

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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**Forest County Potawatomi Community,**  
a federally-recognized Indian Tribe,

Plaintiff,

v.

**The United States of America;** et al.,

Defendants,

**Menominee Indian Tribe of Wisconsin,**  
et al.,

Defendant-Intervenors

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Case No. 1:15-cv-00105-CKK  
Judge Colleen Kollar-Kotelly

**FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN  
RESPONSE TO FOREST COUNTY POTWATOMI COMMUNITY'S MOTION FOR  
SUMMARY JUDGMENT AND IN SUPPORT OF  
THEIR CROSS-MOTION FOR SUMMARY JUDGMENT**

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## **I. INTRODUCTION**

The Forest County Potawatomi Community (“FCPC”) challenges the Assistant Secretary-Indian Affairs’ (“Assistant Secretary”) January 9, 2015 disapproval of a 2014 amendment to the Class III gaming compact between FCPC and the State of Wisconsin (“2014 Amendment”). The 2014 Amendment is designed to protect FCPC’s gaming revenue by requiring that the Menominee Indian Tribe of Wisconsin (“Menominee”) pay an annual Mitigation Payment to FCPC. This attempt to burden the Menominee with insuring FCPC’s continued profitability violates the Indian Gaming Regulatory Act (“IGRA”). As the Assistant Secretary stated, “We have never been presented with a compact or amendment that goes so far as to attempt to guarantee the continued profitability of one tribe’s casino at the expense of another tribe.” Decision at 5. As such, the Assistant Secretary properly found that the 2014 Amendment violates IGRA.

FCPC argues that the Decision is arbitrary and capricious for three reasons: (1) the Assistant Secretary erred in interpreting the 2014 Compact Amendment as requiring Menominee to make mitigation payments to FCPC; (2) the Assistant Secretary erred in finding that the 2014 Compact Amendment’s exclusivity provision was not a permissible subject of a Class III gaming compact; and (3) the Assistant Secretary’s disapproval wrongfully deprived FCPC of its benefit of its bargain with the state. FCPC’s arguments ignore the plain language of the 2014 Amendment and the extent to which the amendment’s exclusivity provision surpasses the permissible subjects of negotiation for a Class III gaming compact.

First, by its terms, the 2014 Amendment’s exclusivity provision requires Menominee to make Mitigation Payments to FCPC and guarantee FCPC’s total profitability. The 2014 Amendment specifically referred to Menominee in several places and FCPC and the State

intended for Menominee to make the Mitigation Payments. FCPC seeks to consider the 2014 Amendment's exclusivity provision in a vacuum, but as the Assistant Secretary found, Menominee would have been responsible for making all of the Mitigation Payments intended to protect FCPC's revenue. The Assistant Secretary properly found that IGRA does not authorize states and tribes to negotiate to shift the burden of potential lost revenues from existing tribal gaming operations to another tribe without its consent. The Assistant Secretary properly disapproved the 2014 Amendment on this basis.

Second, the Assistant Secretary properly interpreted IGRA by finding that the 2014 Amendment's exclusivity provision included subjects that fell outside the permissible subjects of negotiation under IGRA and his decision is subject to deference. While Federal Defendants do not dispute that tribal-state gaming compacts may contain exclusivity provisions, the 2014 Amendment's exclusivity provision's requirement that one tribe reimburse another tribe for all of its potential lost revenues is far beyond the pale of any compact amendments approved by Interior since the enactment of IGRA. In critically comparing the 2014 Amendment's exclusivity provision to other compact exclusivity provisions, the Assistant Secretary found that no other compact amendments have called for anything approaching the Mitigation Payments that guarantees a tribe's profits by another tribe and that included Class II gaming and other revenues. Indeed, as the Assistant Secretary found, the other amendments to which he compared the 2014 Amendment only called for reductions in revenue sharing to the state or indemnification solely by the state for either Class III gaming revenues or loss of revenue and none made another tribe the guarantor of profits without the other tribe's consent. The Assistant Secretary properly disapproved the 2014 Amendment on these grounds.

Finally, the Decision did not deprive FCPC of the benefit of its bargain. The Assistant Secretary had a statutory duty to determine whether the 2014 Amendment complied with IGRA. Under IGRA, the Assistant Secretary may only approve tribal-state gaming compacts that do not violate any provision of IGRA. Here, there can be no benefit of the bargain where the submitted tribal-state gaming compact violates IGRA. While FCPC and the State were free to negotiate a compact amendment, the Assistant Secretary cannot approve it based on that fact alone. Rather, IGRA requires that the Assistant Secretary review amendments to insure that the terms of the compact, as amended and considered as a whole, do not violate any provision of IGRA, any other provision of Federal law that does 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); *see also* Fed. Reg. Vol. 73, No. 235, 74005 (Dec. 5, 2008). Here, the Assistant Secretary reviewed the 2014 Amendment and found that it violates IGRA. Accordingly, he properly disapproved the 2014 Amendment.

Because FCPC fails to demonstrate that the Decision was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, and given the deference due to the Assistant Secretary's decision, the Court should deny FCPC's motion for summary judgment and grant summary judgment in Federal Defendants' favor.

## **II. STATUTORY BACKGROUND**

In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, "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); *see also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayer, J., concurring) (noting the importance of tribal gaming operations to "core



governmental functions” in light of “the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means.”). IGRA divides tribal gaming into three “classes,” each subject to differing levels of state, tribal, and federal regulation. *See, e.g., id.* §§ 2703(6)-(8), 2710. Class I games consist mostly of “social games with small prizes” and are regulated exclusively by Indian tribes. *Artichoke Joe’s Cal. Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1178 n.5 (E.D. Cal. 2003) (*Artichoke Joe’s*). Class II games, which include certain types of bingo and card games “that are explicitly authorized by the laws of the State, or . . . are not explicitly prohibited by the laws of the State and are played at any location in the State[,]” are regulated by both tribal government and the federal government. *Id.* (citing 25 U.S.C. § 2703(7)(A) and § 2710(d)). Class III games, defined as “all forms of gaming that ‘are not class I gaming or class II gaming[,]’ § 2703(8)[,],” permits games such as electric “game[s] of chance or slot machines of any kind.” *Artichoke Joe’s*, 278 F. Supp. 2d at 1178, n.5.

IGRA provides that class III gaming on tribal lands is permitted only where such gaming is “conducted in conformance with a Tribal-State compact entered into by the Indian Tribe and the State under paragraph (3) that is in effect.” 25 U.S.C. § 2710(d)(1)(C). IGRA further provides that “[a]ny State and any Indian Tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian Tribe, but such compact shall take effect only when notice of approval by the Secretary of the Interior of such compact has been published by the Secretary in the Federal Register.” *Id.* at (d)(3)(B). The latter provision provides that a compact must be approved by the Secretary (affirmatively or by operation of law) to be valid and enforceable. The Secretary has 45 days from the submission of a compact to approve or

disapprove it. 25 U.S.C. §§ 2710(d)(3), (8).<sup>1</sup> If the Secretary neither approves nor disapproves the compact within this time frame, the compact is deemed approved, but only to the extent the compact is consistent with the provisions of IGRA. *Id.* § 2710(d)(8)(C); 25 C.F.R. § 292.9. The Secretary may disapprove a compact if such compact violates (i) any provision of IGRA; (ii) any other provision of federal law that does not relate to jurisdiction over gaming on Indian lands; or (iii) the trust obligations of the United States to Indians. *Id.* § 2710(d)(8)(B).

In drafting IGRA, Congress included the tribal-state compact provisions to take into account states' interests in the regulation and conduct of Class III gaming activities by balancing tribal, state, and Federal interests in regulating gaming on Indian lands. As part of this balance of interests, Congress limited the subjects over which tribes and states could negotiate a class III gaming compact. Under IGRA, a tribal-state gaming compact may include provisions relating to:

- (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
- (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
- (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
- (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
- (v) remedies for breach of contract;
- (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

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<sup>1</sup> The Secretary of the Interior delegated this authority to the Assistant Secretary. 209 DM 8 (2003).

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

*Id.* If a compact provision does not explicitly fall within the scope of permissible subjects of negotiation under IGRA, the Assistant Secretary considers whether it involves a subject that is “directly related to the operation of gaming activities.” *Id.* at (vii). This is referred to as the “catch-all” category.

