently enjoined and restrained from enforcing the Gaming Laws against the Tribe on the Settlement Lands.

6. The Tribe is permanently enjoined and restrained from constructing, occupying, and operating a gaming facility on the Settlement Lands without complying with the General Regulatory Laws.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: June 19, 2019

		matter under advisement. (Court Reporter: Valerie OHara at vaohara@gmail.com.)(Attorneys present: Specht, Ellsworth, Andrews−Maltais, Crowell, Rappaport, Kline, Jay, Bone) (Bono, Christine) (Entered: 08/07/2019)
08/05/2019	222	ELECTRONIC NOTICE Setting **TELEPHONIC** Hearing on Motion 221 Emergency MOTION to Alter Judgment *OR AMEND OR, IN THE ALTERNATIVE, CORRECT THE JULY 19, 2019 SECOND AMENDED FINAL JUDGMENT* : Motion Hearing set for 8/5/2019 03:30 PM in Courtroom 2 before Judge F. Dennis Saylor IV. Please use the following dial−in #s: DIAL IN: 1−888−675−2535, ACCESS CODE: 7629998. (Bono, Christine) (Entered: 08/05/2019)
08/02/2019	221	Emergency MOTION to Alter Judgment *OR AMEND OR, IN THE ALTERNATIVE, CORRECT THE JULY 19, 2019 SECOND AMENDED FINAL JUDGMENT* by The Aquinnah Wampanoag Gaming Corporation, The Wampanoag Tribal Council of Gay Head, Inc., The Wampanoag Tribe of Gay Head (Aquinnah). (Attachments: # 1 Affidavit /Declaration of Eric Robitaille in Support of Motion, # 2 Exhibit /Attachment A to Declaration of Eric Robitaille, # 3 Exhibit /Attachment B to Declaration of Eric Robitaille, # 4 Affidavit /Declaration of Scott Crowell in Support of Motion, # 5 Exhibit A to Declaration of Scott Crowell, # 6 Exhibit B to Declaration of Scott Crowell, # 7 Exhibit C to Declaration of Scott Crowell, # 8 Exhibit D to Declaration of Scott Crowell)(Crowell, Scott) (Entered: 08/02/2019)
07/30/2019	220	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above−captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general−info.htm (Scalfani, Deborah) (Entered: 07/30/2019)
07/30/2019	219	Transcript of Motion Hearing held on May 31, 2019, before Judge F. Dennis Saylor IV. COA Case No. 19−1661. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Valerie OHara at vaohara@gmail.com Redaction Request due 8/20/2019. Redacted Transcript Deadline set for 8/30/2019. Release of Transcript Restriction set for 10/28/2019. (Scalfani, Deborah) (Entered: 07/30/2019)
07/26/2019	218	Judge F. Dennis Saylor, IV: ORDER entered denying 206 Motion to Stay. (Entered: 07/26/2019)
07/25/2019	217	Opposition re 206 MOTION to Stay re 202 Notice of Appeal,,,, filed by Aquinnah/Gay Head Community Association, Inc., Town of Aquinnah. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Kline, Douglas) (Entered: 07/25/2019)
07/22/2019	216	USCA Case Number 19−1729 for 210 Notice of Cross Appeal filed by Town of Aquinnah, Aquinnah/Gay Head Community Association, Inc.. (Paine, Matthew) (Entered: 07/22/2019)
07/19/2019	215	Judge F. Dennis Saylor, IV: SECOND AMENDED JUDGMENT (Entered: 07/19/2019)
07/19/2019	214	Judge F. Dennis Saylor, IV: ELECTRONIC ORDER: The motion of the Commonwealth of Massachusetts to Alter or Amend or, in the Alternative, Correct the June 19, 2019 Amended Final Judgment 205 is GRANTED. A second amended final judgment will be issued that does not include an injunction against the Commonwealth of Massachusetts, as the inclusion of such language was due to a clerical mistake. The second amended final judgment will also include various minor changes to clarify that no injunctive relief has been ordered against the Commonwealth. The Tribe has requested a further amendment to include an injunction against the Governor, the Attorney General, or the Chair of the State Gaming Commission, acting in their official capacities, from enforcing the Gaming Laws against the Tribe on Settlement Lands. (Docket No. 208). Such an amendment would appear to satisfy the requirement that such relief be limited to prospective injunctive relief against state officers in their official capacities where necessary to protect a federally protected right. See Ex Parte Young, 209 U.S. 123 (1908);Timpanogos Tribe v. Conway, 286 F.3d 1195, 1205−06 (10th Cir. 2002). However, the Tribe has not filed a motion to alter or amend the judgment pursuant to Rule 59(e) or to correct the judgment pursuant to Rule 60(a), and

		therefore the Court will not act on its request at this time. Finally, the second amended final judgment will also substitute Cathy Judd−Stein, the current chair of the Massachusetts Gaming Commission, for former chair Stephen Crosby. A second amended final judgment will issue consistent with this order. (Entered: 07/19/2019)
07/19/2019	213	NOTICE of Withdrawal of Appearance by Juliana deHaan Rice (Rice, Juliana) (Entered: 07/19/2019)
07/19/2019	212	NOTICE of Appearance by Elizabeth A. Kaplan on behalf of Charlie Baker, Commonwealth of Massachusetts, Stephen Crosby, in his capacity as Chairman of the Massachusetts Gaming Commission, Maura Healey (Kaplan, Elizabeth) (Entered: 07/19/2019)
07/19/2019	211	Certified and Transmitted Abbreviated Electronic Record on Appeal to US Court of Appeals re 210 Notice of Cross Appeal. (Paine, Matthew) (Entered: 07/19/2019)
07/19/2019	210	NOTICE OF CROSS APPEAL as to 201 Judgment by Aquinnah/Gay Head Community Association, Inc., Town of Aquinnah. (Filing fee: $ 505, receipt number 0101−7789499 (Fee Status: Filing Fee paid)) NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov MUST be completed and submitted to the Court of Appeals. **Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel shall also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/efiling.htm. US District Court Clerk to deliver official record to Court of Appeals by 8/8/2019. (Kline, Douglas) (Entered: 07/19/2019)**
07/17/2019	209	TRANSCRIPT ORDER FORM by The Aquinnah Wampanoag Gaming Corporation, The Wampanoag Tribal Council of Gay Head, Inc., The Wampanoag Tribe of Gay Head (Aquinnah) for proceedings held on 5/31/2019 before Judge F. Dennis Saylor IV, (Crowell, Scott) (Entered: 07/17/2019)
07/15/2019	208	Opposition re 205 MOTION to Alter Judgment filed by The Aquinnah Wampanoag Gaming Corporation, The Wampanoag Tribal Council of Gay Head, Inc., The Wampanoag Tribe of Gay Head (Aquinnah). (Crowell, Scott) (Entered: 07/15/2019)
07/11/2019	207	MEMORANDUM in Support re 206 MOTION to Stay re 202 Notice of Appeal,,,, filed by The Aquinnah Wampanoag Gaming Corporation, The Wampanoag Tribal Council of Gay Head, Inc., The Wampanoag Tribe of Gay Head (Aquinnah). (Attachments: # 1 Affidavit /Declaration of Cheryl Andrews−Maltais, # 2 Exhibit A to Declaration of Cheryl Andrews−Maltais, # 3 Exhibit B to Declaration of Cheryl Andrews−Maltais, # 4 Exhibit C to Declaration of Cheryl Andrews−Maltais, # 5 Exhibit D to Declaration of Cheryl Andrews−Maltais, # 6 Affidavit /Declaration of Felix Zemel, # 7 Text of Proposed Order)(Crowell, Scott) (Entered: 07/11/2019)
07/10/2019	206	MOTION to Stay re 202 Notice of Appeal,,,, by The Aquinnah Wampanoag Gaming Corporation, The Wampanoag Tribal Council of Gay Head, Inc., The Wampanoag Tribe of Gay Head (Aquinnah).(Crowell, Scott) (Entered: 07/10/2019)
07/02/2019	205	MOTION to Alter Judgment by Commonwealth of Massachusetts.(Rice, Juliana) (Entered: 07/02/2019)
07/01/2019	204	USCA Case Number 19−1661 for 202 Notice of Appeal filed by The Wampanoag Tribe of Gay Head (Aquinnah), The Wampanoag Tribal Council of Gay Head, Inc., The Aquinnah Wampanoag Gaming Corporation. (Paine, Matthew) (Entered: 07/01/2019)
06/28/2019	203	Certified and Transmitted Abbreviated Electronic Record on Appeal to US Court of Appeals re 202 Notice of Appeal. (Paine, Matthew) (Entered: 06/28/2019)
06/28/2019	202	NOTICE OF APPEAL as to 200 Order on Motion for Miscellaneous Relief, 201 Judgment by The Aquinnah Wampanoag Gaming Corporation, The Wampanoag Tribal Council of Gay Head, Inc., The Wampanoag Tribe of Gay Head (Aquinnah) Filing fee: $ 505, receipt number 0101−7755770 Fee Status: Not Exempt. NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov MUST be completed and submitted to the Court of Appeals. **Counsel shall register for a First**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, **Plaintiff/Counterclaim-Defendant,** **and** **THE AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) and TOWN OF AQUINNAH,** **Intervenors/Plaintiffs,** **v.** **THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION,** **Defendants/Counterclaim-Plaintiffs,** **v.** **CHARLES BAKER, in his official capacity as GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, et al.,** **Third-Party Defendants.**	**Civil Action No. 13-13286-FDS**

SECOND AMENDED FINAL JUDGMENT

SAYLOR, J.

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, and in accordance with the Court's July 28, 2015 Order entering a preliminary injunction (Docket No. 140); the Court's November 13, 2015 Order addressing cross-motions for summary judgment (Docket No. 151);

the mandate of the United States Court of Appeals for the First Circuit dated January 5, 2016 (Docket No. 176); and the Court's June 19, 2019 Order on the motion of the Town of Aquinnah for final judgment (filed herewith), it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

1. The following definitions shall apply in this judgment:

   a. The term "the Tribe" shall mean defendants/counterclaim-plaintiffs the Wampanoag Tribe of Gay Head (Aquinnah); the Wampanoag Tribal Council of Gay Head, Inc.; and the Aquinnah Wampanoag Gaming Corporation.

   b. The term "the Governmental and Private Parties" shall mean plaintiff/counterclaim-defendant the Commonwealth of Massachusetts; intervenor-plaintiff/counterclaim-defendant the Town of Aquinnah; intervenor-plaintiff the Aquinnah/Gay Head Community Association, Inc.; and third-party defendants Governor Charles D. Baker, Attorney General Maura Healey, and Massachusetts Gaming Commission Chair Cathy Judd-Stein, all acting in their official capacities.

   c. The term "Settlement Lands" shall mean the "settlement lands," as defined in 25 U.S.C. § 1771f(8), and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Aquinnah, Massachusetts.

   d. The term "the Gaming Laws" shall mean the laws, regulations, and ordinances of the Commonwealth of Massachusetts and the Town of Aquinnah that prohibit or regulate the conduct of bingo or any other game

of chance.

e. The term "the General Regulatory Laws" shall mean the laws, regulations, and ordinances of the Commonwealth of Massachusetts, the Town of Aquinnah, and other state and local governmental authorities other than the Gaming Laws, including but not limited to any state and local permitting requirements.

2. Judgment is hereby entered in favor of the Tribe, and against the Governmental and Private Parties, as to (a) the claims brought by the Governmental and Private Parties, to the extent that they seek relief providing that the Tribe must comply with the Gaming Laws on the Settlement Lands, and (b) the counterclaims and third-party claims brought by the Tribe, to the extent that they seek relief providing that such compliance with the Gaming Laws is not required.

3. Judgment is hereby entered in favor of the Governmental and Private Parties, and against the Tribe, as to (a) the claims brought by the Governmental and Private Parties, to the extent that they seek relief providing that the Tribe is subject to the General Regulatory Laws in connection with the construction, occupancy, and operation of a gaming facility on the Settlement Lands, and (b) the counterclaims and third-party claims brought by the Tribe, to the extent that they seek relief providing that such activities by the Tribe are not subject to the General Regulatory Laws.

4. Judgment is hereby entered declaring that (a) the Tribe may construct, occupy, and operate a gaming facility on the Settlement Lands without complying with the Gaming Laws, and (b) the Tribe's construction, occupancy, and operation of a

gaming facility on the Settlement Lands shall otherwise be subject to the General Regulatory Laws.

5. The Town of Aquinnah is permanently enjoined and restrained from enforcing the Gaming Laws against the Tribe on the Settlement Lands.

6. The Tribe is permanently enjoined and restrained from constructing, occupying, and operating a gaming facility on the Settlement Lands without complying with the General Regulatory Laws.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: July 19, 2019

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, **Plaintiff/Counterclaim-Defendant,** **and** **THE AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) and TOWN OF AQUINNAH,** **Intervenors/Plaintiffs,** **v.** **THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION,** **Defendants/Counterclaim-Plaintiffs,** **v.** **CHARLES BAKER, in his official capacity as GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, et al.,** **Third-Party Defendants.**	**Civil Action No. 13-13286-FDS**

MEMORANDUM AND ORDER ON MOTION
TO STAY PENDING APPEAL

SAYLOR, J.

Defendants and Counterclaimants The Wampanoag Tribe of Gay Head (Aquinnah) and The Aquinnah Wampanoag Gaming Corporation (collectively, the "Tribe") have moved,

pursuant to Fed. R. Civ. P. 62(c), for an order staying the final judgment of this Court entered on June 19, 2019, and amended on July 19, 2019, pending appeal to the United States Court of Appeals for the First Circuit. In the alternative, the Tribe seeks a temporary stay to allow sufficient time for the Appeals Court to consider and rule upon a motion from the Tribe pursuant to Fed. R. App. P. 8(a)(1)(A) and (C).

