UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:20-cv-02167 (TJK)
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,	)	
Defendants.	)	

COMANCHE NATION CHAIRMAN'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Comanche Nation negotiated its 2020 compact with the State of Oklahoma to advance its own governmental objectives on its own Indian lands. That compact is the Comanche Nation's business. Plaintiff Nations were not parties to that negotiation, are not affected by its terms, and have identified no concrete harm attributable to it. Six years on, the Comanche Nation offers the same games at the same reservation facilities in the same markets.

Plaintiff Nations ask this Court to allow tribes to police the compacts of other tribes operating on their own Indian lands, overriding the Comanche Nation's negotiated agreement on the basis of a procedural objection to how the Governor executed it under state law. IGRA does not authorize that role. It assigns the compacting relationship to the tribe, the state, and the federal government. It confers no supervisory interest on tribes to ensure uniformity of gaming compacts.

Plaintiff Nations standing claim is circular: because the compact is unlawful, they have standing to assert that the compact is unlawful. Strip away the legal conclusion of invalidity and no injury remains: no changed market conditions, no lost revenue, no barrier to their own operations. Their standing theories, however labeled, reduce to a single proposition — the procedure another tribe used to enter into a compact did not comply with state law. That is not an injury Article III recognizes, and it is not an interest IGRA protects. For the reasons set forth below, Plaintiff Nations lack both Article III standing and a statutory cause of action under the APA.

ARGUMENT

I. Plaintiff Nations lack standing.

A. Plaintiff Nations have suffered no injury in fact.

Plaintiff Nations have suffered no injury in fact. They treat Dr. Wyman's survey as irrefutable proof of business diversion, but the survey does not support that inference. Its questions were premised on the hypothetical "if Defendant Chairmen's Tribes' casinos did not exist." ECF# 239 at 25. That premise has no real-world application.

The Comanche Nation's gaming operations exist, have existed for years, and will continue to exist. They would exist if the Secretary had rejected the 2020 compact — the Comanche Nation would have returned to its prior compacts. If the challenged compacts are now void, the Comanche Nation still returns to its prior compact and continues Class III gaming.

Moreover, Class II gaming, unaddressed by the survey, would continue regardless. That means that the casinos would exist even without Class III gaming. While Plaintiff Nations (at fn. 12) try to brush this aside, it is critical to their standing since the survey is the only evidence offered of harm. Yet, the survey did not ask whether continuing Class II gaming would affect patron behavior. Nor did the survey account for other gaming options within the Kiowa-Comanche-Apache reservation or other closer tribal gaming. Had the survey accounted for those things, the number may have been zero — but it is unknown. Injury cannot rest on a fact the survey did not measure, and missing facts essential to standing cannot be presumed. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990).

In any event, the survey results are not evidence of concrete injury. Plaintiff Nations repeatedly invoke the "basic laws of economics," but basic economics recognizes the difference between stated preferences (what people say they would do in hypothetical scenarios) and revealed preferences (what people actually do when facing real choices and real costs). As one economist observes, "[w]hat people say they will do is often not the same as what they actually do." K. Train, *Discrete Choice Methods with Simulation* (Cambridge Univ. Press 2009). Stated preferences — like those given in hypothetical surveys—are vulnerable to hypothetical bias, framing effects, and expressive responses because respondents bear no consequences for their answers. Economists therefore treat stated preferences as hypotheses about behavior that must be verified against actual conduct, not as independent evidence of harm.

The law's concreteness requirement demands the same. Article III requires proof of a concrete injury grounded in actual evidence, not hypotheses about how persons might behave under imagined conditions. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Courts reject expressed intentions and stated preferences as insufficient because they describe abstract or hypothetical harm, not real injury. *Id*. at 564; *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). A concrete injury must be "real, and not abstract," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016), demonstrated through actual economic loss, altered conduct, or tangible exposure. Dr. Wyman's survey supplies, at best, a hypothesis about actual loss. It does not, on its own, supply a concrete injury in fact. Hypothetical reactions premised in a world that will never exist is simply not enough. But that is all that Plaintiff Nations offer.

