IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHEROKEE NATION, ***et al.***,

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR, ***et al.***,

Defendants.

Case No. 1:20-cv-02167-TJK

FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLES OF AUTHORITIES

Cases

Constitution and Statutes

Regulations

Other Authorities

INTRODUCTION

This case concerns the approval by operation of statute of tribal-state gaming compacts under the Indian Gaming Regulatory Act, or IGRA. Plaintiffs—four federally recognized Oklahoma tribes—challenge the statutory approval of gaming compacts between the State of Oklahoma and two other tribes, the Comanche Nation and the Otoe-Missouria Tribe. Plaintiffs claim these compacts violate IGRA and that the Secretary of the Interior acted arbitrarily and capriciously under the Administrative Procedure Act by allowing them to take effect.

Plaintiffs' challenge faces three principal obstacles. First, Plaintiffs have not established Article III standing at the summary judgment stage. Despite the compacts being in effect for over five years, Plaintiffs offer no concrete evidence of actual economic harm—no declarations showing lost revenue, reduced visitation, or employee layoffs. And their expert report addresses only hypothetical scenarios rather than specific evidence of impacts. Second, the Department of the Interior did not act arbitrarily or contrary to law in allowing the compacts to be deemed approved by operation of IGRA. The submitted compacts met all statutory and regulatory requirements, and the disputed question of the Governor's authority under Oklahoma law was outside the scope of federal review. Third, the specific compact provisions Plaintiffs challenge either fall within IGRA's permissible scope or, if not, are (by operation of the statute) not approved—there was no need to invalidate the compacts on the whole.

For these reasons, the Court should deny Plaintiffs' Motion for Summary Judgment and grant summary judgment for Federal Defendants.

BACKGROUND

I. Statutory and Regulatory Background

The Indian Gaming Regulatory Act, or IGRA, 25 U.S.C. § 2701, et seq., "creates a framework for regulating gaming activity on Indian lands." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014). Congress passed IGRA in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221–222 (1987), which held that states lacked regulatory authority over gaming on Indian lands. *Bay Mills*, 572 U.S. at 794. "Through IGRA, Congress sought to 'balance state, federal, and tribal interests.'" *W. Flagler Assocs., Ltd. v. Haaland*, 71 F.4th 1059, 1062 (D.C. Cir. 2023) (quoting *Amador Cnty. v. Salazar*, 640 F.3d 373, 376 (D.C. Cir. 2011)). IGRA aims to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

IGRA divides gaming into three classes. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48 (1996). The third of these—"Class III" gaming—is implicated here and includes casino-like games such as blackjack, roulette, and slot machines. *Bay Mills*, 572 U.S. at 785; 25 C.F.R. § 502.4 (2020). Under IGRA, Class III gaming generally cannot occur on "Indian lands" unless it is: (1) authorized by an appropriate tribal resolution; (2) permitted in the State "for any purpose by any person, organization, or entity"; and (3) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1). "The rationale for the compact system is that 'there is no adequate Federal regulatory system in place for Class III gaming, nor do tribes have such systems for the regulation of Class III gaming currently in place,' and thus 'a logical choice is to make use of existing State regulatory systems' through a negotiated compact." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1549 (10th Cir. 1997) (quoting S. Rep. No. 100–446 (1988), at 13–14, *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3083–84).

The federal government has no role in the compact negotiation process between tribes and states under IGRA. After the tribes and states agree to a compact and present the tribal-state compact to the Secretary of the Interior, "the Secretary can do one of three things." *W. Flagler*, 71 F.4th at 1062–63 (citing *Amador Cnty.*, 640 F.3d at 377).

> First, she may affirmatively approve the compact. 25 U.S.C. § 2710(d)(8)(A). Second, she "may disapprove" the compact, but "only if" the compact violates IGRA, another federal law, or the federal government's trust obligations to Indians. *Id.* § 2710(d)(8)(B). Third, if she does not act within 45 days, the compact is "considered ... approved[,]" "but only to the extent the compact is consistent with the provisions of [IGRA]." *Id.* § 2710(d)(8)(C).

Id.

In 2008, the Department of the Interior (Department) published regulations at 25 C.F.R. Part 293 governing compact submission and review. 79 Fed. Reg. 37907 (Jul. 2, 2008) ("Part 293" or "regulations").[1] To ensure that submitted compacts have been "entered into" by both the Tribe and the State, the regulations required the Tribe and the State to submit (a) an original signed copy of the compact; (b) a "tribal resolution or other document" certifying that "the tribe has approved the compact or [compact] amendment in accordance with applicable tribal law"; and (c) "Certification from the Governor or other representative of the State that he or she is authorized under State law to enter into the compact or amendment." 25 C.F.R. § 293.8(a)–(c). Compacts that are approved by the Secretary or "considered to have been approved" by operation of IGRA where the Secretary does not act, also known as "deemed approved," become effective only after the Secretary publishes a notice of approval in the Federal Register. 25 U.S.C. § 2710(d)(3)(B)

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[1] The Department updated Part 293 in 2024, 89 Fed. Reg. 13232 (Feb. 21, 2024), but the 2008 version of those regulations controlled in this case and is cited throughout.

(compacts effective only upon publication), § 2710(d)(8)(D) (mandating publication in the Federal Register).

II. Statement of Facts

In 2004, the State of Oklahoma offered federally recognized tribes a Model Compact for Class III gaming under the State-Tribal Gaming Act, that, if accepted by a tribe, did not need further approval from the State before it could be presented to the Secretary for approval under IGRA. Okla. Stat. tit. 3A, § 281 (2020). The Comanche Nation and the Otoe-Missouria Tribe of Indians ("Comanche" and "Otoe-Missouria," respectively, and together, the "Defendant Tribes") entered into Model Compacts in 2005. *See* 70 Fed. Reg. 3902 (Jan. 27, 2005) (Comanche Model Compact approval); 70 Fed. Reg. 36407 (June 23, 2005) (Otoe-Missouria Model Compact approval).

In 2019, several Oklahoma tribes, including Plaintiff Tribes—the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, and the Citizen Potawatomi Nation (together, the "Plaintiffs")—sued the Governor of Oklahoma regarding the Model Compact's renewal provisions. *See generally Cherokee Nation v. Stitt*, 475 F. Supp. 3d 1277 (W.D. Okla. 2020). In *Stitt,* the Governor argued that the Model Compacts did not automatically renew because legislative or executive action was required to extend them. Comanche and Otoe-Missouria—whose chairmen, Mark Woommavovah and John R. Shotton, are named Defendants in this litigation—intervened in that suit as well. The United Keetoowah Band of Cherokee Indians in Oklahoma and the Kialegee Tribal Town—whose leaders were also named as defendants but later dismissed—moved to intervene in *Stitt*, but the district court denied those motions. *See Cherokee Nation v. Stitt ex rel. Oklahoma*, No. CIV-19-1198-D, 2020 WL 963380, at *3 (W.D. Okla. Feb.

27, 2020). While the *Stitt* litigation was pending, the Governor negotiated new compacts with Comanche and Otoe-Missouria, and Defendant Tribes voluntarily dismissed their claims in *Stitt*.

