

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
BACKGROUND AND STATEMENT OF THE CASE.....	3
A. The Indian Gaming Regulatory Act and Tribal-State Compacts	3
B. Menominee Tribe.....	5
C. Menominee Efforts to Conduct Off-Reservation Gaming in Kenosha.....	6
D. FCPC and Its Opposition to the Kenosha Casino	7
E. The 2014 Amendment.....	10
F. The Assistant Secretary’s Decision Disapproving the 2014 Amendment.....	13
APPLICABLE LEGAL STANDARD	16
A. APA Standard	16
B. <i>Chevron</i> Deference Applies	17
ARGUMENT	22
I. The Assistant Secretary’s Decision Should be Upheld.....	22
A. The Record Supports the Conclusion that Menominee Would In Fact Have to Make the Mitigation Payments	22
B. The Assistant Secretary Explained His Conclusion that the 2014 Amendment Included Impermissible Subjects	25
C. The Assistant Secretary’s Decision is Based on a Permissible Reading of IGRA	27
D. Not All Exclusivity Agreements are Permissible Under U.S.C. § 2710(d)(3)(C)(vii), and Not All Have Been Approved.....	35

1.	Wisconsin compacts.....	37
2.	Michigan compacts	39
3.	Seneca Nation compact.....	39
E.	FCPC’s Argument that the Decision Deprives It of the Benefit of Its Bargain is Erroneous and Irrelevant	41
II.	Menominee is Entitled to Summary Judgment on Count II	42
III.	FCPC is not Entitled to the Remedies it Seeks in Count III of its Complaint, or in the Conclusion to its Memorandum.....	43
	CONCLUSION.....	45

TABLE OF AUTHORITIES

Cases

<i>Amador County, Cal. v. Salazar</i> , 640 F.3d 373 (D.C. Cir. 2011).....	4
<i>Barnhart v. Walton</i> , 535 U.S. 212 (2002).....	19
<i>Califano v. Sanders</i> , 430 U.S. 99 (1977).....	16
<i>California Valley Miwok Tribe v. United States</i> , 515 F.3d 1262 (D.C. Cir. 2008).....	18
<i>Chemehuevi Indian Tribe v. Brown</i> , No. EDCV161347JFWMRWX, 2017 WL 2971864 (C.D. Cal. Mar. 30, 2017).....	20, 21, 32
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	<i>passim</i>
<i>Citizens Exposing Truth about Casinos v. Kempthorne</i> , 492 F.3d 460 (D.C. Cir. 2007).....	19
<i>Citizens to Pres. Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971).....	16
<i>City of Duluth v. Nat’l Indian Gaming Comm’n</i> , 89 F. Supp. 3d 56 (D.D.C. 2015) <i>dismissed</i> , No. 15-5162, 2016 WL 3615257 (D.C. Cir. July 1, 2016)	19
<i>Cobell v. Norton</i> , 240 F.3d 1081 (D.C. Cir. 2001).....	17, 18
<i>Colorado River Indian Tribes v. Nat’l Indian Gaming Comm’n</i> , 466 F.3d 134 (D.C. Cir. 2006).....	34
<i>Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell</i> , 75 F. Supp. 3d 387 (D.D.C. 2014).....	17
<i>Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell</i> , 830 F.3d 552 (D.C. Cir. 2016).....	17, 18
<i>Confederated Tribes of the Chehalis Indian Reservation v. Washington</i> , 96 F.3d 334 (9th Cir. 1996)	18
<i>Env’tl. Def. Fund, Inc. v. Costle</i> , 657 F.2d 275 (D.C. Cir. 1981).....	16, 17
<i>Flandreau Santee Sioux v. Gerlach</i> , No. CV 14-4171, 2017 WL 4124242 (D.S.D. Sept. 15, 2017).....	34
<i>Fogo De Chao (Holdings) Inc. v. U.S. Dep’t of Homeland Sec.</i> , 769 F.3d 1127 (D.C. Cir. 2014).....	18
<i>Fort Independence Indian Community v. California</i> , 679 F. Supp. 2d 1159 (E.D. Cal. 2009)	20, 21, 27
<i>G & T Terminal Packaging Co. v. U.S. Dep’t of Agric.</i> , 468 F.3d 86 (2d Cir. 2006)	28
<i>Gonzales v. Oregon</i> , 546 U.S. 243 (2006).....	18

<i>Gonzales v. Thomas</i> , 547 U.S. 183 (2006).....	44
<i>Hall v. McLaughlin</i> , 864 F.2d 868 (D.C. Cir. 1989).....	36
<i>I.N.S. v. Orlando Ventura</i> , 537 U.S. 12 (2002).....	44
<i>In re Indian Gaming Related Cases</i> , 331 F.3d 1094 (9th Cir. 2003)	30, 31, 32, 36
<i>In re Sealed Case</i> , 223 F.3d 775 (D.C. Cir. 2000).....	28
<i>In re U.S.</i> , 669 F.3d 1333 (Fed. Cir. 2012)	28
<i>INS v. Aguirre-Aguirre</i> , 526 U.S. 415 (1999).....	28
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987).....	28
<i>Metropolitan Stevedore Co. v. Rambo</i> , 521 U.S. 121 (1997).....	21
<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	17, 27
<i>Mylan Labs., Inc. v. Thompson</i> , 389 F.3d 1272 (D.C. Cir. 2004).....	17, 19
<i>Pension Ben. Guar. Corp. v. LTV Corp.</i> , 496 U.S. 633 (1990).....	24
<i>Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger</i> , 602 F.3d 1019 (9th Cir. 2010)	<i>passim</i>
<i>SEC v. Chenery Corp.</i> , 318 U.S. 80 (1943).....	44
<i>Sherwood Bros. v. District of Columbia</i> , 113 F.2d 162 (D.C. Cir. 1940).....	32
<i>Sierra Club v. Mainella</i> , 459 F. Supp. 2d 76 (D.D.C. 2006).....	16
<i>Skidmore v. Swift & Co.</i> , 323 U.S. 134 (1944).....	20, 21
<i>Sokaogon Chippewa Cmty. v. Babbitt</i> , 214 F.3d 941 (7th Cir. 2000)	18, 33
<i>Stand Up for California! v. U.S. Dep’t of the Interior</i> , No. 16-5327 (D.C. Cir. Jan. 12, 2018)	17
<i>Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers</i> , 255 F. Supp. 3d 101 (D.D.C. 2017).....	44
<i>Styrene Info. & Research Ctr., Inc. v. Sebelius</i> , 944 F. Supp. 2d 71 (D.D.C. 2013).....	16, 25
<i>Tomlinson Black North Idaho v. Kirk-Hughes</i> , No. CV06–118, 2006 WL 1663591 (D. Id. 2006).....	33
<i>U.S. v. Mead Corp.</i> , 533 U.S. 218 (2001).....	18, 19

<i>United Municipal Distributors Group v. FERC</i> , 732 F.2d 202 (D.C. Cir.1984).....	36
<i>United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.</i> , 484 U.S. 365 (1988).....	29
<i>Vill. of Barrington, Ill. v. Surface Transp. Bd.</i> , 636 F.3d 650 (D.C. Cir. 2011).....	21
<i>West Coast Media, Inc. v. FCC</i> , 695 F.2d 617 (D.C. Cir.1982).....	36
<i>Wisconsin v. Ho-Chunk Nation</i> , 512 F.3d 921 (7th Cir. 2008)	32
<i>Wisconsin v. Ho-Chunk Nation</i> , 784 F.3d 1076 (7th Cir. 2015)	4, 31
<i>Yue Zhang v. United States Citizenship & Immigration Servs.</i> , No. CV 17-706 (EGS), 2017 WL 3190559 (D.D.C. July 26, 2017)	44