In the context of applying the “catch-all” category, the Assistant Secretary does not consider whether “but for the existence of the Tribe’s Class III gaming operation, would the particular subject regulated under the compact provision exist.” Decision at 6 (FCPCAR001464). Examining a compact provision to determine whether a particular object of regulation was “directly related to the operation of gaming activities” on this basis alone would permit states to use tribal-state compacts as a means to regulate a number of tribal activities far beyond that which Congress intended. *Id.* Instead, the Assistant Secretary closely scrutinizes whether the regulated activity has a direct connection to the tribe’s conduct of Class III gaming activities. *Id.* (quoting Testimony of K. Washburn, Assistant Secretary, before Senate Committee on Indian Affairs, July 23, 2014 (“The Department closely scrutinizes tribal-state gaming compacts and disapproves compacts that do not squarely fall within the topics delineated in IGRA. For example, Class II gaming is not an authorized subject of negotiation for Class III compacts. . . .”)).

### **III. FACTUAL BACKGROUND**

#### **A. FCPC’s Off-Reservation Casino in Milwaukee**

FCPC is a federally-recognized Indian Tribe. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942 (Jan. 14, 2015); Compl. ¶ 11 (ECF No. 1). In 1987, FCPC submitted an application to Interior in

which it requested that Interior acquire two parcels of land in the Menomonee Valley in Milwaukee, Wisconsin, in trust for its benefit. 2014 Decision at 2 (FCPCAR001460).<sup>2</sup> In its application, FCPC stated its intent to operate a bingo hall on the parcel. *Id.* at 3 (FCPCAR001461). On July 10, 1990, the Assistant Secretary issued a two-part determination under section 20 of IGRA finding that acquisition of the Menominee Valley Land in trust for the FCPC would be in the best interest of the FCPC and not detrimental to the surrounding community. *Id.* at 2 (FCPCAR001460); *see also* BIA\_003085. The Governor of Wisconsin concurred in this determination and on August 4, 1992, Interior approved FCPC's Class III gaming compact with the State. *Id.* at 3 (FCPCAR001461). Thus, FCPC became the first tribe to use IGRA's provisions to develop an off-reservation casino. *Id.* at 1 (FCPCAR001459). FCPC and the State of Wisconsin subsequently amended the gaming compact four times. *Id.* at 3 (FCPCAR001461). The most recent amendment went into effect by operation of law "but only to the extent [the Amendment] is consistent with IGRA." 25 U.S.C. § 2710(d)(8)(C) (the "2005 Amendment"). *Id.* at 3-4 (FCPCAR001461-62).

#### **B. FCPC's 2005 Compact Amendment**

In a 2003 compact amendment ("2003 Amendment"), FCPC and Wisconsin initially included a section seeking to relieve FCPC of its revenue-sharing payments to Wisconsin and required refund of certain payments if Wisconsin entered into, or authorized, an agreement permitting Class III gaming within 50 miles of FCPC's Milwaukee casino. *Id.* at 3 (FCPCAR001461). Interior advised FCPC that it was prepared to disapprove the 2003 Amendment unless FCPC and Wisconsin removed this "poison pill" anti-competitive provision.

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<sup>2</sup> Because Federal Defendants agreed to include additional documents in the administrative record after it was lodged, references to the administrative record are referred to as "FCPCAR00XXXX," documents comprising the initial administrative record, or "BIA\_0XXX," documents later included.

*Id.* FCPC and Wisconsin then submitted an addendum to the 2003 compact amendment that removed the provision. Interior took no action on the 2003 Amendment, thereby allowing it to go into effect by operation of law, also known as “deemed approved.” *See* 25 U.S.C. § 2710(d)(8)(C). In its letter notifying FCPC and Wisconsin that it had allowed the substitute 2003 Amendment to go into effect by operation of law (after the deletion of the “poison pill” provision), Interior stated that the stricken provision was “anathema to the basic notions of fairness in competition and inconsistent with the goals of IGRA.” 2014 Decision at 3 (FPCAR001461).

By 2005, FCPC and Wisconsin returned to the negotiating table. *Id.* The parties reached an agreement, submitted it for review and Interior declined to issue an approval of the 2005 Amendment, which allowed it to go into effect as “deemed approved.” *Id.* at 3-4 (FPCAR001461-62). Under the 2005 Amendment, Wisconsin’s Governor was prohibited from concurring in a future positive two-part Secretarial Determination under IGRA for a gaming facility within 30 miles of FCPC’s Milwaukee casino without FCPC’s consent, or unless FCPC and Wisconsin negotiated an amendment to FCPC’s compact. *Id.* In the event the parties reached an impasse, the 2005 Amendment also established a dispute resolution process that included binding arbitration in the event Interior issued a two-part determination for lands within 50 miles of FCPC’s Milwaukee casino. *Id.* The amendment went into effect by operation of law, but only to the extent it was consistent with IGRA. *Id.*

### **C. The Menominee Indian Tribe of Wisconsin’s Two-Part Application**

In 2004, Menominee applied for a two-part determination requesting that Interior acquire land located in Kenosha, Wisconsin in trust for gaming purposes under IGRA. Decision at 4 (FPCAR001462). The Kenosha site is approximately 33 miles from FCPC’s Milwaukee

casino. *Id.* Menominee did not own the Kenosha parcel in fee, but made monthly payments preserving its option to purchase the property. BIA\_003100-01. On August 23, 2013, Interior approved Menominee's two-part determination request for gaming on the Kenosha site, finding that it was in the tribe's best interest and would not be detrimental to the surrounding community. Decision at 4 (FCPCAR001462). As required by IGRA, Interior requested the concurrence of Wisconsin's Governor. *Id.* At the time FCPC filed its Complaint on January 21, 2015, the Governor had not reached a decision. Just two days later, on January 23, 2015, the Governor advised the Assistant Secretary that he did not concur with Interior's two-part determination. As a result, the Kenosha parcel is not eligible for gaming.

#### **D. FCPC's Proposed 2014 Amendment**

Interior's two-part determination regarding Menominee's application triggered the negotiation and dispute resolution process under FCPC's 2005 Amendment. On November 26, 2014, FCPC and the State submitted the 2014 Amendment to Interior for review and approval. Decision at 4 (FCPCAR001462); FCPCAR000003. The 2014 Amendment provides that the Governor may not concur in a two-part determination for a gaming facility ("Applicant Facility") within 50 miles of FCPC's casino except as provided by the 2014 Amendment. FCPCAR0000029 at XXXVII.2.A. The 2014 Amendment states that Menominee's proposed Kenosha facility is an Applicant Facility. *Id.* The 2014 Amendment then provides that should the Governor concur in the Secretary's determination for an Applicant Facility, the State, or the Applicant – here, the Menominee – is required to make an annual mitigation payment to FCPC, through the State, to compensate FCPC for any revenue losses at its Milwaukee facility. *Id.* at XXXVII.2.C. These payments include any revenue losses associated with Class III gaming,

Class II gaming, food and beverage, and hotel and entertainment activity at the facility. *Id.* at XXXVII.D.2.

The 2014 Amendment includes a “State Alternative Mitigation Payment Mechanism,” which provides that FCPC and Menominee may enter into an agreement obligating “Applicant to make some or all of the Mitigation payments.” *Id.* at XXXVII.F. The proposals for Alternative Mechanisms could “include such mechanisms as payments made out of the Lock Box established in the Menominee Compact Section XXXVII(C)(9) and (11) for Menominee Compact payments.” *Id.* The obligation to make mitigation payments begins with the start of gaming at an Applicant Facility and continues for the duration of FCPC’s gaming compact with Wisconsin, a lifespan that could extend upwards of forty years. *Id.* at XXXVII.E.3. Menominee was not a party to FCPC and Wisconsin’s arbitration, nor was Menominee involved in the underlying negotiations. 2014 Decision at 2 (FCPCAR001460).

