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' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLES OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Plaintiffs are Tribes and established gaming operators who have competed alongside the Defendant Tribes for years, hold their own approved class III compacts, and face no government-imposed restriction on any benefit they seek. They challenge Defendant Tribes' Compacts by arguing that the Secretary acted arbitrarily, capriciously, and contrary to law in taking no action on the Compacts, which resulted in each being approved by operation of law.

Plaintiffs' challenge fails at the threshold and on the merits. Starting with standing, Plaintiffs cannot show an injury in fact because the government has not imposed any barrier to any benefit Plaintiffs seek and their own expert never measured the Compacts' effect on competition. And Plaintiffs cannot show redressability because the chain of events required to translate a favorable ruling into actual relief depends on independent choices by parties not before this Court.

Even if Plaintiffs have standing, they fail to show that the Secretary acted arbitrarily or contrary to law in not taking any action on the Compacts. They fault the Secretary for not resolving the contested question of Oklahoma law about whether the Governor had authority to sign the Compacts. But the Indian Gaming Regulatory Act ("IGRA") does not authorize, let alone require, the Secretary to adjudicate disputed questions of state law within its short 45-day compact review window. The IGRA approval process exists to ensure compacts do not violate three specific areas of law: IGRA, federal law unrelated to jurisdiction over gaming on Indian lands, and the trust obligations of the United States to Indians—nothing more, nothing less. The Secretary reviewed facially complete submissions. And no provision is contrary to IGRA or requires the Court to find the entire agreement unlawful. The Court should find the Secretary acted reasonably and in accordance with law and enter judgment for Federal Defendants.

ARGUMENT

The Court should deny Plaintiffs' motion and grant Federal Defendants' cross-motion for three reasons: (1) Plaintiffs lack standing, (2) the Secretary acted consistent with his responsibilities under IGRA by reviewing facially complete submissions, and (3) each compact provision Plaintiffs challenge in Counts IV through VII is not contrary to IGRA.

I. Plaintiffs Have Not Established Standing.

At summary judgment, Plaintiffs must set forth specific facts showing a "substantial probability" of injury in fact. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). And they must show that it is "likely," not merely "speculative," that their injury will be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38, 43 (1976)). That burden is heavier here because Plaintiffs are not the object of the challenged government action, making it "substantially more difficult to establish" standing. *Id.* at 562 (citation modified). Federal Defendants' motion showed why Plaintiffs do not satisfy that demanding standard. Neither Plaintiffs' motion nor their response show facts sufficient to support their alleged equal footing injuries, direct economic injuries, or competitive injuries for either the six potential casinos or the ten existing casinos. Plaintiffs therefore lack standing.

A. Plaintiffs Fail to Show an Equal Footing Injury.

An equal footing injury requires a concrete, government-erected barrier to a specific benefit the plaintiff is able and ready to seek. *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Plaintiffs identify no such barrier. Their three attempts to manufacture one fail.

First, Plaintiffs contend that the Secretary's inaction deprives them of the right to compete on an equal footing because they must game under compacts that comply with IGRA, while Defendant Tribes allegedly do not. Pls.' Opp'n 3–7, Dkt. No. 239. But that framing of their claimed harm is merely their competitive injuries restated. And it misapplies the equal footing injury line of cases. Under that precedent, an equal footing injury exists when a plaintiff faces government-erected barriers that prevent them from seeking a benefit. *See, e.g.*, *Ne. Fla. Chapter*, 508 U.S. at 666. An equal footing injury does not arise from generalized complaints about competitive conditions. Plaintiffs put forth no benefit they are ready to seek, and no government action that prevents them from receiving that benefit. They have not, therefore, shown an equal footing injury.

Second, Plaintiffs attempt to save their asserted equal footing injury by pointing to the legal arguments made by Defendants defending this case. Pls.' Opp'n 3–4. They allege those legal "positions" pose a barrier to them because they would "allow illegal gaming" under the Compacts and deny Plaintiffs "judicial recourse to challenge" the Secretary's actions. *Id.* at 4, 6. But "standing is assessed at the time the action commences." *Adv. Mgmt. Tech., Inc. v. FAA*, 211 F.3d 633, 636 (D.C. Cir. 2000) (citation modified). Litigation positions stated well after the complaint is filed cannot form the basis of an injury-in-fact. Plaintiffs must show that it is "substantially probable" that the challenged agency action—here, the Secretary's inaction on the Compact—"caused [their] injury," not the litigation positions taken to defend that action years later. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175 (D.C. Cir. 2012). Plaintiffs cannot establish Article III standing by suing first and asserting an equal footing injury later based on legal arguments advanced during this case.