Statutes

5 U.S.C. § 706(2)(A).....	16
18 U.S.C. § 1166(c)(2).....	20
25 U.S.C. §§ 2701 <i>et seq.</i>	1
25 U.S.C. § 2702.....	36
25 U.S.C. § 2702(1)	4, 33
25 U.S.C. § 2703.....	4
25 U.S.C. § 2703(6)	4
25 U.S.C. § 2703(7)	4
25 U.S.C. § 2703(8)	4
25 U.S.C. § 2710(a)(1).....	4
25 U.S.C. § 2710(b)	4
25 U.S.C. § 2719(b)(1)(A).....	29
25 U.S.C. § 2710(d)	4
25 U.S.C. § 2710(d)(1)(C)	4
25 U.S.C. § 2710(d)(3)(A).....	4, 29
25 U.S.C. § 2710(d)(3)(B)	5
25 U.S.C. § 2710(d)(3)(C)	4, 12, 25
25 U.S.C. § 2710(d)(3)(C)(vii)	<i>passim</i>
25 U.S.C. § 2710(d)(4)	5
25 U.S.C. § 2710(d)(4)(C)	35
25 U.S.C. § 2710(d)(6)	20
25 U.S.C. § 2710(d)(8)(B)	5, 42
25 U.S.C. § 2710(d)(8)(C)	3, 5, 35
25 U.S.C. § 2719.....	6
25 U.S.C. § 2719(b)(1)(A).....	7
25 U.S.C. § 5108.....	7
25 U.S.C. § 5123(f).....	12
I.R.C § 6103(h)(4)(B)	28

Regulations

25 C.F.R. § 292.2	8, 29
25 C.F.R. § 293.4	42

Other Authorities

68 Fed. Reg. 24,754 (May 8, 2003)	9
71 Fed. Reg. 5,068 (Jan. 31, 2006)	35, 42
Federal Rule of Civil Procedure 56	16
S. REP. 100-446 (1988)	15, 29, 33, 36
U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-355, INDIAN GAMING, REGULATION AND OVERSIGHT BY THE FEDERAL GOVERNMENT, STATES, AND TRIBES (2015)	5

INTRODUCTION

The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* (the “IGRA”), was enacted to provide a statutory basis for tribes to engage in gaming to develop their economies and tribal governments. Using IGRA, Defendant-Intervenor Menominee Indian Tribe of Wisconsin (“Menominee”) has attempted for nearly two decades to develop an off-reservation gaming facility in Kenosha, Wisconsin, to support its severely underfunded government programs and to raise its people out of poverty. Plaintiff Forest County Potawatomi Community (“FCPC”) has opposed Menominee’s efforts in order to prevent competition to its own highly successful off-reservation casino in Milwaukee, just over 30 miles away.

In 2013, the Secretary made a determination under IGRA (“Menominee Two-Part Determination”) that would allow Menominee to conduct gaming in Kenosha, subject to a concurrence from the Governor of Wisconsin (“Governor”). That determination—made despite FCPC’s opposition—triggered an arbitration between FCPC and the Governor, resulting in their entering into an amendment to FCPC’s tribal-state gaming compact (“2014 Amendment”) which governs FCPC’s class III gaming activities under IGRA. The 2014 Amendment prohibited the Governor from concurring in the Menominee Two-Part Determination unless FCPC received “Mitigation Payments” equal to the FCPC’s annual net revenue loss caused by the Menominee facility—not only the lost class III gaming revenues (from casino-type games), but also losses from class II gaming (bingo and some card games), and ancillary activities such as hotel and restaurant. The State was required to make the payment, but FCPC and the State anticipated that Menominee would agree to assume the obligation in order to obtain the requisite concurrence.

As required by IGRA, FCPC submitted the 2014 Amendment to the Secretary of the Interior for approval. In the decision at issue in this case, Kevin Washburn, the Assistant

Secretary for Indian Affairs (through delegated authority) disapproved the 2014 Amendment, finding that it “violates IGRA because it includes provisions involving subjects that exceed the permissible scope of a Class III gaming compact.” FCPCAR001466 (the “Decision”). He stated that “IGRA does not allow one tribe to use the state compact process to impose upon another tribe the obligation to guarantee the tribe’s gaming and other profits when the other tribe was not even at the negotiation table and has not consented to this arrangement.” *Id.* at FCPCAR001460.

Assistant Secretary Washburn understood that under the 2014 Amendment the State was ultimately responsible for the Mitigation Payments, but that the State could and would meet its obligation by requiring Menominee to make the payments. The record, particularly when read in light of Menominee’s need for the Governor’s concurrence in the Secretarial determination that it could conduct gaming in Kenosha, supports this factual determination.

The Assistant Secretary correctly determined that Congress did not intend compacts to be used for the purpose of insuring the profitability of one tribe’s casino at the expense of another tribe’s rights under IGRA. The Assistant Secretary found that the “catch-all” provision in § 2710(d)(3)(C)(vii)—which permits class III gaming compacts to include provisions relating to “any other subjects that are directly related to the operation of [Class III] gaming activities” not enumerated in clauses (i)-(vi) of that provision—did not provide authority for the 2014 Amendment, because the amendment did not address the regulation or actual operation of FCPC’s class III gaming activity, and rather sought to protect FCPC’s profits at Menominee’s expense. Further, the amendment was not limited to class III gaming revenue losses, but included losses in class II gaming activities, and ancillary activities such as hotel and restaurant. The Assistant Secretary properly distinguished other compacts that had been approved by the Secretary or allowed to go into effect through inaction by the Secretary (and therefore approved

by operation of law only to the extent consistent with IGRA), on various grounds, including that “none of these other compact provisions involved specific guarantees of profitability or revenues for one tribe without the prior consent of another tribe or tribes,” Decision at FCPCAR001466, and that none involved class II activities or ancillary activities. *Id.*

The Court should affirm the Assistant Secretary’s Decision. It is supported by the record, and its construction of the statutory provision—which is entitled to *Chevron* deference—is based on a permissible reading of IGRA.

Menominee is also entitled to summary judgment on Count II of the Complaint, in which FCPC asserts that the Secretary had a “ministerial duty” to approve the 2014 Amendment because it was the product of arbitration pursuant to the 2005 Amendment to the FCPC gaming compact. As the Assistant Secretary found, all compacts and compact amendments must be submitted for review and approval by the Secretary under IGRA, and a compact cannot bind the Secretary to approve a later compact amendment. In addition, the 2005 Amendment—which was not affirmatively approved by the Secretary, and so became effective “only to the extent the compact is consistent with the provisions of [IGRA],” 25 U.S.C. § 2710(d)(8)(C)—is itself contrary to the IGRA, for the same reasons as the 2014 Amendment—namely, it included provisions beyond those permissible in compacts because it imposed on Menominee the burden of agreeing to make mitigation payments to FCPC, or else to make the State whole for any reductions or repayment of FCPC revenue sharing payments to the State.

BACKGROUND AND STATEMENT OF THE CASE

A. The Indian Gaming Regulatory Act and Tribal-State Compacts

IGRA was enacted in 1988 “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong

tribal governments.” 25 U.S.C. § 2702(1). IGRA created a regulatory framework for the conduct of gaming on Indian lands that balanced state, federal, and tribal interests. *Amador County, Cal. v. Salazar*, 640 F.3d 373, 376 (D.C. Cir. 2011).

IGRA divides gaming into three classes. 25 U.S.C. § 2703. Class I gaming, which is “within the exclusive jurisdiction of the Indian tribes,” *id.* § 2710(a)(1), includes social games and traditional Indian ceremonial gaming. *Id.* § 2703(6). Class II gaming includes bingo, pull-tabs, games similar to bingo, and certain non-banked card games. *Id.* § 2703(7). Class III gaming “means all forms of gaming that are not class I gaming or class II gaming,” *id.* § 2703(8), and “includes most casino games such as blackjack and roulette as well as slot machines.” *Amador County*, 640 F.3d at 376. “Class II gaming is enforced exclusively by the tribes and the National Indian Gaming Commission, 25 U.S.C. § 2710(b), whereas Class III gaming is regulated pursuant to tribal-state compacts, 25 U.S.C. § 2710(d).” *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1078 (7th Cir. 2015). *See* 25 U.S.C. § 2710(d)(1)(C).