The following four factors apply to a motion for a stay pending appeal: "(1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent relief; (3) whether issuance of relief will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010); *see also Rio Grande Cmty. Health Ctr., Inc. v. Armendariz*, 792 F.3d 229, 231 (1st Cir. 2015).

Here, the Tribe has not made a strong showing of likely success on the merits, for the reasons set forth in the order of the Court dated June 19, 2019. Furthermore, it has not demonstrated a likely risk of irreparable injury during the pendency of an appeal. Having lost the first appeal, the Town and the Commonwealth cannot simply prevent the Tribe from conducting gaming operations and building a facility to house those operations. But according to this Court's ruling, the Tribe must comply with any rules and regulations---such as obtaining a building permit and demonstrating that the construction complies with applicable codes---that are applicable generally to the construction of any similar commercial facility in the Town of Aquinnah. If the Town somehow applies those requirements in an unfair or discriminatory manner, or otherwise treats the Tribe unfairly, the Tribe can seek appropriate relief from this Court. There is no reason, however, at this stage to assume that the Tribe will be treated in such a manner.

Furthermore, the Tribe has not shown that the balance of equities or the public interest favor a stay. If construction proceeds subject to normal permitting processes, the resulting facility presumably will be in full compliance with the safety, health, environmental, and other requirements of the Town and the Commonwealth; it is difficult to see how that injures the Tribe in any meaningful respect. But if the Tribe is permitted to construct a facility without complying with those requirements during the pendency of the appeal, and then loses that appeal, the Town and the Commonwealth will likely find it to be exceedingly difficult, if not impossible, to apply and enforce those requirements after the fact. And it is obvious that the public interest favors the construction of a facility that complies with the state building code and other basic requirements, including safety, health, and environmental laws, applicable to commercial facilities generally.

Accordingly, and for the foregoing reasons, the motion of The Wampanoag Tribe of Gay Head (Aquinnah) and The Aquinnah Wampanoag Gaming Corporation to stay the judgment and injunction pending appeal is DENIED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: July 26, 2019

08/22/2019	231	Electronic Clerk's Notes for proceedings held before Judge F. Dennis Saylor, IV: Status Conference held on 8/22/2019. Court hears update from parties concerning efforts toward resolution of 221 Emergency Motion to Alter Judgment. Court shall reconvene by telephone on 8/23/2019 at 2:00 PM. **NOTICE OF HEARING:** Telephone Conference set for 8/23/2019 02:00 PM in Courtroom 2 before Judge F. Dennis Saylor IV. Parties who wish to participate should notify the deputy clerk by email. Dial−in Number: 888−675−2535, Access Code: 7629998. (Court Reporter: Valerie OHara at vaohara@gmail.com.)(Attorneys present: Kaplan, Crowell, Echo Hawk, Jay, Rappaport, Ellsworth, Bone) (Bono, Christine) (Entered: 08/22/2019)
08/19/2019	230	Judge F. Dennis Saylor, IV: ORDER entered. THIRD AMENDED FINAL JUDGMENT (Halley, Taylor) (Entered: 08/19/2019)
08/19/2019	229	Judge F. Dennis Saylor, IV: "The Tribe's Emergency Motion to Alter or Amend or, in the Alternative, Correct the July 19, 2019 Second Amended Judgment (Docket No. 221) is GRANTED in part. A third amended final judgment will issue amending paragraph 5 to add the requested relief concerning the Governor, Attorney General, and Chair of the Massachusetts Gaming Commission, all in their official capacities. The motion will otherwise remain pending until further order of the Court." ELECTRONIC ORDER entered granting in part 221 Motion to Alter Judgment. (Bono, Christine) (Entered: 08/19/2019)
08/19/2019	228	Judge F. Dennis Saylor, IV: "The time in which the Town of Aquinnah may respond to the Tribe's Emergency Motion (Docket No. 221) is extended to August 23, 2019. The Court will hold a status conference on Thursday, August 22, 2019 at 3:00 p.m. to address the status of efforts to ensure that the work site is maintained in a safe and secure manner pending further developments in the litigation. Counsel may appear by telephone at the conference." ELECTRONIC ORDER entered. **NOTICE OF HEARING:** Status Conference set for 8/22/2019 03:00 PM in Courtroom 2 before Judge F. Dennis Saylor IV. *(Counsel shall notify the deputy clerk by email no later than 8/21/2019 if they wish to attend by telephone.)* (Bono, Christine) (Entered: 08/19/2019)
08/16/2019	227	RESPONSE to Motion re 221 Emergency MOTION to Alter Judgment *OR AMEND OR, IN THE ALTERNATIVE, CORRECT THE JULY 19, 2019 SECOND AMENDED FINAL JUDGMENT* filed by Charlie Baker, Commonwealth of Massachusetts, Stephen Crosby, in his capacity as Chairman of the Massachusetts Gaming Commission, Maura Healey. (Kaplan, Elizabeth) (Entered: 08/16/2019)
08/16/2019	226	STATUS REPORT *RE: Efforts to Resolve the Tribe's Emergency Motion to Alter or Amend the Judgment* by Town of Aquinnah. (Kline, Douglas) (Entered: 08/16/2019)
08/13/2019	225	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above−captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general−info.htm (Scalfani, Deborah) (Entered: 08/13/2019)
08/13/2019	224	Transcript of Motion Hearing held on August 5, 2019, before Judge F. Dennis Saylor IV. COA Case No. 19−1729. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Valerie OHara at vaohara@gmail.com Redaction Request due 9/3/2019. Redacted Transcript Deadline set for 9/13/2019. Release of Transcript Restriction set for 11/12/2019. (Scalfani, Deborah) (Entered: 08/13/2019)
08/05/2019	223	Electronic Clerk's Notes for proceedings held before Judge F. Dennis Saylor, IV: Motion Hearing held on 8/5/2019 re 221 Emergency MOTION to Alter Judgment *OR AMEND OR, IN THE ALTERNATIVE, CORRECT THE JULY 19, 2019 SECOND AMENDED FINAL JUDGMENT* filed by The Wampanoag Tribe of Gay Head (Aquinnah), The Wampanoag Tribal Council of Gay Head, Inc., The Aquinnah Wampanoag Gaming Corporation. Court hears argument from parties. Commonwealth shall be made aware of the request to modify injunction and be given opportunity to respond. Parties shall work together to develop plan ensuring site safety. Court takes

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, **Plaintiff/Counterclaim-Defendant,** **and** **THE AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) and TOWN OF AQUINNAH,** **Intervenors/Plaintiffs,** **v.** **THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION,** **Defendants/Counterclaim-Plaintiffs,** **v.** **CHARLES BAKER, in his official capacity as GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, et al.,** **Third-Party Defendants.**	**Civil Action No. 13-13286-FDS**

THIRD AMENDED FINAL JUDGMENT

SAYLOR, J.

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, and in accordance with the Court's July 28, 2015 Order entering a preliminary injunction (Docket No. 140); the Court's November 13, 2015 Order addressing cross-motions for summary judgment (Docket No. 151);

the mandate of the United States Court of Appeals for the First Circuit dated January 5, 2016 (Docket No. 176); and the Court's June 19, 2019 Order on the motion of the Town of Aquinnah for final judgment, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

1. The following definitions shall apply in this judgment:

   a. The term "the Tribe" shall mean defendants/counterclaim-plaintiffs the Wampanoag Tribe of Gay Head (Aquinnah); the Wampanoag Tribal Council of Gay Head, Inc.; and the Aquinnah Wampanoag Gaming Corporation.

   b. The term "the Governmental and Private Parties" shall mean plaintiff/counterclaim-defendant the Commonwealth of Massachusetts; intervenor-plaintiff/counterclaim-defendant the Town of Aquinnah; intervenor-plaintiff the Aquinnah/Gay Head Community Association, Inc.; and third-party defendants Governor Charles D. Baker, Attorney General Maura Healey, and Massachusetts Gaming Commission Chair Cathy Judd-Stein, all acting in their official capacities.

   c. The term "Settlement Lands" shall mean the "settlement lands," as defined in 25 U.S.C. § 1771f(8), and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Aquinnah, Massachusetts.

   d. The term "the Gaming Laws" shall mean the laws, regulations, and ordinances of the Commonwealth of Massachusetts and the Town of Aquinnah that prohibit or regulate the conduct of bingo or any other game of chance.

e. The term "the General Regulatory Laws" shall mean the laws, regulations, and ordinances of the Commonwealth of Massachusetts, the Town of Aquinnah, and other state and local governmental authorities other than the Gaming Laws, including but not limited to any state and local permitting requirements.

2. Judgment is hereby entered in favor of the Tribe, and against the Governmental and Private Parties, as to (a) the claims brought by the Governmental and Private Parties, to the extent that they seek relief providing that the Tribe must comply with the Gaming Laws on the Settlement Lands, and (b) the counterclaims and third-party claims brought by the Tribe, to the extent that they seek relief providing that such compliance with the Gaming Laws is not required.

3. Judgment is hereby entered in favor of the Governmental and Private Parties, and against the Tribe, as to (a) the claims brought by the Governmental and Private Parties, to the extent that they seek relief providing that the Tribe is subject to the General Regulatory Laws in connection with the construction, occupancy, and operation of a gaming facility on the Settlement Lands, and (b) the counterclaims and third-party claims brought by the Tribe, to the extent that they seek relief providing that such activities by the Tribe are not subject to the General Regulatory Laws.

4. Judgment is hereby entered declaring that (a) the Tribe may construct, occupy, and operate a gaming facility on the Settlement Lands without complying with the Gaming Laws, and (b) the Tribe's construction, occupancy, and operation of a gaming facility on the Settlement Lands shall otherwise be subject to the General

Regulatory Laws.

5. The Town of Aquinnah; Charles D. Baker, in his official capacity as Governor; Maura Healey, in her official capacity as Attorney General; and Cathy Judd-Stein, in her official capacity as Chair of the Massachusetts Gaming Commission, are permanently enjoined and restrained from enforcing the Gaming Laws against the Tribe on the Settlement Lands.

6. The Tribe is permanently enjoined and restrained from constructing, occupying, and operating a gaming facility on the Settlement Lands without complying with the General Regulatory Laws.

So Ordered.

/s/ F. Dennis Saylor IV
F. Dennis Saylor IV
United States District Judge

Dated: August 19, 2019

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, **Plaintiff/Counterclaim-Defendant,** **and** **THE AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) and TOWN OF AQUINNAH,** **Intervenors/Plaintiffs,** **v.** **THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION,** **Defendants/Counterclaim-Plaintiffs,** **v.** **CHARLES BAKER, in his official capacity as GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, et al.,** **Third-Party Defendants.**	**Civil Action No. 13-13286-FDS**

ORDER ADDRESSING SAFETY OF SITE PENDING APPEAL

SAYLOR, J.

For the reasons stated on the record, and in order to ensure that the construction site for the gambling facility in Aquinnah, Massachusetts, is maintained in a safe and secure manner pending resolution of the appeal of this matter, the Wampanoag Tribe of Gay Head (Aquinnah),

the Wampanoag Tribal Council of Gay Head, Inc., and The Aquinnah Wampanoag Gaming Corporation (collectively, "the Tribe") are hereby ORDERED to undertake the following activities as soon as reasonably practicable:

1. The installation of protective covers on any exposed rebar ends that present an impalement hazard, as referred to in the Zemel report submitted with the Tribe's emergency motion to alter or amend the judgment (Docket No. 221-5);

2. The restriction of access to exposed trenches by covers or portable barriers as described in 520 C.M.R. 14.00, *i.e.*, "Jackie's Law"; and

3. The reinforcement of existing fencing, and/or the installation of new fencing, to reasonably restrict public access to the site.

This order shall take effect at 2:00 p.m. on August 30, 2019 ("the deadline"); provided, however, as follows:

If the Tribe and the Town of Aquinnah agree in writing on or before the deadline to substitute or supplemental methods providing for the safety and security of the site by other means, the foregoing obligations will not take effect. The parties also will be permitted to seek by written agreement to extend the deadline, but no later than 5:00 p.m. on September 4, 2019, if necessary in good faith to facilitate a negotiated agreement.

Magistrate Judge M. Page Kelley is hereby designated as a mediator and special master, and to conduct such hearings or proceedings as may be reasonably necessary, to help mediate any dispute between the parties and to make such proposed findings of fact and reports and recommendations to the Court as may be appropriate. The parties shall contact the deputy clerk of her session, Kellyann Moore, at 617-748-9183 to discuss arrangements for a conference with the Court.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: August 23, 2019

CHAPTER 831

THE MARTHA'S VINEYARD COMMISSION ACT

Chapter 831of the Commonwealth of Massachusetts 1977 Acts and Resolves as Amended

An Act Further Regulating The Protection Of The Land And Waters Of The Island Of Martha's Vineyard

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Be it enacted by the Senate and House of Representatives in General Court Assembled, and by the Authority of the Same as Follows:

Section 1

Goals

The island of Martha's Vineyard possesses unique natural, historical, ecological, scientific, cultural, and other values and there is a regional and statewide interest in preserving and enhancing these values.

These values are being threatened and may be irreversibly damaged by uncoordinated or inappropriate uses of the land.

The protection of the health, safety and general welfare of island residents and visitors requires the establishment of a regional commission whose purpose shall be to ensure that henceforth the land usages which will be permitted are those which will not be unduly detrimental to those values or to the economy of the island.

The preserving and enhancing of these values requires the designation of districts of critical planning concern and the recognition of developments of regional impact, and the review thereof by the regional commission.