Third, Plaintiffs argue that the equal footing theory applies whenever an agency "disadvantages some incumbents in a market while favoring other incumbents." Pls.' Opp'n 6.

But every case Plaintiffs rely on—*Time Warner Cable*, *Lac du Flambeau Band*, and *Forest County Potawatomi Community*—found standing because the plaintiff faced a concrete, government-imposed barrier to a specific benefit it was actively seeking. None supports Plaintiffs' sweeping formulation, and none resembles this case. In *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630 (5th Cir. 2012), a statute expressly denied plaintiffs the same regulatory benefit it afforded competitors, making it a direct, legislatively-imposed exclusion. *Id.* at 636. In *Lac du Flambeau Band v. Norton*, 422 F.3d 490 (7th Cir. 2005), a compact provision gave one tribe veto-like power over the plaintiff tribe's pending application to game on newly acquired lands, making it a concrete barrier to a benefit the plaintiff was pursuing. *Id.* at 494, 496–99. And in *Forest County Potawatomi Community v. United States*, 317 F.R.D. 6 (D.D.C. 2016), a non-competition zone provision required the state to compensate one tribe for any revenue lost from a competing facility the plaintiff sought to build, making it a direct impediment to obtaining the approvals it needed. *Id.* at 12.

Plaintiffs face no such barrier. They currently game under approved compacts. They have no pending application that the challenged Compacts block or condition. No provision of the Compacts bars, penalizes, or restricts Plaintiffs from seeking any regulatory benefit, including a compact with the same terms Defendant Tribes obtained. Plaintiffs' complaint is that a competitor may operate under compacts Plaintiffs view as legally deficient. That is not a barrier to any benefit Plaintiffs are seeking to gain, and it does not establish an equal footing injury.

B. Plaintiffs Cannot Show Their Alleged Competitive Injuries Are Caused by the Compacts.

Plaintiffs also fail to establish that the challenged Compacts are the likely cause of their alleged competitive injuries. Their asserted harms are remote and conjectural, and thus insufficient to support Article III standing.

To establish a competitive injury, Plaintiffs must show that the challenged agency action itself is likely to cause financial harm. *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002); *Citizens for Resp. & Ethics in Washington v. Trump*, 971 F.3d 102, 107 (2d Cir. 2020) (Menashi, J., dissenting) (quoting *El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 27–28 (D.C. Cir. 1995)) (noting that to show competitor standing, a plaintiff is required "to demonstrate that it will 'likely' or 'almost surely' suffer personal harm as a result of the challenged actions"). Plaintiffs fail to do so. Their only evidence of injury, the report of Dr. Brian Wyman, does not address the effect of the Compacts. Instead, Wyman asked patrons what they would do if Defendant Tribes' casinos did not exist at all. That counterfactual does not measure the effect of the Compacts on competition. Wyman did not ask patrons about any new games, new jackpots, or anything else the Compacts purportedly allow. *See* Wyman Report ¶¶ 147–158, Dkt. No. 223-29. And the report does not establish whether competition has increased, decreased, or remained constant since the Compacts took effect in June 2020. Without evidence tying the alleged harm to the challenged action, Plaintiffs cannot establish causation. And because the Wyman Report fails to show a likely financial injury caused by the Compacts, Plaintiffs are left only with their bare assertions, which are not sufficient. *KERM, Inc. v. FCC*, 353 F.3d 57, 60–61 (D.C. Cir. 2004) (holding bare allegations are insufficient "to establish standing on the basis of any competitive injury").