B. Plaintiff Nations cannot establish an equal footing harm.

Equal footing standing doctrine does not apply here because the Comanche Nation's 2020 compact does not impose a barrier to Plaintiff Nations' gaming operations, their ability to negotiate new gaming compacts, or any other benefit conferred by IGRA. Notably, Plaintiff Nation's cannot claim that the Comanche Nation's compact terms themselves violate IGRA. And, having disclaimed (at 16) any interest in equal compact terms, Plaintiff Nations are left merely with a generalized state-law objection to the procedure through which the Comanche Nation and State of Oklahoma entered into the compact. That is not an injury in fact under any formulation of the equal footing doctrine.

Plaintiff Nations' equal footing theory rests on *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490 (7th Cir. 2005), which they read to mean that any tribe competing in a market where another tribe operates under an allegedly invalid compact suffers an equal footing injury. That reading is incorrect. *Lac du Flambeau* does not hold that a general allegation of noncompliance within a shared market confers equal footing standing. It holds something far narrower: that a compact provision erecting a direct, structural barrier to a plaintiff tribe's own IGRA-conferred operations constitutes a cognizable injury in fact. Nothing in the 2020 compact does that here.

The compact at issue in *Lac du Flambeau* required Wisconsin to notify the Ho-Chunk Nation whenever another tribe sought off-reservation gaming approval and prohibited the State from concurring in that application if the Ho-Chunk determined it would reduce their gaming revenue, unless the State agreed to indemnify the Ho-Chunk for the loss. 422 F.3d at 494. Under IGRA, off-reservation gaming requires the Governor's concurrence. 25 U.S.C. § 2719(b)(1)(A). The Ho-Chunk compact thus gave one tribe direct authority over the State's ability to grant that concurrence to any other tribe and saddled the State with an open-ended financial obligation if it did so anyway. That provision was a concrete, structural impediment to the Lac du Flambeau Band's ability to obtain a benefit IGRA specifically authorized; that is, the Governor's concurrence for off-reservation gaming. The barrier existed in the compact itself, independently of any litigation, and foreclosed a specific IGRA-conferred opportunity.

The Seventh Circuit explained that the analytical threshold is the nature of the injury. "Whether to apply [equal footing] analysis depends on the nature of the alleged injury." *Id*. at 498. The injury the court credited was not that the Ho-Chunk compact was generally noncompliant with state law or that it advantaged one tribe over others in the market. It was that the compact imposed a direct impediment on the plaintiff tribe's own ability to pursue a benefit under IGRA. That is the injury in fact. The equal footing doctrine supplies a theory of standing for plaintiffs who face that kind of structural barrier. It is not, however, a mechanism for conferring standing on any tribe who questions the state law procedure used by another tribe to procure a compact.

Nothing in the 2020 Comanche compact imposes any barrier on Plaintiff Nations' gaming operations, their ability to negotiate compacts, or their ability to seek any benefit IGRA confers. Plaintiff Nations do not allege that any provision of the 2020 compact restricts their access to the Governor's concurrence, forecloses their ability to negotiate their own compact terms, or gives the Comanche Nation authority over any governmental decision affecting Plaintiff Nations. Their allegation is that the Comanche Nation operates under a compact negotiated in the wrong way in the same state. That is a grievance about a competitor's legal status, not a barrier to the plaintiff's own operations. The Reply confirms as much, characterizing the barrier as the Secretary's "allow[ing] illegal gaming." Doc. 239 at 6. Allowing a competitor to operate, even allegedly without a valid compact, does not impede or injure Plaintiff Nations' gaming in any concrete way. It is not a barrier or injury. It is an objection to the principle of a third party's obtaining a compact through an improper procedure.