Such a program can protect the natural character and beauty of Martha's Vineyard and can contribute to the maintenance of sound local economies and private property values.

The people of Martha's Vineyard did, on March fourteenth, nineteen hundred and seventy-four vote to endorse the provisions of chapter six hundred and thirty-seven of the acts of nineteen hundred and seventy-four.

The purpose of the commission created by this act shall be to further protect the health, safety and general welfare of island residents and visitors by preserving and conserving for the enjoyment of present and future generations the unique natural, historical, ecological, scientific, and cultural values of Martha's Vineyard which contribute to public enjoyment, inspiration and scientific study, by protecting these values from development and uses which would impair them, and by promoting the enhancement of sound local economies.

Section 2

Organization, Election Of Commissioners

There is hereby created the Martha's Vineyard Commission, hereinafter referred to as the commission, which shall be a public body corporate and which shall have the responsibilities, duties, and powers established herein over the lands and waters in the county of Dukes County with the exception of the Elizabeth Islands and the Indian Common Lands known generally as the Cranberry Bogs, the Clay Cliffs, and Herring Creek, all situated in the town of Gay Head, and to the extent they are excluded from the responsibilities, duties and powers of the towns, all lands owned by the commonwealth or any of its constituent agencies, boards, departments, commissions or offices.

The commission shall consist of twenty-one members, except as provided further in this section; one selectman or a resident registered to vote from each town on Martha's Vineyard, appointed by the board of selectmen of that town; nine persons to be elected at-large, island wide, provided that there shall not be less than one person nor more than two persons elected from each town on Martha's Vineyard and provided that said elections shall be held in accordance with the provisions of the following paragraphs; one

county commissioner of the county of Dukes County, or a designee, appointed by the county commissioners of said county; one member of the cabinet, or his designee, appointed by the governor; and four persons whose principal residence is not Martha's Vineyard to be appointed by the governor, said persons to have a voice but not vote in deciding matters before the commission. In the event that legislation relevant to the purposes of this act is enacted by the Congress of the United States, upon certification of such enactment by the President of the United States and by the governor of the commonwealth, and one member of the cabinet of the United States or the designee of such cabinet member shall also be a member of the commission.

The election of the nine at-large members of the commission shall be conducted at biennial state election in nineteen hundred and seventy-eight and succeeding elections of such members shall take place at the biennial state election. The nomination of candidates for election to the office of commission members shall be in accordance with sections six and eight of chapter fifty-three of the General Laws, provided, however, that no more than ten signatures of voters shall be required on the nomination papers for such office. Notwithstanding the provisions of section ten of chapter fifty-three of the General Laws, nomination papers for said candidates shall be filed with the office of the state secretary on or before the tenth Tuesday preceding the day of the election. Such nomination papers shall be subject to the provisions of section seven of said chapter fifty-three. All candidates for said office are hereby exempted from the reporting requirements as provided for in section sixteen of chapter fifty-five of the General Laws. Upon his election or appointment to the commission, each commission member shall be sworn to the faithful execution of his duties by the town clerk of the town in which he resides; provided however, that the four commission members who do not have their principal place of residence on Martha's Vineyard shall be sworn by the town clerk of any town on Martha's Vineyard. Upon the qualification of its members, the commission members shall meet and organize by electing from among its members a chairman, Vice-chairman, and clerk treasurer. Succeeding election of officers shall be held annually, on or before December thirty-first, at a meeting called for the purpose; provided that the commission clerk-treasurer shall not concurrently hold the position of treasurer of said county. Terms of office for the elected members of the commission and for the non-resident taxpayer members shall be two years.

Terms of office for members who are selectmen or their designees or county commissioners shall be for one year and may be renewed only upon vote of the appointing body. The cabinet member or his designee appointed by the governor, shall serve at the discretion of the governor. Terms of office shall be computed from January first each year. Any vacancy in an appointed position shall be filled in the same manner as the original appointment for the remainder of the unexpired term.

Any vacancy in the elected membership shall be filled by a majority vote of the planning board, or the board of selectmen in the absence of a planning board, of the town in which the former member was a registered voter; said vacancy to be filled for the remainder of the unexpired term. The commission shall notify the municipality of any vacancy in the elected membership by notice to the own clerk and planning board at the town of residence of the elected member whose office is vacated. The cabinet member of the United States or his designee shall serve pursuant to applicable federal law.

The commission may also contract for such additional clerical, expert, legal and other assistance as may be required to discharge its responsibilities and may reimburse its members and staff for reasonable expenses incurred in the performance of their duties, including meals, travel and lodging.

Section 3

Regulatory Powers

The commission may adopt regulations for the control of districts of critical planning concern pursuant to sections eight to eleven, inclusive, and to specify conditions and modifications necessary for the control of developments of regional impact pursuant to sections twelve to sixteen, inclusive.
In adopting such regulations, the commission may include any type of regulation which may be adopted by any city or town under the following General Laws: section eight C of chapter forty; chapter forty A; sections eighty-one E to eighty-one H, inclusive, of chapter forty C as they relate to official maps, and sections eighty-one K to eighty-one GG, inclusive, of chapter forty-one; section twenty-seven B of chapter one hundred and eleven, as it relates to regional health boards; and sections forty and forty A of chapter one hundred and thirty-one, as they pertain to the protection of wetlands.

Regulations adopted pursuant to section ten or conditions and modification specified pursuant to section sixteen by the commission under the above-mentioned General Laws may differ from the otherwise relevant local development ordinances and by-laws in their scope and magnitude when such ordinances and by-laws are clearly restrictive of the purposes of the commission. In adopting regulations or specifying conditions which would not otherwise be permitted or required by existing local development ordinances and by-laws the commission shall describe in writing and present evidence which demonstrates that the public health, safety and welfare would be endangered or that irreversible damage would result to natural, historical, ecological, scientific or cultural values on Martha's Vineyard by the continuing application of the existing local development ordinance or by-law as it applies to the specific district of critical planning concern or development of regional impact which the commission is considering.

The commission may be designated by any state or federal agency to participate in or receive funds and technical assistance from any state or federal programs, especially as those programs relate to environmental protection, conservation, land planning, water and air quality control, economic development, transportation or the development of region-wide public services. The commission may authorize debt in anticipation of receipt of revenue as provided in section four.

Section 4

Assessments, Accounting

The commission shall annually in the month of January estimate the amount of money required to pay its total expenses for the following fiscal year, deduct estimated contributions from sources, and pro rate the net expenses to each town on the basis of its latest equalized valuation for property tax purposes as established pursuant to section nine of chapter fifty-eight of the General Laws. The commission shall certify the amount so determined to the town clerk and assessors of each town within the commission's jurisdiction who shall include the sum in the tax levy of the year.

Upon order of the commission, each town treasurer shall, subject to the provisions of sections fifty-two and fifty-six of chapter forty-one of the General Laws, pay to the commission clerk-treasurer the town's share of the commission's net expenses. The amount so determined and levied shall not exceed .036 per cent of the latest equalized valuation for each town. A penalty of eight per cent annum shall be paid by towns delinquent in paying their assessed appropriations to the commission if not paid within sixty days of the notice of payment due.

The commission may upon majority vote of its members accept gifts of land, buildings, interests in land, or any funds or monies from any source including grants, bequests, gifts, or contributions made by an individual, association, or corporation or by any municipal, county, state or federal government. Monies so received shall be disbursed by the clerk-treasurer of the commission and the charge upon all towns may be reduced correspondgly upon majority vote of all members if such monies were not included in the calculations of the towns net share of expenses for the fiscal year.

The commission may authorize debt by a majority vote of the commission in anticipation of revenue to an amount not in excess of that to be received during the current fiscal year from all federal, state, county and local sources. Notes issued under authority of this section shall be signed by the clerk-treasurer of the commission, and the chairman of the commission shall countersign and approve them in the presence of the vice-chairman of the commission who shall certify to the fact on the face thereof. Such notes shall be payable, and shall be paid, not later than one year from their dates, and shall not be renewed or paid by the issue of new notes, except as provided in section seventeen of chapter of chapter forty-four of the General Laws.

The commission shall record all receipts and disbursements in accordance with the requirements of the commonwealth which govern accounting practices for towns.

All personnel, material and service charges shall be kept separately and allocated to either direct or indirect accounts by project or program. Complete annual accounting reports, prepared in the manner prescribed for towns, shall be published and distributed within ninety days after the end of each fiscal year. Copies of said annual accounting reports shall be made available to the public and copies shall be sent to the town clerks and the finance committees of each town in the county of Dukes County.

Section 5

Application Of Regulations

Notwithstanding the provisions of any ordinance or by-law of a municipality on Martha's Vineyard, every municipal land regulatory agency shall be governed by the procedures, standards, and criteria established pursuant to this act in passing on applications for development permits relating to areas and developments subject to this act. A copy of each such permit granted by any such agency shall be filed with the commission.

Where there is conflict between a local rule, regulation, ordinance, by-law or master plan, the more limiting or restrictive requirement shall prevail.

Section 6

Definition

The following words, wherever used in this act shall, unless the context requires otherwise, have the following meanings:

"Development", any building, mining, dredging, filling, excavation or drilling operation; or any material change in the use or appearance of any structure or in the land itself; or the dividing of land into parcels; or a change in the intensity of use of land, such as an increase in the number of dwelling units in a structure; or alteration of a shore, beach, seacoast, river, stream, lake, pond, or canal, including coastal construction; or demolition of a structure; or the clearing of land as an adjunct of construction; or the deposit of refuse, solid or liquid waste or fill on a parcel of land.

"Development" ordinances and by-laws", any by law, ordinance, rule, regulation or code adopted by a municipality for the control or regulation of activities related to construction, improvement, or alteration made to buildings or land within the boundaries of said municipality.

"Development permit", any permit, license, authority, endorsement, or permission required from a municipal agency prior to the commencement of construction, improvement, or alteration made to buildings or land.

"Municipal land regulatory agency", any municipal agency, board, commission, department, office, or official that has statutory authority to approve or grant a development permit.

"Person", an individual, corporation, governmental agency, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any legal entity.

"Regulation", any ordinance, by-law, rule regulation or code which may be adopted by a city or town under the General Laws enumerated in section three of this act and which is adopted by the commission under the provisions of section ten.

Section 7

Adoption Of Criteria & Standards

The commission shall submit to the secretary of the executive office of environmental affairs standards and criteria which the commission proposes to use in determining whether or not a proposed area is one of critical planning concern as that term is defined in section eight; and standards and criteria which the commission proposes to use and to be used by municipal authorities in determining whether or not a proposed development is one of regional impact as that term is defined in section twelve.

The secretary of the executive office of environmental affairs, with the concurrence of such other members of the governor's cabinet as the governor shall designate for this purpose, may approve, disapprove, or amend and approve with the advice and consent of the commission, the standards and criteria regarding designation of districts of critical planning concern and review of developments of regional impact if such standards and criteria are in accordance with the purposes of the commission. The secretary of the executive office of environmental affairs and such other cabinet members designated by the governor shall approve, disapprove, or amend and approve standards and criteria submitted to them within forty-five days after the receipt of such standards and criteria.

The standards and criteria submitted by Martha's Vineyard Commission established under chapter six hundred and thirty-seven of the acts of nineteen hundred and seventy-four, and by the secretary of communities and development on September eighth, nineteen hundred and seventy-five shall be deemed in

full compliance with this section and shall continue in full force and effect until such time as they are amended by the commission and approved, or amended and approved, by the secretary of the executive office of environmental affairs in accordance with this section.

Section 8

Districts Of Critical Planning Concern (DCPC) Nomination

The commission may, after notice to all municipalities which include within their boundaries any part of the area of a proposed district of critical planning concern and after notice and public hearing pursuant to section two of chapter thirty A of the General Laws, designate specific geographical areas on Martha's Vineyard as districts of critical planning concern. The designation of such districts shall be made only in accordance with the standards and criteria for districts of critical planning concern approved pursuant to section seven.

A district of critical planning concern may be Designated only for

(a) an area which possesses unique natural, historical, ecological, scientific, or cultural resources of regional or statewide significance;
(b) an area which possesses marginal soil or topographic conditions which render it unsuitable for intense development; or
(c) an area significantly affected by, or having significant impact on, an existing or proposed major public facility or other area of major public investment. A major public facility is any publicly owned facility of regional importance except:

1. any public facility operated by a municipality primarily for the benefit of the residents of that municipality, or by any agency serving primarily the residents of one municipality;
2. any street or highway which is not recognized as or maintained as a part of the state or federal highway system; or
3. any educational institution serving primarily the residents of one municipality.

Nomination of areas for consideration for designation as districts of critical planning concern may be made by the commission or by a board of selectmen, planning board, board of health, or conservation commission of any of the towns affected by this act for any area within or without its municipal boundaries. Nominations also may be made upon petition of seventy-five taxpayers of any town on the island. Within forty-five days of the receipt of a nomination the commission shall accept or reject the nomination for consideration for designation upon a majority vote of its members. The acceptance of the nomination for consideration for designation shall be accompanied by a general statement of purpose, describing the reasons for acceptance of the nomination for consideration. Nominations which are not accepted for consideration shall be returned to their sponsors with a written explanation of the commission's reasons for not accepting the nomination within forty-five days of submission. The commission may consolidate nominations which pertain to the same geographical area or to areas which are contiguous or it may amend a nomination. Nominations accepted for consideration for designation which do not receive designation may be reconsidered for designation within one year of the original acceptance for

consideration upon a vote of two-thirds of the commission members.