IGRA governs the negotiation of such compacts, their contents, and their review by the Secretary of the Interior (“Secretary”). “[T]he State shall negotiate with the Indian tribe in good faith to enter into such a compact.” 25 U.S.C. § 2710(d)(3)(A). Compacts may include provisions relating to: (i) the application of the criminal and civil laws and regulations of the tribe or the state directly related to the licensing and regulation of class III gaming; (ii) the allocation of criminal and civil jurisdiction between the state and the tribe necessary for the enforcement of such laws; (iii) the assessment by the state of class III gaming to defray its costs of regulating it; (iv) taxation by the tribe of class III gaming; (v) remedies for breach; (vi) standards for the operation of class III gaming and maintenance of the gaming facility, including licensing; and (vii) “any other subjects that are directly related to the operation of gaming

activities.” 25 U.S.C. § 2710(d)(3)(C). Except for any assessments that may be agreed upon to defray the state’s cost of regulating tribal gaming, IGRA does not confer upon a state authority to impose any tax, fee, charge, or other assessment upon an Indian tribe. 25 U.S.C. § 2710(d)(4).

Compacts are subject to review by the Secretary, who “may disapprove a compact ... only if such compact violates—(i) any provision of [IGRA], (ii) any other provision of Federal law ..., or (iii) the trust obligations of the United States to Indians.” 25 U.S.C. § 2710(d)(8)(B). If the Secretary does not approve or disapprove a compact within 45 days, “the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of [IGRA].” *Id.* § 2710(d)(8)(C). Allowing a compact to take effect through inaction, often referred to as “deemed approval,” thus “leav[es] open” the legality of provisions contained in the compact. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1041–42 (9th Cir. 2010). A compact takes effect when notice is published in the Federal Register. 25 U.S.C. § 2710(d)(3)(B). The Secretary has considerable expertise in reviewing compacts and compact amendments, having reviewed 516 of them through 2014. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-355, INDIAN GAMING, REGULATION AND OVERSIGHT BY THE FEDERAL GOVERNMENT, STATES, AND TRIBES 18 (2015).

B. Menominee Tribe

Menominee has a reservation in Northern Wisconsin. Menominee Two-Part Determination at BIA_003095. The Menominee Reservation has higher unemployment and lower community health indicators than any county in the State, and Menominee tribal members and their families are among the poorest in the State. *Id.* at BIA_003095-96, BIA_003098.

Menominee tribal governmental programs suffer from chronic underfunding. *Id.* at BIA_003096-98.

At one time, Menominee was an economically successful and self-sustaining tribe. *Id.* at BIA_003092-93. Tribal government and services were funded largely by the Menominee's sawmill business, which also provided stable employment. *Id.* In 1954, however, Congress "terminated" Menominee, ending the federal government's trust responsibility to Menominee, and the status of the Menominee Reservation. *Id.* Termination was a disaster, leading to closure of many tribal services, layoffs at the sawmill, and the loss of thousands of acres of land. *Id.* at BIA_003093-94. Unemployment increased, and the health and welfare of Menominees decreased. *Id.* at BIA_003094. Many Menominees left in search of opportunity elsewhere. *Id.*

In 1973, Congress acknowledged the failure of termination and restored Menominee's federal rights. *Id.* Menominee has made great efforts to restructure its tribal institutions and services and to rebuild the economy on the restored Menominee Reservation in response to the damage wrought by termination, but the effects have not been easily undone. *Id.* at BIA_003094-95. Menominee's economic development activities on its lands are limited because 97 percent of reservation land is dedicated to Menominee's sustained-yield forest, and the remaining 3 percent is already developed. *Id.* at BIA_003115. Menominee operates a casino on its Reservation, but due to its remote location it does not generate revenues sufficient to meet governmental funding needs or provide substantial economic activity. *Id.* at BIA_003095.

C. Menominee Efforts to Conduct Off-Reservation Gaming in Kenosha

Section 20 of IGRA, 25 U.S.C. § 2719, generally prohibits tribes from gaming on land acquired after IGRA's enactment. An exception, commonly referred to as the "two-part determination," applies when the Secretary determines that the proposed gaming would be in the

best interest of the tribe and would not be detrimental to the surrounding community, provided that the State's Governor concurs in the Secretary's determination. 25 U.S.C. § 2719(b)(1)(A).

Since 1999, Menominee has worked towards developing a tribal casino in Kenosha, Wisconsin, to provide revenues sufficient to meet Menominee's unmet needs. FCPCAR000685. In 2000, the Secretary approved an amendment to Menominee's gaming compact with Wisconsin that authorizes gaming in Kenosha, subject to the land being acquired in trust for gaming purposes. Menominee Two-Part Determination at BIA_003102; FCPCAR000685.

In 2004, Menominee filed an application asking the Secretary to take the Kenosha land into trust for gaming purposes under the Indian Reorganization Act, 25 U.S.C. § 5108 (formerly codified at 25 U.S.C. § 465), and for a two-part determination under IGRA. Menominee Two-Part Determination at BIA_003084. On August 23, 2013, Assistant Secretary Washburn made the "two-part" determination, *id.* at BIA_003084-145, finding that the proposed facility "would be in the best interest of the tribe and its members," and that "gaming on the trust lands would not be detrimental to the surrounding community." *Id.* at BIA_003084. The Governor had until February 19, 2015, to concur. FCPCAR001478.¹

D. FCPC and Its Opposition to the Kenosha Casino

FCPC staunchly opposed Menominee's efforts in Kenosha, to prevent competition with FCPC's casino in Milwaukee, Wisconsin, 33 miles away. Decision at FCPCAR001462. FCPC's Milwaukee casino—located in the Menominee Valley, approximately 216 miles from FCPC's government headquarters—is itself an off-reservation casino. Menominee Two-Part Determination at BIA_003138; FCPCAR001655. "In 1990, [FCPC] became the first tribe in

¹ The Governor did not concur. BIA_003244. In granting Menominee's motion to intervene in this case, the Court held that Menominee retained an interest in this case, because its compact authorizes development of the Kenosha facility, subject to a two-part determination, and it would suffer an injury if FCPC succeeded in this action. ECF No. 41 at 9-11 (Apr. 14, 2016).

history to use the provision in IGRA that allows a tribe to develop an off-reservation casino with the concurrence of the Governor of a state.” Decision at FCPCAR001459.

FCPC was, like Menominee, a poor tribe when it developed its casino in 1992. FCPCAR001647. FCPC’s casino “has resulted in substantial benefits to the [FCPC] and has been so successful that in 2011, the [casino] funded over 84 percent of FCPC’s government.” Menominee Two-Part Determination at BIA_003138. Casino revenues in excess of those needed for tribal programs are paid to FCPC tribal members under a revenue allocation plan approved by the Department of the Interior (“Department”). *Id.* at BIA_003138, BIA_003140.

In the Menominee Two-Part Determination, the Department noted “that FCPC ultimately wishes to prevent a favorable determination for the Menominee.” BIA_003139. Nonetheless, after carefully considering FCPC’s position, the Department determined that “the overall impact on the FCPC’s casino will not be so significant that it will affect FCPC’s ability to operate its government or provide services to its tribal members.” *Id.* at BIA_003140.²

FCPC also used its gaming compact to thwart Menominee’s efforts. In 2003, FCPC submitted to the Secretary a compact amendment that included an anti-competitive provision that would have relieved FCPC of its obligation to make revenue sharing payments to the State, and would have required that some past payments be returned to FCPC, if the State “enters into or authorizes an agreement permitting Class III gaming under the [IGRA] within 50 miles of the Potawatomi Bingo and casino[.]” FCPCAR00107-08, ¶ 15.B.3 (“2003 Amendment”).³

² The Department considered FCPC’s comments notwithstanding that FCPC’s casino and its reservation were outside of the 25-mile radius to be considered a “nearby Indian tribe” that is part of the “surrounding community,” and even though FCPC did not petition to be considered as such as permitted by 25 C.F.R. § 292.2. Menominee Two-Part Determination at BIA_003137-38.

³ Beginning with its 1998 compact amendment, FCPC agreed to make revenue sharing payments to the State in exchange for the right to conduct class III gaming activities that the State does not allow non-Indians to conduct. FCPCAR000083-87. Under the 2003 Amendment, if the State

Menominee urged the Secretary to disapprove that amendment, on the grounds that the anti-competitive provision would violate IGRA and the United States' trust obligation to Menominee. FCPCAR001562-64. The Assistant Secretary advised FCPC that she would likely disapprove the amendment, and FCPC and the Governor "agreed to remove the [provision] at the insistence of the Assistant Secretary ... so that notice of the remaining amendments would be [approved]" FCPCAR000291 ("2005 Amendment"). *See* FCPCAR00114, ¶ 3; Decision at FCPCAR001461.