Lac du Flambeau does not reach that far. If equal footing standing attached whenever a tribe alleged that another tribe's compact did not comply with state law, the doctrine would confer standing on anyone intellectually capable of framing a legal objection under state law, without regard to whether the plaintiff faces any actual harm or injury to its own operations. *Lac du Flambeau* requires a direct threat to the plaintiff's own IGRA-conferred rights. The 2020 compact poses none.

C. Plaintiff Nations cannot establish competitor standing.

Competitor standing requires that a challenged agency action itself impose a competitive injury — by lifting restrictions on an existing competitor or expanding the number of entrants in the plaintiff's market. *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002). The doctrine does not reach agency actions that are "at most, the first step in the direction of future competition." *Id*. To establish injury, a plaintiff's concrete economic interests must be "perceptibly damaged" by the agency action. *Id*. at 171 (quoting *Orange Park Fla. T.V., Inc. v. FCC*, 811 F.2d 664, 673 (D.C. Cir. 1987)). Even where future harm is alleged, the risk must be "sufficiently imminent and substantial." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 435 (2021); *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013).

Plaintiff Nations rely exclusively on a public letter written by prior counsel for the Comanche Nation describing the benefits of the 2020 compact. As a threshold matter, the statement is inadmissible hearsay — a letter written by counsel, not the Comanche Nation — and Plaintiff Nations identify no applicable exception. Fed. R. Evid. 801–805; Fed. R. Civ. P. 56(c)(2).

Even setting admissibility aside, the statement speaks to future competition, not present harm. Counsel wrote that new games "will provide the Nation with a competitive advantage" when such games are offered. The compact pre-authorizes those games, but they cannot be offered until Oklahoma law changes. A pre-authorization that has not been and cannot yet be exercised is what *New World Radio* describes as at most a first step. 294 F.3d at 172. Six years of unchanged gaming operations confirm it has remained only that. Any part of the statement suggesting current competition is wrong. IGRA requires that Class III gaming be conducted consistently with state law. 25 U.S.C. § 2710(d)(1)(B). The gaming remains unlawful in Oklahoma, and a compact cannot authorize what state law prohibits.

Potential competition plus allegations of illegality is not competitor standing. *New World Radio*, 294 F.3d at 172. The doctrine requires that the agency action itself impose a present competitive injury, not that it create the possibility of future competition contingent on further steps. *Id.* Plaintiff Nations point to pre-authorizations for games and locations that have not materialized in six years and ask the Court to treat them as present injuries. That is the argument *New World Radio* foreclosed.

Plaintiff Nations advance the most expansive reading of the compact — more expansive than any party to it now endorses — to manufacture a threat the record does not support. But Plaintiff Nations are not parties to the compact. Under basic principles of contract interpretation, a reading that gives lawful and effective meaning to a compact's terms is preferred over one that renders them unlawful or ineffective. Restatement (Second) of Contracts § 203(a) (1981). Plaintiff Nations invert that principle, advancing an interpretation that the contracting parties themselves have abandoned, for the sole purpose of generating an injury the record does not otherwise show.

The competitive landscape is unchanged. Before the 2020 compact, the Comanche Nation conducted Class III gaming at its existing facilities, offering the same games, serving the same markets. Six years later, nothing has changed. The Comanche Nation has offered no games unavailable under its prior compact, opened no new facilities, and expanded into no new markets. The record contains no evidence of diverted patrons, lost revenue, or any market change attributable to the Secretary's no-action approval. Plaintiff Nations assert that "the competitive environment has changed," Doc. 239 at 8, but point to nothing in the record that shows it. Plaintiff Nations' economic interests have not been perceptibly damaged. No case holds that competitor standing exists where the competitive landscape remained exactly the same before and after the challenged government action — let alone six years later — even if the action is alleged to be unlawful.

The lower exclusivity fee does not perceptibly damage Plaintiff Nations. Plaintiff Nations point to the Comanche Nation's lower exclusivity fee as a competitive benefit. But nothing in

IGRA requires uniform fees, so no regulatory restriction was lifted. And the fee is paid to the State of Oklahoma. It does not flow to the Comanche Nation's gaming operations in any form that affects competition. The Comanche Nation uses the fee savings for internal tribal operations and per capita distributions to tribal citizens. Plaintiff Nations provide no record evidence that a lower fee paid to the State translates into competitive harm.