In its designation of a district of critical planning concern the commission shall specify why the area is of critical concern to the region, the problems associated with the uncontrolled or inappropriate development of the area, and the advantages to be gained from development of the area in a controlled manner. The commission also shall specify broad guidelines for the development of the district. The issuance of such guidelines shall be based on, but need not necessarily be limited to, the following considerations:

(a) that development of the district will not result in undue water, air, land, or noise pollution, taking into account the elevation of the district above sea level, the nature of the soils and subsoils and their ability adequately to support waste disposal, the slope of the land and its effect on effluents, availability of streams and other conduits for disposal of effluents, and the applicable health, water resources and environmental regulations:

(b) that the existing water supply of the district will not be unreasonably burdened by any development;

(c) that development of the district will not result in increased beach erosion or damage to the littoral or wetlands environments;

(d) that development of the district will not result in undue harm to cultural, economic, or historic values.

In any application for a development permit which applies to an area within a district of critical planning concern, the burden of proof of compliance with the above considerations shall be on the applicant. The commission may amend or rescind the designation of a district in the manner provided for designation.

Nominations accepted for consideration for designation which do not receive designation from the commission within sixty days of the date of acceptance shall be returned to their sponsors with a written explanation of the commission's reasons for no granting the designation.

Section 9

DCPC - Consideration

No municipality shall grant a development permit applicable within a district of critical planning concern except in accordance with regulations promulgated pursuant to section ten.

The acceptance of a nomination for consideration for designation of a district of critical planning concern shall suspend the power of a municipality to grant development permits applicable within the district; provided, however, that until regulations for the district adopted pursuant to section ten have become effective, a municipality may grant development permits, applicable within the district if:

(a) the commission has certified that the type or class of proposed construction, improvement, or alteration is essential to protect the public health, safety and general welfare because of an existing emergency certified by the commission; and

(b) a development ordinance or by-law had been in effect immediately prior to the nomination of such area and development permits would have been granted under such ordinance or by-law.

Section 10

DCPC - Designation

After designation of a district of critical planning concern, a municipality whose boundaries include all or part of the district may adopt regulations in conformance to the guidelines for the development of the district as set forth in the designation. In adopting such regulations, each municipality shall have all of the powers it otherwise had under the General Laws. A copy of regulations so adopted shall be submitted to the commission.

Pursuant to the issuance of broad guidelines for the development of the district by the commission in its designation of a district of critical planning concern, four town boards, the town planning board, the board of health, the board of selectmen and the conservation commission shall prepare proposed regulations which conform to the guidelines. Said proposed regulations shall be transmitted to the commission by the boards of the town concerned.

If the commission determines that the proposed regulations, or regulations amended by the commission, conform to the guidelines for the development of the district specified in the commission's designation of the district, the commission shall, after notice to all municipalities which include within their boundaries any part of the district of critical planning concern and after notice and public hearing pursuant to section two of chapter thirty A of the General Laws, notify the four town boards of conformance to the guidelines. When boards from more than one town shall, pursuant to this act, submit proposed regulations for areas within a single district, the commission may encourage such boards to submit compatible regulations, notwithstanding the differences between the municipalities.

If the commission determines that said proposed regulations are not in conformance to the guidelines, the commission shall specify to the four town boards why the regulations fail to conform to the guidelines. The four town boards may then submit to the commission proposed amended regulations. Upon the approval by the commission of proposed regulations or proposed amended regulations, the municipality in whose boundaries the district was designated may adopt the regulations or amended regulations by a two-thirds vote on a town ballot, with discussion of the question on the town meeting floor at the discretion of the moderator. A failure to adopt by a two-thirds vote of a town meeting constitutes a rejection of the regulations.

If a municipality whose boundaries include all or part of the district fails to submit regulations which conform to the guidelines for the development of the district within six months after the designation, the commission may, after notice to such municipality and notice and public hearing pursuant to section two of chapter thirty A of the General Laws, adopt regulations applicable to such municipality's portion of the district.

The adoption of such regulations shall specify the extent to which they shall supercede the otherwise applicable local development ordinances and by-laws or be supplementary thereto. Regulations so adopted shall be only the types specified in section three.

All regulations so adopted shall be incorporated, without regard to the provisions of section thirty-two of chapter forty of the General Laws, by the municipality into the official ordinances, by-laws and maps of the municipality and shall not be effective prior thereto. Such regulations shall be administered by the municipality as if they were part of its development ordinances and by-laws. If such a regulation requires enforcement by an administrative office or body which has not been constituted by a municipality, the board of selectmen of the

municipality shall enforce such regulation. At any time after the adoption by the commission of such regulations, the municipality concerned may adopt regulations which, if approved by the commission as provided in this section, shall supercede any regulations adopted by the commission pursuant to this section.

A municipality may rescind regulations in the manner provided for adoption. The process to rescind regulations may be initiated by a written request by the commission or by the board of selectmen, planning board, board of health, or conservation commission or the town affected, or by a petition of seventy-five Island taxpayers.

The written request for rescission shall be presented to the following four town boards: board of selectmen, planning board, board of health and conservation commission. The four town boards shall hold a public hearing with due notice.

Following the hearing, the boards shall transmit to the commission a recommendation for its consideration. The commission shall hold a public hearing with due notice and shall make a recommendation for town meeting consideration.

The board of selectmen of the town concerned shall place upon the town ballot a question regarding rescinding of regulations. Regulations so rescinded shall immediately be removed from the local development ordinances and by-laws and shall not be supplementary thereto.

Section 11

DCPC - Adoption Of Regulations

If the commission has not approved or adopted regulations applicable to the entirety of a district within twelve months after designation of such district, the designation of such part for which regulations have not been approved or adopted shall be terminated. No part of the area formerly designated as a district shall again be designated as a district for a period of twelve months from the date of such termination. Notice of such termination shall be given in the same manner as provided for designation.

Section 12

Developments Of Regional Impact (DRI)

The commission shall adopt and submit for approval, pursuant to section seven, standards and criteria which specify the types of development which, because of their magnitude or the magnitude of their effect on the surrounding environment, are likely to present development issues significant to more than one municipality of the island of Martha's Vineyard. For the purpose of this act, such types of development shall be termed developments of regional impact.

Notice shall be given by the commission at least fourteen days prior to a public hearing on amendments to the criteria and standards for development of regional impact.

Said notice shall be given by certified mail by the commission to but not limited to the following town boards or officials of each town on Martha's Vineyard: Board of Selectmen, Board of Health, Planning Board, Building Official, Conservation Commission and Board of Assessors.

Within ninety days following the public hearing the commission shall consider

changes to the standards and criteria, which shall be submitted in accordance with section seven.

In adopting standards and criteria pursuant to this section, the commission shall consider, but shall not be limited by the following considerations:

(a) the extent to which a type of development would create or alleviate environmental problems, including, but not limited to. air, water and noise pollution;
(b) the size of the site to be developed;
(c) the amount of pedestrian and vehicular traffic likely to be generated;
(d) the number of persons likely to be residents, employees, or otherwise present;
(e) the extent to which a type of development is intended to serve a regional market;
(f) the location of a type of development near a waterway, publicly-owned land, or a municipal boundary; and
(g) the extent to which the development would require the provision of the following municipal or regional services: solid waste disposal, public water supplies, sewage treatment facilities, parking facilities and tourist services and public education facilities.

The standards and criteria shall be reviewed at least every two years.

Section 13

DRI Referral

The governmental agency within each municipality which has responsibility for issuing a development permit shall in accordance with the standards and criteria approved pursuant to section seven determine whether or not a proposed development, for which application for a development permit has been made, is one of regional impact; if so, it shall refer the application for the development permit to the commission.

Section 14

DRI Review

The commission shall review all applications for development permits for developments of regional impact. Notice and public hearing pursuant to section two of chapter thirty A of the General Laws shall be required, except that only fourteen days rather than twenty-one days of prior notice shall be required and a copy of said notice need not be sent to the state secretary. The commission shall permit the referring agency to grant a development permit for such development only if it finds after such public hearing that:

(a) the probable benefit from the proposed development will exceed the probable detriment as evaluated pursuant to section fifteen;
(b) the proposed development will not substantially or unreasonably interfere with the achievement of the objectives of the general plan of any municipality or the general plan of the county of Dukes County;
(c) the proposed development is consistent with municipal development ordinances and by-laws, or, if it is inconsistent, the inconsistency is necessary to enable a substantial segment of the population of a larger community of which the municipality is a part to secure adequate opportunities for housing, education or recreation; and
(d) if the proposed development is located in whole or in part within a designated district of critical planning concern, it

is consistent with the regulations approved or adopted by the commission pursuant to section ten; and

(e) a proposed development which does not qualify as a development of regional impact under the standards and criteria approved pursuant to section seven may nevertheless be referred to the commission as a development of regional impact by a municipal agency in the town where the development is located, by the board of selectmen in any other municipality in the county of Dukes county or by the county commissioners.

Within thirty days of the receipt of such a referral, the commission shall publish notice of a public hearing in a newspaper of general circulation on Martha's Vineyard to consider accepting a referral under this clause. The commission shall cause such notice to be published not less than seven days prior to the date of hearing in a newspaper of general circulation and shall mail written notice of said hearing to the owner of the premises, as appearing on the records of the assessors of the town in which the proposed development of regional impact is located and to the board of selectmen of said town, no less than seven days prior to the public hearing. Public hearings under this clause shall be held and concluded within forty days of receipt of a referral unless the proponent of the proposed development of regional impact agrees in writing to extend such period. Unless the commission votes to accept a referral under this clause as a development of regional impact within fifty days after receipt of a referral or in case of an extension of the public hearing period, within ten days after the end of the extended period, the referral shall be deemed denied. At the public hearing the commission shall receive evidence as to whether the proposed development will have impacts within other municipalities on the values protected under section one or the interests referred to in clauses (a) to (h) inclusive, of section fifteen. If the commission votes to accept a referral of a development as a development of regional impact under this clause, the commission shall forthwith notify the town clerk, the board of selectmen and the municipal agencies of the municipality which are considering development permits for the proposed development which has been accepted as a development of regional impact by mailing to them a copy of the commission's vote. The commission shall also mail a copy of said vote forthwith to the applicant for any municipal development permits for the development of regional impact. Thereafter, the municipal land regulatory agencies and the commission shall treat the commission's vote as a referral pursuant to section thirteen and the commission shall review all applications for the development in accordance with this section and sections fifteen and sixteen.

The commission shall hold the public hearing within thirty days after receipt of the referral, or application. The commission shall make the required finding and notify the referring agency and applicant of its decision within sixty days after the public hearing. These time limits may be waived by mutual agreement between the commission and the applicant for the development.

Section 15

DRI Benefits vs. Detriments

In making a finding of the probable benefits and detriments of a proposed development, the commission shall not restrict its consideration to benefits and detriments within the municipality of the referring agency, but shall consider also the impact of the proposed development on the areas within other municipalities. Such probable benefits and detriments shall be considered even if they are indirect, intangible or not readily quantifiable. In evaluating the probable benefits and detriments of a proposed development of regional impact the commission shall consider, together with other relevant factors, whether:

(a) development at the proposed location is or is not essential or especially appropriate in view of the available alternatives on the island of Martha's Vineyard;

(b) development in the manner proposed will have a more favorable or adverse impact on the environment in comparison to alternative manners of development;

(c) the proposed development will favorably or adversely affect other persons and property, and if so. whether, because of circumstances peculiar to the location, the effect is likely to be greater than is ordinarily associated with the development of the types proposed;

(d) the proposed development will favorably or adversely affect the supply of needed low and moderate income housing for island residents;

(e) the proposed development will favorably or adversely affect the provision of municipal services and the burden on taxpayers in making provision there for;

(f) the proposed development will use efficiently or burden unduly existing public facilities or those which are to be developed within the succeeding five years;

(g) the proposed development will aid or interfere with the ability of the municipality to achieve the objectives set forth in the municipal general plan; and

(h) the proposed development will further contravene land development objectives and policies developed by regional or state agencies.

Whenever the commission is required to find whether the probable benefit from a proposed development of regional impact will exceed the probable detriment, it shall prepare a written opinion setting forth the grounds of its findings.

Section 16

DRI Permits

No referring agency shall grant a development permit for a development of regional impact except with the permission of the commission. In permitting the referring agency to grant a development permit for a development of regional impact the commission may also specify conditions to be met by the developer to whom the permit is being issued for the purpose of minimizing economic, social or environmental damage.

Section 17

Decision Enforcement

The commission may enforce any decisions, conditions or restrictions it may impose upon a development by recording certificates of noncompliance with appropriate plan or title references in the registry of deeds. The commission may commence such other actions or proceedings as it may deem necessary to enforce its decisions, conditions or restrictions.

Section 18

Decision Appeal

Any party aggrieved by a determination of the commission may appeal to the superior court within twenty days after the commission has sent the development applicant written notice, by certified mail, of its decision and has filed a copy of its decision with the town clerk of the town in which the proposed development is located. The court shall hear all pertinent evidence and shall annul the determination of the commission if it finds that said determination is unsupported by the evidence or exceeds the authority of the commission, or it may remand the case for further action by the commission or may make such other decree as is just and equitable. Costs of the appeal shall not be allowed against the commission unless it shall appear to the court that the commission acted with gross negligence, bad faith or malice. Costs of such appeal shall not be allowed against the appellant unless it shall appear to the court that the appellant acted in bad faith or with malice.

Section 19

Additional Functions

In addition to performing its functions under this act, the commission may perform any function assigned to it under federal law.