After the provision was removed, the Acting Assistant Secretary neither approved nor disapproved the 2003 Amendment, and it was deemed approved to the extent consistent with IGRA. FCPCAR000323, 68 Fed. Reg. 24,754 (May 8, 2003). In a letter to FCPC, the Acting Assistant Secretary addressed the removal of the anti-competitive provision, stating that "we find a provision excluding other Indian gaming anathema to basic notions of fairness in competition and inconsistent with the goals of IGRA." FCPACR000326.

The amendment to the FCPC Compact in 2005 noted that FCPC and the State had not been able to agree on a provision to replace the removed anti-competitive provision. 2005 Amendment at FCPCAR000292. The 2005 Amendment included a procedure whereby FCPC and the State would submit to an arbitrator proposed compact amendments specifying the rights and obligations of the parties in the event that the State concurs in a two-part determination as to a tribal casino within 50 miles of the FCPC Milwaukee casino, with the arbitrator to choose between them. *Id.* at FCPCAR000292, FCPCAR000297-98, § XXII.A.11. The 2005 Amendment constrained the terms of those proposals. It provided that "[t]he Tribe's last best offer may provide for a reduction in, or refund of, [FCPC's revenue sharing payments] ... in the event the

permits non-Indians to conduct gaming not allowed them now, then FCPC is relieved of the requirement to make revenue sharing payments (and, in some cases, the State would also have to return to FCPC a portion of its previous revenue sharing payments). *Id.* at § XXXI.B1&2.

State concurs in a favorable determination of the Secretary of the Interior pursuant to Section 20 of the [IGRA] regarding a proposed gaming establishment located within 50 miles of the Tribe's Class III gaming facility in Milwaukee." *Id.* at FCPCAR000297. Further, "[t]he State's last best offer will propose a procedure(s) to establish an agreement between, at a minimum, the [FCPC] and the tribe making application pursuant to Section 20 of the [IGRA]..., pursuant to which the [FCPC] will be compensated for revenues lost due to the operation of the Class III gaming facility located within 50 miles of [FCPC's] Class III gaming facility in Milwaukee[.]" *Id.* at FCPCAR000297-98. The arbitrator was to reject any offer that was not consistent with this provision. *Id.* at FCPCAR000298.

Menominee opposed approval of the 2005 Amendment. FCPCAR000685-89. Among other things, Menominee asserted that "[i]f, through a decision of the arbitrator, the State is forced to return [FCPC's revenue sharing] payments or accept a reduced payment from [FCPC], it is logical to believe that the State will seek to recoup the 'loss' in revenue from [Menominee]. ... [Menominee] could be forced to pay the wealthiest tribe in the State in order to secure the concurrence of the Governor in the Two-Part Determination process." FCPCAR000687-88.

The Secretary declined to approve the 2005 Amendment, and it went into effect only to the extent that it is consistent with IGRA. FCPCAR000290, 71 Fed. Reg. 5,068 (Jan. 31, 2006).

E. The 2014 Amendment

In 2014, FCPC and the Governor entered into the 2014 Amendment, BIA_002959-63, as a result of the arbitration process set out in the 2005 Amendment, which was triggered by Menominee's application for the two-part determination. Decision at FCPCAR001459; *see also* FCPCAR000003-4; FCPCAR000036. The 2014 Amendment prohibits the Governor from concurring in any positive determination of the Secretary under Section 20 of the IGRA for land

from 30 to 50 miles of FCPC's Milwaukee casino, except as provided in the Amendment, and specifies that the Amendment's provisions apply to "[t]he gaming establishment proposed in Kenosha, Wisconsin by the Menominee" BIA_002959, § XXXVII.A. FCPC's Executive Council resolution authorizing execution of the 2014 Amendment also references Menominee's Two-Part Determination, and that Menominee's proposed facility in Kenosha was in the 30-50 mile zone. BIA_002964-65.

The 2014 Amendment requires that FCPC be paid an annual "Mitigation Payment" equal to the FCPC's annual net revenue loss caused by the competitive tribal facility. BIA_002961, § XXXVII.E.2. Net revenues were defined to include not only class III gaming revenues, but also revenue from class II gaming, food and beverage, hotel, and entertainment. 2014 Amendment at BIA_002960, § XXXVII.D.2. The Mitigation Payments are to continue for the duration of the FCPC Compact. *Id.* at BIA_00296, § XXXVII.E.3.

The 2014 Amendment provides that "[t]he State is responsible for ensuring that the Mitigation Payments are paid ...," *id.* at § XXXVII.E.1, but that "[t]he State and [FCPC] anticipate that the State will enter into agreements under which the Applicant [for the Section 20 concurrence] will agree to pay the Mitigation Payment required in this Section," and "[t]imely payment of a Mitigation Payment in full to [FCPC] by the Applicant satisfies the State's obligation to make that Mitigation Payment." *Id.* Section XXXVII.F permits the State to request that FCPC negotiate directly with the Applicant for payment of the Mitigation Payments, and specifically provides that one method for payment by Menominee of the Mitigation Payments would be through a "Lock Box" established in the Menominee's gaming compact for its revenue sharing payments to the State. *Id.* at BIA_002962.

Menominee made several submissions urging the Department to reject the 2014 Amendment on the grounds that it violated the IGRA, the trust responsibility to Menominee, and 25 U.S.C. § 5123(f) (formerly codified at 25 U.S.C. § 476(f)). FCPCAR000387-91;⁴ FCPCAR001160-61; FCPCAR001162-74; FCPCAR000392-96.⁵ Menominee noted that the Secretary had threatened disapproval of FCPC's 2003 Amendment due to the anti-competitive clause therein, and had not affirmatively approved the 2005 Amendment containing the anti-competitive arbitration clause, allowing it to take effect only to the extent consistent with IGRA. FCPCAR001163-66. Menominee argued that the provision chosen by the arbitrator was designed to protect FCPC's profits—not to regulate gaming—and that it included profit protection not only for class III gaming revenues, but also for revenues from class II gaming, food and beverage, hotel, and entertainment, and was therefore beyond the scope of matters permissible in compacts under 25 U.S.C. § 2710(d)(3)(C). FCPCAR001161; FCPCAR001173-74; FCPCAR000388-89. Menominee noted that the 2014 Amendment “assumes that the Menominee Tribe will pay for any [FCPC] facility revenue losses allegedly caused by the Kenosha gaming facility,” FCPCAR000389, and it asserted that Menominee would in effect be required to make the Mitigation Payments, or else the Governor would not concur in the two-part determination. FCPCAR001167; FCPCAR000388-90. As Menominee stated: “The Compact Amendment makes it clear that the State of Wisconsin is responsible for ensuring that [FCPC] receives compensation for its Class III gaming, Class II gaming, and non-gaming activities [citing 2014 Amendment § XXXVII.E.3] but, it makes it difficult for the Governor to concur in the

⁴ This opinion was written by Penny Coleman, a former attorney in the Division of Indian Affairs, Office of the Solicitor in the Department of the Interior, and the former lead counsel for the National Indian Gaming Commission (“NIGC”). *See* FCPCAR000147-48.

⁵ This opinion was written by George Skibine, a former Deputy Assistant Secretary for Indian Affairs, and former Interim Chair of the NIGC. *See* FCPCAR000147-48; FCPCAR001636.

[Menominee Two-Part Determination] without first obtaining the contemplated agreement with the Menominee Tribe.” FCPCAR001167. *See also* FCPCAR001160 (2014 Amendment “is designed to make it difficult for Governor Walker to concur...”).

F. The Assistant Secretary’s Decision Disapproving the 2014 Amendment

On January 9, 2015, Assistant Secretary Washburn disapproved the 2014 Amendment, finding that it “violates IGRA because it includes provisions involving subjects that exceed the permissible scope of a Class III gaming compact.” Decision at FCPCAR001466.

Assistant Secretary Washburn recognized that under the 2014 Amendment the State was “ultimately responsible” for the Mitigation Payments, *id.* at FCPCAR001464, but he determined that “the 2014 Amendment and the supporting documents from [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.* at FCPCAR001464. He concluded that the IGRA does not permit this kind of agreement: “[n]othing in IGRA or its legislative history 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 FCPCAR001466. *See also id.* at FCPCAR001460 (“IGRA does not allow one tribe to use the state compact process to impose upon another tribe the obligation to guarantee the tribe’s gaming and other profits when the other tribe was not even at the negotiation table and has not consented to this arrangement.”); *id.* at FCPCAR001464 (“The 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 to shift the burden of loss revenues [sic] from existing gaming operations to another tribe without the consent of the other tribe.”).