**E. Interior’s Denial of the 2014 Compact Amendment**

The current lawsuit stems from the Assistant Secretary’s Decision disapproving the 2014 Amendment on the basis that it violated IGRA. Compl. ¶¶ 1-4. Pursuant to IGRA, the Secretary may approve or disapprove of a compact amendment within 45-days of its submission. The Secretary’s central inquiry turns on whether the agreement violates one of three areas: (1) IGRA; (2) any other provision of federal law that does not relate to jurisdiction over gaming on Indian lands; or (3) the trust obligation of the United States to Indians. *See* 25 U.S.C. § 2710(d)(8); Decision at 5 (FCPCAR001463).

Here, relying on the premise that the purpose of state-tribal compacts was to ensure that states’ interests were considered in the regulation and conduct of Class III gaming activities, the Assistant Secretary considered whether the regulated activity “has a direct connection to the

Tribe's conduct of Class III gaming activities." Decision at 6 n.26 (FCPCAR001464) (quoting 25 U.S.C. § 2710(d)(3)(C)(vii)).

In examining the 2014 Amendment, the Assistant Secretary found several areas of the agreement problematic, the most glaring of which was the intent of the 2014 Amendment to "protect [] the Potawatomi Hotel & Casino's revenue stream[.]" *Id.* at 6 (quoting December 30, 2014, letter from FCPC to the Assistant Secretary (FCPCAR0000014)). The Assistant Secretary stated that this type of provision violated IGRA because it contemplates payments to the State from the Menominee for purposes other than defraying the State's cost of regulating Class III gaming activities. Nothing in IGRA or its legislative history, the Assistant Secretary explained, "suggests that Congress intended compacts to be used for the purpose of insuring the profitability of a tribe's casino at the expense of another tribe's rights under IGRA or fairness in inter-tribal gaming competition, at least without the consent of the other tribe." *Id.* at 8. The Assistant Secretary noted that the mitigation payments went well beyond a potential reduction in FCPC's revenue sharing payments that Interior permitted in other instances. *Id.* at 7. The Assistant Secretary cited to other compact amendments between Wisconsin tribes and the State that did not require anything approaching the mitigation payments that guarantee a tribe's profits by another tribe nor did the other compact amendments include Class II gaming and other, non-gaming revenues. *Id.*

The Assistant Secretary found other areas problematic, as well. The Assistant Secretary was concerned that the 2014 Amendment was ultimately designed to shift the burden of compensating for potential decreased revenues to the Menominee, an obligation that would continue for the life of FCPC's gaming compact. *Id.* Given that the 2014 Amendment specifically addresses the Menominee, the Assistant Secretary stated that FCPC and the State



made it impossible for the Assistant Secretary to not consider Menominee's interests. *Id.* That the Menominee did not participate in this amendment made the obligation all the more troublesome. Coupled with the unrepresented extent to which the mitigation payments were designed to guarantee continued levels of profit, including for purposes other than defraying the State's cost of regulating Class III gaming activities, the Assistant Secretary concluded that the 2014 Compact Amendment violated the provisions of IGRA.

#### **F. FCPC's Complaint**

FCPC filed its Complaint on January 21, 2015, alleging that Federal Defendants erred by interpreting the 2014 Amendment as obligating Menominee to compensate FCPC for lost revenue. ECF No. 1. FCPC alleges that in disapproving the 2014 Amendment, Federal Defendants acted contrary to law, in an arbitrary and capricious manner and abused their discretion, if any, in violation of the IGRA and the APA. FCPC's Complaint seeks, *inter alia*, (1) an order holding unlawful and setting aside the Federal Defendants' disapproval of the 2014 Compact Amendment; (2) an order compelling the Federal Defendants to approve the 2014 Compact Amendment or to cause the 2014 Compact Amendment to take effect as "deemed approved" under the IGRA; (3) and an order that the Federal Defendant shall take those actions necessary for the 2014 Compact Amendment to take effect as a matter of federal law. *See* Compl at 25-26.

#### **IV. STANDARD OF REVIEW**

FCPC filed the instant lawsuit challenging Interior's disapproval of the 2014 Amendment under the APA. "[W]hen an agency action is challenged[, t]he entire case on review is a question of law, and only a question of law." *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). While the general standard for summary judgment set forth in

Rule 56 of the Federal Rules of Civil Procedure does not apply to a review of agency actions, summary judgment nonetheless “serves as the mechanism for 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.” *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) (citing *Richards v. INS*, 554 F.2d 1173, 1177 & n.28 (D.C. Cir. 1977)); accord *UPMC Braddock v. Harris*, 934 F. Supp. 2d 238, 245 (D.D.C. 2013); *Cottage Health Sys. v. Sebelius*, 631 F. Supp. 2d 80, 89-90 (D.D.C. 2009).

Under the APA, a reviewing court shall “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.” 5 U.S.C. § 706(2)(A). “This is a ‘deferential standard’ that ‘presume[s] the validity of agency action.’” *WorldCom, Inc. v. FCC*, 238 F.3d 449, 457 (D.C. Cir. 2001) (alteration in original) (quoting *Sw. Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999)). A reviewing court must be satisfied that the agency has “‘examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’” *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006). The agency’s decisions are entitled to a “presumption of regularity,” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), and although “inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.” *Id.* at 416.

“An agency decision is arbitrary and capricious if it ‘relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency

expertise.’” *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 714 (D.C. Cir. 2011) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); accord *Agape Church, Inc. v. FCC*, 738 F.3d 397, 410 (D.C. Cir. 2013). The Court’s “limited” review “focuses on the reasonableness of the agency’s decisionmaking process” and is “particularly deferential” where the agency’s decision is “primarily predictive” and the agency has “acknowledge[d] factual uncertainties and identif[ied] the considerations it found persuasive.” *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009). The Court may not substitute its judgment for that of the agency. *Manin v. Nat’l Transp. Safety Bd.*, 627 F.3d 1239, 1243 (D.C. Cir. 2011).

## **V. STATUTORY INTERPRETATION**

While the parties do not dispute IGRA’s plain language, FCPC argues that should the Court find an ambiguity in the text, the Court must interpret that ambiguity in its favor using the canons of construction relevant to Indian law, which counsel that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. Pl.’s Br. at 14 (citing *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985))). It also argues that the Assistant Secretary’s determination deserves no deference because it has no precedential effect and is not binding on third parties. Pl.’s Br. at 15. FCPC is mistaken. First, where there is no ambiguity, as here, this canon has no application. *Negonset v. Samuels*, 507 U.S. 99, 110 (1993). Second, even if the Court were to find that there is an ambiguity in the statutory language of IGRA – setting aside the fact that FCPC points to no ambiguity in the language and asserts that there *is* no ambiguity – the *Blackfeet* canon of construction does not apply where the interests of two tribes are adverse. Third, the Assistant Secretary’s decision has precedential effect, is binding on third parties, and thus is entitled to *Chevron* deference on those grounds.

When interpreting a statute, courts must first determine whether Congress has specifically spoken to the question at issue, in other words, whether the statutory text is plain and unambiguous. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). If it is, courts “must apply the statute according to its terms.” *Id.* When deciding whether the statutory text is plain and unambiguous, a court “should not confine itself to examining a particular statutory provision in isolation” and should read the words in their context within the overall statutory scheme. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000). “[I]n expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849); *see also Chemical Mfrs. Ass’n v. E.P.A.*, 217 F.3d 861, 867 (D.C. Cir. 2000) (quoting *Boisdore*).

If the statutory text is ambiguous, there exist two canons of statutory interpretation relevant to this case. Generally, when reviewing an agency’s interpretation of its enabling statute and the laws it administers, courts are guided by “the principles of [*Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*], 467 U.S. 837 (1984).” *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 754 (D.C. Cir. 2007). Under *Chevron*, if a statute is ambiguous or silent on an issue, an agency interpretation that is permissible and reasonable receives controlling weight, “even if the agency’s reading differs from what the court believes is the best statutory interpretation.” *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). In making this determination, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Confed. Tribe of Grand Ronde Cmty. of Or. v. Jewell*, 75 F. Supp. 3d 387, 396 (D.D.C. 2014), *aff’d*, 830 F.3d 552 (D.C. Cir. 2016) (quoting *Chevron*, 467 U.S. at 844). As with the principles of APA review,

in reviewing an agency's interpretation of the laws it administers, the court is "principally concerned with ensuring that [the Agency] has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made,' that the Agency's 'decision was based on a consideration of the relevant factors,' and that the Agency has made no 'clear error of judgment.'" *Confed. Tribe of Grand Ronde*, 75 F. Supp. 3d at 396 (quoting *Bluewater Network v. E.P.A.*, 370 F.3d 1, 11 (D.C. Cir. 2004) (quoting *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43)).