Plaintiffs' fallback assertion—that all current Class III competition from Defendant Tribes is "attributable to the Agreements" because the Tribes allegedly lack valid compacts—likewise fails. Pls.' Opp'n 8. Defendant Tribes operated under the Model Compacts for more than fifteen years before the challenged Compacts took effect. Plaintiffs themselves had argued that those Model Compacts automatically renewed and guaranteed a federal right to conduct gaming. *See*

Cherokee Nation v. Stitt, 475 F. Supp. 3d 1277, 1283 (W.D. Okla. 2020). Plaintiffs cannot now recast the same ongoing competition as a new injury traceable to the Secretary's inaction.

Plaintiffs' assertions regarding purported competitive advantages, such as lower exclusivity fees or access to additional games, are unsupported. Plaintiffs offer no evidence that Defendant Tribes are offering games not permitted under Oklahoma law, or that they have altered pricing or payouts because of the Compacts. The Wyman Report is silent on these points. *See generally* Wyman Report. Plaintiffs' arguments regarding exclusivity fees are also internally inconsistent. They contend that reduced fees confer a competitive advantage, Pls.' Opp'n 9, while also characterizing those same provisions as an unlawful tax. But Plaintiffs cannot plausibly maintain that a purportedly unlawful tax is also a competitive benefit.

Finally, Plaintiffs have not shown a non-speculative competitive injury from potential future casinos. As explained in Federal Defendants' motion, alleged injuries from future casinos depend on speculative events. Fed. Defs.' Mot. 17–19, Dkt. No. 230. Neither Defendant Tribe has applied to take land into trust for gaming, and even if one did, the fee-to-trust and two-part determination processes under 25 U.S.C. § 2719(b)(1)(A) are complex and uncertain. At most, the Compacts remove one potential obstacle from a multi-step, multi-year regulatory process. That is insufficient to establish imminence. *See Cherokee Nation v. U.S. Dep't of the Interior*, 643 F. Supp. 3d 90, 112 (D.D.C. 2022); *New World Radio*, 294 F.3d at 172 (no standing where agency action is "at most, the first step in the direction of future competition"). Any future injury "will occur, if at all, only if [Defendant Tribes] subsequently seek and secure" the necessary approvals. *New World Radio*, 294 F.3d at 171 (citation modified).

C. Redressing Plaintiffs' Alleged Injuries Requires An Unlikely Chain of Events.

Plaintiffs also fail to establish that their alleged injuries are redressable. To satisfy redressability, Plaintiffs must show that it is "likely," not merely "speculative," that their injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43). Plaintiffs cannot show it is likely their competitor injuries would be redressed. Remedying the injury described in the Wyman Report would require a speculative chain of events, which means Plaintiffs cannot show redressability.

Plaintiffs' injury rests on the theory that they would receive more customers if they win this litigation. But Wyman opines only that patrons would visit Plaintiffs' casinos if Defendant Tribes' existing casinos were to close entirely. Wyman Report ¶¶ 70, 72, 118–121, 166–67. That scenario, however, rests on a speculative chain of events. It depends on: (1) this Court holding that the Compacts are contrary to law, (2) a court holding Defendant Tribes' Model Compacts did not renew; (3) Defendant Tribes failing to negotiate a new gaming compact with the state; (4) Defendant Tribes deciding to close their class III gaming facilities; and (5) third-party casino patrons deciding to take their business to Plaintiffs' casinos.

Only the first step in that chain is within the Court's control. Plaintiffs seek relief for injuries allegedly caused by the challenged Compacts, Am. Compl., 129–131 (Prayer for Relief), Dkt. No. 104, and any remedy must be limited to the violation of law alleged. *Maryland v. U.S. Dep't of Agric.*, 151 F.4th 197, 212 (4th Cir. 2025). Plaintiffs therefore cannot seek to prevent a return to gaming under the Model Compacts, Pls.' Opp'n 13, because they did not plead such a claim or request any relief related to the Model Compacts. And even assuming such a remedy could be available in this APA case, each of the remaining steps in Plaintiffs' theory depend on independent actions by third parties not before this Court. Because the Court cannot redress inadequacies not alleged or actions of third parties not present, Plaintiffs' redressability from the harms alleged remain speculative.

Plaintiffs cannot show that a favorable decision here would likely redress their alleged injuries. As a result, their theory of redressability cannot support standing and their claims must be dismissed.

II. The Secretary Did Not Act Arbitrarily or Contrary to IGRA in Allowing the Compacts to Become Approved By Operation of Law (Counts I–III).