On April 23, 2020, Comanche and Otoe-Missouria submitted their new compacts to the Secretary for approval under IGRA. *See* Administrative Record (AR) 1. Both Comanche and Otoe-Missouria submitted an original signed copy of their respective compact, AR 5–34 (Comanche Compact), AR 39–68 (Otoe-Missouria Compact) (together, the "Compacts"); tribal resolutions approving the respective Compacts in accordance with applicable tribal law, AR 4 (Comanche Resolution), AR 37–38 (Otoe-Missouria Resolution); and a certification that the Governor was authorized under State law to enter into the compact, AR 3, 36. The next day, the Governor submitted a memorandum certifying that he was authorized under State law to enter into compacts and that the Compacts were consistent with IGRA. AR 85–95. During the 45-day statutory review period, Plaintiffs submitted a letter to the Secretary stating that the Compacts were unlawful, including because the Governor allegedly lacked authority to enter the Compacts on behalf of the State. *See, e.g.*, AR 607–08 (Cherokee Letter). The Oklahoma Attorney General submitted a legal opinion during the 45-day review period asserting that the Governor lacked authority to enter the Compacts on behalf of the State. AR 508–16.

The Compacts were deemed approved by operation of IGRA because the Secretary did not act within the statutory 45-day review period ending on June 7, 2020, and they became effective upon published notice later that month, "but only to the extent the [Compacts are] consistent with [IGRA]." 25 U.S.C. § 2710(d)(3)(C); *see Tribal-State Class III Gaming Compacts Taking Effect in the State of Oklahoma*, 85 Fed. Reg. 38919 (June 29, 2020).

Three days before the end of IGRA's 45-day review period for the Compacts, the Oklahoma legislature's Senate President Pro Tempore and Speaker of the House of

Representatives, respectively, filed an original action in the Oklahoma Supreme Court challenging the Governor's authority to sign the Compacts on the State's behalf. AR 2612. On July 21, 2020—more than six weeks after the IGRA's 45-day review period for the Compacts concluded and nearly a month after the Compacts had become effective for purposes of IGRA—the Oklahoma Supreme Court ruled on the petition. *Treat v. Stitt (Treat I)*, 473 P.3d 43 (Okla. 2020). The court held that "[t]he tribal gaming compacts Governor Stitt entered into with the Comanche Nation and Otoe-Missouria Tribes are invalid under Oklahoma law. . . . Oklahoma is not and cannot be legally bound by those compacts until such time as the Legislature enacts laws to allow the specific Class III gaming at issue, and in turn, allowing the Governor to negotiate additional revenue." *Id.* at 45.

Plaintiffs filed suit in August 2020, alleging under the Administrative Procedure Act ("APA") that the Secretary of the Interior acted arbitrarily and contrary to IGRA by not exercising his authority to disapprove the Compacts. *See* Compl., Dkt. No. 1. The operative Complaint includes seven counts against the Federal Defendants, including the Department, the Secretary, and the Assistant Secretary for Indian Affairs. *See* Second Am. Compl. ("SAC") ¶¶ 12–14, 232–65, Dkt. No. 104. The seven counts can be grouped into two categories. Counts One, Two and Three "dispute the validity of the entire compacts because they were not legally 'entered into' as IGRA requires." *Cherokee Nation v. United States Dep't of the Interior*, 643 F. Supp. 3d 90, 108 (D.D.C. 2022); Mem. Op. and Order, Dkt. No. 157 at 21–22. Counts Four, Five, Six, and Seven "dispute the legality of certain provisions in the compacts." *Id.* The Complaint also includes claims against the Chairman of the Business Committee of the Comanche Nation, and Chairman of the Tribal Council of the Otoe-Missouria Tribe. *See* SAC ¶¶ 16–19, 266–68. Plaintiffs seek declaratory relief and an order reversing the deemed approval of the Compacts under IGRA and remanding them to the Secretary for disapproval. *See* SAC at 129–31 (Prayer for Relief).

In October 2021, Federal Defendants and then-Comanche Chairman Woommavovah moved to dismiss Plaintiffs Complaint. In November 2022, the Court granted in part Federal Defendants' motion and denied Chairman Woommavovah's motion. *Cherokee Nation*, 643 F. Supp. 3d at 121. The Court found that Plaintiffs had "plausibly alleged standing" to challenge the Comanche and Otoe-Missouria Compacts but had not plausibly alleged standing to challenge the United Keetoowah Band's or the Kialegee Tribal Town's compacts. *Id.* at 105. The Court therefore dismissed the claims against Defendant Joe Bunch, Chief of the United Keetoowah Band, and Defendant Brian Givens, Mekko of the Kialegee Tribal Town. *Id.* at 121. The Court also denied Federal Defendants' motion to dismiss under Rule 12(b)(6), finding that their "limited" challenge to Plaintiffs claims at the pleading stage failed. *Id.* at 116, 121.

Federal Defendants answered the Complaint, Dkt. No. 163, and lodged the Administrative Record. Dkt. No. 164. Plaintiffs moved to compel Federal Defendants to produce certain deliberative documents. Dkt. No. 166. The Court denied Plaintiffs motion, finding the deliberative documents were not part of the administrative record and that Plaintiffs failed to show bad faith or improper behavior by the Secretary. Dkt. No. 215.

While that motion to compel was pending, the Court stayed the case pending resolution of a question of state law unrelated to the summary judgment motions here that the Court certified to the Oklahoma Supreme Court. Min. Order of Mar. 21, 2024. The Oklahoma Supreme Court answered the certified question, *see* Dkt. Nos. 198, 205, and the Court lifted the stay in its Order denying Plaintiffs' motion to compel. Dkt. No. 215.

Plaintiffs now move for summary judgment on all counts in the Second Amended Complaint. Pls.' Mot. for Summ. J. and Mem. of P. & A. ("Pls.' Mot."), Dkt. No. 223, 223-1.

STANDARD OF REVIEW

All of Plaintiffs' claims are brought under the APA and are governed by the "deferential arbitrary-and-capricious standard." *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168, 179–80 (2025); 5 U.S.C. § 706(2)(A) (instructing reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). This standard of review is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). The reviewing court determines whether the agency "considered the factors relevant to its decision and articulated a rational connection between the facts found and the choice made." *Keating v. Fed. Energy Regul. Comm'n*, 569 F.3d 427, 433 (D.C. Cir. 2009). The court's review "must be based on the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, (1971). "If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

Rule 56 does not apply "[w]hen evaluating cross-motions for summary judgment under the APA." *Healthy Gulf v. Burgum*, 775 F. Supp. 3d 455, 468 (D.D.C. 2025). Instead, the court's review is "limited to 'deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review.'" *Id.* (quoting *Ipsen Biopharmaceuticals, Inc. v. Becerra*, 678 F. Supp. 3d 20, 29 (D.D.C. 2023), *aff'd*, 108 F.4th 836 (D.C. Cir. 2024)). As the parties challenging the administrative decision, Plaintiffs bear the burden to demonstrate an APA violation. *Banner Health v. Sebelius*, 715 F. Supp. 2d 142, 153 (D.D.C. 2010).