Section 20

Savings Clause - Actions

All petitions, hearings and other proceedings duly brought before, and all prosecutions and legal and other proceedings duly begun by any person, municipal land regulatory agency, local board or official or the Martha's Vineyard Commission, established by chapter six hundred and thirty-seven of the acts of nineteen hundred and seventy-four, as amended, which arise from or relate to the exercise of powers or the performance of duties under said chapter six hundred and thirty-seven and which are pending or incomplete immediately prior to the effective date of this act shall continue unabated and remain in full force and effect notwithstanding and passage of this act and shall thereafter be completed in accordance with this act.

All orders, actions, guidelines, standards and criteria, designations, procedures, by-laws, development ordinances and by-laws, regulations, conditions and modifications and decisions duly made, and all licenses, permits, authorities, permissions, certificates, approvals and endorsements duly granted, by any municipality, municipal land regulatory agency, local board or official of the said Martha's Vineyard Commission, as so established, which arise from or relate to the exercise of powers or the performance of duties under said chapter six hundred and thirty-seven and which are in effect immediately prior to the effective date of this

act, shall continue in full force and effect and the provisions thereof shall thereafter be enforced, until superseded, revised, rescinded or canceled in accordance with this act and any other applicable law.

Section 21

Savings Clause - Records - Interests

All books, papers, records, documents, equipment, lands. interests in land. buildings, facilities and other property, both personal and real, which immediately prior to the effective date of this act, are in the custody of the Martha s Vineyard Commission, established by chapter six hundred and thirty-seven of the acts of nineteen hundred and seventy-four, as amended, and which relate to or are maintained for the purpose of the exercise of powers or the performance of duties under said chapter six hundred and thirty-seven are hereby held by the Martha's Vineyard Commission established under the provisions of this act.

Section 22

Savings Clause - Contracts

All duly existing contracts, leases and obligations of the Martha's Vineyard Commission, established by chapter six hundred and thirty-seven of the acts of nineteen hundred and seventy-four, as amended, which relate to the exercise of powers or the performance of duties under said chapter six hundred and thirty-seven shall hereafter; be obligations which are assumed and performed by the Martha's Vineyard Commission established under the provisions of this act.

Section 23

Savings Clause - Assessments, Monies

All assessments made by the Martha's Vineyard Commission established by chapter six hundred and thirty-seven of the acts of nineteen hundred and seventy-four, as amended, and all monies heretofore received or to be received from any source by said commission for the performance of its duties and which remain unexpended on the effective date of this act shall immediately be transferred to the Martha's Vineyard Commission established under the provisions of this act and shall be available for expenditure by said commission. Any such assessments unpaid on the effective date of this act shall be due and owing to the Martha's Vineyard Commission established under the provisions of this act.

Section 24

Savings Clause - Members, Employees

The members of the Martha's Vineyard Commission established by chapter six hundred and thirty-seven of the acts of nineteen hundred and seventy- four, as amended, in office on the effective date of this act shall continue in office as members of the Martha's Vineyard Commission established by this act for the duration of the term for which they were originally elected or appointed.

All employees of the Martha's Vineyard Commission established by said chapter six hundred and thirty-seven immediately prior to the effective date of this act shall be transferred to and become employees of the Martha's Vineyard Commission established by this act. Such transfer shall be without impairment of seniority, retirement, or other rights or benefits accruing to the employees

and without interruption of service or reduction in compensation or salary grade.

Section 25

Repeal of Chapter 637

Chapter six hundred and thirty-seven of the acts of nineteen hundred and seventy-four, as most recently amended by chapter two hundred and nineteen of the acts of nineteen hundred and seventy-six, is hereby repealed.

Section 26

Severability of Provisions

The provisions of this act are severable and if any of its provisions shall be held unconstitutional or invalid by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

Section 27

Effective Date

This act shall take effect upon its passage.

12/21/77

(This draft incorporates the amendments of Chapter 319 of 6/25/79).

(Note: This copy of Chapter 831 repeats the headings of each section. These editorial additions are for the assistance of the reader, an are not part of the Act itself.)

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SUBCHAPTER III—SPECIAL PROGRAMS RELATING TO ADULT EDUCATION FOR INDIANS

§ 2631. Repealed. Pub. L. 103–382, title III, § 367, Oct. 20, 1994, 108 Stat. 3976

Section, Pub. L. 100–297, title V, § 5330, Apr. 28, 1988, 102 Stat. 410, related to improvement of educational opportunities for adult Indians. See section 7851 of Title 20, Education.

SUBCHAPTER IV—PROGRAM ADMINISTRATION

§§ 2641 to 2643. Repealed. Pub. L. 103–382, title III, § 367, Oct. 20, 1994, 108 Stat. 3976

Section 2641, Pub. L. 100–297, title V, § 5341, Apr. 28, 1988, 102 Stat. 411; Pub. L. 100–427, § 21, Sept. 9, 1988, 102 Stat. 1612, related to establishment of Office of Indian Education within Department of Education. See section 3423c of Title 20, Education.

Section 2642, Pub. L. 100–297, title V, § 5342, Apr. 28, 1988, 102 Stat. 412; Pub. L. 100–427, § 22, Sept. 9, 1988, 102 Stat. 1613, established National Advisory Council on Indian Education.

Section 2643, Pub. L. 100–297, title V, § 5343, Apr. 28, 1988, 102 Stat. 413, authorized appropriations for administration of Indian education programs. See section 7882 of Title 20, Education.

SUBCHAPTER V—MISCELLANEOUS

§ 2651. Repealed. Pub. L. 103–382, title III, § 367, Oct. 20, 1994, 108 Stat. 3976

Section, Pub. L. 100–297, title V, § 5351, Apr. 28, 1988, 102 Stat. 413; Pub. L. 100–427, § 23, Sept. 9, 1988, 102 Stat. 1613, defined terms for purposes of this chapter. See section 7881 of Title 20, Education.

CHAPTER 29—INDIAN GAMING REGULATION

Sec.

2701. Findings.
2702. Declaration of policy.
2703. Definitions.
2704. National Indian Gaming Commission.
2705. Powers of Chairman.
2706. Powers of Commission.
2707. Commission staffing.
2708. Commission; access to information.
2709. Interim authority to regulate gaming.
2710. Tribal gaming ordinances.
2711. Management contracts.
2712. Review of existing ordinances and contracts.
2713. Civil penalties.
2714. Judicial review.
2715. Subpoena and deposition authority.
2716. Investigative powers.
2717. Commission funding.
2717a. Availability of class II gaming activity fees to carry out duties of Commission.
2718. Authorization of appropriations.
2719. Gaming on lands acquired after October 17, 1988.
2720. Dissemination of information.
2721. Severability.

§ 2701. Findings

The Congress finds that—

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

(Pub. L. 100–497, § 2, Oct. 17, 1988, 102 Stat. 2467.)

SHORT TITLE

Pub. L. 100–497, § 1, Oct. 17, 1988, 102 Stat. 2467, provided: ''That this Act [enacting this chapter and sections 1166 to 1168 of Title 18, Crimes and Criminal Procedure] may be cited as the 'Indian Gaming Regulatory Act'.''

§ 2702. Declaration of policy

The purpose of this chapter is—

(1) 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;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

(Pub. L. 100–497, § 3, Oct. 17, 1988, 102 Stat. 2467.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2703. Definitions

For purposes of this chapter—

(1) The term ''Attorney General'' means the Attorney General of the United States.

(2) The term ''Chairman'' means the Chairman of the National Indian Gaming Commission.

(3) The term ''Commission'' means the National Indian Gaming Commission established pursuant to section 2704 of this title.

(4) The term ''Indian lands'' means—

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term ''Indian tribe'' means any Indian tribe, band, nation, or other organized group or community of Indians which—

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term ''class I gaming'' means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term ''class II gaming'' means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term ''class II gaming'' does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term ''class II gaming'' includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term ''class II gaming'' includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term ''class II gaming'' includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term ''class III gaming'' means all forms of gaming that are not class I gaming or class II gaming.

(9) The term ''net revenues'' means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(10) The term ''Secretary'' means the Secretary of the Interior.

(Pub. L. 100–497, §4, Oct. 17, 1988, 102 Stat. 2467; Pub. L. 102–238, §2(a), Dec. 17, 1991, 105 Stat. 1908; Pub. L. 102–497, §16, Oct. 24, 1992, 106 Stat. 3261.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

AMENDMENTS

1992—Par. (7)(E). Pub. L. 102–497 struck out ''or Montana'' after ''Wisconsin''.

1991—Par. (7)(E), (F). Pub. L. 102–238 added subpars. (E) and (F).

CLASS II GAMING WITH RESPECT TO INDIAN TRIBES IN WISCONSIN OR MONTANA ENGAGED IN NEGOTIATING TRIBAL-STATE COMPACTS

Pub. L. 101–301, §6, May 24, 1990, 104 Stat. 209, provided that: ''Notwithstanding any other provision of law, the

term 'class II gaming' includes, for purposes of applying Public Law 100–497 [25 U.S.C. 2701 et seq.] with respect to any Indian tribe located in the State of Wisconsin or the State of Montana, during the 1-year period beginning on the date of enactment of this Act [May 24, 1990], any gaming described in section 4(7)(B)(ii) of Public Law 100–497 [25 U.S.C. 2703(7)(B)(ii)] that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated made a request, by no later than November 16, 1988, to the State in which such gaming is operated to negotiate a Tribal-State compact under section 11(d)(3) of Public Law 100–497 [25 U.S.C. 2710(d)(3)].''

TRIBAL-STATE COMPACT COVERING INDIAN TRIBES IN MINNESOTA; OPERATION OF CLASS II GAMES; ALLOWANCE OF ADDITIONAL YEAR FOR NEGOTIATIONS

Pub. L. 101–121, title I, § 118, Oct. 23, 1989, 103 Stat. 722, provided that: ''Notwithstanding any other provision of law, the term 'Class II gaming' in Public Law 100–497 [25 U.S.C. 2701 et seq.], for any Indian tribe located in the State of Minnesota, includes, during the period commencing on the date of enactment of this Act [Oct. 23, 1989] and continuing for 365 days from that date, any gaming described in section 4(7)(B)(ii) of Public Law 100–497 [25 U.S.C. 2703(7)(B)(ii)] that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdication [sic] over the lands on which such gaming was operated, requested the State of Minnesota, no later than 30 days after the date of enactment of Public Law 100–497 [Oct. 17, 1988], to negotiate a tribal-state compact pursuant to section 11(d)(3) of Public Law 100–497 [25 U.S.C. 2710(d)(3)].''

§ 2704. National Indian Gaming Commission

(a) Establishment

There is established within the Department of the Interior a Commission to be known as the National Indian Gaming Commission.

(b) Composition; investigation; term of office; removal

(1) The Commission shall be composed of three full-time members who shall be appointed as follows:

(A) a Chairman, who shall be appointed by the President with the advice and consent of the Senate; and

(B) two associate members who shall be appointed by the Secretary of the Interior.

(2)(A) The Attorney General shall conduct a background investigation on any person considered for appointment to the Commission.

(B) The Secretary shall publish in the Federal Register the name and other information the Secretary deems pertinent regarding a nominee for membership on the Commission and shall allow a period of not less than thirty days for receipt of public comment.

(3) Not more than two members of the Commission shall be of the same political party. At least two members of the Commission shall be enrolled members of any Indian tribe.

(4)(A) Except as provided in subparagraph (B), the term of office of the members of the Commission shall be three years.

(B) Of the initial members of the Commission—

(i) two members, including the Chairman, shall have a term of office of three years; and

(ii) one member shall have a term of office of one year.

(5) No individual shall be eligible for any appointment to, or to continue service on, the Commission, who—

(A) has been convicted of a felony or gaming offense;

(B) has any financial interest in, or management responsibility for, any gaming activity; or

(C) has a financial interest in, or management responsibility for, any management contract approved pursuant to section 2711 of this title.

(6) A Commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate member, by the Secretary) for neglect of duty, or malfeasance in office, or for other good cause shown.

(c) Vacancies

Vacancies occurring on the Commission shall be filled in the same manner as the original appointment. A member may serve after the expiration of his term of office until his successor has been appointed, unless the member has been removed for cause under subsection (b)(6) of this section.

(d) Quorum

Two members of the Commission, at least one of which is the Chairman or Vice Chairman, shall constitute a quorum.

(e) Vice Chairman

The Commission shall select, by majority vote, one of the members of the Commission to serve as Vice Chairman. The Vice Chairman shall serve as Chairman during meetings of the Commission in the absence of the Chairman.

(f) Meetings

The Commission shall meet at the call of the Chairman or a majority of its members, but shall meet at least once every 4 months.

(g) Compensation

(1) The Chairman of the Commission shall be paid at a rate equal to that of level IV of the Executive Schedule under section 5315 of title 5.

(2) The associate members of the Commission shall each be paid at a rate equal to that of level V of the Executive Schedule under section 5316 of title 5.

(3) All members of the Commission shall be reimbursed in accordance with title 5 for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

(Pub. L. 100–497, § 5, Oct. 17, 1988, 102 Stat. 2469.)

§ 2705. Powers of Chairman

(a) The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to—

(1) issue orders of temporary closure of gaming activities as provided in section 2713(b) of this title;

(2) levy and collect civil fines as provided in section 2713(a) of this title;

(3) approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 2710 of this title; and

(4) approve management contracts for class II gaming and class III gaming as provided in sections 2710(d)(9) and 2711 of this title.

(b) The Chairman shall have such other powers as may be delegated by the Commission.

(Pub. L. 100–497, § 6, Oct. 17, 1988, 102 Stat. 2470.)

§ 2706. Powers of Commission

(a) Budget approval; civil fines; fees; subpoenas; permanent orders

The Commission shall have the power, not subject to delegation—

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 2717 of this title;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 2713(a) of this title;

(3) by an affirmative vote of not less than 2 members, to establish the rate of fees as provided in section 2717 of this title;

(4) by an affirmative vote of not less than 2 members, to authorize the Chairman to issue subpoenas as provided in section 2715 of this title; and

(5) by an affirmative vote of not less than 2 members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 2713(b)(2) of this title.