Plaintiffs contend IGRA required the Secretary to look behind the Compact submissions and independently adjudicate whether the Governor's certification was correct under Oklahoma law. Neither IGRA nor the regulations impose that obligation. Plaintiffs do not dispute that the submissions were facially complete. Pls.' Opp'n 26. And they fail to show anything that required the Secretary to disapprove the Compacts as contrary to IGRA during the 45-day review period. The Secretary therefore did not act arbitrarily or contrary to IGRA.

A. The Compacts Satisfied All Statutory and Regulatory Submission Requirements.

The facts relevant to Counts One through Three are not disputed. The Comanche and Otoe-Missouria Tribes submitted executed compacts, tribal resolutions, and a certification from the Governor that he was authorized under state law to enter into the Compacts, all as required by 25 C.F.R. § 293.8.[1] AR 2–34; AR 35–68. The Governor's certification stated that he had authority to enter into the Compacts and bind the State. AR 3, 36. The Secretary took no action within the 45-day statutory review period. The Compacts were therefore "considered to have been approved, but only to the extent [the Compacts] are consistent with IGRA," and notice was published in the Federal Register on June 29, 2020. 85 Fed. Reg. 38919-01 (June 29, 2020); 25 U.S.C.

[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.

§ 2710(d)(8)(C). The submissions satisfied each requirement of 25 C.F.R. § 293.8. Nothing more is required.

The documents submitted, including the Governor's certification, were facially valid. Plaintiffs, however, contend that under the IGRA regulations, "Compact … means an intergovernmental agreement executed *between Tribal and State governments* under [IGRA]" Pls.' Opp'n 25 (quoting 25 C.F.R. § 293.2(b)(2) (emphasis added)), and therefore a compact cannot be "an agreement between an Indian tribe and a governor." *Id.* at 24–26. But as Plaintiffs have stated, "[w]hether a governor can act for the state is a question of state law unless Congress has said otherwise, and it did not do so in IGRA." *Id.* at 23. Indeed, "[i]t is difficult to imagine a matter more closely related to internal self-government than the question of how a state's powers are allocated among its elected officials." *Id.* (quoting *Rhode Island v. Narragansett*, No. 94-cv-0619-T, 1995 WL 17017347, at *4 (D.R.I. Feb. 3, 1995)). Each state creates its own rules and procedures for compact approvals. In Wisconsin, for example, the legislature delegated its authority to enter into compacts to the governor such that he "may, on behalf of [Wisconsin], enter into any compact that has been negotiated under 25 U.S.C. § 2710(d)." Wis. Stat. Ann. § 14.035. There was, therefore, nothing from the face of the Oklahoma Governor's certification that would immediately indicate he did not have the authority he said he did.

When the Secretary reviewed the Compact submittals during the 45-day review period, the submittals were consistent with the provisions of IGRA and the implementing regulations. It was therefore not arbitrary and capricious or contrary to law to take no action on the Compacts.

B. IGRA Does Not Require the Secretary to Resolve Contested State Law Disputes During the 45-Day Review Period.

Plaintiffs do not dispute that the Compact submissions satisfied IGRA's submission requirements; they challenge only whether the Governor acted with authority under state law. But

IGRA does not authorize—let alone require—the Secretary to adjudicate contested questions of state law during the 45-day review period.

IGRA authorizes the Secretary to approve "any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands." 25 U.S.C. § 2710(d)(8)(A). It authorizes disapproval only on three grounds: violation of IGRA, violation of other federal law unrelated to jurisdiction over gaming on Indian lands, or violation of the trust obligations of the United States to Indians. *Id.* § 2710(d)(8)(B)(i)–(iii). Stated simply, "the approval process exists so that the Secretary may ensure that a compact does not violate certain federal laws, and her approval is a prerequisite for the compact to have legal effect: nothing more, nothing less." *W. Flagler Assocs., Ltd. v. Haaland*, 71 F.4th 1059, 1068 (D.C. Cir. 2023). Plaintiffs, however, ask the Court to read into this framework an implicit requirement that, when considering whether the Compacts comply with IGRA, the Secretary must resolve a separation of powers dispute among the state's governor, attorney general, and legislature concerning whether a compact was validly entered by the State. And they demand the Secretary do this all within the 45-day review period.