ARGUMENT

The Court should grant summary judgment for Federal Defendants. First, the Court lacks Article III jurisdiction because Plaintiffs have failed to produce evidence of a certainly impending injury in fact traceable to the Compacts, as is necessary to establish standing. Second, the Compacts were properly before the Secretary for review under IGRA and he did not act arbitrarily by allowing the Compacts to become approved by operation of IGRA despite the unresolved State separation of powers dispute. Third, the Compacts were deemed approved by operation of IGRA and published in the Federal Register. As a result, the Compacts are valid and enforceable only to the extent they are consistent with IGRA's provisions. No clause is contrary to IGRA such that the Secretary acted arbitrarily in not disapproving the Compacts.

I. Plaintiffs Lack Standing.

The Court should grant summary judgment for Federal Defendants because Plaintiffs have failed to carry their burden to show they have suffered an injury in fact traceable to the challenged action necessary for Article III standing at summary judgment. "The Constitution limits the 'judicial Power of the United States' to 'Cases' or 'Controversies.'" *Humane Soc'y of the U.S. v. Perdue*, 935 F.3d 598, 602 (D.C. Cir. 2019) (quoting U.S. Const. art. III, §§ 1–2). "One of the essential elements of a legal case or controversy is that the plaintiff have standing to sue." *Trump v. Hawaii*, 585 U.S. 667, 697 (2018). To show standing, Plaintiffs "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

Plaintiffs must establish each of those elements "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "A plaintiff's burden to demonstrate standing grows heavier at each stage of the litigation."

Osborn v. Visa Inc., 797 F.3d 1057, 1063 (D.C. Cir. 2015). At summary judgment, Plaintiffs "can no longer rest" on "mere allegations," but must set forth "specific facts." *Lujan*, 504 U.S. at 561. "Although general factual allegations of injury resulting from the defendant's conduct may suffice to show standing at the motion to dismiss stage, at summary judgment a court will not presume the missing facts necessary to establish an element of standing." *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015) (citation modified). Plaintiffs' "burden of proof is to show a 'substantial probability'" that they meet each element, and they "must support each element of [their] claim to standing 'by affidavit or other evidence.'" *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (citations omitted).

Where, as here, the plaintiffs are not "the object of the government action or inaction" challenged, "standing is not precluded, but it is ordinarily substantially more difficult to establish." *Lujan,* 504 U.S. at 562 (citation omitted). Indeed, "courts [only] occasionally find the elements of standing to be satisfied in cases challenging government action on the basis of third-party conduct." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004), *abrogated on other grounds by Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 620–21 (D.C. Cir. 2017).

Plaintiffs allege three types of injuries in support of standing. They allege that because of the Secretary's approval of the Compacts, they are (1) unable to compete on an equal footing with Defendant Tribes, (2) suffering direct economic injuries, and (3) suffering competitive injuries. Pls.' Mot. at 5–10. When this Court considered Plaintiffs' standing at the pleading stage, the Court held their allegations of economic injury were enough to survive a motion to dismiss. *Cherokee Nation*, 643 F. Supp. 3d at 108. But the case is now at the summary judgment stage. Plaintiffs must do more than allege; they must prove.

Plaintiffs have shown no "specific facts" to support an injury in fact. To establish "injury-in-fact," the plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *SunCom Mobile & Data Inc. v. FCC*, 87 F.3d 1386, 1388 (D.C. Cir. 1996) (citation modified). "It must also be 'substantially probable' that the challenged agency action caused that injury." *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175 (D.C. Cir. 2012). Plaintiffs fail to meet their burden to show a substantial probability that they have suffered the equal-footing injuries, direct economic injuries, or competitive injuries they allege for either the ten existing casinos or the six potential casinos. *See* Pls.' Mot. at 5–10.

A. The equal footing theory of standing does not apply to these facts.

Plaintiffs' first theory of injury, the equal footing or opportunity injury, does not apply to these facts. *See* Pls.' Mot. at 5–7. An equal footing or opportunity injury occurs when "the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group[.]" *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Examples of an opportunity injury include denying an applicant the opportunity to compete for all available openings in a medical school class because of race, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978); denying a candidate the ability to compete equally for a position because of a "patronage hiring practice[,]" *Tarpley v. Jeffers*, 96 F.3d 921, 924 (7th Cir. 1996); or denying a prisoner a fair opportunity at receiving parole because of a prohibition against having representation at the hearing, *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1102 (D.C. Cir. 2005). *See also* 13A Wright & Miller's Fed. Prac. & Proc. Juris. § 3531.4 n.104–111 (3d ed. 2025) (collecting cases). The Court should decline to apply this doctrine because Plaintiffs have failed to identify any barrier or unequal treatment that impedes their opportunity to obtain a benefit that they are "able and ready" to seek. *Ne. Fla. Chapter*, 508 U.S. at 666. Plaintiffs have long operated Class III gaming facilities under compacts approved by the Secretary. Plaintiffs have not alleged that the approvals of the Compacts at issue here impede them from doing or seeking anything.

Plaintiffs find no support for their equal footing theory in either *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490 (7th Cir. 2005) or *Forest County Potawatomi Community v. United States*, 317 F.R.D. 6 (D.D.C. 2016). In *Lac Du Flambeau,* the Lac du Flambeau Band ("LDF") challenged the Secretary's approval of a gaming compact between the Ho-Chunk Nation and the State of Wisconsin. 422 F.3d at 493. A provision in that compact required Wisconsin to notify Ho-Chunk if it received a submission from the Secretary to concur with a determination that another tribe's pending application to game on newly acquired trust lands would be in the best interest of the applicant tribe and not detrimental to the surrounding community. *Id.* at 494 (citing 25 U.S.C. § 2719(b)(1)(A)). If Ho-Chunk then notified the state that the new gaming facility would substantially reduce its gaming revenue, the Compact barred Wisconsin's governor from concurring with the Secretary's determination, unless the State agreed to indemnify Ho-Chunk. *Id.* at 494. The court found that the anti-competitive provision, coupled with LDF's pending application to game on newly acquired lands, was a basis for supporting LDF's injury. *Id.* at 496–99. Wisconsin's governor would have a strong incentive to reject LDF's application so that it would not have to indemnify Ho-Chunk, which was an impediment to LDF's future gaming. *Id.* at 499.

Likewise, in *Forest County Potawatomi*, this Court held that the Menominee Indian Tribe of Wisconsin had standing to intervene in a challenge to Interior's disapproval of a discrete compact amendment chosen by an arbitrator due to a "50-mile non-competition zone." 317 F.R.D.

at 12 (citation omitted). The non-competition provision would have impeded Menominee's efforts to obtain state concurrence by requiring the state to "compensate Potawatomi for any lost revenue" from a future Menominee casino. *Id*.

Plaintiffs allege no such impediment to them receiving or seeking any kind of benefit. Unlike *Lac du Flambeau*, none of the Plaintiffs have a two-part determination pending before the Secretary. And unlike both *Lac du Flambeau* and *Forest County Potawatomi*, the Compacts do not include anticompetitive provisions. Plaintiffs' allegation that they are "forced to compete" with the Defendant Tribes' casinos is not an opportunity injury. It is merely a repackaging of their alleged competitive injuries and is outside their equal footing theory's sphere. *See* Pls.' Mot. at 6; *see also id.* at 7 (alleging equal footing injuries are particularized because approvals "increase competition in the same market in which Plaintiff Nations compete"). Moreover, to the extent Plaintiffs complain that the Compacts might contain terms Plaintiffs view as more or less favorable than terms in their existing compacts, nothing in the Compacts restricts Plaintiffs from requesting negotiations with the State over amendments to their compacts. Plaintiffs cannot show an opportunity injury.