The Assistant Secretary determined that the 2014 Amendment was not within the permissible scope of the IGRA under the “catch-all” provision at 25 U.S.C. § 2710(d)(3)(C)(vii), which provides that Class III compacts may include provisions relating to “any other subjects that are directly related to the operation of gaming activities.” The Decision states that, in applying that provision, the Department “do[es] 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?’” Decision at FCPCAR001464 (internal citation omitted). Rather, in order to ensure that compact provisions do not extend beyond what Congress intended to permit, the Department “closely scrutinize(s) whether the regulated activity has a direct connection to the Tribe’s conduct of Class III gaming activities.” *Id.* at FCPCAR001464. The Assistant Secretary also explained that “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.* at FCPCAR001464. In light of this purpose and because the 2014 Amendment “does not address the regulation or the actual operation of [FCPC’s] Class III gaming activity” but instead is intended to protect the [FCPC’s] profits at Menominee’s expense, *id.* at FCPACR001464, the Assistant Secretary determined that the 2014 Amendment was not made permissible by virtue of the “catch-all” provision at 25 U.S.C. § 2710(d)(3)(C)(vii).

In support of this interpretation, the Assistant Secretary quoted from the Senate Report that accompanied IGRA, which stated: “[i]t is the Committee’s intent that the compact requirement for Class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market

competition with Indian tribes.” Decision at FCPCAR001466 n.36 (quoting S. REP. 100-446, at 13 (1988)).

The Assistant Secretary also determined that the Mitigation Payments included revenues from class II gaming, and ancillary activities such as hotel and restaurant operations, “none of which are directly related to the operation of [FCPC’s] Class III gaming activity.” *Id.* at FCPCAR001465 n.33.

The Assistant Secretary addressed provisions in other compacts, and distinguished them from the 2014 Amendment. He found that “compact amendments between other tribes and the State of Wisconsin do not specifically call for anything approaching the Mitigation Payments that guarantee the Tribe’s profits by another tribe. Nor do these other compact amendments include Class II gaming and other revenues.” *Id.* at FCPCAR001465. He also distinguished compacts from other states. He found, for example, that the Michigan compacts were distinguishable because there all of the tribal signatories agreed to the model compact. *Id.* at FCPCAR001465-66. He stated:

Most importantly, none of these other compact provisions involved specific guarantees of profitability or revenues for one tribe without the prior consent of another tribe or tribes. In addition, none of the examples involve a revenue guarantee for a tribe that is operating gaming on so-called “off-reservation” lands acquired by the Secretary in trust under a two-part determination. Finally, 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.

Id. at FCPCAR001466 (footnote omitted).

The Assistant Secretary also found that FCPC could not rely upon the 2005 Amendment containing the arbitration provision that had been deemed approved, because under the applicable regulations, “all compacts and amendments ... must be submitted for review and approval by the Secretary under IGRA,” *id.* at FCPCAR001459 n.1, and because a compact

cannot bind the Secretary to approve a later compact amendment. *Id.* at FCPCAR001465 n.34.

Further, the 2005 Amendment was distinguishable in that it did not impose a financial burden on Menominee but provided a dispute resolution process. *Id.* at FCPCAR00146 n.35.

APPLICABLE LEGAL STANDARD

A. APA Standard

“[D]ue to the limited role of a court in reviewing the administrative record, the typical summary judgment standards set forth in Federal Rule of Civil Procedure 56 are not applicable” in an Administrative Procedure Act (“APA”) case such as this one. *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 944 F. Supp. 2d 71, 77 (D.D.C. 2013). Rather, 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.” *Id.* (internal quotations and citations omitted); *accord*, *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006).

The APA permits a reviewing court to “hold unlawful and set aside agency action, findings, and conclusions” that the court finds to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]” 5 U.S.C. § 706(2)(A). “To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The standard of review is a “narrow” and “highly deferential” one, and the court “is not empowered to substitute its judgment for that of the agency.” *Id.*; *Env'tl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981). While a reviewing court “may not supply a reasoned

basis for the agency's action that the agency itself has not given[.]" it will nevertheless "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The challenged agency action is entitled to a presumption of validity, and the burden of overcoming this presumption rests with the party challenging the action. *Env'tl. Def. Fund*, 657 F.2d at 298 & n.28. "The standard mandates judicial affirmance if a rational basis for the agency's decision is presented, even though [the court] might otherwise disagree[.]" *Id.* at 283 (internal quotations and citations omitted).

B. *Chevron* Deference Applies

"Ordinarily [the court] review[s] an agency's interpretation of a statute it is charged with implementing under the familiar and deferential two-part framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 [] (1984)." *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1279 (D.C. Cir. 2004) (internal quotation omitted). FCPC argues that *Chevron* is not applicable in this case, first because ambiguities in cases involving Indian law must be construed liberally in favor of Indians. Pls. Mem. P.&A. Supp. Mot. Summ. J. 14-15, ECF No. 42-2 (citing *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001)). This principle, however, has no application where a particular interpretation of a statutory provision would benefit the interests of one tribe while adversely affecting the interests of another tribe. *See Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 75 F. Supp. 3d 387, 396 (D.D.C. 2014) ("[T]he Indian canon of construction does not apply for the benefit of one tribe if its application would adversely affect the interests of another tribe"), *aff'd*, 830 F.3d 552 (D.C. Cir. 2016) (deferring to agency interpretation of Indian Reorganization Act under *Chevron* in challenge brought by Indian tribe to Secretary's decision to acquire land in trust for another

tribe); *Stand Up for California! v. U.S. Dep't of the Interior*, No. 16-5327, slip op. at 6 (D.C. Cir. Jan. 12, 2018) (deferring to agency construction, citing *Confederated Tribes of Grand Ronde*, 830 F.3d 552). *See also*, *Confederated Tribes of the Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996).⁶

Next, citing *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1136-37 (D.C. Cir. 2014), FCPC argues that the Assistant Secretary's construction of IGRA in gaming compact decisions should not receive *Chevron* deference because compact decisions do not have "precedential effect" and are not "binding on third parties." Pls. Mem. P.&A. Supp. Mot. Summ. J. 15, ECF No. 42-2. But *Fogo De Chao* is part of a line of cases recognizing that non-precedential rulings of the Board of Immigration Appeals are not entitled to *Chevron* deference due to the specific nature of those decisions under a regulatory scheme far different from Secretarial review of gaming compacts. *Fogo De Chao (Holdings)*, 769 F.3d at 1137 & n.6.⁷ Instead, the relevant question is whether "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and [whether] the agency interpretation claiming deference was promulgated in the exercise of that authority." *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006) (quoting *U.S. v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other

⁶ If anything, the Indian canon of construction would support the Assistant Secretary's interpretation of the IGRA, in that it is consistent with the Department's "general obligation as trustee to serve all tribes," BIA_003085, by "ensur[ing] a continued level playing field among all tribal gaming market entrants" such that the benefits of IGRA are accessible to all tribes. Decision at FCPCAR001466. *See Cobell*, 240 F.3d at 1101 (Indian canon arises from the trust relationship); *California Valley Miwok Tribe v. U.S.*, 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008). (Secretary's interpretation was due deference because it advanced the federal trust relationship).

⁷ Board of Immigration Appeals regulations specify a procedure for designating a decision as precedential. In *Fogo De Chao*, that procedure was not used, and so the agency had "disclaimed any intent to set a rule of law with any force beyond the petition at issue[.]" *Id.* at 1137.

indication of a comparable congressional intent.” *Mead*, 533 U.S. at 228. To determine *Chevron*’s applicability under *Mead*, the D.C. Circuit applies the factors identified by the Supreme Court in *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).⁸ See *Mylan Labs.*, 389 F.3d at 1279–80. Under this framework, *Chevron* has been applied by the D.C. Circuit to the Secretary’s interpretation of the IGRA in making determinations under that statute. *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 466–67 (D.C. Cir. 2007) (determination by Secretary that certain lands constituted “initial reservation” under IGRA). See also *City of Duluth v. Nat’l Indian Gaming Comm’n*, 89 F. Supp. 3d 56, 64–65 (D.D.C. 2015) (National Indian Gaming Commission’s interpretation of the IGRA in a Notice of Violation accorded *Chevron* deference), *dismissed*, No. 15-5162, 2016 WL 3615257 (D.C. Cir. July 1, 2016).