Nothing in the statutory or regulatory text supports that contention. The only question at issue when reviewing a compact is whether the terms within the four corners of the document violate IGRA, federal law unrelated to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians. When determining whether a compact or specific provision violates IGRA, specifically, the Secretary would necessarily look to the provisions of IGRA itself. As shown above, the Compact submittals were consistent with the provisions of IGRA and the Department's applicable implementing regulations at 25 C.F.R. § 293.8. The unresolved question about the Governor's authority "and any other related questions of state law" were "outside the scope of the Secretary's review of the Compact." *See W. Flagler*, 71 F.4th at 1068.

Plaintiffs argue that because *West Flagler* addressed only the specific question of online sports betting outside Indian lands, rather than the entirety of the compact, its holding regarding the review of state law does not apply. Pls.' Opp'n 27–30. But the court's reasoning was not so narrow. The court grounded its conclusion in the structure of IGRA itself. Because the question at issue was only whether the provision complied with IGRA, the Court did not need to look outside of IGRA. The related state law questions were thus "not the subject of [that] litigation and not for [the court] to decide." *W. Flagler*, 71 F.4th at 1062. Here, the submission for each Compact complied with the Department's regulations at 25 C.F.R. § 293.8, which triggered the statutory 45-day review period. The Secretary was therefore not required to look behind state law and determine whether the Governor, who certified his authority to enter the Compacts and bind the state, acted *ultra vires* in executing the Compacts.

The implementing regulations reinforce this conclusion. Section 293.8 identifies the documents the Secretary requires to confirm that a compact has been "entered into": an executed compact, a tribal resolution, and a certification from the Governor or other state representative that he or she is authorized under state law to enter into the compact. 25 C.F.R. § 293.8(a)–(c). This framework places the obligation on the submitting parties to certify their authority, it does not require the Secretary to independently verify those certifications. The Secretary's reliance on that certification was fully consistent with the regulatory framework.

And *Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011) reinforces that conclusion too. In the first appeal during that litigation, the D.C. Circuit considered whether a compact that is deemed approved by operation of law is judicially reviewable as a final agency action under the

APA. *Id.* at 379–83. The court held that it is, explaining that "disapproval is obligatory" where a compact governs gaming outside Indian lands. *Id.* at 381. On remand, the district court, in accordance with that opinion, looked beyond the administrative record and federal law to determine the preclusive effect of the parties' prior consent decree. *Amador Cnty. v. S.M.R. Jewell*, 170 F. Supp. 3d 135, 141–46 (D.D.C. 2016). But when it turned to the substantive questions of whether the land qualified as "Indian lands" under IGRA, the court looked only to IGRA and the implementing regulations. *Id.* at 146–47. *Amador's* consideration of preclusion materials did not expand IGRA's substantive scope; when the court decided the Indian lands question, it confined itself to IGRA and its regulations, not to state-law governance. Though this case deals with the "entered into" requirement rather than the "Indian lands" requirement, the same principle of review applies: the Secretary's review is limited, and as to whether the compact complies with IGRA, the Secretary need not look beyond IGRA. The relevant focus is therefore IGRA's text, structure, purpose, and implementing regulations when determining whether the Compacts were properly "entered into." Contested questions of state law are not part of the Secretary's compact review or the Court's review of the deemed approval.

Plaintiffs focus on the wrong aspect of *Amador County*. They emphasize that deemed approvals are "judicially reviewable." Pls.' Opp'n 1, 19, 27, 43–44 (citing *Amador Cnty.*, 640 F.3d at 381). But reviewability is not in dispute. The relevant holding for present purposes is instead that the Secretary must disapprove a compact that violates IGRA, other federal law unrelated to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians. *Amador Cnty.*, 640 F.3d at 381. And if 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," *id.*, it is even more likely correct that congress did not intend for the

Secretary to adjudicate compliance with state law. Plaintiffs identify nothing in that opinion imposing such a requirement.