B. Five and a half years after the compacts were deemed approved, Plaintiffs offer only speculative evidence of any direct economic harm or competitive injuries from the currently operating casinos.

Plaintiffs' alleged competition-based injury is also insufficient. The compacts have been effective for purposes of IGRA for over five and a half years. And years before that, Defendant Tribes were gaming under the Model Compacts. Yet Plaintiffs provide no evidence—whether past, present, or future—showing that any one or all of the Plaintiffs has suffered any actual new economic harm or competitive injury from the Defendant Tribes' casinos since the Compacts became effective.

First, Plaintiffs do not meet their burden to show direct economic injury from the Defendant Tribes' existing casinos operating under the Compacts. Plaintiffs offer no declarations or affidavits showing any actual financial harm, such as an actual decline in visitation, lost gaming revenue, or having to lay off employees. It is not enough for Plaintiffs to merely show a statutory violation of IGRA (which they have not). Plaintiffs must show a substantial probability that they are or will be injured because of the Compacts. *Spokeo*, 578 U.S. at 342 ("Article III standing requires a concrete injury even in the context of a statutory violation."). Plaintiffs submit the Report of Dr. Brian Wyman in an effort to show that revenues otherwise destined for some or all of Plaintiffs' casinos are instead being diverted to the Defendant Tribes' existing casinos. Pls.' Mot. Ex. 27, ("Wyman Report"), Dkt. 223-29. But the showing amounts to nothing more than hypothetical and speculative injuries. Wyman opines only on what would happen if the Defendant Tribes' existing casinos close. Wyman Report ¶ 70, 72, 118–121, 166–67. But that scenario assumes the Compacts are invalid for purposes of IGRA and the Defendant Tribes' casinos stop operations altogether. It says nothing about what effect, if any, the Compacts had at the time the Complaint was filed—or any other time—on Plaintiffs' bottom line. For the reasons stated below, the Defendant Tribes' casinos closing is speculative and certainly not impending. Plaintiffs have not provided evidence that any present, direct economic injury "actually exists." *See Spokeo*, 578 U.S. at 340.

Plaintiffs also fail to show a competitive injury related to the existing casinos. The competitive standing doctrine applies "when an agency action … itself imposes a competitive injury" that (1) "provides benefits to an existing competitor," or (2) "expands the number of entrants in the petitioner's market." *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002). For the doctrine to apply, the "challenged agency action" must "*almost surely* cause petitioner to lose business." *El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995) (emphasis added).

On this point, the only evidence Plaintiffs offer is again the Wyman Report. The Wyman Report fails to establish a competitive injury for at least three reasons. *First*, it addresses only whether Plaintiffs share customers with the existing casinos. *See* Wyman Report ¶¶ 65–74. But to show competitor standing it is not enough to say generally that they compete; a party must show that they face "imminent *increase* in competition." *Delta Air Lines, Inc. v. Exp.-Imp. Bank of U.S.*, 85 F. Supp. 3d 250, 262 (D.D.C. 2015) (emphasis added); *cf. Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000) (noting, in context of intervention as of right, that "it is hard to find anything in [IGRA] that suggests an affirmative right for nearby tribes to be free from economic competition"). Defendant Tribes' existing casinos have operated alongside Plaintiffs' casinos for years, long before the new compacts went into effect. But the Wyman Report does not state whether competition has gone up, gone down, or stayed the same as a result of the Secretary taking no action on the Compacts.

Second, the Wyman Report analyzes only hypothetical patron behavior if the Defendant Tribes' casinos close entirely. *See* Wyman Report ¶¶ 70, 72, 118–21, 166–67. Those injuries rest on speculative chain of events that does not meet Plaintiffs' standing burden, and in any event, fails to recognize that the Defendant Tribes were operating casinos before the present Compacts. Under IGRA, Comanche and Otoe-Missouria have a guaranteed right to game on their land. A federal district court has found that the Model Compacts, which both Comanche and Otoe-Missouria operated under previously, automatically renewed, which means Defendant Tribes would be able to continue gaming under those compacts. *See Cherokee Nation*, 475 F. Supp. 3d at 1283. Plaintiffs' injuries rest on speculative injuries that may not come to pass. *See Grocery Mfrs.*

Ass'n, 693 F.3d at 175 ("This hypothetical chain of events fails as a showing of Article III standing.").

Third, the Wyman Report fails to connect any change in competitive conditions to the actual challenged agency action. A "party must make a concrete showing that it is in fact likely to suffer financial injury as a result of the *challenged action*[.]" *KERM, Inc. v. FCC*, 353 F.3d 57, 60–61 (D.C. Cir. 2004) (emphasis added). The Wyman Report does not answer what effect, if any, the Compact approvals by operation of statute have had on competition. Stating only that the casinos share customers says nothing about whether the *Compacts* have or will likely cause an increase in competition and thus financial injury to Plaintiffs. Indeed, if competition has decreased since the new Compacts became effective, there would be no injury to Plaintiffs sufficient to show standing. *See El Paso*, 50 F.3d at 28 (cautioning that even when a plaintiff is "competing" in the relevant market, "that would not necessarily bring petitioners within the ambit of our 'competitor standing' cases. [The plaintiff] would still be required to allege facts demonstrating 'injury in fact.'").[2]

Without any evidence to support their injuries related to the existing casinos, Plaintiffs cannot show standing. *See Lujan*, 504 U.S. at 561. They contend, however, that they can show a competitive injury because of the benefits conferred by the Compacts. Pls.' Mot. at 9. Plaintiffs identify three purported competitive "benefits" conferred by the Compacts: (1) the right to conduct gaming; (2) authority to offer Class III games that Plaintiffs cannot; and (3) lower exclusivity fees. Pls.' Mot. at 9. None supports standing. The first benefit, the right to game, existed long before

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[2] The Court ruled previously that Plaintiffs sufficiently alleged that the Comanche Nation's newly expanded Cache Casino supported their showing of redressability. *See Cherokee Nation*, 643 F. Supp. 3d at 25 (citing SAC ¶ 231.r). Plaintiffs, however, have showed no specific facts that the Cache Casino is causing any injury now or in the future. *See generally* Pls.' Mot.; Wyman Report.

the Compacts became effective. Defendant Tribes were gaming under the Model Compact going back to 2005; the current Compacts merely continue the rights the Defendant Tribes have been exercising now for over 20 years. And, as Plaintiffs acknowledge, "federal law *guarantees* Indian tribes equal rights and privileges to enter [the gaming] market consistent with IGRA." *See* Pls.' Reply in Supp. of Mot. to Amend Suppl. Compl. 15, Dkt. No. 103 (citing 25 U.S.C. §§ 2710, 5123(f)). If both the Model and current Compacts are found invalid, Comanche and Otoe-Missouria may enter into a new compact with Oklahoma. *See Treat v. Stitt*, 481 P.3d 240, 242–43 (Okla. 2021) (*Treat II*) (noting two methods for entering into new compacts).