The Assistant Secretary’s interpretation of the IGRA in this case is likewise due deference because Secretarial review of compacts is a key component of a comprehensive, detailed, and complex statutory scheme. In making his decision, the Secretary engages in an informal adjudicatory process, in which he takes into consideration the arguments of the compacting parties, submissions of other interested parties, previous compact decisions of particular relevance, the overall statutory scheme and Congressional intent. See *Mylan Labs.*, 389 F.3d at 1279 (according *Chevron* deference to the FDA’s interpretation of a statute expressed in letters to the parties, given the FDA’s expertise in administering a complex regulatory scheme, and its reliance on previous determinations of similar issues). The Secretary’s decision is publicly available, and serves to inform other parties of his interpretation of IGRA. Moreover, a

⁸ These factors include “... the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time[.]” *Id.* at 222.

compact decision has the “force of law”—and thus binds third parties (including the gaming public, gaming contractors and suppliers, law enforcement, and prosecutors)—because approval by the Secretary has the effect of exempting gaming activities conducted pursuant to the compact from the operation of federal criminal law. *See* 25 U.S.C. § 2710(d)(6) (prohibition on possession or sale of gambling devices in Indian country does not apply to gaming under compact); 18 U.S.C. § 1166(c)(2) (state gambling laws do not apply to gaming under compact).

FCPC relies on two cases from California district courts for the proposition that *Chevron* does not apply to the Secretary’s construction of the IGRA in compact approvals. Pls. Mem. P.&A. Supp. Mot. Summ. J. 15, ECF No. 42-2. Both cases, however, are distinguishable or wrongly decided. Neither *Chemehuevi Indian Tribe v. Brown*, No. EDCV161347JFWMRWX, 2017 WL 2971864 (C.D. Cal. Mar. 30, 2017) nor *Fort Independence Indian Community v. California*, 679 F. Supp. 2d 1159 (E.D. Cal. 2009), involved review of a decision of the Secretary on a compact. Each was an action by a tribe against the State under IGRA alleging failure to negotiate a compact in good faith. In *Chemehuevi Indian Tribe*, the Court did state that “the Assistant [Secretary’s] approval of gaming compacts containing duration provisions is not, by itself, entitled to *Chevron* deference,” 2017 WL 2971864, at *8 n.9 (emphasis added) (noting that such approvals were entitled to *Skidmore* deference), but that statement was *dictum*, as the court accorded *Chevron* deference to an applicable regulation consistent with those approvals. *Id.* at 8 n.10. *Fort Independence Indian Community* concerned whether a particular revenue sharing provision sought by the State was permissible. The court noted that the Secretary had previously approved compacts containing revenue sharing provisions generally, though the court was “not aware of any explicit interpretation of section 2710(d)(3)(C)(vii) as it specifically applies to revenue sharing.” 679 F. Supp. 2d at 1177. Here, in contrast, there is a reasoned decision before

the Court. And, while the court in *Fort Independence Indian Community* concluded that compact decisions “appear not to have a precedential effect that binds third parties,” the court noted that the parties had not briefed the issue, *id.*, and that conclusion is erroneous given the binding effect of compact decisions on not just the parties, but the legality of gaming operations, as noted above.⁹

FCPC’s arguments against *Chevron* deference are thus without merit. Under *Chevron*, “If ... the court determines Congress has not directly addressed the precise question at issue, ... the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron*, 467 U.S. at 843. A court’s review of the agency’s construction is “highly deferential,” *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 665 (D.C. Cir. 2011), and “[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” *Chevron*, 467 U.S. at 843 n.11.

Assuming *arguendo* that the Court were to rule that *Chevron* deference did not apply, the Decision should be accorded *Skidmore* deference. Under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), an agency’s decision that may not merit *Chevron* deference merits some deference, given the “specialized experience and broader investigations and information” available to the agency, *id.* at 139, and given the value of uniformity in its administrative and judicial understandings of what a national law requires. *Id.*, at 140. See *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (reasonable agency interpretations carry “at least some added persuasive force” where *Chevron* is inapplicable).

⁹ *Chemehuevi Indian Tribe* did not consider the binding effect of compacts on third parties.

ARGUMENT

I. The Assistant Secretary's Decision Should Be Upheld

A. The Record Supports the Conclusion that Menominee Would In Fact Have to Make the Mitigation Payments

We first address the Assistant Secretary's factual conclusion, based on the entire record, "that, in fact, Menominee would be responsible for making all of the Mitigation Payments." Decision at FCPCAR001464. FCPC asserts that this statement, and others like it in the Decision, are erroneous because the 2014 Amendment would not have required Menominee to make the Mitigation Payments, and that the Decision is therefore arbitrary and capricious. Pls. Mem. P.&A. Supp. Mot. Summ. J. 18-29, ECF No. 42-2. As the Decision makes clear, however, Assistant Secretary Washburn understood that under the 2014 Amendment the State was "ultimately responsible" for the Mitigation Payments, but that it could meet its obligation by requiring Menominee to make the payments. Decision at FCPCAR001464; *see also id.* at FCPCAR001462 (amendment "requires the State, or in the alternative, Menominee to make an annual 'Mitigation Payment'"); *id.* (amendment "requires the State or Menominee to compensate [FCPC] for revenue losses"). The Decision specifically states: "[t]he 2014 Amendment contemplates that the State is ultimately is [sic] obligated to make the mitigation payments to [FCPC] to reimburse it for any lost revenue experienced by its Milwaukee Casino, but may pass its payment obligation to the Menominee." FCPCAR001466. Despite arguing that the Assistant Secretary made an error of fact regarding the 2014 Amendment's terms, FCPC admits that this statement in the Decision "acknowledges" that the State was responsible for the Mitigation Payments. Pls. Mem. P.&A. Supp. Mot. Summ. J. 25, ECF No. 42-2.

The 2014 Amendment itself states: "[t]he State and [FCPC] anticipate that the State will enter into agreements under which the Applicant [Menominee] will agree to pay the Mitigation

Payment” BIA_002961, § XXXVII.E.1. This language was quoted and relied on in the Decision. FCPCAR001462. It was perfectly acceptable for the Assistant Secretary to consider an agreement by Menominee to undertake the Mitigation Payments when the parties to the compact amendment anticipated it in the amendment itself. FCPC’s submissions to the Secretary also discussed the possibility that the Menominee’s gaming compact could be amended in such a way as to cover some of the payments. BIA_002951; *see also* BIA_002947 (“[FCPC] anticipates that the State and the Menominee Tribe will submit a separate compact amendment to the Assistant Secretary reflecting their agreement as to any additional financial obligations regarding the Kenosha casino.”). Statements by the Governor and his counsel also referenced the possibility of Menominee assuming the obligation. FCPCAR001411 (the 2014 Amendment “would require the State to make an annual payment to [FCPC] to compensate [it] for losses that are not covered by the Menominee.”); BIA_003082 (the 2014 Amendment “does provide that payment by Menominee to FCPC would satisfy the State’s obligation....”). Members of Congress who supported approval of the 2014 Amendment informed the Assistant Secretary that “the State and FCPC anticipate entering into agreements under which the Menominee will agree to make annual payments to FCPC to mitigate lost revenue should the Governor concur in the Secretary’s two-part determination.” FCPCAR001642.