In cases involving American Indians, however, courts have applied the canon of construction that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). This canon is "'rooted in the unique trust relationship between the United States and the Indians.'" *Id.* (quotation omitted). Although courts in this circuit generally construe the legislation in favor of the tribe rather than adopt the agency's interpretation, finding that an agency's interpretation is given consideration but not deference, *see Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444-45 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989), this canon of construction does not apply for the benefit of one tribe if its application would adversely affect the interests of another tribe. *Confed. Tribes of Grand Ronde*, 75 F. Supp. 3d at 396 (citing *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996)).

As an initial matter, FCPC points to no ambiguity; indeed, the parties assert that there are no ambiguities. *See* Pl.'s Br. at 14 ("In this case, both IGRA and the 2014 Amendment are unambiguous and thus required to be applied according to their terms."). The Court's inquiry should stop there. If, however, the Court determines that there is an ambiguity, *Chevron*

deference applies because the Indian law canon of construction does not apply. This case involves the interpretation of IGRA and the compact provisions permissible under that statute. In this instance, where one tribe seeks to interpret IGRA to allow it to shift the burden of potential lost revenues to another tribe without the other tribe's consent, the canon does not apply for the benefit of one tribe because its application would adversely affect the interests of the other tribe. *Confed. Tribes of Grand Ronde*, 75 F. Supp. 3d at 396; *see also California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 n.7 (D.D.C. 2008) (court concluded that *Chevron* deference—rather than *Skidmore v. Swift & Co.*, 323 U.S. 134—was appropriate, that the Secretary's proposed interpretation, which considered matters involving a heated tribal leadership dispute, actually advances “the trust relationship between the United States and the Native American people[,],” and that adherence to *Chevron* was consistent with the customary Indian-law canon of construction).

An interpretation of IGRA that would benefit FCPC would not necessarily benefit other tribes or groups. *See Redding Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015) (declining to apply *Blackfeet* presumption because all tribal interests were not aligned). It would pit tribe against tribe and authorize states and tribes to negotiate to shift the burden of potential lost revenues from existing gaming operations to another tribe without the consent of the other tribe, and allow non-permissible subjects to be negotiated under IGRA. The canon should not apply in such circumstances. The canon has been applied only when there is a choice between interpretations that would favor Indians on the one hand and state or private actors on the other. *Id.* For example, in *Blackfeet*, the Supreme Court applied the canon in a dispute between a state and a tribe, interpreting the 1938 Mineral Leasing Act. The Court concluded that the statute should not be read to permit the state of Montana to tax Indian royalty income from mineral

leases because the Act did not expressly authorize state taxation of Indian royalty interests. *Id.* (citing *Blackfeet*, 471 U.S. at 767). In the absence of such an express authorization, the statute had to be interpreted in favor of the Indians. The *Blackfeet* presumption does not apply when tribal interests are adverse because “[t]he government owes the same trust duty to all tribes.” *Id.* (quoting *Confed. Tribes of Chehalis Indian Reservation*, 96 F.3d at 340). This is not a dispute between state and tribal interests and the canon does not apply in this case.

Finally, as final agency action, the Decision is judicially reviewable and represents the agency’s official position, not a mere policy statement. *See Williams v. Babbitt*, 115 F.3d 657, 663 n.3 and 5 (9th Cir. 1997). *See also Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (applying *Chevron* deference despite less formal rulemaking procedures because of “the careful consideration the Agency ha[d] given the question over a long period of time” and other factors). Although FCPC argues that the Decision has no precedential impact and thus not entitled to deference, the cases it cites in support are distinguishable. *See Pl.’s Br.* at 15. In both *Fort Indep. Indian Cmty. v. California*, 679 F. Supp. 2d 1159, 1176-77 (E.D. Cal. 2009) and *Chemehuevi Indian Tribe v. Brown*, CV 16-1347-JFW, 2017 WL 2971864 (C.D. Cal. Mar. 30, 2017), while the court found that *Chevron* deference did not apply to those particular compact decisions, the courts also did not apply the *Blackfeet* presumption, instead finding that *Skidmore* deference applied to the agency’s decisions. *Id.*; *see United States v. Mead, Inc.*, 533 U.S. 218, 237 (2001) (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).<sup>3</sup> Specifically in *Chemehuevi*, the court found that where the agency had practice in and specialized expertise in matters relating to Indian gaming, its determination was entitled to substantial weight. 2017 WL

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<sup>3</sup> Under *Skidmore*, the measure of deference afforded to the agency varies “depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” 323 U.S. at 140.

2971864, at \*8.

Rather, the appropriate course is for the Court to follow the D.C. Circuit decisions FCPC cites, *Confed. Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 559 (D.C. Cir. 2016) and *Citizens Exposing Truth about Casinos v. Kemphorne*, 492 F.3d 460, 465 (D.C. Cir. 2007). Pl.’s Br. at 15 n.4. In those cases, the court applied *Chevron* deference to the Secretary’s decisions interpreting the IRA and IGRA. *Id.* In *Citizens Exposing Truth about Casinos*, the Court noted that even in the absence of notice and comment or administrative formality, there may be reasons for according *Chevron* deference where an agency action has the force of law. *Id.* (citing *Mead Corp.*, 533 U.S. at 231). This includes opinion letters made pursuant to congressionally delegated lawmaking power that have legally binding effect. *Id.* (citing *FEC v. National Rifle Ass’n of America*, 254 F.3d 173, 186 (D.C. Cir. 2001) (FEC advisory opinion was due *Chevron* deference). The court found that the Secretary’s interpretation of the “initial reservation” exception under IGRA was entitled to *Chevron* deference because it formed the basis of the Secretary’s decision under the IRA to acquire the property in trust and the Secretary gave formal public notice in the Federal Register of the determination and the basis for it, including the opinion letter on which the Secretary relied. *Citizens Exposing Truth about Casinos*, 492 F.3d at 466. The court noted that although publication in the federal register is not in itself sufficient to constitute an agency’s intent that its pronouncement have the force of law, publication reflects a deliberating agency’s self-binding choice, as well as a declaration of policy, which is further evidence of a *Chevron*-worthy interpretation. *Id.* Likewise, in *Confed. Tribes of Grand Ronde*, the circuit court, affirming the district court’s decision – which found that the Indian canon of construction did not apply – applied *Chevron* deference to the agency’s determinations. 830 F.3d at 559-560.



Here, the Decision is entitled to *Chevron* deference because of the careful consideration given and the expertise of the agency, to which Congress delegated a substantial role in administering IGRA, most relevantly here in approving tribal-state gaming compacts. *See Citizens Exposing Truth about Casinos*, 492 F.3d at 465. The Assistant Secretary made his determination pursuant to congressionally delegated lawmaking power. Under Interior regulations, all compacts and amendments must be submitted for review and approval by the Secretary under IGRA. *See* 25 C.F.R. § 293.4. IGRA provides no authority for a compact or amendment to bypass Secretarial review—regardless of how the agreement was developed—because a compact or amendment becomes effective only upon publication of the Assistant Secretary’s notice of approval in the Federal Register. 25 U.S.C. § 2710(d)(3)(B). The Assistant Secretary’s disapproval represents the agency’s self-binding choice and its declaration of policy regarding the interpretation of IGRA. The Decision has legally binding effect and the power to control future decisions. The Assistant Secretary’s interpretation of IGRA in the Decision is, therefore, entitled to *Chevron* deference.