As to the second and third benefits, Plaintiffs offer no evidence that the Defendant Tribes are offering any games that are currently not allowed in Oklahoma or have reduced prices or increased jackpots. Bare allegations about non-existent games and hypothetical use of surplus funds from lower fees, unsupported by specific evidence, cannot satisfy Plaintiffs' summary judgment burden. *Lujan*, 504 U.S. at 561. The Compacts do not authorize gaming that is currently not allowed in Oklahoma. And Plaintiffs' theory that lower exclusivity rates provide benefits to Comanche and Otoe-Missouria contradicts their own allegations that the Compacts in fact harm the Defendant Tribes through impermissible taxation. *See* Pls.' Mot. at 47–50.

Because the Wyman Report does not support Plaintiffs' direct or competitive injury theories, and because they offer no other evidence to support their claims, Plaintiffs fail to show an injury in fact from the operation of the Defendant Tribes' existing casinos.

C. Alleged harm from future casinos that have yet to be authorized is speculative and not certainly impending.

Plaintiffs next turn from existing casinos to potential future ones. Plaintiffs allege injuries from the Defendant Tribes' alleged "plans to add six more locations to their operations." Pls.'

Mot. at 7. But those allegations are insufficient to demonstrate standing because Plaintiffs offer nothing to prove that those injuries are imminent.

The imminence "theory of standing is not easily satisfied[.]" *Pub. Citizen, Inc. v. Trump*, 435 F. Supp. 3d 144, 149 (D.D.C. 2019). "[A] 'substantial risk' is more than a 'possible' one, and even an 'objectively reasonable likelihood' of the injury occurring is not enough." *Cherokee Nation*, 643 F. Supp. 3d at 112 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 568. 409–10, 414 n.5. (2013)). "Further, particularly relevant here, where 'future competition remains indeterminable and amorphous pending future clarifying events that postdate the filing of the complaint,' the imminence requirement is unmet." *Id.* (quoting *Delta Air Lines*, 85 F. Supp. 3d at 267).

Plaintiffs fail to show the six future casinos are imminent. As Plaintiffs allege, the six proposed locations are either completely or partially within other tribes' reservations. Pls.' Mot. Statement of Facts ¶ 91, Dkt. No. 223-2. But the Defendant Tribes cannot game on those lands—and the Compacts are thus irrelevant—because those lands are not held in trust for either of the Defendant Tribes. Tribes generally cannot game on land that was taken into trust by the United States after 1988, unless certain exceptions apply. *See* 25 U.S.C. § 2719(a)–(b). One of those exceptions, known as a "two-part determination," allows gaming on newly acquired land if the Secretary determines (after consulting with State officials and other local tribes) that a new gaming facility "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." *Id.* § 2719(b)(1)(A). After the Secretary makes a favorable two-part determination, the Governor of the State must also concur in that determination. *Id.* This process "is a complicated one, the results of which are uncertain." *Cherokee Nation*, 643 F. Supp. 3d at 112.

Neither of the Defendant Tribes has an application pending before the Department of the Interior to acquire land in trust for gaming purposes.[3] Even if one or both Defendant Tribes submitted an application this year, the fee-to-trust process is a multi-step, multi-year endeavor where the outcome is uncertain. Plaintiffs' contention that their injuries from "the future casinos[] can be realized at any time" is insufficient for Article III purposes. Plaintiffs do not contend that the Compacts permit the Secretary to bypass consultation with "other nearby Indian tribes" or mandate a specific finding for the "two-part determination" by the Secretary. The Compacts, at most, remove a single potential impediment to authorizing gaming on new lands that may be acquired in trust—the governor's concurrence with a favorable two-part determination by the Secretary. Plaintiffs thus fail to show a substantial risk of any imminent financial harm or competitive injury from the six speculative future casinos. *New World Radio*, 294 F.3d at 172 (competitive injury does not apply to "an agency action that is, at most, the first step in the direction of future competition").

In sum, Plaintiffs' standing theories fail for a common reason: each depends on speculative, multi-step contingencies involving future trust acquisitions, future state and federal approvals, and hypothetical market impacts. Plaintiffs fail to support their allegations with facts. Such conjectural harms are insufficient to establish Article III standing at summary judgment. The Court should grant summary judgment for Federal Defendants.

[3] *See* Declaration of Troy Woodward, (Acting) Director, Office of Indian Gaming, Ex. A ¶ 4.

II. The Secretary Did Not Act Arbitrarily or Contrary to IGRA With Respect to the State Law Dispute Regarding the Governor's Authority (Counts I-III).

Even if Plaintiffs had standing, summary judgment in favor of Federal Defendants would still be appropriate. In Counts One, Two, and Three, Plaintiffs contend that the Compacts are invalid because they were not legally "entered into" as required by IGRA. The Court should grant summary judgment for Federal Defendants as to Counts One, Two and Three because IGRA does not authorize the Secretary to adjudicate state separation of powers disputes regarding a governor's authority to bind a state. In any event, the Compacts satisfied all facial submission requirements under 25 C.F.R. 293.8(a)–(c) and the Secretary did not act arbitrarily or contrary to law in allowing the Compacts to become approved by operation of IGRA.

A. The compact submittals complied with IGRA.

Under IGRA, "[t]he Secretary is authorized to approve any Tribal-State compact entered into between [the] Indian tribe and [the] State governing gaming on Indian lands of such Indian tribe." 25 U.S.C. § 2710(d)(8)(A). In order for a compact to be properly before the Secretary for review under IGRA, the Department's then-applicable regulations governing compact submission and review required that either the state or tribe submit: (1) an original copy of the compact or amendment; (2) a tribal resolution "that certifies that the tribe has approved the compact or amendment in accordance with applicable tribal law"; and (3) "[c]ertification from the Governor or other representative of the State that he or she is authorized under State law to enter into the compact or amendment." 25 C.F.R. § 293.8(a)–(c) (2008).

Here, Comanche and Otoe-Missouria each submitted to the Secretary a compact, a tribal resolution, and a certification from the Governor. AR 2–34 (Comanche); AR 35–68 (Otoe-Missouria). The Governor's certification stated that he had authority to enter into the compact and bind the state. AR 3, 36. All the documents the Defendant Tribes submitted were facially valid.

Nothing more was required for the Secretary to confirm that the Compact had been "entered into" under IGRA. *See Pueblo of Santa Ana*, 104 F.3d at 1555 (IGRA requires that a compact be "entered into" "before it can go into effect"). And when the Secretary did not act on the Compacts within the Congressionally-mandated 45-day review period, the Secretary published notice of the approved Compacts in the Federal Register, making the Compacts "in effect." *See* 85 Fed. Reg. at 38,919; 25 U.S.C. § 2710(d)(3)(B), (d)(8)(D). The Comanche and Otoe-Missouria Compacts thus met all the requirements in IGRA and the implementing regulations for the Compacts to be considered entered into and to take effect under federal law. *See* 25 U.S.C. § 2710(d)(8)(A); 25 C.F.R. §§ 293.7, 293.8.