Further, Assistant Secretary Washburn had before him submissions by Menominee pointing out that the 2014 Amendment “assumes that the Menominee Tribe will pay for any [FCPC] facility revenue losses allegedly caused by the Kenosha gaming facility,” FCPCAR000389 (citing 2014 Amendment, § XXXVII.E.1), and asserting that Menominee would in effect be required to make the Mitigation Payments, or else the Governor would not concur. FCPCAR000388-90; FCPCAR001167; FCPCAR001160. As this Court noted in

granting Menominee’s motion to intervene, “[T]he requested relief [ordering the 2014 Amendment approved], if granted, would, as a practical matter, impede Menominee’s efforts to obtain a gubernatorial concurrence” Mem. Op. 9, ECF No. 41.¹⁰

The Assistant Secretary’s Decision also reflects the context in which the 2014 Amendment was submitted—namely, Menominee’s long-standing efforts to develop a casino in Kenosha, FCPC’s long-standing efforts to prevent that, and Menominee’s Two-Part Determination and the impending deadline for the Governor to concur. Decision at FCPCAR001459 (“In two of [FCPC’s compact amendments], [FCPC] sought to protect themselves from the risk that another tribe would follow the same path as [FCPC] and develop an off-reservation casino within the same general area.”); *id.* at FCPCAR001462 (noting approval of Menominee’s Two-Part Determination and deadline for the Governor to concur). The Assistant Secretary’s review of the 2014 Amendment’s terms in light of the parties’ submissions as well as the factual context in which they would be applied is the kind of “real world” analysis that agencies are empowered to make in their experience and expertise in administering complex regulatory schemes. *See Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651 (1990) (“[J]udgments about the way the real world works that have gone into the [agency’s] policy are precisely the kind that agencies are better equipped to make than are courts.”). The Assistant Secretary’s factual conclusions “that, in fact, Menominee would be responsible for making all of the Mitigation Payments,” Decision at FCPCAR001464, and that Menominee would essentially be compelled to agree because “if Menominee did not consent to make the Mitigation Payments, for example,

¹⁰ FCPC itself inadvertently provides credence to this position in its brief when it states that “IGRA does not impose any conditions on a governor’s decision to concur or not The Governor, thus, had unfettered discretion regarding his concurrence decision on the Kenosha casino, and he was free to negotiate an agreement with Menominee on the Mitigation Payments as a condition of his approval.” Pls. Mem. P.&A. Supp. Mot. Summ. J. 28, ECF No. 42-2.

the Governor may decline to concur in the Secretary's two part-determination for Kenosha[,]" *id.* at FCPCAR001466, must be upheld because "the evidence in the administrative record permitted the agency to make the decision it did." *Styrene Info & Research Ctr.*, 944 F. Supp. 2d at 77.¹¹

B. The Assistant Secretary Explained His Conclusion that the 2014 Amendment Included Impermissible Subjects

FCPC argues that even if the Assistant Secretary is correct that Menominee would be responsible for making Mitigation Payments, he failed to explain how that would make the 2014 Amendment contrary to IGRA. Pls. Mem. P.&A. Supp. Mot. Summ. J. 38, ECF No. 42-2. In fact, the Assistant Secretary explained that the 2014 Amendment "violates IGRA because it includes provisions involving subjects that exceed the permissible scope of a Class III gaming compact[,]" Decision at FCPCAR001466, and specifically that "[n]othing in IGRA or its legislative history 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.* See also *id.* at FCPCAR001460, FCPCAR001464.

The Assistant Secretary further explained that the 2014 Amendment was not within the scope of permissible compact provisions under the so-called "catch-all" provision in § 2710(d)(3)(c)(vii). The Decision explains that if a compact provision does not fit within one of the authorized subjects enumerated in the first six clauses of 25 U.S.C. § 2710(d)(3)(C), the Department closely scrutinizes it to see that it fits within that provision, which permits class III

¹¹ FCPC argues that the Assistant Secretary's conclusion that Menominee would have to make the Mitigation Payments ignores that the Assistant Secretary could have disapproved a Menominee compact amendment requiring such payments. Pls. Mem. P.&A. Supp. Mot. Summ. J. 27-28, ECF No. 42-2. FCPC's argument fails to consider how, in light of disapproval of such a compact amendment, the Governor would have concurred.

gaming compacts to include provisions relating to “any other subjects that are directly related to the operation of gaming activities.” As stated in the Decision:

When we apply this provision of IGRA we do 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?” If this question were used to provide the standard for determining whether a particular object of regulation was “directly related to the operation of gaming activities,” it would permit states to use tribal-state compacts as a means to regulate a number of tribal activities far beyond that which Congress intended when it originally enacted IGRA. Instead, we closely scrutinize whether the regulated activity has a direct connection to the Tribe’s conduct of Class III gaming activities.

Decision at FCPCAR001464 (footnotes omitted) (citing, *inter alia*, Testimony of Kevin K. Washburn, Assistant Secretary – Indian Affairs, before the Senate Committee on Indian Affairs, July 23, 2014).¹² The Assistant Secretary further noted that “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.* at FCPCAR001464. Because the purpose of the 2014 Amendment was to “protect the [FCPC] Hotel & Casino’s revenue stream” at Menominee’s expense,¹³ and because it did not address the regulation or actual operation of FCPC’s Class III gaming activity, the Assistant Secretary stated

¹² The Decision also cited a letter to the Pascua Yaqui Tribe from the Director of the Office of Indian Gaming, noting this approach and using some of the same language as in the Decision. BIA_003173-79. That letter stated: “[w]hile each compact is reviewed according to its unique facts and circumstances, the Department often views ... businesses and amenities [that are ancillary to tribal casinos, such as hotels, conference centers, and restaurants] as not ‘directly related to gaming activities’ unless class III gaming is conducted within those businesses or the parties ... can demonstrate particular circumstances establishing a direct connection between the business and class III gaming activities.” BIA_003177. *See also* Decision at FCPCAR001464-65 n.32 (ancillary businesses may not be directly related to gaming activities.).

¹³ The Decision stated: “[h]ere, the Potawatomi are seeking to use the compact process for the purpose of excluding or otherwise impairing competition from another tribe under IGRA, with the effect of imposing a financial burden on the operation of another casino and Menominee’s entry into the tribal gaming market.” FCPCAR001465 n.36.

that the 2014 Amendment fell outside of this Congressional purpose and outside of the “directly related” “catch-all” provision. *Id.*

The Decision was also based in part on the fact that the Mitigation Payments were not limited to class III revenues: “[m]oreover, the calculation of the Mitigation Payment includes revenues from Class II gaming, and food, beverage, hotel, and entertainment operations, none of which are directly related to the operation of the Potawatomi’s Class III gaming activity.” Decision at FCPCAR001465 n.33. *See also id.* at FCPCAR001466 (“none of the [other] compact provisions [relied upon by FCPC] 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 clearly disagrees with the Assistant Secretary’s Decision, and the reasoning therein, but the Decision cannot be overturned on the grounds that the Assistant Secretary did not explain his reasoning. A reviewing court “may not supply a reasoned basis for the agency’s action that the agency itself has not given[.]” but will “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43. Here, the Assistant Secretary explained that the IGRA, as interpreted and applied by the Department, does not permit the type of agreement reflected in the 2014 Amendment.

C. The Assistant Secretary’s Decision is Based on a Permissible Reading of the IGRA

The Assistant Secretary’s interpretation and application of the IGRA is reasonable, and entitled to *Chevron* deference. Specifically, the “catch-all” provision itself does not address whether imposing a burden of mitigation payments on another tribe to protect the compacting tribe’s profits is within the section. The meaning of “directly related to the operation of gaming activities” is at best ambiguous. How closely the subjects must be to be related, and how directly,

are not addressed. *See Fort Indep. Indian Cmty.*, 679 F. Supp. 2d at 1173 (finding 25 U.S.C. § 2710(d)(3)(C)(vii) to be ambiguous); *cf. In re U.S.*, 669 F.3d 1333, 1338 (Fed. Cir. 2012) (“We find that ‘directly related’ as used in [I.R.C § 6103(h)(4)(B)] is ambiguous on its face.”).

When a compact is submitted to the Secretary, and he is tasked with determining whether it complies with IGRA, “[o]ne of the most challenging aspects of this review is determining whether a particular provision adheres to the ‘catch-all’ category at [25 U.S.C. § 2710(d)(3)(C)(vii)].” BIA_003177. As the Decision explains, the Secretary “closely scrutinizes” compacts on an individual basis for compliance with this provision. The Department’s application of the IGRA and interpretation of its terms through this careful case by case approach—all but required by IGRA, which mandates review of compacts on an individual basis—merits *Chevron* deference. All compacts and compact amendments are different, contain different provisions, and are negotiated under different circumstances; and, as stated in *G & T Terminal Packaging Co. v. U.S. Department of Agriculture*, 468 F.3d 86 (2d Cir. 2006):

The Supreme Court has indicated that because some “ambiguous statutory terms” can be given concrete meaning only “through a process of case-by-case adjudication,” the individual determinations reached by an agency engaged in that process also “should be accorded *Chevron* deference.” *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 [] (1999); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 [] (1987) (citing *Chevron*) (“There is obviously some ambiguity in a term like well-founded fear which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling any gap left, implicitly or explicitly, by Congress, the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program.”) (quotation marks omitted); *In re Sealed Case*, 223 F.3d 775, 779-80 (D.C.Cir.2000) (extending *Chevron* deference to the Federal Election Commission’s case-specific probable cause determination).