## VI. ARGUMENT

### A. The 2014 Amendment violates IGRA by seeking to protect FCPC Revenues by imposing the Burden on a Separate Federally Recognized Tribe

FCPC alleges that the Assistant Secretary erred in interpreting the 2014 Amendment to require Menominee to make Mitigation Payments. FCPC asserts that the 2014 Amendment did not require Menominee to make Mitigation Payments, did not impose any legal obligations on Menominee, and that the Assistant Secretary wrongly based his decision on what actions Menominee may take in the future. Pl.’s Br. at 18-25. The Assistant Secretary properly found that the administrative record supported the conclusion that the intent of the 2014 Amendment was to require Menominee to make the Mitigation Payments. The 2014 Amendment seeks to

protect the revenues of FCPC by fully anticipating that Menominee will bear the burden of making FCPC whole. Though this places an enormous burden on Menominee, it was not a part of the compact amendment negotiations. As the Assistant Secretary found, FCPC was granted a tremendous benefit in 1990 when Interior and the State authorized it to open an off-reservation casino in Milwaukee. FCPCAR0001460. FCPC, however, was not promised nor guaranteed an absolute monopoly in perpetuity. In the face of potential competition, FCPC has attempted to shift to Menominee the significant financial burden of preserving all of FCPC's monopoly profits. The 2014 Amendment goes further than simply obtaining financial guarantees from the State, which other compact amendments have done. Instead, it seeks to impose a substantial financial burden on Menominee, a tribe that was not even a party to the negotiation of the compact amendment.

The 2014 Amendment first provides the procedures that would happen if the Secretary issued a positive determination under 25 U.S.C. § 2719(b)(1)(A) regarding a proposed gaming facility ("Applicant Facility") on lands more than 30 miles and within 50 miles of FCPC's hotel and casino facility. *Id.* at XXXVII.A. In that event, the State would not concur in that determination except as provided in the 2014 Amendment. *Id.* The 2014 Amendment then states that: "The gaming establishment proposed in Kenosha, Wisconsin by the [Menominee] is an Applicant Facility." *Id.*

The 2014 Amendment requires the State, or in the alternative, Menominee, to make an annual "Mitigation Payment" to FCPC to compensate FCPC for revenue losses caused by a Menominee Kenosha casino. The 2014 Amendment provides that

The State and the [FCPC] anticipate that the State will enter into agreements under which the Applicant will agree to pay for the Mitigation Payment required in this Section. Timely payment of a Mitigation Payment in full to the [FCPC] by the Applicant satisfies the State's obligation to make that Mitigation Payment.

2014 Amendment, Section XXXVII.E.1 (FCPCAR000031).

As the Assistant Secretary noted, the 2014 Amendment also requires the State or Menominee to compensate FCPC for revenue losses to “Class II gaming, food and beverage, hotel, and entertainment activity earned at the Milwaukee Facility. FCPCAR001462 (quoting 2014 Amendment, Section XXXVII.E.1.).<sup>4</sup> The 2014 Amendment includes a “State Alternative Mitigation Payment Mechanism” that provides that FCPC and Menominee may enter into an agreement obligating “[Menominee] to make some or all of the Mitigation Payments.” FCPCAR001462 (quoting 2014 Amendment, Section XXXVII.F.).

Upon the written request of the State, the [FCPC] shall negotiate in good faith to reach an agreement on reasonable terms proposed by the State which would obligate the Applicant or other third party to make some or all of the Mitigation Payments (“Alternative Mechanisms”). These proposals for Alternative Mechanisms could include such mechanisms as payments made out of the Lock Box established in the Menominee Compact Section XXXIII(C)(9) and (11) for Menominee Compact payments; establishing an Advance Account for the deposit of casino revenue from the Applicant Facility; requiring the Applicant to provide an Evergreen Letter of Credit that would guarantee some or all of the Mitigation Payments; or assigning the Applicant’s State Compact Payments to [FCPC].

FCPCAR001463 (quoting 2014 Amendment, Section XXXVII.F.). The obligation to make the payments begins on the commencement of any gaming activity and continues for the duration of FCPC’s compact, or between 15 and 40 years. FCPCAR001463; Decision at 5 fn. 24 and at 7 fn. 33.

In reviewing these provisions and the whole of the 2014 Amendment, the Assistant Secretary considered whether the 2014 Amendment addressed regulatory concerns or the operation of Class III gaming at FCPC’s Milwaukee casino. *Id.* at 1464. He found that it did

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<sup>4</sup> Read in conjunction with section XXXVII.D.2, which defines “Milwaukee Net Revenues” as “(a) revenue from class III gaming, class II gaming, food and beverage, hotel and entertainment activity earned at the Milwaukee Facility . . . and not including revenue from ancillary activity such as retail activity[.]”

not. Instead, its intent was to “protect[] the Potawatomi Hotel & Casino’s revenue stream,” from any losses due to competition from the proposed Menominee casino at Kenosha. *Id.* (quoting December 30, 2014, Letter from FCPC). The Assistant Secretary noted that while “IGRA identifies in great detail what is allowable for negotiation in a tribal-state Class III gaming compact, [] it does not authorize states and tribes to negotiate to shift the burden of loss revenues from existing gaming operations to another tribe without the consent of the other tribe.” *Id.* While the “2014 Amendment purports to make the State ultimately responsible for collecting the Mitigation Payments, the plain language of the 2014 Amendment and supporting documents from the [FCPC] and the State demonstrate that, in fact, Menominee would be responsible for making all of the Mitigation Payments intended to protect [FCPC’s] revenue.” *Id.* This analysis and conclusion was reasonable and appropriate and is entitled to deference. *See Fuller v. Winter*, 538 F. Supp. 2d 179, 186 (D.D.C. 2008) (“Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record.”). Here, the Assistant Secretary examined the record and resolved the factual issues, finding that while the 2014 Amendment purported to make the State liable for the Mitigation Payments, FCPC and the State intended Menominee to make those payments. FCPCAR001464.

The record more than supports this determination. The 2014 Amendment was negotiated by FCPC and the State directly as a result of the Secretary’s approval of Menominee’s two-part determination. FCPCAR001462. But for the approval of Menominee’s two-part determination, it is unlikely that the 2014 Amendment would have been selected by the arbitration panel. It is unlikely that there would have been a dispute between FCPC and the State to be arbitrated. Given the history between FCPC and Menominee surrounding Menominee’s efforts to conduct gaming in Kenosha, as documented in the administrative record, it was the possibility of the

State's concurrence in Menominee's two-part determination that triggered the negotiation and resolution process under FCPC's 2005 Amendment and drove FCPC and the State to negotiate a further compact amendment. *Id.* at 1462. And it is within this context, as documented in the administrative record, that the Assistant Secretary reviewed the 2014 Amendment and issued his decision. It was proper for the Assistant Secretary to review these factual submissions, including submissions from FCPC, the State, and Menominee, as part of the administrative process for the Assistant Secretary to reach his decision.

“Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.” *Cottage Health Sys.*, 631 F.Supp.2d at 89-90 (internal quotation marks omitted). Here, the Assistant Secretary resolved factual issues and applied the law to arrive at his decision. The administrative record supports his reasoning and permitted him to make the decision he did. It was not erroneous for him to consider the fact that the intent of the 2014 Amendment was to make Menominee responsible for making all of the Mitigation Payments to FCPC. Because this is impermissible under IGRA, he properly disapproved the 2014 Amendment as a violation of IGRA and his decision should be upheld.

**B. The Assistant Secretary Properly Found that the 2014 Amendment Fell Outside the Permissible Subjects of a Class III Gaming Compact**

FCPC asserts that the Decision is arbitrary and capricious because the Assistant Secretary erred in finding that the 2014 Amendment fell outside the permissible subjects of a gaming compact under IGRA. Pl.'s Br. at 29. In support, FCPC argues that the 2014 Amendment's exclusivity provision (1) is allowed under IGRA's permitted “catch-all” category, which includes “any other subjects that are directly related to the operation of gaming activities[,]” 25 U.S.C. §

2710(d)(3)(C)(vii);<sup>5</sup> and (2) has been permitted in other tribal-state gaming compacts. Pl.’s Br. at 29.