Neither new off-reservation locations nor new game categories constitute an actual or imminent increase in competition. They are pre-authorizations only. At most, they are a first step.

As to new game categories: the 2020 compact pre-authorizes event wagering and house-banked games, but the Comanche Nation has represented it will not offer those games until they are permitted under Oklahoma law. Plaintiff Nations point to the Oklahoma Attorney General's opinion, *In re Treat*, 2020 OK AG 8, and the Oklahoma Supreme Court's decision in *Treat v. Stitt*, 2020 OK 64, 473 P.3d 43, for the proposition that the compact already authorizes those games. But neither decision binds the Comanche Nation or requires it to offer games that remain unlawful under Oklahoma law. Any such change would require legislative action that would benefit all tribes equally. The compact's authorization is what *New World Radio* describes as "at most, the first step in the direction of future competition," not a competitive injury the approval itself imposes. 294 F.3d at 172.

As to new off-reservation locations: the 2020 compact pre-authorizes certain locations, but the Comanche Nation has no current plans to open facilities there. This is, in part, due to the lengthy regulatory process required to open such facilities. Any off-reservation gaming would require a separate application to the Secretary and compliance with IGRA's land-into-trust process, a multi-step proceeding that is neither imminent nor inevitable and will not proceed without ample notice. If the Comanche Nation pursues any such location, Plaintiff Nations will have a concrete, ripe basis to challenge at that time. *See New World Radio, Inc.,* 294 F.3d at 172 (noting that a challenger "will have an opportunity to challenge any [agency] decision that directly affects it as a competitor"). Plaintiff Nations invoke *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), for the proposition that they need not wait for a competitor to exploit newly available opportunities. But *Shays* requires that adverse use of illegally granted opportunities "appears inevitable." *Id.* at 90. A pre-authorization the Comanche Nation has no plans to exercise does not meet that standard.

Characterizing existing competition as unlawful is not a substitute for injury in fact. The competitor standing doctrine addresses real market changes: new entrants, new products, regulatory burdens actually lifted. It does not attach to a legal recharacterization of competition that is otherwise substantively unchanged. Before the 2020 compact, the Comanche Nation participated in gaming in Oklahoma. Today, the Comanche Nation participates in gaming in exactly the same way. Plaintiff Nations' economic interests are not perceptibly damaged by a compact that has changed nothing about the market in which they operate.

Even if the 2020 compact were voided, the competitive landscape would remain the same. The Comanche Nation would return to its prior compact because the supersession clause has no legal effect if the instrument containing it is void ab initio. The same facilities, the same games, the same locations. The federal government has recognized as much, acknowledging that the Comanche Nation may return to its prior compact if the 2020 compact is invalidated. Plaintiff Nations cannot establish causation or redressability for the same reason they cannot establish injury: the competitive conditions they challenge do not vary due to the existence of the 2020 compact.

Plaintiff Nations attempt to avoid this conclusion by invoking claim preclusion, arguing that the Comanche Nation's prior dismissal with prejudice bars revival of the prior compact.

Plaintiffs are wrong—a dismissal premised on a settlement that is later declared to be void is not preclusive. More fundamentally, Plaintiff Nations have no authority to assert claim preclusion on behalf of the State of Oklahoma, which is the party that would need to raise it. Whether the State would invoke claim preclusion to block the automatic continuation of the prior compact is entirely speculative, and speculation does not satisfy the redressability requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In any event, even if they could invoke it, Plaintiff Nations work through none of the elements of claim preclusion analysis, rendering that argument too underdeveloped to sustain.

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In the end, Plaintiff Nations have no injury independent of their merits claim. The competitive landscape is the same before the compact, during it, and would be the same without it. IGRA does not require uniform terms, and Plaintiff Nations now disclaim any interest in them. There is no perceptible damage in the record. Strip that away and what remains is purely circular: the compact is unlawful, so there is standing to challenge the compact as unlawful. Article III standing requires more. Plaintiff Nations lack standing.