B. The state law dispute about the Governor's authority was outside the scope of the Secretary's review.

To avoid this conclusion, Plaintiffs assert that the Secretary should have looked behind state law to confirm whether the Governor's certification submitted with the Compact was valid and whether the Governor could in fact bind the state to the compact. Pls.' Mot. 13–15, 34–39. Neither IGRA nor the regulations impose such a requirement.

In *West Flagler*, the D.C. Circuit made clear that questions of state law are outside the scope of the Secretary's compact review. 71 F.4th at 1065. There, the D.C. Circuit held that the Secretary allowing a compact between the Seminole Tribe and State of Florida to be deemed approved by statute did not violate IGRA, even though the Secretary did not resolve the state law questions raised. *Id.* at 1062. The court explained that IGRA only governs gaming on Indian lands, and therefore the Secretary did not act arbitrarily or contrary to IGRA even though the compact addressed sports betting outside Indian lands. *Id.* at 1066. As to whether that sports betting clause (which was ratified by the Florida legislature) was valid under the Florida constitution, the court held that such a "question and any other related questions of state law are outside the scope of the

Secretary's review of the Compact, are outside the scope of our judicial review, and as a prudential matter are best left for [the state]'s courts to decide." *Id.* at 1068.

Applying *West Flagler* here, the Secretary was not required to look behind state law to resolve the dispute over the Governor's authority to enter into the compacts. The compacts met all the statutory and regulatory requirements for compacts to be entered into under IGRA. 25 C.F.R. § 293.8. IGRA narrowly restricts the Secretary's disapproval authority to violations of IGRA, or other provisions of Federal law that do not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians. 25 U.S.C. § 2710(d)(8)(B)(i-iii). Nothing in IGRA mandates that the Secretary disapprove a compact for an alleged violation of state law. *Amador Cnty.*, 640 F.3d at 381 (noting that it "may be correct" that congress did not intend "to embroil the Secretary in lengthy investigations" into whether a compact complies with "other federal law and trust obligations"). As to whether the state had validly bound itself to the Compacts, and thus entered into those agreements, it is state law that controls. *See Cherokee Nation*, 643 F. Supp. 3d at 116–17; *Pueblo of Santa Ana*, 104 F.3d at 1557 ("State law must determine whether a state has validly bound itself to a compact."). That question is therefore outside the scope of the Secretary's review of the compact.[4] *West Flagler*, 71 F.4th at 1068. The Secretary was not required to investigate and research state law to determine whether the Governor's certification that he had authority to bind the state was valid.

[4] Multiple federal courts have reached the same conclusion. *See Pueblo of Santa Ana*, 104 F.3d at 1557 ("Congress did not intend to force the Secretary to make extensive inquiry into state law to determine whether the person or entity signing the compact for the state in fact had the authority to do so."); *Langley v. Edwards*, 872 F. Supp. 1531, 1535 (W.D. La. 1995), *aff'd sub nom. Langley v. Dardenne*, 77 F.3d 479 (5th Cir. 1996) (per curiam); *Rhode Island v. Narragansett Indian Tribe*, No. Civ.A. 94–0619–T, 1995 WL 17017347, at *2 (D.R.I. Feb. 3, 1995); *accord Detroit Int'l Bridge Co. v. Gov't of Canada*, 883 F.3d 895, 899-900 (D.C. Cir. 2018) (federal government not required to look into state law where statutory text does not require it).

The Secretary's decision to decline to resolve the state law issues is especially reasonable given the then-divergent views about state-law requirements. Both Plaintiffs and Defendant Tribes submitted letters to the agency that, respectively, attacked or defended the Governor's asserted authority. *See* AR 607–08 (Cherokee); AR 695–704 (Comanche and Otoe-Missouria). Both the Governor and the Oklahoma Attorney General weighed in too. AR 85–95 (Governor Stitt Memorandum); AR 508–16 (Attorney General legal opinion). And though the Oklahoma legislature's leadership filed an action in state court challenging the compacts on state law grounds that ultimately answered the question, that case was filed just three days before IGRA's 45-day review period ended, and it was not resolved until months after the review period expired. *See* AR 2612. Requiring the Secretary to approve or disapprove a compact based on his construction of state law would thus serve little purpose in this situation. The Secretary has no power to issue binding interpretations of state law so his approval or disapproval would not have answered the disputed questions beyond cavil.

The Oklahoma Attorney General's legal opinion does not change this conclusion. *First*, the legal opinion of a state official is not binding on a federal official such as the Secretary. While Oklahoma state officials, including the Governor, are bound by an Attorney General's legal opinion, *see Keating v. Edmondson*, 37 P.3d 882, 885 & n.8 (Okla. 2001), Federal officials are not. States may not impede or "in any manner control" the actions of federal executive officials when they are carrying out federal laws. *M'Culloch v. Maryland*, 17 U.S. 316, 436 (1819). Thus, the Attorney General's opinion could not bind the Secretary's decision as to whether the Compacts were properly before the Secretary for review under, or are consistent with, IGRA. *Cf. Stenberg v. Carhart*, 530 U.S. 914, 940 (2000) (noting federal courts do not accept as "authoritative" an Attorney General's interpretation of state law in all cases).

Second, the legal effect of the Attorney General's opinion is solely a state law question that is outside the scope of the Secretary's compact review. The amount of weight given to the opinion of an Attorney General and whether such opinions bind state courts and officials varies greatly from state to state. *See*, *e.g.*, *Tahoe Reg'l Plan. Agency v. McKay*, 590 F. Supp. 1071, 1074 n.1 (D. Nev. 1984) (surveying effects of Attorney General opinions in different states). Indeed, even in Oklahoma, the binding effect of opinions depends on the type of opinion given. For many issues, Oklahoma state officers are bound by such opinions until a court says otherwise; when an opinion finds a legislative act unconstitutional, however, that opinion "should be considered advisory only[.]" *State ex rel. York v. Turpen*, 681 P.2d 763, 767 (Okla. 1984). So to determine whether a State Attorney General's opinion resolves a state-law dispute, the Secretary would be forced to research and interpret what weight to give the opinion; whether the pertinent state law officials are bound by the opinion; and, relevant here, whether the opinion would retroactively void any actions already taken. IGRA gives no indication that Congress intended to require the Secretary to conduct such a review of state law issues in such a short time. Indeed, it would be "patently unreasonable to expect that potentially complex questions of that nature can be adequately addressed during the 45 day review period mandated by IGRA." *Narragansett Indian Tribe*, 1995 WL 17017347, at *2.