As an initial matter, Federal Defendants do not dispute that in general, exclusivity agreements *may* be permissible in a gaming contract under IGRA. *See* Pl.’s Br. at 30. As the Assistant Secretary noted, “[h]ad the State alone, without reference to Menominee as the ‘Applicant,’ agreed to a reduction in revenue sharing, for example, rather than the Mitigation Payment as calculated by the 2014 Amendment, our decision might be different.” FCPCAR001465. Any such exclusivity provision, however, must comply with IGRA’s requirements. It was not the fact that the 2014 Amendment contained an exclusivity agreement, per se, that violated IGRA, it was the fact that the Mitigation Payments envisioned by the 2014 Amendment went well beyond FCPC’s revenue sharing payments that Interior permitted in other instances. *Id.* While numerous tribal-state gaming compacts contain exclusivity agreements whereby a state agrees to limit non-tribal gaming competition with a tribe’s casino in exchange for payments from the tribe, these agreements have been carefully crafted and have not sought to unilaterally impose a financial burden on another tribe by making it guarantee another tribe’s revenue. These compact amendments did not include Class II gaming and other revenues. Instead, the amendments call for negotiations over potential reductions in revenue sharing to the state or indemnification by the state for either Class III gaming revenues or loss of revenue. *Id.*

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<sup>5</sup> FCPC makes a separate argument that the Assistant Secretary erroneously decided that Class II gaming revenues in the calculation of mitigation payments did not provide a basis for distinguishing the 2014 Amendment from other exclusivity agreements. Pl.’s Br. at 41. Because this argument is a subpart of FCPC’s challenge to the Assistant Secretary’s determination that the 2014 Amendment contained subjects impermissible under IGRA by including Class II gaming, hotel, and food in its calculation of revenues, Federal Defendants address FCPC’s Class II revenue in the context of the larger argument.

And even then, any amendment must be submitted for review to determine its compliance with IGRA. *Id.*

The 2014 Amendment goes beyond other exclusivity provisions that have been affirmatively approved by Interior or deemed approved, “but only to the extent the [compact or amendment] is consistent with [IGRA].” FCPC’s arguments to the contrary are unavailing. FCPC first cites to the Assistant Secretary’s affirmative approval of an exclusivity agreement in a compact amendment for the Lac du Flambeau Band of Lake Superior Chippewa Indians (“LDF”). Pl.’s Br. at 33. FCPC mischaracterizes LDF’s amendment. Although the LDF compact amendment contemplates the state compensating LDF for the reduction in revenue from Class III gaming, it is the state that is required to make that payment.<sup>6</sup> It doesn’t bring another tribe to the table. Further, the LDF compact amendment previously defines its Class III revenue as “net win” from Class III gaming. Section XXXI (BIA\_003163-64). Indeed, the LDF compact amendment adjusted the definition of “net win,” as “the amount wagered in Class III gaming, less fills and the amounts paid out in jackpots and prizes[.]” BIA\_003149. The LDF compact amendment, unlike the 2014 Amendment, does not include impermissible subjects in its definition of revenue like Class II gaming, hotels, entertainment, and food and beverage, which

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<sup>6</sup> FCPC argues that, in regards to the 2014 Amendment, it is not consistent with the objectives of IGRA to allow tribes to make revenue sharing payments to states but prohibit states from making payments to tribes. Pl.’s Br. at 36. Federal Defendants do not dispute that the Assistant Secretary has deemed approved or approved compact amendments in which a state was required to make a payment to a tribe. But the fact that the State agreed to reimburse FCPC was not the sole reason for the Assistant Secretary’s disapproval. The Assistant Secretary conditioned his disapproval on the grounds that the 2014 Amendment sought to place the burden to reimburse FCPC for its losses on Menominee and defined revenue to include subjects that fall outside the permissible subjects of negotiation under IGRA. Indeed, the Assistant Secretary noted that had the State alone agreed to a reduction in revenue sharing, the decision might be different. FCPCAR001464-65.

is beyond the scope of a Class III gaming compact. The LDF compact amendment offers FCPC no support.<sup>7</sup>

The 2014 Amendments are not directly related to the FCPC's gaming activities within the meaning of section 2710(d)(3)(C)(vii). In considering whether a provision is directly related to the operation of gaming activities, the Assistant Secretary "closely scrutinize[s] whether the regulated activity has a direct connection to the Tribe's conduct of Class III gaming activities." FCPCAR001464. The primary reason for IGRA's requirement of a state-tribal compact is to ensure that state governments have an opportunity to engage with tribes as to legitimate regulatory concerns about the conduct of gaming. *Id.* While "IGRA identifies in great detail what is allowable for negotiation in a tribal-state Class III gaming compact, [] it does not authorize states and tribes to negotiate to shift the burden of loss revenues from existing gaming operations to another tribe without the consent of the other tribe." *Id.* Because the purpose of the 2014 Amendment was to protect FCPC's revenue stream at its Milwaukee hotel and casino and did not address the actual regulation or operation of FCPC's Class III gaming activity, the Assistant Secretary found that the 2014 Amendment did not fall within IGRA's "catch-all" and was not a permissible subject of negotiation under IGRA.

The Assistant Secretary also found that the 2014 Amendment did not fall within IGRA's catch-all because the calculation of the Mitigation Payments is based in part on revenues from

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<sup>7</sup> FCPC also cites to exclusivity provisions that have been deemed approved by the Assistant Secretary in other gaming compacts of four Wisconsin tribes. Pl.'s Br. at 33 n.6. Like the LDF compact amendment, these amendments are also distinguishable from the 2014 Amendment in that they do not seek to impose a guarantee of their profitability on other tribes not included in the negotiations and do not include Class II gaming and other revenues. *See* Ho-Chunk Nation Compact (if state concurs, the Nation will either reduce its revenue payments or terminate its payments; revenue defined as net win); Oneida Compact (if state concurs, Tribe terminates its payments; revenue defined as net win); St. Croix Compact (if state concurs, Tribe's payment obligation terminates; revenue defined as net win); Stockbridge Compact (if state concurs, Community's payment obligations reduced; revenue defined as net win).



Class II gaming, food and beverage, hotel and entertainment activity, none of which are directly related to FCPC's Class III gaming activity. *Id.* The Assistant Secretary noted that

[a]s tribal gaming has matured, many tribes – including [FCPC] have developed businesses or amenities that are ancillary to their gaming activities, such as hotels, conference centers, restaurants, spas, golf courses, recreational vehicle parks, water parks, and marinas. These businesses are often located near or adjacent to tribal gaming facilities. It does not necessarily follow, however, that such ancillary businesses are “directly related to the operation of gaming activities,” and therefore subject to regulation or inclusion under a tribal-state compact. In fact, it appears that [FCPC's] new, \$97 million, 360 room hotel, restaurant, and conference complex are located beyond the exterior boundaries of [FCPC's] trust lands at the Milwaukee casino.

*Id.* at 1465. *See also Id.* at 1466 (“none of the compact provisions define revenue to include Class II gaming, food and beverage, hotel and entertainment activities, which fall outside the permissible subjects of negotiation under IGRA.”).

FCPC cites to *Flandreau Santee Sioux Tribe v. Gerlach*, CIV 14-4171, 2007 WL 4124242, \*10 (D.S.D. Sept. 15, 2017) for support that ancillary activities are also “directly related” to Class III gaming activities such that ancillary businesses may be included within the scope of a tribal-state gaming compact. *Flandreau* is distinguishable. In that case, the tribe sought to enjoin the state from taxing ancillary activities on the grounds that they were a permissible subject of compact under IGRA's catch-all provision. Interior was not a party. In considering whether the state could impose a use tax on nonmembers, the court applied a but-for test to find that but for the casino, the gift shop, hotel and other activities located within the casino building “would not exist in the sleepy but pleasant little town of Flandreau, population 2,332. Nor could the Casino operate without the existence of these amenities.” *Id.* The court also found instructive the fact that the use tax would be placed in the state's general fund, to be used for any number of purposes not related to what was being taxed. *Id.* As the Assistant Secretary noted, in applying IGRA's catch-all provision, Interior does not simply ask “but for the

existence of the Tribe's Class III gaming operation, would the particular subject regulated under a compact provision exist?" FCPCAR001464. Instead, Interior closely scrutinizes the compact amendment to determine whether the regulated activity has a direct connection to the Tribe's conduct of Class III gaming activity. *Id.* While the court came to the conclusion that certain ancillary activities should not be taxed in a sleepy South Dakota town, the same analysis would not be applicable to a \$97 million hotel beyond the exterior boundaries of a tribe's trust lands located within a bustling metropolitan area like the City of Milwaukee. FCPCAR001464-65 n.32. Indeed, the court in *Flandreau* determined that a convenience store not located in the casino building was not "directly related" and subject to the state's use tax.