II. Plaintiff Nations' claims fall outside IGRA's zone of interests.

Plaintiff Nations' APA claims fail because the interests they assert fall outside IGRA's zone of interests. The zone-of-interests inquiry asks whether Congress intended to allow a plaintiff asserting a particular interest to invoke judicial review under the statute. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). The inquiry turns on the particular interest asserted. *Lexmark*, 572 U.S. at 130. Moreover, the injury supplying constitutional standing must be the same injury falling within the zone of interests. *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996).

Plaintiff Nations argue that the Court's prior ruling on zone of interests forecloses this argument. It does not. The zone-of-interests inquiry at the pleading stage and at summary judgment are not the same. At the pleading stage, the Court accepts general allegations and draws reasonable inferences in the plaintiff's favor. At summary judgment, the Court evaluates the particular interest the record actually shows Plaintiff Nations to be asserting. That interest has shifted. It has gone from unequal treatment in compact terms (for example, the ability to offer different games) to a generalized interest in ensuring that the procedure used by the Comanche Nation to enter into a compact complies with state law. Whatever the prior ruling credited, it did not credit that interest, and law of the case does not foreclose its examination now.

Plaintiff Nations have now disclaimed any interest in uniform or equal compact terms. What remains is a purported interest in ensuring that the Comanche Nation's compact was executed by the Governor in compliance with state law. Equal footing and competitor standing are mere labels; they are the doctrinal vehicles through which that interest is asserted. Nothing in IGRA gives a neighboring tribe a cognizable interest in ensuring that another tribe's compact was executed in compliance with state law.

IGRA's compacting framework assigns defined roles to three parties: the tribe, the state on whose lands gaming occurs, and the federal government. 25 U.S.C. § 2710(d)(3). Compact terms "may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State," and rights relinquished "shall be specific to the tribe so making the election, and shall not be construed to extend to other tribes." S. Rep. No. 100-446, at 6, 14 (1988). Consistent with that design, one tribe has no cognizable interest under IGRA in another tribe's exclusivity fee, authorized game categories, or pre-authorized locations. Those matters concern only the contracting parties. An interest in ensuring a neighboring tribe's compliance with state-law requirements for compact execution is contrary to IGRA's structure.

Plaintiff Nations' reliance on *Patchak* and *Amador County* is misplaced. Both cases involved parties directly affected by the governmental decisions they challenged. *Match-E-Be-Nash-She-Wish Band v. Patchak*, 567 U.S. 209, 224 (2012) (neighboring landowner challenging land-into-trust decision); *Amador County v. Salazar*, 640 F.3d 373, 379 (D.C. Cir. 2011) (county with governmental responsibilities over affected lands). No provision of the Comanche compact imposes any obligation on Plaintiff Nations or restricts any right they hold. Their claim rests on a generalized interest in the legal validity of the procedure through which the compact was negotiated, which neither case supports.

The 2020 compact is a negotiated agreement between the Comanche Nation and the State of Oklahoma. Plaintiff Nations were not parties to that negotiation and have no cognizable interest in the validity of those negotiations under state law. IGRA does not authorize other tribes to challenge another tribe's compact on the basis of a generalized interest in state-law compliance. Treating such a claim as within the zone of interests is inconsistent with IGRA's structure, which confines the negotiation of compacts to the tribe, the state, and the federal government. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800 (2014). Because IGRA does not protect a tribe's interest in ensuring that another tribe's compact complies with state law, Plaintiff Nations lack a statutory cause of action under the APA, and their claims should be dismissed on this ground independently of any Article III deficiency.

CONCLUSION

Summary judgment should be granted to the Comanche Nation.

Dated: April 24, 2026

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on April 24, 2026, with the help of my legal assistant I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all individuals registered to receive this case's filings.

/s/ Mike McBride
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