Contrary to Plaintiffs' assertions, the law of the case doctrine does not demand summary judgment in their favor. Pls.' Mot. at 13 & n.8. "The law of the case doctrine is a principle that guides courts in the exercise of their discretion, not a binding rule," and "rigid adherence to rulings made at an earlier stage of a case is not required under all circumstances[.]" *Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 697 (D.C. Cir. 2022). The denial of a motion to dismiss is an interlocutory order, and "[i]nterlocutory orders are not subject to the law of the case doctrine and may always be reconsidered prior to final judgment." *Langevine v. District of Columbia*, 106 F.3d

1018, 1023 (D.C. Cir. 1997). Indeed, "there are certain situations in which it is widely accepted that courts should not apply the [law of the case] doctrine to preclude reconsideration of a prior legal determination," *Wye Oak*, 24 F.4th at 698, such as when "intervening legal authority makes clear that a prior decision bears qualification." *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 n.14 (D.C. Cir. 1990). The Memorandum Opinion and Order resolving the Motions to Dismiss (Dkt. No. 157) was an interlocutory order and focused on the sufficiency of the allegations in the Complaint. Dkt. No. 215 at 7. And the Order was issued without the benefit of *West Flagler*'s clarification on the scope of the Secretary's review when it comes to disputes over interpretation of state law, making reconsideration of the previous ruling on this issue even more appropriate. The law of the case therefore does not dictate the outcome of these cross-motions for summary judgment.

In sum, the compacts here met the requirements of IGRA at the time they were submitted and were deemed approved by operation of statute. And neither IGRA nor the Department's compact submission and review regulations mandated that the Secretary resolve state law separation of powers issues to determine whether the Compacts were properly before the Secretary for review under IGRA. *See* 25 U.S.C. § 2710(d)(8)(A); 25 C.F.R. § 293.8(a)–(c); *West Flagler*, 71 F.4th at 1068; s*ee also Pueblo of Santa Ana*, 104 F.3d at 1557 ("[T]he Secretary is not expected to *resolve* state law issues regarding that authority in the 45-day period given to him to approve a compact."). The Court should therefore grant Federal Defendants summary judgment on Plaintiffs' Counts One, Two, and Three.

III. The Secretary Did Not Act Arbitrarily or Contrary to IGRA With Respect to Any Specific Compact Provision (Counts IV-VII).

Unable to show the compacts were not entered into, Plaintiffs challenge individual compact provisions in Counts Four, Five, Six, and Seven. Pls.' Mot. at 39–54. The Court should grant summary judgment for Federal Defendants on Counts Four, Five, Six, and Seven because the clauses at issue address activity that is "directly related to the operation of gaming activities" authorized in the Compacts and are therefore not contrary IGRA. 25 U.S.C. § 2710(d)(3)(C)(vii). The Court should therefore conclude that, because the clauses at issue are consistent with IGRA, the Secretary did not act arbitrarily or contrary to law.

But in any event, even if one or more compact provision is determined to be inconsistent with IGRA, the Secretary could not have acted arbitrarily or contrary to law because when a compact is deemed approved by operation of statute, 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*." 25 U.S.C. § 2710(d)(8)(C) (emphasis added). Any compact provisions that are inconsistent with IGRA were therefore not approved. We take in turn Counts Four through Seven and the Compact provisions on which each focuses.

Count Four alleges that the Secretary acted arbitrarily because the Comanche and Otoe-Missouria Compacts "authorize" gaming that is not otherwise permitted in Oklahoma, contrary to 25 U.S.C. § 2710(d)(1)(B). Plaintiffs' claim fails because the Compacts do not authorize gaming that is not currently allowed in Oklahoma, and discussions about such gaming is not contrary to IGRA. Each compact defines "covered games" the same:

> "Covered Game" or any derivative thereof means all Gaming Machines, House-banked Card Games, Nonhouse-Banked Card Games, House-banked Table Games, Nonhouse-banked Table Games, and Event Wagering, which are conducted in accordance with the Standards, as applicable, if the operation of such game by the Tribe would require a Compact and if such game has been approved by the S[tate] C[ompliance] A[gency]. Class II gaming, as defined by IGRA, is expressly excluded from this definition.

AR 8 (Comanche Compact 2.A.7); AR 71 (Otoe-Missouria Compact 2.A.6)

That language contains the important limitation that the identified games are permitted only "if such game has been approved by the [State Compliance Agency]." AR 8, 71. The Compacts offer no more than a potential authorization where a critical condition precedent must satisfied—the game must be approved by the State Compliance Agency ("SCA") before the game is authorized and the Defendant Tribes may begin operating it as a "Covered Game." Operating a game not approved by the SCA is not authorized and would be a violation of the Compacts.

Plaintiffs seem to contend, however, that the SCA has such authority only as to a subset of games under the Compacts, because the definition limits "Covered Games" to those "conducted in accordance with the Standards" before the definition limits "Covered Games" to those authorized by the SCA. Pls.' Mot. at 43–47; AR 12, 46 (defining "Standards"). By Plaintiffs' reading of the Compacts, games that are not subject to the Standards, such as house-banked card games, house-banked table games, and event wagering, do not require SCA approval and the Defendant Tribes would be authorized to operate them under the Compacts. Pls.' Mot. at 44. But the better reading of the Compact, supported by the plain language, is that all games require SCA approval. The commas around the phrase "which are conducted in accordance with the Standards" indicates that the phrase is a parenthetical element. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 163 (2012). The immediately following phrase, "as applicable," applies to that Standards clause because it is the nearest-reasonable-referent, *see id.* at 152, and because it makes logical sense—the Standards apply only to specific electronic games, so when applied to a list of electronic and non-electronic games, the Standards apply only to "applicable" games. Because the "Standards" and "as applicable" clauses are together a parenthetical element, the "if" clauses at the end of the sentence become part of the main sentence (the list of covered games) and do not apply only to the "Standards" clause. *Id.* at 163. The phrase "if such game has been approved by the SCA" therefore applies to the entire series of games listed, making State Compliance Agency approval necessary.

The Compacts are also consistent with IGRA because the statute authorizes Class III gaming on Indian lands where the tribe has an approved ordinance and the gaming is "(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." 25 U.S.C. § 2710(d)(1)(B), (C) (emphasis added). The requirements in subparagraphs (d)(1)(B) and (d)(1)(C) are conjunctive. Having an approved tribal-state compact under (d)(1)(C) does not allow a tribe to conduct gaming activities that would otherwise be contrary to the limitation in (d)(1)(B).

Even though certain games listed under "Covered Games" are not yet approved in Oklahoma, their inclusion in the Compacts does not violate IGRA. Section 2710(d)(3)(C) lists six specific topics that a compact may address, plus "any other subjects . . . directly related to the operation of gaming activities." *Id.* § 2710(d)(3)(C)(vii). Referencing games that may be approved in the future, that only then are authorized for operation by the Defendant Tribes under the Compacts, squarely "fall within the scope of subsection (d)(3)(C)(vii)." *W. Flagler*, 71 F.4th at 1067. And if there is any doubt as to the correct interpretation of this clause, the Court should interpret it "in such a fashion as to render it lawful rather than unlawful." *Id.* at 1065 (citation omitted).

Count Five alleges that the Compacts violate IGRA because they contain revenue sharing provisions without a meaningful concession from the State, making them an illegal tax. Pls.' Mot. at 47–49. The Compacts include revenue sharing provisions that differ from the Model Compacts. AR 27, AR 61 (Compacts Part 10.B). The Compacts also include an exclusivity provision: "The Parties acknowledge and agree that this Compact provides the Tribe with substantial exclusivity over class III Covered Gaming consistent with the goals of IGRA." AR 27, AR 61 (Compacts Part 10.A.).