FCPC further argues that the Decision is arbitrary and capricious because it considered the inclusion of Class II gaming revenues as part of the Mitigation Payments to not be directly related under the catch-all provision. Pl.'s Br. at 41. FCPC argues that the Class II revenues are permissible because they represented a concession by the State and increased FCPC's revenue allocation. FCPC asserts that including Class II revenues in the Mitigation Payments is consistent with IGRA and that 25 U.S.C. § 2710(d)(3)(C)(vii) is not limited to Class III activity. *Id.* The Assistant Secretary has held, however, that "Class II gaming is not an authorized subject of negotiation for Class III compacts." FCPCAR001464 n. 29 (quoting July 23, 2014, testimony of Assistant Secretary before the Senate Committee on Indian Affairs); *see also Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 138 (D.C. Cir. 2006) (finding that section 2710(d)(3)(C)(vii) means directly related to Class III gaming, not Class II gaming).

It is important to note that the Assistant Secretary did not take the position that these types of activities could never be considered "directly related." Rather, the Assistant Secretary carefully scrutinized the compact amendment to consider whether the regulated activity included

in the compact had a direct connection to the tribe's conduct of Class III gaming activities. In his review of the 2014 Amendment, he found that it did not. The Assistant Secretary examined the plain language of the 2014 Amendment to conclude that a compact amendment where the intent was to protect one tribe's hotel and casino's revenue stream from any losses due to competition and did not address the regulation or actual operation of the tribe's Class III gaming activity at its casino must be disapproved as violation of IGRA. The Decision should be affirmed.

**C. The Assistant Secretary Distinguished the 2014 Amendment from Other Exclusivity Provisions**

FCPC argues that exclusivity agreements the Assistant Secretary has approved for other tribes are highly similar to the 2014 Amendment and that the Assistant Secretary failed to offer any explanation as to why the other exclusivity provisions were "directly related" to gaming activities whereas the 2014 Amendment was not. Pl.'s Br. at 37-38. FCPC is wrong on both counts.

The Assistant Secretary noted that IGRA identifies in great detail what is allowable for negotiation in a tribal-state Class III compact, but it does not authorize states and tribes to negotiate the shift in burden of loss of revenues from existing gaming operations to another tribe without the consent of the other tribe. FCPCAR001464. Under this framework, the Assistant Secretary compared the 2014 Amendment to other exclusivity provisions that had been approved or deemed approved. He noted that the Mitigation Payments envisioned by the 2014 Amendment went well beyond a potential reduction in FCPC's revenue sharing payments permitted in other instances. *Id.* at 1465. The Assistant Secretary examined compact amendments between other tribes and the State of Wisconsin and found that they did not specifically call for anything approaching the Mitigation Payments that guarantee the Tribe's

profits by another tribe. As discussed, the only entity responsible to the compacting tribe was the State of Wisconsin. *See supra* at 27 n.7. Nor do these other compact amendments require that revenues reimbursed include Class II gaming and other revenues. *Id.* Instead, the amendments call for negotiations over potential reductions in revenue sharing with the State or indemnification by the State for either Class III gaming revenues or an undefined “loss of revenue.” Any amendment resulting from these negotiations would still need to be submitted for review by the Assistant Secretary to determine if the amendment complied with IGRA. *Id.*

FCPC specifically points to a 2003 compact amendment between Wisconsin and the Winnebago Tribe, now known as Ho-Chunk Nation, arguing that it contains a similar exclusivity clause. Pl.’s Br. at 31. FCPC misquotes the relevant provision. The 2003 Ho-Chunk Amendment is limited to payments in the event of “substantial reduction of Class III gaming revenues.” BIA\_003416. By contrast, the 2014 Amendment has no such modification and requires an annual Mitigation Payment equal to the Annual Revenue Loss no matter how insignificant the loss may be, including losses beyond Class III gaming revenues. 2014 Amend. ¶ 2.

FCPC also points to the Second Amendment to the 1991 Compact between Oneida and Wisconsin as another similar exclusivity provision (Oneida 2003 Amendment). The Oneida 2003 Amendment, however, provides that if the State executes a compact or an amendment with another tribe within 50 miles, the State will negotiate a compact amendment with Oneida whereby it returns certain payments made by Oneida. BIA\_003569. This is unlike the 2014 Amendment, which requires payment to FCPC of revenue losses and allows the State to assign those payments to an Applicant tribe. 2014 Amendment ¶ XXXVII.E.1.

In addition to compacts with Wisconsin tribes, in his decision, the Assistant Secretary also considered compact amendments outside of Wisconsin. The Assistant Secretary examined compacts entered into by Michigan and tribes in 1993, along with provisions in compacts for the Little Traverse Band of Odawa Indians, Seneca Nation of Indians from New York, and the North Fork Rancheria of Mono Indians in California, finding key differences. FCPCAR001465-66. The 1993 Michigan compacts are distinguishable from the 2014 Amendment because they were based on a model agreement and all of the signatories consented to its provisions. Specifically, each Michigan tribe agreed in its own compact that it would not seek a two-part determination unless it entered into a revenue sharing agreement with the other tribes in the state. While FCPC argues that this demonstrates that payments between tribes can be permissible under IGRA, the 1993 Michigan compacts' uniform provision agreed to by each tribe working together is distinguishable from an attempt to seek to have a non-party tribe guarantee all revenue losses. In approving the compact, the Assistant Secretary stated, "while it is not clear one tribe can own such an establishment and distribute revenue to the other tribes, we believe that the IGRA does permit tribal co-ownership of a gaming establishment with a concomitant sharing of revenue. Thus, this Section does not violate Federal law." BIA\_003251.

The Assistant Secretary examined the other compacts and noted that the Little Traverse Band of Odawa Indians Compact relieved the tribe of its revenue sharing payments while the Seneca Nation's compact – discussed in more detail below – did not make another tribe the guarantor of its profits. FCPCAR001465. Finally, North Fork provided for a diversion of two percent of its revenue sharing payment to another tribe, not a profit guaranty, and unlike here, North Fork was a party to the negotiations and agreed to the payments. *Id.*

Importantly, none of these compact provisions involved specific guarantees of profitability or revenues for one tribe without the prior consent of another. None of these compacts involved a revenue guarantee for a tribe operating gaming on so-called “off-reservation” lands acquired by the Secretary in trust under a two-part determination. And none of these compact provisions defined revenue to include Class II gaming, food and beverage, hotel, and entertainment activities. *Id.*

Finally, FCPC cites to former Interior Secretary Norton’s November 12, 2002, letter (“2002 Letter”) in which she declined to take action on a 2002 tribal-state gaming compact between the Seneca Nation of Indians (“Seneca Nation”) and the State of New York for support that the 2014 Amendment is consistent with IGRA. Pl.’s Br. at 39; BIA\_003180-243. The letter offers no such support and in fact demonstrates the flaws in the 2014 Amendment.

In 2002, the Seneca Nation requested that the Secretary approve a tribal-state gaming compact that authorized the tribe to conduct gaming at three sites. BIA\_003180. The tribe agreed to pay New York graduated revenue-sharing payments, which were defined as a portion of the “net drop” (generally the equivalent of “net win” defined *supra*) of gaming devices for which it had exclusivity over a course of 14 years in exchange for several benefits including an exclusive 10,500 square-mile area in Western New York. *Id.* at 003226. The compact provided that New York, however, could enter into negotiations with the Tuscarora Indian Nation and the Tonawanda Band of Seneca Indians for a gaming facility within this area provided that the State did not authorize another tribe to establish a Class III gaming facility within a twenty five miles of a Seneca Nation gaming facility unless on federally recognized Indian land. BIA\_003224. Should the State allow another facility, then Seneca Nation’s obligation to pay the percentage of net drop would cease. *Id.* at 003225.