A contrary rule would create intractable problems for the Secretary when reviewing a compact. As this litigation has shown, having to review and resolve contested issues of state law in just 45-days would be unmanageable; even after more than five years of litigation, state-law questions, such as the legal effect of the Attorney General's opinion under Oklahoma state law, remain at issue. Nothing in IGRA authorizes the Secretary to pause the 45-day timeline, even briefly. And here, the problem is even more acute, as the separation of powers issue was not contested until just three days before the review period ended. IGRA does not require the Secretary to anticipate, research, and adjudicate complex and unsettled questions of state law within days.

C. The Attorney General's Opinion Did Not Compel Disapproval.

Plaintiffs argue that the Oklahoma Attorney General's legal opinion conclusively resolved the state-law dispute and required the Secretary to disapprove the Compacts. Pls.' Opp'n 35–37. But the record presented to the Secretary was contested, not one-sided. Indeed, most of the parties here weighed in on one side or the other. *See* AR 607–08 (Cherokee); AR 695–704 (Comanche and Otoe-Missouria); AR 85–95 (Governor Stitt Memorandum); AR 508–16 (Attorney General legal opinion). And the dispute led to state court litigation filed just three days before the close of IGRA's 45-day review period, which remained pending when the period expired. *See* AR 2612.

Despite these divergent views, Plaintiffs contend the Attorney General's Opinion conclusively decided the issue. Pls.' Opp'n 49–54. Though the Attorney General's opinion may have bound the Governor, it was the Oklahoma Supreme Court that would have final word, not the Attorney General. *Brandon v. Ashworth*, 955 P.2d 233, 238 (Okla., 1998) (Attorney General opinions are "not binding" on the Supreme Court of Oklahoma). That meant the issue was not conclusively resolved for the then-pending state court litigation, and certainly not conclusively for the Secretary. What is more, Plaintiffs do not identify any authority indicating that the Attorney General opinion altered the legal status of the Compacts themselves, which had already been executed before the opinion was written. Under Oklahoma's constitutional structure, definitive resolution of such legal questions rests with the courts, rather than the Attorney General. Okla. Const. art. VII, § 1. So while the Attorney General's opinion may have bound state officials' actions for future compacts, it did not resolve the underlying separation of powers question or eliminate the ongoing dispute. The Attorney General's opinion therefore did not alter the scope of the Secretary's review.

III. The Challenged Compact Provisions Do Not Violate IGRA (Counts IV–VII).

Plaintiffs' remaining IGRA challenges fail because they misread what the Compacts actually authorize. As explained below, the Compacts do not approve any unlawful gaming, do not impose an impermissible tax, do not regulate Class II gaming, and do not violate IGRA or any cognizable trust obligation. The provisions fall squarely within IGRA's framework and the Secretary's inaction was therefore not arbitrary or contrary to law.

A. The Compacts Do Not Authorize Illegal Gaming (Count IV).

Plaintiffs fail to show that the Compacts authorize gaming currently prohibited under Oklahoma law in violation of 25 U.S.C. § 2710(d)(1)(B). Pls.' Opp'n 68–70. Plaintiffs' argument misreads both the Compacts and IGRA.

Each compact defines "Covered Games" to include house-banked games and event wagering "if such game has been approved by the [State Compliance Agency ("SCA")]." AR 8, 41. The SCA approval requirement is a condition precedent: absent SCA approval, neither event wagering nor house-banked games are covered or authorized.

Plaintiffs do not meaningfully contest this reading. Instead, they argue that the SCA approval condition "changes nothing" because the SCA could on its own authority permit presently illegal gaming. Pls.' Opp'n 70 n.63. But the SCA is a state regulatory body that operates under Oklahoma law; Plaintiffs put forth no evidence that the SCA may authorize gaming that Oklahoma law prohibits. If Oklahoma law were to change to permit event wagering or house-banked games, the SCA could then approve or disapprove those games under the Compacts, which is how the conditional structure is designed to work. The SCA approval ensures that no game is authorized under the Compacts unless state law permits it.

Plaintiffs also argue that IGRA's use of the present tense in Section 2710(d)(1)(B)—requiring that for Class III gaming to be lawful the State "permits such gaming"—means that gaming must be lawful at the time the compact is entered into, not at some future time. Pls.' Opp'n at 69. But that argument conflates what the Compacts authorize with what they discuss. The Compacts do not authorize event wagering or house-banked games now; they are subject to SCA approval, which is not yet satisfied. A compact provision that conditionally references games that may become lawful in the future, but that by its plain terms authorizes nothing until that occurs, does not conflict with IGRA.