(b) Monitoring; inspection of premises; investigations; access to records; mail; contracts; hearings; oaths; regulations

The Commission—

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this chapter;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.

(c) Omitted

(d) Application of Government Performance and Results Act

(1) In general

In carrying out any action under this chapter, the Commission shall be subject to the Government Performance and Results Act of 1993 (Public Law 103–62; 107 Stat. 285).

(2) Plans

In addition to any plan required under the Government Performance and Results Act of 1993 (Public Law 103–62; 107 Stat. 285), the Commission shall submit a plan to provide technical assistance to tribal gaming operations in accordance with that Act.

(Pub. L. 100–497, § 7, Oct. 17, 1988, 102 Stat. 2470; Pub. L. 109–221, title III, § 301(a), May 12, 2006, 120 Stat. 341.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (b)(4), (10) and (d)(1), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

The Government Performance and Results Act of 1993, referred to in subsec. (d), is Pub. L. 103–62, Aug. 3, 1993, 107 Stat. 285, which enacted section 306 of Title 5, Government Organization and Employees, sections 1115 to 1119, 9703, and 9704 of Title 31, Money and Finance, and sections 2801 to 2805 of Title 39, Postal Service, amended section 1105 of Title 31, and enacted provisions set out as notes under sections 1101 and 1115 of Title 31. For complete classification of this Act to the Code, see Short Title of 1993 Amendment note set out under section 1101 of Title 31 and Tables.

CODIFICATION

Subsec. (c) of this section, which required the Commission to submit a report to Congress every two years on various matters relating to the operation of the Commission, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, page 114 of House Document No. 103-7.

AMENDMENTS

2006—Subsec. (d). Pub. L. 109–221 added subsec. (d).

§ 2707. Commission staffing

(a) General Counsel

The Chairman shall appoint a General Counsel to the Commission who shall be paid at the annual rate of basic pay payable for GS–18 of the General Schedule under section 5332 of title 5.

(b) Staff

The Chairman shall appoint and supervise other staff of the Commission without regard to the provisions of title 5 governing appointments in the competitive service. Such staff shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so ap-

pointed may receive pay in excess of the annual rate of basic pay payable for GS–17 of the General Schedule under section 5332 of that title.

(c) Temporary services

The Chairman may procure temporary and intermittent services under section 3109(b) of title 5, but at rates for individuals not to exceed the daily equivalent of the maximum annual rate of basic pay payable for GS–18 of the General Schedule.

(d) Federal agency personnel

Upon the request of the Chairman, the head of any Federal agency is authorized to detail any of the personnel of such agency to the Commission to assist the Commission in carrying out its duties under this chapter, unless otherwise prohibited by law.

(e) Administrative support services

The Secretary or Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services as the Commission may request.

(Pub. L. 100–497, § 8, Oct. 17, 1988, 102 Stat. 2471.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (d), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

REFERENCES IN OTHER LAWS TO GS–16, 17, OR 18 PAY RATES

References in laws to the rates of pay for GS–16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, § 101(c)(1)] of Pub. L. 101–509, set out in a note under section 5376 of Title 5.

§ 2708. Commission; access to information

The Commission may secure from any department or agency of the United States information necessary to enable it to carry out this chapter. Upon the request of the Chairman, the head of such department or agency shall furnish such information to the Commission, unless otherwise prohibited by law.

(Pub. L. 100–497, § 9, Oct. 17, 1988, 102 Stat. 2472.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2709. Interim authority to regulate gaming

Notwithstanding any other provision of this chapter, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before October 17, 1988, relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

(Pub. L. 100–497, § 10, Oct. 17, 1988, 102 Stat. 2472.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than—

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of

$25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which—

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section[1]

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has—

[1] So in original. Probably should be followed by a comma.

(A) conducted its gaming activity in a manner which—

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for—

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation—

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706(b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsection (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such 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.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe[2] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

[2] So in original. Probably should not be capitalized.

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

(Pub. L. 100–497, § 11, Oct. 17, 1988, 102 Stat. 2472.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a), (d)(7)(B)(iv), (vii)(I), (8)(B)(i), (C), and (e), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

CONSTITUTIONALITY

For information regarding constitutionality of certain provisions of section 11 of Pub. L. 100–497, see Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation, Appendix 1, Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States.

§ 2711. Management contracts

(a) Class II gaming activity; information on operators

(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 2710(b)(1) of this title, but, before approving such contract, the Chairman shall require and obtain the following information:

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

(B) a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this chapter, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) Approval

The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least—

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied

that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and

(6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

(c) Fee based on percentage of net revenues

(1) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee requested by the Indian tribe.

(d) Period for approval; extension

By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection.

(e) Disapproval

The Chairman shall not approve any contract if the Chairman determines that—

(1) any person listed pursuant to subsection (a)(1)(A) of this section—

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this chapter or has refused to respond to questions propounded pursuant to subsection (a)(2) of this section; or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this chapter; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) Modification or voiding

The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) Interest in land

No management contract for the operation and management of a gaming activity regulated by this chapter shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) Authority

The authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the Commission.

(i) Investigation fee

The Commission shall require a potential contractor to pay a fee to cover the cost of the investigation necessary to reach a determination required in subsection (e) of this section.

(Pub. L. 100–497, § 12, Oct. 17, 1988, 102 Stat. 2479.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(3), (e)(1)(C), (3), (g), and (h), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2712. Review of existing ordinances and contracts

(a) Notification to submit

As soon as practicable after the organization of the Commission, the Chairman shall notify each Indian tribe or management contractor who, prior to October 17, 1988, adopted an ordinance or resolution authorizing class II gaming or class III gaming or entered into a management contract, that such ordinance, resolution, or contract, including all collateral agreements relating to the gaming activity, must be submitted for his review within 60 days of such notification. Any activity conducted under such ordinance, resolution, contract, or agreement shall be valid under this chapter, or any amendment made by this chapter, unless disapproved under this section.

(b) Approval or modification of ordinance or resolution

(1) By no later than the date that is 90 days after the date on which an ordinance or resolution authorizing class II gaming or class III gaming is submitted to the Chairman pursuant

to subsection (a) of this section, the Chairman shall review such ordinance or resolution to determine if it conforms to the requirements of section 2710(b) of this title.

(2) If the Chairman determines that an ordinance or resolution submitted under subsection (a) of this section conforms to the requirements of section 2710(b) of this title, the Chairman shall approve it.

(3) If the Chairman determines that an ordinance or resolution submitted under subsection (a) of this section does not conform to the requirements of section 2710(b) of this title, the Chairman shall provide written notification of necessary modifications to the Indian tribe which shall have not more than 120 days to bring such ordinance or resolution into compliance.

(c) Approval or modification of management contract

(1) Within 180 days after the submission of a management contract, including all collateral agreements, pursuant to subsection (a) of this section, the Chairman shall subject such contract to the requirements and process of section 2711 of this title.

(2) If the Chairman determines that a management contract submitted under subsection (a) of this section, and the management contractor under such contract, meet the requirements of section 2711 of this title, the Chairman shall approve the management contract.

(3) If the Chairman determines that a contract submitted under subsection (a) of this section, or the management contractor under a contract submitted under subsection (a) of this section, does not meet the requirements of section 2711 of this title, the Chairman shall provide written notification to the parties to such contract of necessary modifications and the parties shall have not more than 120 days to come into compliance. If a management contract has been approved by the Secretary prior to October 17, 1988, the parties shall have not more than 180 days after notification of necessary modifications to come into compliance.

(Pub. L. 100–497, § 13, Oct. 17, 1988, 102 Stat. 2481.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (a), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2713. Civil penalties

(a) Authority; amount; appeal; written complaint

(1) Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter, any regulation prescribed by the Commission pursuant to this chapter, or tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(3) Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this chapter, by regulations prescribed under this chapter, or by tribal regulations, ordinances, or resolutions, approved under section 2710 or 2712 of this title, that may result in the imposition of a fine under subsection (a)(1) of this section, the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have been violated, but may not consist merely of allegations stated in statutory or regulatory language.

(b) Temporary closure; hearing

(1) The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this chapter, of regulations prescribed by the Commission pursuant to this chapter, or of tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

(2) Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation.

(c) Appeal from final decision

A decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of title 5.

(d) Regulatory authority under tribal law

Nothing in this chapter precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with this chapter or with any rules or regulations adopted by the Commission.

(Pub. L. 100–497, § 14, Oct. 17, 1988, 102 Stat. 2482.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(1), (3), (b)(1), and (d), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2714. Judicial review

Decisions made by the Commission pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of title 5.

(Pub. L. 100–497, § 15, Oct. 17, 1988, 102 Stat. 2483.)

§ 2715. Subpoena and deposition authority

(a) Attendance, testimony, production of papers, etc.

By a vote of not less than two members, the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter under consideration or investigation. Witnesses so summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(b) Geographical location

The attendance of witnesses and the production of books, papers, and documents, may be required from any place in the United States at any designated place of hearing. The Commission may request the Secretary to request the Attorney General to bring an action to enforce any subpoena under this section.

(c) Refusal of subpoena; court order; contempt

Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpoena for any reason, issue an order requiring such person to appear before the Commission (and produce books, papers, or documents as so ordered) and give evidence concerning the matter in question and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) Depositions; notice

A Commissioner may order testimony to be taken by deposition in any proceeding or investigation pending before the Commission at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Reasonable notice must first be given to the Commission in writing by the party or his attorney proposing to take such deposition, and, in cases in which a Commissioner proposes to take a deposition, reasonable notice must be given. The notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission, as hereinbefore provided.

(e) Oath or affirmation required

Every person deposing as herein provided shall be cautioned and shall be required to swear (or affirm, if he so requests) to testify to the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent. All depositions shall be promptly filed with the Commission.

(f) Witness fees

Witnesses whose depositions are taken as authorized in this section, and the persons taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(Pub. L. 100–497, § 16, Oct. 17, 1988, 102 Stat. 2483.)

§ 2716. Investigative powers

(a) Confidential information

Except as provided in subsection (b) of this section, the Commission shall preserve any and all information received pursuant to this chapter as confidential pursuant to the provisions of paragraphs (4) and (7) of section 552(b) of title 5.

(b) Provision to law enforcement officials

The Commission shall, when such information indicates a violation of Federal, State, or tribal statutes, ordinances, or resolutions, provide such information to the appropriate law enforcement officials.

(c) Attorney General

The Attorney General shall investigate activities associated with gaming authorized by this chapter which may be a violation of Federal law.

(Pub. L. 100–497, § 17, Oct. 17, 1988, 102 Stat. 2484.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a) and (c), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2717. Commission funding

(a)(1) The Commission shall establish a schedule of fees to be paid to the Commission annually by each gaming operation that conducts a class II or class III gaming activity that is regulated by this chapter.

(2)(A) The rate of the fees imposed under the schedule established under paragraph (1) shall be—

(i) no more than 2.5 percent of the first $1,500,000, and

(ii) no more than 5 percent of amounts in excess of the first $1,500,000,

of the gross revenues from each activity regulated by this chapter.

(B) The total amount of all fees imposed during any fiscal year under the schedule established under paragraph (1) shall not exceed 0.080 percent of the gross gaming revenues of all gaming operations subject to regulation under this chapter.

(3) The Commission, by a vote of not less than two of its members, shall annually adopt the rate of the fees authorized by this section which shall be payable to the Commission on a quarterly basis.

(4) Failure to pay the fees imposed under the schedule established under paragraph (1) shall,

subject to the regulations of the Commission, be grounds for revocation of the approval of the Chairman of any license, ordinance, or resolution required under this chapter for the operation of gaming.

(5) To the extent that revenue derived from fees imposed under the schedule established under paragraph (1) are not expended or committed at the close of any fiscal year, such surplus funds shall be credited to each gaming activity on a pro rata basis against such fees imposed for the succeeding year.

(6) For purposes of this section, gross revenues shall constitute the annual total amount of money wagered, less any amounts paid out as prizes or paid for prizes awarded and less allowance for amortization of capital expenditures for structures.

(b)(1) The Commission, in coordination with the Secretary and in conjunction with the fiscal year of the United States, shall adopt an annual budget for the expenses and operation of the Commission.

(2) The budget of the Commission may include a request for appropriations, as authorized by section 2718 of this title, in an amount equal the amount of funds derived from assessments authorized by subsection (a) of this section for the fiscal year preceding the fiscal year for which the appropriation request is made.

(3) The request for appropriations pursuant to paragraph (2) shall be subject to the approval of the Secretary and shall be included as a part of the budget request of the Department of the Interior.

(Pub. L. 100–497, § 18, Oct. 17, 1988, 102 Stat. 2484; Pub. L. 105–83, title I, § 123(a)(1)–(2)(B), Nov. 14, 1997, 111 Stat. 1566; Pub. L. 109–221, title III, § 301(b), May 12, 2006, 120 Stat. 341.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (a)(1), (2), (4), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

AMENDMENTS

2006—Subsec. (a)(2)(B). Pub. L. 109–221 added subpar. (B) and struck out former subpar. (B) which read as follows: ''The total amount of all fees imposed during any fiscal year under the schedule established under paragraph (1) shall not exceed $8,000,000.''

1997—Subsec. (a)(1). Pub. L. 105–83, § 123(a)(1), substituted ''gaming operation that conducts a class II or class III gaming activity'' for ''class II gaming activity''.