Secretary Norton stated that she reluctantly allowed the compact to take effect without Secretarial action and could not affirmatively approve it because of the effect it would likely have on future compacts. *Id.* at 003180-81. Among those concerns, Secretary Norton had serious reservations about the compact's revenue sharing and geographic exclusivity provision. *Id.* at 003182. The Secretary noted that "I am very troubled that the parties have chosen to exclude other tribes within the area of geographic exclusivity. . . . The choice to deny other tribes gaming opportunities is the primary reason I have chosen not to affirmatively approve this Compact." *Id.* at 003183. Although the Secretary found that the exception for the two tribes did not violate Interior's trust obligation to Indians, she expressed her apprehension with where it could lead:

I am still troubled that the parties in future compacts may pit tribe against tribe. While I believe that that it was unintended here, especially because both the Tonawanda Band and the Tuscarora Nation are regarded as traditionally opposed to gaming, I do not welcome the prospect of future compacts pitting tribes against one another. While I understand that the State is required to negotiate in good-faith with all Indian tribes and has assured us that it understands its obligation under law, *I still find a provision excluding other Indian gaming anathema to basic notions of fairness in competition and, if pushed to its extreme by future compacts, inconsistent with the goals of IGRA.*

*Id.* at 003184 (emphasis added). And that is exactly what the 2014 Amendment is, an extreme compact amendment, inconsistent with the goals of IGRA, as Secretary Norton feared.

As the Assistant Secretary noted, the Seneca Nation compact is distinguishable from the 2014 Amendment on several grounds. Decision at 7-8 (FCPCAR001465-66). First, the Seneca Nation compact does not make another tribe a guarantor of the Seneca Nation's profits. *Id.* at 8. Rather, under the compact, should New York enter into an agreement with another tribe within the exclusivity area, the Seneca Nation could cease paying to the State a percentage of revenue tied directly to the Class III gaming machines. Second, the Seneca Nation compact did not

involve a total revenue guarantee for a tribe that is operating gaming on “off-reservation” lands. Decision at 8. It only required that the Seneca Nation cease paying to the State a percentage of revenue generated from Class III gaming machines. And third, as the Assistant Secretary noted, the Seneca Nation compact did not define revenue to include Class II gaming, food and beverage, hotel, and entertainment activities, which fall outside the permissible subjects of negotiation under IGRA. Decision at 001466. Revenue under the Seneca Nation compact was narrowly-defined to encompass only the “net drop,” i.e., the money deposited into slot and lottery machines for which the Seneca Nation had exclusivity, after payouts but before expenses. BIA\_003226. It did not seek to reimburse the Seneca Nation for all revenue loss and ensure the profitability of the Seneca Nation’s casino at the expense of another tribe’s rights under IGRA or fairness to inter-tribal gaming competition. The 2014 Amendment, by contrast, defines Mitigation Payments to include Class II gaming, food and beverage, hotel, and entertainment activities, all which fall outside of the permissible subjects of negotiation under IGRA. *See* Decision at 8.

FCPC also argues that at no point in his decision did the Assistant Secretary consider whether the terms of the 2014 Amendment would benefit the FCPC. Pl.’s Br. at 41 (discussing Secretary Norton’s statement that Interior should consider whether the exclusivity provision provides sufficient valuable consideration to the tribe receiving the exclusivity to justify the revenue sharing payments). The Assistant Secretary did make this consideration. The Assistant Secretary found that under the 2014 Amendment’s method for calculating the Mitigation Payments, it was unlikely that the payments would comply with Interior’s long-standing revenue sharing test. Decision at 9 (FCPCAR001467). Under that test, the Assistant Secretary first looks to whether the state has offered meaningful concessions to the tribe. *Id.* Interior views this



concept as one where the state concedes something it was not otherwise required to negotiate, such as granting exclusive rights to operate Class III gaming or other benefits sharing a gaming-related nexus. The Assistant Secretary then examines whether the benefit of the concessions provide substantial economic benefits to the tribe in a manner justifying the revenue sharing required. *Id.* Here, the Assistant Secretary, applying the revenue sharing test, found that in the absence of a companion agreement between the State and Menominee and in light of the 2014 Amendment's method for calculating Mitigation Payments, he was unable to determine whether the State would be making any concession to Menominee and whether the Mitigation Payments offered a benefit to the Menominee, the tribe that would be making those payments. *Id.*

The Assistant Secretary's decision does not depart from Secretary's Norton's decision to allow the Seneca Nation compact to go onto effect without Secretarial approval; it is the logical conformance with that decision. Secretary Norton was concerned that a future tribal-state gaming compact would go too far and step outside the permissible bounds of IGRA. The 2014 Amendment did just that and the Assistant Secretary properly disapproved it.

**D. The Decision does not deprive FCPC of the Benefit of any Bargain with the State**

FCPC argues that the Decision is arbitrary and capricious because it denies it the benefit of its bargain with Wisconsin.<sup>8</sup> Pl.'s Br. at 43. As already demonstrated, the 2014 Amendment is inconsistent with IGRA and could not be approved by the Assistant Secretary. Because the 2014 Amendment was inconsistent with IGRA, the Assistant Secretary could not deprive FCPC with any benefit of a bargain. Unlike the arbitration panel that chose the 2014 Amendment, the Assistant Secretary's duty is to determine whether the 2014 Amendment compiles with IGRA.

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<sup>8</sup> This argument appears to stem from the Complaint's Second Claim for Relief, which asserts that Federal Defendants have a ministerial duty to approve the 2014 Amendment selected by the Arbitration Panel per the terms of the 2005 Amendment.

FCPCAR0001465. This is not ministerial. The Assistant Secretary cannot approve a compact that does not comply with IGRA. 25 U.S.C. § 2710(d)(8)(B). The 2014 Amendment impermissibly sought to bind another tribe to guarantee FCPC's revenues and includes provisions involving subjects that exceed the permissible scope of a Class III gaming compact. FCPC could not receive the benefit of a compact amendment that is impermissible under IGRA. The Assistant Secretary, therefore, properly disapproved the 2014 Amendment.

**E. FCPC is not entitled to Declaratory Relief**

Although FCPC requests in its Complaint that the Court set aside and vacate the Decision and have the 2014 Amendment deemed approved, in an APA action such as this, the requested relief is not automatic. Even if FCPC could show that the Assistant Secretary's decision was arbitrary or capricious (which Federal Defendants dispute), under the APA, the Court retains its equitable authority to craft the appropriate remedy. 5 U.S.C. § 702 (“[n]othing herein . . . affects . . . the power or duty of the court to dismiss any action or deny any relief on any other appropriate legal or equitable ground”). Equitable relief is neither presumed nor automatic. Upon consideration of the equities, courts have the discretion to determine that equitable relief such as vacatur should not issue despite a legal violation. *See, e.g., Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 23 (2008) (finding public interest outweighed injunction even assuming irreparable harm to plaintiffs).

Vacatur is a form of equitable relief. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.2d 1091, 1096 (10th Cir. 2010). Case law makes clear that courts are not mechanically obligated to vacate an agency decision that they find invalid. *See, e.g., Cal. Communities Against Toxics v. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (“Although the district court has power to do so, it is

not required to set aside every unlawful agency action.”). In determining whether to vacate an agency decision or to remand it to the agency without vacatur, courts consider a two-part test.

*See Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm’n*, 988 F.2d 146, 150 (D.C. Cir. 1993). Under *Allied-Signal*, the decision whether to vacate an agency decision depends on “[1] the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed.” *Id.* at 150-51.

In reaching a determination on any remedy, the parties to the lawsuit are usually afforded a full opportunity to brief their respective positions on what remedy would be appropriate. In this case, should the Court determine that the Decision is arbitrary and capricious, the Court should either allow the parties an opportunity to brief their respective positions on remedy or remand the decision to the agency without vacatur.

## **VII. CONCLUSION**

The 2014 Amendment obligated Menominee to pay what amounts to profit insurance to FCPC using the instrument of compacting under IGRA with the State acting as FCPC’s collecting agent. This would have been unprecedented under IGRA and represents former Secretary Norton’s concern of the prospect of future compacts pitting tribes against one another. The 2014 Amendment pushes exclusivity provisions to the extreme and is inconsistent with the goals of IGRA. The Assistant Secretary, in examining the law and the facts in the administrative record, properly found that the 2014 Amendment was in violation of IGRA and could not be approved. The Decision, therefore, was not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. The Court should grant summary judgment in favor of Federal Defendants and deny FCPC’s request for summary judgment.

Respectfully submitted this 18th day of January, 2018.

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