Plaintiffs also argue that Section 2710(d)(3)(C)(vii)—listing "any other subjects … directly related to the operation of gaming activities" as a permissible topic that a compact may address—cannot save the "Covered Games" provision because several of the games listed are not currently authorized under state law. Pls.' Opp'n 69. That provision, however, needs no saving. Merely addressing the contingency of whether games not currently permitted are allowed in the future, should they ever become legal under state law, falls squarely within Section 2710(d)(3)(C)(vii)'s authority. *West Flagler* recognized that a compact may discuss activity that is "directly related to" gaming without thereby authorizing conduct that would otherwise be unlawful. 71 F.4th at 1065–66. And where any doubt remains about the correct interpretation of the Compacts' covered games definition, the Court should construe it in a manner that preserves its lawfulness. *Id.* at 1065.

B. The Revenue-Sharing Provisions Do Not Impose an Unlawful Tax (Count V).

Plaintiffs argue that the Compacts' revenue-sharing provisions constitute an unlawful tax because the State's concession of "substantial exclusivity" is meaningless. Pls.' Opp'n 70–71. But the Compacts expressly provide that each Defendant Tribe receives "substantial exclusivity over class III Covered Gaming consistent with the goals of IGRA." AR 27, 61. Substantial exclusivity is a meaningful concession that the Department has long recognized as supporting revenue sharing because it gives tribes a protected competitive market position. *See* Fed. Defs.' Mot. 29; 1 Cohen's Handbook of Federal Indian Law § 16.05 (2026). That the State may authorize other gaming in the future, if ever, does not negate the present value of the exclusivity concession the Tribes received, and Plaintiffs do not show otherwise. Plaintiffs themselves describe the revenue sharing provisions, which require lower percentages of net win than those found in the Model Compact, as giving Defendant Tribes competitive advantages. Pls.' Mot. for Summ. J. 9, Dkt. No. 223-1. Having conceded that the concessions carry competitive value, Plaintiffs cannot simultaneously argue those concessions are legally meaningless for purposes of the revenue-sharing analysis.

C. The Revenue Certification and Reporting Provisions Do Not Impermissibly Regulate Class II Gaming (Count VI).

Next, the revenue certification and reporting provisions do not impermissibly regulate Class II gaming. The Compacts preserve tribal rights to operate Class II gaming and expressly disclaim any such regulation. AR 13, 47. That is enough to find the provisions consistent with IGRA. Even so, the provisions are otherwise permissible.

Defendant Tribes' sovereign decision to agree to a certain mix of Class II electronic bingo and Class III slots does not mean there is a violation of IGRA. The Department's past approvals support that conclusion. As Federal Defendants showed in its motion, the Department in 2010 approved a compact establishing an initial limitation on Class II electronic bingo games with a graduated conversion to all Class III slots as part of the revenue sharing structure.[2] Fed. Defs.' Mot. 30. The 2010 provisions were in fact a continuation of similar language present in a predecessor compact that was deemed approved in 2007.[3] Here, nothing in the Compacts requires the Tribes to operate all Class III slots. At bottom, Plaintiffs seek to impose their approach to the mix of Class II or III games over Defendant Tribes' approach to the mix of such games. The Defendant Tribes' approach does not violate IGRA.

The reporting of Class II and Class III device counts also does not amount to a prohibited regulation of Class II gaming. Plaintiffs mischaracterize how Parts 4.K and 3.A work in harmony to avoid regulating Class II gaming. Part 4.K simply requires Defendant Tribes to "keep a record of, and report … the number of Covered Games and Class II devices in each facility, by name/type and denomination of bets," and imposes a penalty only for failure to report. AR 19, 53. The provision does not subject Class II gaming to State approval and Part 3.A expressly preserves the Tribes' full Class II rights without limitation. Read together, these clauses function as audit and classification safeguards to ensure that (1) Class III Covered Games are compliant with and accurately certified for revenue sharing purposes, and (2) Class II devices—which remain outside the compact's regulatory scope—are properly excluded from any assessments for the State's

---

[2] *See* Gaming Compact Between the Seminole Tribe of Florida and the State of Florida, Part XI., 75 Fed. Reg. 38833-02 (July 6, 2010).