Subsec. (a)(2)(A)(i). Pub. L. 105–83, § 123(a)(2)(A), substituted ''no more than 2.5 percent'' for ''no less than 0.5 percent nor more than 2.5 percent''.

Subsec. (a)(2)(B). Pub. L. 105–83, § 123(a)(2)(B), substituted ''$8,000,000'' for ''$1,500,000''.

APPLICATION TO SELF-REGULATED TRIBES

Pub. L. 105–83, title I, § 123(a)(2)(C), Nov. 14, 1997, 111 Stat. 1566, as amended by Pub. L. 105–277, div. A, § 101(e) [title III, § 338], Oct. 21, 1998, 112 Stat. 2681–231, 2681–295, provided that: ''[N]othing in subsection (a) of this section [amending this section] shall apply to the Mississippi Band of Choctaw.''

§ 2717a. Availability of class II gaming activity fees to carry out duties of Commission

In fiscal year 1990 and thereafter, fees collected pursuant to and as limited by section 2717 of this title shall be available to carry out the duties of the Commission, to remain available until expended.

(Pub. L. 101–121, title I, Oct. 23, 1989, 103 Stat. 718.)

CODIFICATION

Section was enacted as part of the Department of the Interior and Related Agencies Appropriations Act, 1990, and not as part of the Indian Gaming Regulatory Act which comprises this chapter.

§ 2718. Authorization of appropriations

(a) Subject to section 2717 of this title, there are authorized to be appropriated, for fiscal year 1998, and for each fiscal year thereafter, an amount equal to the amount of funds derived from the assessments authorized by section 2717(a) of this title.

(b) Notwithstanding section 2717 of this title, there are authorized to be appropriated to fund the operation of the Commission, $2,000,000 for fiscal year 1998, and $2,000,000 for each fiscal year thereafter. The amounts authorized to be appropriated in the preceding sentence shall be in addition to the amounts authorized to be appropriated under subsection (a) of this section.

(Pub. L. 100–497, § 19, Oct. 17, 1988, 102 Stat. 2485; Pub. L. 102–238, § 2(b), Dec. 17, 1991, 105 Stat. 1908; Pub. L. 105–83, title I, § 123(b), Nov. 14, 1997, 111 Stat. 1566; Pub. L. 105–119, title VI, § 627, Nov. 26, 1997, 111 Stat. 2522.)

AMENDMENTS

1997—Subsec. (a). Pub. L. 105–119 amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: ''Subject to the provisions of section 2717 of this title, there are hereby authorized to be appropriated for fiscal year 1998, and for each fiscal year thereafter, an amount equal to the amount of funds derived from the assessments authorized by section 2717(a) of this title for the fiscal year immediately preceding the fiscal year involved, for the operation of the Commission.''

Pub. L. 105–83, § 123(b)(1), substituted ''for fiscal year 1998, and for each fiscal year thereafter, an amount equal to the amount of funds derived from the assessments authorized by section 2717(a) of this title for the fiscal year immediately preceding the fiscal year involved,'' for ''such sums as may be necessary''.

Subsec. (b). Pub. L. 105–83, § 123(b)(2), added subsec. (b) and struck out former subsec. (b) which read as follows: ''Notwithstanding the provisions of section 2717 of this title, there are hereby authorized to be appropriated not to exceed $2,000,000 to fund the operation of the Commission for each of the fiscal years beginning October 1, 1988, and October 1, 1989. Notwithstanding the provisions of section 2717 of this title, there are authorized to be appropriated such sums as may be necessary to fund the operation of the Commission for each of the fiscal years beginning October 1, 1991, and October 1, 1992.''

1991—Subsec. (b). Pub. L. 102–238 inserted at end ''Notwithstanding the provisions of section 2717 of this title, there are authorized to be appropriated such sums as may be necessary to fund the operation of the Commission for each of the fiscal years beginning October 1, 1991, and October 1, 1992.''

§ 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) of this section shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86–2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 465 and 467 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected

Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of title 26

(1) The provisions of title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

(Pub. L. 100–497, § 20, Oct. 17, 1988, 102 Stat. 2485.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a) and (d)(1), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2720. Dissemination of information

Consistent with the requirements of this chapter, sections 1301, 1302, 1303 and 1304 of title 18 shall not apply to any gaming conducted by an Indian tribe pursuant to this chapter.

(Pub. L. 100–497, § 21, Oct. 17, 1988, 102 Stat. 2486.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2721. Severability

In the event that any section or provision of this chapter, or amendment made by this chapter, is held invalid, it is the intent of Congress that the remaining sections or provisions of this chapter, and amendments made by this chapter, shall continue in full force and effect.

(Pub. L. 100–497, § 22, Oct. 17, 1988, 102 Stat. 2486.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

CHAPTER 30—INDIAN LAW ENFORCEMENT REFORM

Sec.
2801. Definitions.
2802. Indian law enforcement responsibilities.
2803. Law enforcement authority.
2804. Assistance by other agencies.
2805. Regulations.
2806. Jurisdiction.
2807. Uniform allowance.
2808. Source of funds.
2809. Reports to tribes.
2810. Assistant United States Attorney tribal liaisons.
2811. Native American Issues Coordinator.
2812. Indian Law and Order Commission.
2813. Testimony by Federal employees.
2814. Policies and protocol.
2815. State, tribal, and local law enforcement cooperation.

§ 2801. Definitions

For purposes of this chapter—

(1) The term ''Branch of Criminal Investigations'' means the entity the Secretary is required to establish within the Office of Justice Services under section 2802(d)(1) of this title.

(2) The term ''Bureau'' means the Bureau of Indian Affairs of the Department of the Interior.

(3) The term ''employee of the Bureau'' includes an officer of the Bureau.

(4) The term ''enforcement of a law'' includes the prevention, detection, and investigation of an offense and the detention or confinement of an offender.

(5) The term ''Indian country'' has the meaning given that term in section 1151 of title 18.

(6) The term ''Indian tribe'' has the meaning given that term in section 1301 of this title.

(7) The term ''offense'' means an offense against the United States and includes a violation of a Federal regulation relating to part or all of Indian country.

(8) The term ''Secretary'' means the Secretary of the Interior.

(10)[1] The term ''tribal justice official'' means—

(A) a tribal prosecutor;

(B) a tribal law enforcement officer; or

(C) any other person responsible for investigating or prosecuting an alleged criminal offense in tribal court.

(Pub. L. 101–379, § 2, Aug. 18, 1990, 104 Stat. 473; Pub. L. 111–211, title II, §§ 203(b), 211(a), July 29, 2010, 124 Stat. 2263, 2264.)

AMENDMENTS

2010—Pub. L. 111–211, § 211(a), redesignated and reordered pars. (9) and (1) to (7) as (1) to (8), respectively, substituted ''Office of Justice Services'' for ''Division of Law Enforcement Services'' in par. (1), and struck out former par. (8) which read as follows: ''The term 'Division of Law Enforcement Services' means the entity established within the Bureau under section 2802(b) of this title.''

Par. (10). Pub. L. 111–211, § 203(b), added par. (10).

SHORT TITLE OF 2010 AMENDMENT

Pub. L. 111–211, title II, § 201(a), July 29, 2010, 124 Stat. 2261, provided that: ''This title [enacting part G (§ 458ccc et seq.) of subchapter II of chapter 14 of this title and sections 2810 to 2815, 3665a, and 3682 of this title, redesignating part F (§ 458bbb et seq.) of subchapter II of chapter 14 of this title as part H (§ 458ddd et seq.), amending this section and sections 458ddd–1, 458ddd–2, 1302, 1321, 2411 to 2413, 2414a, 2415, 2431 to 2433, 2441, 2442, 2451, 2453, 2802 to 2804, 2809, 3613, 3621, 3653, 3662, 3663, 3666, and 3681 of this title, sections 841, 845, 1162, 4042, and 4352 of Title 18, Crimes and Criminal Procedure, sections 872, 872a, 873, and 878 of Title 21, Food and Drugs, sections 534 and 543 of Title 28, Judiciary and Judicial Procedure, and sections 2996f, 3732, 3796h, 3796dd, 5616, 5783, and 13709 of Title 42, The Public Health and Welfare, enacting provisions set out as notes under this section and section 1302 of this title, section 872 of Title 21, section 534 of Title 28, and sections 3732, 3796h, 3796dd, and 14044 of Title 42, amending provisions set out as a note under section 534 of Title 28, and repealing provisions set out as a note under section 3651 of this title] may be cited as the 'Tribal Law and Order Act of 2010'.''

SHORT TITLE

Pub. L. 101–379, § 1, Aug. 18, 1990, 104 Stat. 473, provided that: ''This Act [enacting this chapter and provisions set out as a note under section 2991a of Title 42, The Public Health and Welfare] may be cited as the 'Indian Law Enforcement Reform Act'.''

SEVERABILITY

Pub. L. 111–211, title II, § 204, July 29, 2010, 124 Stat. 2263, provided that: ''If any provision of this title [see Short Title of 2010 Amendment note above], an amendment made by this title, or the application of such a provision or amendment to any individual, entity, or circumstance, is determined by a court of competent jurisdiction to be invalid, the remaining provisions of this title, the remaining amendments made by this title, and the application of those provisions and amendments to individuals, entities, or circumstances other than the affected individual, entity, or circumstance shall not be affected.''

FINDINGS; PURPOSES

Pub. L. 111–211, title II, § 202, July 29, 2010, 124 Stat. 2262, provided that:

''(a) FINDINGS.—Congress finds that—

''(1) the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country;

''(2) Congress and the President have acknowledged that—

''(A) tribal law enforcement officers are often the first responders to crimes on Indian reservations; and

''(B) tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country;

''(3) less than 3,000 tribal and Federal law enforcement officers patrol more than 56,000,000 acres of Indian country, which reflects less than ½ of the law enforcement presence in comparable rural communities nationwide;

''(4) the complicated jurisdictional scheme that exists in Indian country—

''(A) has a significant negative impact on the ability to provide public safety to Indian communities;

''(B) has been increasingly exploited by criminals; and

[1] So in original. There is no par. (9).

(1) Forward to the Commission a completed application for employment that contains the notices and information listed in §§ 556.2, 556.3 and 556.4 of this chapter; and

(2) Conduct a background investigation under part 556 of this chapter to determine the eligibility of the key employee or primary management official for continued employment in a gaming operation.

(b) Upon completion of a background investigation and a determination of eligibility for employment in a gaming operation under paragraph (a)(2) of this section, a tribe shall forward a report under § 556.5(b) of this chapter to the Commission within 60 days after an employee begins work or within 60 days of the Chairman's approval of an ordinance under part 523. A gaming operation shall not employ a key employee or primary management official who does not have a license after 90 days.

(c) During a 30-day period beginning when the Commission receives a report submitted under paragraph (b) of this section, the Chairman may request additional information from a tribe concerning a key employee or a primary management official who is the subject of a report. Such a request shall suspend the 30-day period until the Chairman receives the additional information.

§ 558.4 Granting a gaming license.

(a) If, within the 30-day period described in § 558.3(c) of this part, the Commission notifies a tribe that it has no objection to the issuance of a license pursuant to a license application filed by a key employee or a primary management official for whom the tribe has provided an application and investigative report to the Commission pursuant to § 558.3 (a) and (b) of this part, the tribe may go forward and issue a license to such applicant.

(b) If, within the 30-day period described in § 558.3(c) of this part, the Commission provides the tribe with a statement itemizing objections to the issuance of a license to a key employee or to a primary management official for whom the tribe has provided an application and investigative report to the Commission pursuant to § 558.3 (a) and (b) of this part, the tribe shall reconsider the application, taking into account the objections itemized by the Commission. The tribe shall make the final decision whether to issue a license to such applicant.

§ 558.5 License suspension.

(a) If, after the issuance of a gaming license, the Commission receives reliable information indicating that a key employee or a primary management official is not eligible for employment under § 558.2 of this part, the Commission shall notify the tribe that issued a gaming license.

(b) Upon receipt of such notification under paragraph (a) of this section, a tribe shall suspend such license and shall notify in writing the licensee of the suspension and the proposed revocation.

(c) A tribe shall notify the licensee of a time and a place for a hearing on the proposed revocation of a license.

(d) After a revocation hearing, a tribe shall decide to revoke or to reinstate a gaming license. A tribe shall notify the Commission of its decision.

PART 559—FACILITY LICENSE NOTIFICATIONS, RENEWALS, AND SUBMISSIONS

Sec.

559.1 What is the scope and purpose of this part?
559.2 When must a tribe notify the Chairman that it is considering issuing a new facility license?
559.3 How often must a facility license be renewed?
559.4 When must a tribe submit a copy of a newly issued or renewed facility license to the Chairman?
559.5 What must a tribe submit to the Chairman with the copy of each facility license that has been issued or renewed?
559.6 Does a tribe need to notify the Chairman if a facility license is terminated or not renewed or if a gaming place, facility, or location closes or reopens?
559.7 May the Chairman request Indian lands or environmental and public health and safety documentation regarding any gaming place, facility, or location where gaming will occur?
559.8 May a tribe submit documents required by this part electronically?

AUTHORITY: 25 U.S.C. 2701, 2702(3), 2703(4), 2705, 2706, 2710 and 2719.

SOURCE: 73 FR 6029, Feb. 1, 2008, unless otherwise noted.

§ 559.1 What is the scope and purpose of this part?

(a) The purpose of this part is to ensure that each place, facility, or location where class II or III gaming will occur is located on Indian lands eligible for gaming and that the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety pursuant to the Indian Gaming Regulatory Act.

(b) Each gaming place, facility, or location conducting class II or III gaming pursuant to the Indian Gaming Regulatory Act or on which a tribe intends to conduct class II or III gaming pursuant to the Indian Gaming Regulatory Act is subject to the requirements of this part.