The phrase "revenue sharing" is not found in IGRA; rather, it is a concept that grew out of compacts negotiated in the early 1990s when tribes in Connecticut agreed to pay percentages of their net win from slot machines in exchange for the state granting the tribes exclusive rights over slots and other Class III gaming. *See* Letter to the Honorable Ralph Sturges, Chief, Mohegan Tribe of Connecticut, from Ada Deer, Assistant Secretary – Indian Affairs (Dec. 5, 1994).[5]

> Over time, the secretary has developed a consistent approach to evaluating the lawfulness of revenue sharing in a gaming compact. First, the secretary analyzes whether the state has offered "meaningful concessions" to the tribe. If meaningful concessions are found, the secretary next examines whether the meaningful concessions provide a substantial economic benefit that is adequate to justify the amount of revenue sharing with the state.

1 Cohen's Handbook of Federal Indian Law § 16.05 (2026). Variation between the revenue percentages tribes agree to pay in their compacts are not unusual. For example, in Wisconsin some tribes with approved compacts pay between 1.75 and 6.5 percent of their revenue for complete statewide exclusivity over slots, blackjack and other Las Vegas-style gaming.[6]

Here, the compacts provide a long-recognized and meaningful concession of "substantial exclusivity over Class III Covered Gaming consistent with the goals of IGRA." AR 27, 61. The Defendant Tribes agreeing to a different revenue sharing scheme than the Plaintiffs have in their

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[5] Available at https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/pdf/508_compliant_1994.12.16_mohegan_tribe_of_indians_tribal_state_gaming_compact_0.pdf (last visited Jan. 23, 2026).

[6] *See generally* Compacts, as amended, for Forest County Potawatomi Community at Section XXXI.G.2. (2005 Amendment) (6.5%), and Sokaogon Chippewa Community at Section XXXII.A. (2003 Amendment) (1.75%), available at https://www.bia.gov/as-ia/oig/gaming-compacts?field_us_state_s__value=WI&field_bogs_federally_recognized_target_id=All&field_approve_or_not_approved_value=All (last accessed Jan. 23, 2026).

Model Compacts does not amount to a violation of IGRA's prohibition against the State "impos[ing] a tax, fee, charge or other assessment." 25 U.S.C. § 2710(d)(4).

Count Six alleges that the Compacts regulate Class II gaming, which IGRA does not permit to be regulated via compact. Plaintiffs claim that the Compacts impermissibly regulate Class II gaming because they require the Defendant Tribes to obtain a certain percentage of their revenue from Class III games, Pls.' Mot. at 49 (citing AR14, AR48 (Compacts Part 3.D)), and to report the number of gaming devices in each gaming facility, *id.* (citing AR8 (Comanche Compact Part 2.A.7.); AR41 (Otoe-Missouria Agreement Part 2.A.6.). To the contrary, the Compacts explicitly state that "nothing in this Compact shall limit the Tribe's right to operate any game that is Class II under IGRA." AR 13, 47.

Plaintiffs' Count Six arguments also fail because the Defendant Tribes' sovereign decisions to agree to operate a certain mix of Class III and Class II games is not, in and of itself, a violation of IGRA. Nothing in the Compacts requires the Defendant Tribes to operate *all* Class III slot machines or controls how any Class II games should be offered. These types of provisions are not new: in 2010, the Department approved a compact between the Seminole Tribe and the State of Florida that set an initial limitation on Class II electronic bingo games and then a graduated conversion to all Class III slot machines as part of the revenue sharing structure.[7] IGRA does not require all tribes to offer the same the mix of Class II or Class III games on the floors of their casinos. The Defendant Tribes' decisions to agree to a mix of Class II and Class III games that differs from the mix Plaintiffs chose to offer does not amount to a violation of IGRA.

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[7] See *Gaming Compact Between the Seminole Tribe of Florida and the State of Florida,* Part XI., available at https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/pdf/508_compliant_2010.07.06_seminole_tribe_tribal_state_gaming_compact.pdf (last visited Jan. 21, 2026, and published at 74 Fed. Reg. 38833 (July 6, 2010).

Count Seven alleges that the Compacts' provisions provide the Governor's authorization "to conduct Class III gaming at six new facilities, to be located on land to be acquired in specified areas of certain counties, and also to concur in any determination by the Secretary that the lands should be taken in trust for gaming purposes and that gaming may be conducted on those lands." Pls.' Mot. at 51 (citing AR19, AR 53 (Compacts Part 4.J.2.)). Plaintiffs contend that by providing for the Governor's concurrence in future off-reservation trust land acquisitions, which (in Plaintiffs' view) is contrary to trust responsibilities owed to Plaintiffs, the Secretary violated 25 U.S.C. § 2710(d)(8)(B)(iii). *Id.* at 50–54.

Plaintiffs' contention that this provision violates "the trust obligations of the United States to Indians" is without merit. *Id.* at 54. To state a claim for breach of trust, a tribe must identify a statute or regulation that imposes an enforceable trust obligation. *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 892–95 (D.C. Cir. 2014). Plaintiffs' reliance on the "general trust responsibility to Indian tribes," Pls.' Mot. at 54, cannot be the basis of their claim. *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (holding general trust "relationship alone is insufficient" for breach of trust claim). And IGRA "does not create a fiduciary duty; it is a regulatory scheme that balances the competing interests of the states, the federal government and Indian tribes." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisc. v. United States*, 259 F. Supp. 2d 783, 790 (W.D. Wis. 2003), *aff'd,* 367 F.3d 650 (7th Cir. 2004).

The regulations Plaintiffs cite in their brief, 25 C.F.R. §§ 151.2, 151.7, are inapposite because Part 151 governs a separate decision by the Secretary: whether to acquire land in trust for the benefit of a tribe. The Department's regulations at Subpart C of 25 C.F.R. Part 292 govern the Secretarial two-part determination process that requires a governor's concurrence. Plaintiffs are conflating the two regulations. And, in any event, nothing in Parts 292 or the cited Part 151 regulations create fiduciary duties. Plaintiffs fail to identify any language in either regulation "establishing *specific fiduciary duties*" on the government. *El Paso Nat. Gas*, 750 F.3d at 892. Plaintiffs therefore cannot show a federal trust violation here.

In sum, each of the challenged provisions address permissible topics for an IGRA compact and are not contrary to the statute. And any provisions inconsistent with IGRA would not have been approved by operation of the statute. The Court should grant summary judgement for Federal Defendants for counts four, five, six, and seven.

CONCLUSION

For all these reasons, the Court should deny Plaintiffs' Motion for Summary Judgment and grant Federal Defendants' Motion for Summary Judgment. Plaintiffs have failed to establish Article III standing with specific evidence required at this stage of litigation. Even if they had standing, the Secretary did not act arbitrarily or contrary to IGRA. The Comanche and Otoe-Missouria Compacts complied with IGRA's requirements, and disputed questions of state law about the Governor's authority were outside the scope the Secretary's review. The challenged compact provisions are permissible under IGRA, and to the extent any provision is not permissible, those provisions are not approved under the statute. Federal Defendants therefore request that the Court enter judgment in their favor.

Dated: January 23, 2026

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