[3] *See* Gaming Compact Between the Seminole Tribe of Florida and the State of Florida Part XI., 73 Fed. Reg. 1229-01 (Jan. 7, 2008).

regulatory costs. That audit purpose is "directly related to the operation of gaming activities" consistent with 25 U.S.C. § 2710(d)(3)(C)(vii) because it protects the integrity of the compact's core purpose of regulating only Class III gaming while avoiding regulation of Class II gaming.

And the non-reporting fine does not amount to regulation of Class II gaming either. The $5,000 per facility penalty at Part 4.K is triggered by nonreporting, not by any Class II gaming choice or level of activity. It does not penalize Class II play, device counts, or payouts. Rather, it deters Defendant Tribes from failing to provide the reporting necessary to confirm that compacted Class III certifications and payments exclude Class II revenues. That type of provision is process related, not gaming regulation.

D. The Concurrence Provisions Do Not Violate IGRA or Federal Trust Obligations (Count VII).

Plaintiffs fail to show that the Governor's supposed pre-concurrence in future (but not yet applied for) Secretarial two-part determinations violates either IGRA or the federal trust responsibility. Pls.' Opp'n 72–75.

First, the concurrence provisions address what will occur only if the Secretary finds "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," after consultation with state and local officials and nearby tribes. 25 U.S.C. §§ 2719(a), (b)(1)(A); AR 19, 53. Neither Defendant Tribe has such an application pending before the Secretary and, even if an application were pending, the Governor's authority to concur in such a determination may be a question of state law that the Secretary is not required to resolve.

Second, the concurrence provisions are not contrary to any trust duty. Plaintiffs are correct that the United States maintains a general trust relationship with Indian tribes. Pls.' Opp'n 74. But to show the government owes a trust obligation, Plaintiffs "must establish" those duties are required by "the text of a treaty, statute, or regulation." *Arizona v. Navajo Nation*, 599 U.S. 555, 563–64 (2023). The general trust language does not suffice—the government must accept those obligations through "specific rights-creating or duty-imposing language." *Id.* at 564 (citation modified); *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014).

Plaintiffs identify no language in any applicable statute or regulation establishing a specific trust duty. That failure is dispositive. IGRA itself does not create fiduciary duties. *See Lac Courte Oreilles Band v. United States*, 259 F. Supp. 2d 783, 790 (W.D. Wis. 2003). And the Part 151 regulations Plaintiffs cite govern the separate decision of whether to acquire land in trust. Those regulations do not create enforceable trust obligations with respect to compact approvals.

Plaintiffs try to avoid the requirement to identify a trust duty by arguing the test does not apply to non-Indian Tucker Act cases. Pls.' Opp'n 74 n.66. But the "framework for determining the trust obligations of the United States applies to any claim seeking to impose trust duties on the United States." *Navajo Nation*, 599 U.S. at 564 n.1; *cf. El Paso Nat. Gas*, 750 F.3d at 892. Plaintiffs attempt to impose trust duties on the United States, and so the framework applies here too. And because Plaintiffs failed to satisfy the applicable test, they cannot show the Compact provision is invalid.

CONCLUSION

For all these reasons, the Court should deny Plaintiffs' motion for summary judgment and grant Federal Defendants' cross-motion for summary judgment. Plaintiffs have failed to establish Article III standing with the concrete, specific evidence the summary judgment standard demands. Even if standing were established, the Secretary acted consistently with IGRA's text, its implementing regulations, and the weight of legal authority in allowing the Compacts to take effect without resolving the question of the Governor's authority under state law. And the challenged provisions are permissible under IGRA. Federal Defendants therefore request that the Court enter judgment in their favor.

Dated: April 24, 2026

ADAM R.F. GUSTAFSON
Principal Deputy Assistant Attorney General

By: *\/s/ Samuel R. Vice*
SAMUEL R. VICE
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Tel: (202) 353-5540
E-mail: samuel.vice@usdoj.gov

Counsel for Federal Defendants