§ 559.2 When must a tribe notify the Chairman that it is considering issuing a new facility license?

(a) A tribe shall submit to the Chairman a notice that a facility license is under consideration for issuance at least 120 days before opening any new place, facility, or location on Indian lands where class II or III gaming will occur. The notice shall contain the following:

(1) The name and address of the property;

(2) A legal description of the property;

(3) The tract number for the property as assigned by the Bureau of Indian Affairs, Land Title and Records Offices, if any;

(4) If not maintained by the Bureau of Indian Affairs, Department of the Interior, a copy of the trust or other deed(s) to the property or an explanation as to why such documentation does not exist; and

(5) If not maintained by the Bureau of Indian Affairs, Department of the Interior, documentation of the property's ownership.

(b) A tribe does not need to submit to the Chairman a notice that a facility license is under consideration for issuance for occasional charitable events lasting not more than a week.

§ 559.3 How often must a facility license be renewed?

At least once every three years after the initial issuance of a facility license, a tribe shall renew or reissue a separate facility license to each existing place, facility or location on Indian lands where a tribe elects to allow gaming.

§ 559.4 When must a tribe submit a copy of a newly issued or renewed facility license to the Chairman?

A tribe must submit to the Chairman a copy of each newly issued or renewed facility license within 30 days of issuance.

§ 559.5 What must a tribe submit to the Chairman with the copy of each facility license that has been issued or renewed?

(a) A tribe shall submit to the Chairman with each facility license an attestation certifying that by issuing the facility license:

(1) The tribe has identified and enforces the environment and public health and safety laws, resolutions, codes, policies, standards or procedures applicable to its gaming operation;

(2) The tribe is in compliance with those laws, resolutions, codes, policies, standards, or procedures, or, if not in compliance with any or all of the same, the tribe will identify those with which it is not in compliance, and will adopt and submit its written plan for the specific action it will take, within a period not to exceed six months, required for compliance. At the successful completion of such written plan, or at the expiration of the period allowed for its completion, the tribe shall report the status thereof to the Commission. In the event that the tribe estimates that action for compliance will exceed six months, the Chairman must concur in such an extension of the time period, otherwise the tribe will be deemed noncompliant. The Chairman will take into consideration the consequences on the environment and the public health and safety, as well as mitigating measures the tribe may provide in the interim, in his or her consideration of requests for such an extension of the time period.

(3) The tribe is ensuring that the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety.

(b) A document listing all laws, resolutions, codes, policies, standards or procedures identified by the tribe as applicable to its gaming facilities, other than Federal laws, in the following areas:

(1) Emergency preparedness, including but not limited to fire suppression, law enforcement, and security;

(2) Food and potable water;

(3) Construction and maintenance;

(4) Hazardous materials;

(5) Sanitation (both solid waste and wastewater); and

(6) Other environmental or public health and safety laws, resolutions, codes, policies, standards or procedures adopted by the tribe in light of climate, geography, and other local conditions and applicable to its gaming places, facilities, or locations.

(c) After the first submission of a document under paragraph (b) of this section, upon reissuing a license to an existing gaming place, facility, or location, and in lieu of complying with paragraph (b) of this section, a tribe may certify to the Chairman that it has not substantially modified its laws protecting the environment and public health and safety.

§ 559.6 Does a tribe need to notify the Chairman if a facility license is terminated or not renewed or if a gaming place, facility, or location closes or reopens?

A tribe must notify the Chairman within 30 days if a facility license is terminated or not renewed or if a gaming place, facility, or location closes or reopens.

§ 559.7 May the Chairman request Indian lands or environmental and public health and safety documentation regarding any gaming place, facility, or location where gaming will occur?

A tribe shall provide Indian lands or environmental and public health and safety documentation that the Chairman may in his or her discretion request.

§ 559.8 May a tribe submit documents required by this part electronically?

Yes. Tribes wishing to submit documents electronically should contact the Commission for guidance on acceptable document formats and means of transmission.

SUBCHAPTER F [RESERVED]

PARTS 560–569 [RESERVED]

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Decision of the Martha's Vineyard Commission

DRI 690 – Wampanoag Tribal Gaming Facility

1. SUMMARY

Referring Board:	Board of Selectmen, Town of Aquinnah, MA
Project:	To complete a Class II gaming facility.
Owner:	Wampanoag Tribe of Gay Head (Aquinnah)
Applicant:	Wampanoag Tribe of Gay Head (Aquinnah)
Applicant Address:	Tribal Administration Building, Community Center Road, Aquinnah, MA
Project Location:	Approximately 6 acres off Black Brook Road, Aquinnah, MA.
Description:	To complete an approximately 10,000 square foot Class II gaming facility.
Decision:	The Martha's Vineyard Commission (the Commission) voted to not approve the application for this project as a Development of Regional Impact on the grounds that the application was incomplete on July 11, 2019.
Written Decision:	This written decision was approved by a vote of the Commission on July 18, 2019.

The permit-granting authorities of the Town of Aquinnah are not authorized to approve the project for the development of a Class II gaming facility due to the information not being provided in order for the Commission to evaluate and make finding in accordance with Chapter 381 and Commission policy.

2. FACTS

The exhibits listed below including the referral, correspondence from the Commission to the Town and Wampanoag Tribe. The full record of the application is kept on the premises of the Martha's Vineyard Commission.

1. Referral from the Town of Aquinnah Board of Selectman on January 16, 2019 with clarification sent on February 13, 2019.
2. Referral letter from the Town of Chilmark Board of Selectman on February 20, 2019.
3. Letter from Adam Turner to Gary Haley (Aquinnah Board of Selectmen Chair) regarding DRI Checklist items triggered by the project, dated February 20, 2019.
4. Letter from Adam Turner to Cheryl Andrews-Maltais regarding hearing schedule and other matters, dated February 20, 2019.
5. Letter from Cheryl Andrews-Maltais to Adam Turner regarding the applicant's participation, dated February 22, 2019.
6. Letter from Adam Turner to Cheryl Andrews-Maltais regarding a meeting request, dated February 25, 2019.
7. Letter from Scott Crowell, legal representation for the Wampanoag Tribe of Gay Head (Aquinnah), to Adam Turner regarding administrative procedure and possible litigation, dated February 25, 2019.
8. Letter from Adam Turner to Scott Crowell regarding a meeting request, dated February 26, 2019.
9. Letter from Brian Hurley, legal representation for the MVC, to Scott Crowell regarding topic points for discussion, dated March 15, 2019.
10. Email from Brian Hurley to Lael Echo-Hawk, legal representation for the Wampanoag Tribe of Gay Head (Aquinnah), regarding a meeting to discuss regional impacts, dated March 27, 2019.
11. Email from Lael Echo-Hawk to Brian Hurley regarding collaboration between the parties, dated April 1, 2019.
12. Letter from Adam Turner to Cheryl-Andrews Maltais regarding hearing schedule, dated April 19, 2019.
13. Letter from Adam Turner to Cheryl-Andrews Maltais regarding hearing procedure, dated May 8, 2019.

2.1 Referral

The project was referred to the Commission on February 13, 2019 by the Board of Selectman of the Town of Aquinnah, MA for action pursuant to Chapter 831 of the Acts of 1977, as amended (the Act) and the Commission's Standards and Criteria Administrative Checklist for Developments of Regional Impact, Sections 3.10 (Development of new construction totaling 3,500 sq. ft or more).

2.2 Hearings

Notice: Public notice of a public hearing on the Application was published in the Vineyard Gazette on May 24, 2019 and May 31, 2019.

Hearings: The Commission held a public hearing on the Application that was conducted by the Commission pursuant to the Act and M.G.L. Chapter 30A, Section 2, as modified by Chapter 831 on June 6, 2019, which was continued to July 11, 2019. The hearing was closed on July 11, 2019.

2.3 The Plan

No plans nor any supporting documentation was submitted.

2.4 Summary of Testimony

The following is a summary of the principal testimony given during the public hearing:

- Staff report by MVC staff.
- Testimony from Jeffery Madison, Administrator, Town of Aquinnah.
- Testimony from Julie Vanderhoop, Selectperson, Town of Aquinnah.

3. FINDINGS

3.1 Project Description

- To construct a 10,000 square foot Class II gaming facility.

3.2 Statutory Authority

The purpose of the Commission, as set forth in Section 1 of the Act, is to "protect the health, safety and general welfare of island residents and visitors by preserving and conserving for the enjoyment of present and future generations the unique natural, historical, ecological, scientific and cultural values of Martha's Vineyard which contribute to public enjoyment, inspiration and scientific study by protecting these values from development and uses which would impair them, and by promoting the enhancement of sound local economies."

The Commission has reviewed the project as a Development of Regional Impact, using the procedures and criteria that the Commission normally uses in evaluating the benefits and detriments of such a proposal. The Commission has considered the Application and the information presented at the public hearing, including considering all the testimony presented and reviewing all documents and correspondence submitted during the hearing and review period.

3.3 Benefits and Detriments

Based on the lack of record and testimony presented therein, the Commission makes no finding in respect to the following pursuant to Sections 14 and 15 the Act.

THE COMMISSION MAKES NO FINDINGS RELATIVE TO THE PROBABLE BENEFITS AND/OR PROBABLE DETRIMENTS DUE TO INFORMATION NOT BEING PROVIDED:

The Commission makes no finding that the proposed development at this location is appropriate in view of the available alternatives (Section 15(a) – (e) of the Act.) due to the lack of information and testimony provided.

With respect to Wastewater and Groundwater,
The Commission makes no finding due to the lack of information provided.

With respect to Open Space, Natural Community and Habitat,
The Commission makes no finding due to the lack of information provided.

With respect to Night Lighting and Noise,
The Commission makes no finding due to the lack of information provided.

With respect to Energy and Sustainability,
The Commission makes no finding due to the lack of information provided.

With respect to Traffic and Transportation,
The Commission makes no finding due to the lack of information provided.

With respect to Scenic Values, Character, and Identity:
The Commission makes no finding due to the lack of information provided.

With respect to the Impact on Abutters,
The Commission makes no finding due to the lack of information provided.

With respect to the provision of municipal services or burden on taxpayers,
The Commission makes no finding due to the lack of information provided.

The Commission makes no finding whether the proposed development would use efficiently and not unduly burden existing public facilities (other than municipal) or those that are to be developed within the succeeding five years. (Section 15(f) of the Act).

The Commission makes no finding whether the proposed development interferes with the ability of the municipality to achieve the objectives set forth in the municipal general plan. (Section 15(g) of the Act) due to the lack of information provided.

The Commission makes no finding whether the proposed development would not contravene land development objectives and policies developed by regional or state agencies. (Section 15(h) of the Act) due to the lack of information provided.

In sum, the Commission has concluded that lack of information and testimony does not permit the Commission to determine whether the application is consistent with the land development objectives of the commission, as evaluated in light of the considerations set forth in section 14(b) of the act.

The Commission makes no finding that the proposed development is consistent with municipal development ordinances and by-laws, to the best of the Commission's knowledge due to the lack of information provided.

The Commission makes no finding regarding whether the site is in conformance with the regulations of districts of critical planning concern, as evaluated in light of the considerations set forth in section 14(d) of the act. The Commission finds that the proposed development site is located within Aquinnah District of Critical Planning Concern (DCPC), but makes no finding due to the lack of information provided.

4. DECISION

The Martha's Vineyard Commission deliberated about the application at a duly noticed meeting of the Commission held on July 11, 2019 and made its decision at the same meeting.

The following Commissioners, all of who participated in all hearings and deliberations on this project, participated in the decision on July 11, 2019.

- Voting in favor: Trip Barnes, Leon Brathwaite, Christina Brown, Rob Doyle, Josh Goldstein, Fred Hancock, James Joyce, Joan Malkin, Kathy Newman; Ben Robinson, Doug Sederholm, Linda Sibley, Ernie Thomas, Richard Toole; and Jim Vercruysse.
- Voting against: None.
- Abstentions: None.

Based on this vote, the Commission did not approve the application for the project as a Development of Regional Impact on the grounds that the application is incomplete and that there is no basis to approve the application.

This written Decision is consistent with the vote of the Commission July 11, 2019 and was approved by vote of the Commission on July 18, 2019.

5. CONCLUSION

5.1 Permitting from the Town

The Applicant shall not, consistent with this Decision, be granted applicable development permits by appropriate Town of Aquinnah Officers and Boards until DRI approval is granted by the Commission.

5.2 Notice of Appellate Rights

Any party aggrieved by a determination of the Commission may appeal to Superior Court within twenty (20) days after the Commission has sent the development Applicant written notice, by certified mail, of its Decision and has filed a copy of its Decision with the Aquinnah Town Clerk.

5.3 Signature Block

E. Douglas Sederholm, Chairman — Date: 8-12-19

5.4 Notarization of Decision

Commonwealth of Massachusetts
County of Dukes County, Mass.

On this 12th day of August, 2019, before me, Lucy C. Morrison, the undersigned Notary Public, personally appeared E. Douglas Sederholm, proved to me through satisfactory evidence of identity, which was/were personal knowledge to be the person(s) whose name(s) was/were signed on the preceding or attached document in my presence, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of his/her/their knowledge and belief.

LUCY C. MORRISON
Notary Public
COMMONWEALTH OF MASSACHUSETTS
My Commission Expires
May 9, 2025

Signature of Notary Public

Lucy C. Morrison
Printed Name of Notary
My Commission Expires May 9, 2025

5.5 Filing of Decision

Filed at the Dukes County Registry of Deeds, Edgartown, on: August 12, 2019

Deed – Book 1503, Page 186
Document Number: 00004381