Id. at 95–96.

The Assistant Secretary’s construction of the “catch-all” provision in this case is supported by IGRA’s legislative history, cited by the Assistant Secretary in the Decision. In support of his conclusion that Congress did not intend for 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," Decision at FCPCAR001466, the Assistant Secretary cited and quoted from the Senate Report on IGRA: "It is the Committee's intent that the compact requirement for Class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes." *Id.* n.36 (citing S. REP. 100-446, at 13 (1988)). The 2014 Amendment would serve to exclude Menominee from gaming in Kenosha unless it agreed to make the Mitigation Payments.

The Secretary's construction of the "catch-all" provision is also consistent with other provisions of IGRA, including compacting provisions which make clear that the purpose of a gaming compact is to "govern[] the conduct of gaming operations," 25 U.S.C. § 2710(d)(3)(A), and Section 20, under which the Menominee had received the two-part determination, subject to the Governor's concurrence, pending when the Assistant Secretary disapproved the 2014 Amendments. *See United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction ... is a holistic endeavor," requiring examination of seemingly ambiguous provisions in the context of the "remainder of the statutory scheme...."). Section 20 allows surrounding communities, including nearby Indian tribes, to participate in the process, and to demonstrate that the proposed gaming facility would be detrimental to their interests. *See* 25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. § 292.2.¹⁴

FCPC argues that the 2014 Amendment is "directly related" to FCPC's gaming activities because it protects the FCPC's gaming revenues, and is calculated based on current revenues, including class III revenues. Pls. Mem. P.&A. Supp. Mot. Summ. J. 35, ECF No. 42-2. Imposing

¹⁴ As noted above, *supra* n.2, FCPC submitted comments in regard to Menominee's two-part determination application, though it declined to request treatment as a nearby tribe.

Mitigation Payments to protect FCPC's profits may be related (in part) to the class III revenue loss that FCPC may face in the event of competition from the Menominee Kenosha casino, but that is a step removed from determining that those payments are directly related to FCPC's class III gaming activities. If anything, the Mitigation Payments would be related to the conduct of gaming by Menominee.¹⁵ The payments are not necessarily "directly related" to gaming activities merely because they are based, in part, on gaming revenues. Even if FCPC's construction were a permissible one, it is not the construction reached by the Assistant Secretary, and under *Chevron*, the Court must affirm the Assistant Secretary's reasonable construction.

FCPC relies on *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003), which approved of certain revenue sharing clauses as permissible, Pls. Mem. P.&A. Supp. Mot. Summ. J. 30, 32, ECF No. 42-2. However, that decision was explained and limited by *Rincon Band*, 602 F.3d 1019, which reached a different result as to a different revenue sharing provision. *In re Indian Gaming Related Cases* involved two revenue sharing requirements, in exchange for which tribes could engage in gaming not permitted to anyone else in the state. *In re Indian Gaming Related Cases*, 331 F.3d at 1111-12. Payments were to be made to the Revenue Sharing Trust Fund (RSTF), to be distributed among non-gaming tribes in California, and to the Special Distribution Fund (SDF), to be used for purposes that were directly related to gaming (such as costs of state regulation and gambling addiction programs). *Id.* at 1105, 1111, 1113. In contrast, *Rincon Band* involved compact provisions proposed by the State requiring revenue sharing payments to the State's general fund that could be used for any purpose (an issue that the court declined to rule on in *In re Indian Gaming Related Cases*, 331 F.3d at 1114 n.17). *Rincon Band*

¹⁵ The Mitigation Payment is equal to the Annual Revenue Loss, defined as the reduction in revenues to FCPC "caused by the Applicant Facility." 2014 Amendment at FCPCAR002959-61, §§ XXXVII.D.1&E.2.

held that the revenue sharing payments were not “directly related to gaming” merely because they were paid from gaming revenues, *Rincon Band*, 602 F.3d at 1033, distinguishing *In re Indian Gaming Related Cases* (referred to in *Rincon Band* as “*Coyote Valley II*”):

Crucially, in *Coyote Valley II* we did not conclude that § 2710(d)(3)(C)(vii) authorized the RSTF and SDF because “revenue sharing” is a subject directly related to gaming. Rather, we held that fair distribution of gaming opportunities and compensation for the negative externalities caused by gaming are subjects directly related to gaming, and the RSTF and SDF were the means chosen by the parties to the 1999 compacts to deal with those issues. *See Coyote Valley II*, 331 F.3d at 1111, 1114.

Rincon Band, 602 F.3d at 1033. Because the revenue sharing payments could be used for any purpose, they were not within the “catch all” provision, even though they were based on gaming revenues. *Id.* at 1034. *See also id.* at 1041 (“[T]he rationale for permitting revenue sharing under 25 U.S.C. § 2710(d)(3)(C)(vii) in *Coyote Valley II* is not present in this case.”).

Rincon Band further held that under *In re Indian Gaming Related Cases*, to be a permissible subject for a compact, a provision must be consistent with the purposes of IGRA. *Rincon Band*, 602 F.3d at 1033-34. The Court distinguished payments to the RSTF as being consistent with IGRA’s purpose of promoting tribal economic development, *id.* at 1034, but held that payments to the general revenue fund did not accomplish IGRA’s goals. *Id.*; *cf. Wis. v. Ho-Chunk Nation*, 512 F.3d 921, 932 (7th Cir. 2008) (Although the Secretary has permitted revenue sharing agreements when the State provides a tribe with substantial exclusivity vis-à-vis non-tribal entities, “the legitimacy of these revenue-sharing provisions is far from a settled issue.”).

What the court did in *Rincon Band* is essentially what the Assistant Secretary did here. The Decision acknowledges the real purpose and effect of the Amendment—that is, to either exclude Menominee from gaming under the IGRA or to otherwise protect FCPC profits at Menominee’s expense—and concludes that purpose is neither directly related to the operation of

gaming within the meaning of the IGRA nor consistent with the intent of the IGRA. The fact that a mitigation payment connected with a revenue sharing agreement was “the means chosen by the parties... to deal with those issues[,]” *Rincon Band*, 602 F.3d at 1033, is not determinative.¹⁶ The Assistant Secretary’s construction of the “catch-all” provision is thus a permissible reading that must be upheld under *Chevron*. *See supra* at 17-21.

FCPC has not cited any cases construing 25 U.S.C. § 2710(d)(3)(C)(vii) that are inconsistent with the construction of the provision in the Decision. *Chemehuevi Indian Tribe*, 2017 WL 2971864, found that duration of a compact was within the “broad language” of 25 U.S.C. § 2710(d)(3)(C)(vii), *id.* at *6, but that decision accorded *Chevron* deference to an applicable regulation. *Id.* at *8. The Ninth Circuit’s decisions in *In re Gaming Related Cases* and *Rincon Band*, which reach different results as to different revenue sharing provisions, support the careful case by case approach used by the Secretary.¹⁷

FCPC disregards the Assistant Secretary’s interpretation of the IGRA, and argues that he based his decision on “notions of ‘fairness in inter-tribal gaming competition,’” Pls. Mem. P.&A. Supp. Mot. Summ. J. 38, ECF No. 42-2. The Assistant Secretary’s Decision was in fact based on his interpretation of the “catch-all” provision under the Secretary’s careful case-by-case approach; legislative history; and other provisions of the IGRA, and it is not contrary to law to consider fairness when fairness is consistent with the statutory purposes or rules of construction.

¹⁶ Whether, and under what circumstances, revenue sharing payments are permissible under IGRA is not at issue in this case, and need not be decided. *See Ho-Chunk Nation*, 512 F.3d at 933 (declining to rule on the matter, finding other dispositive grounds for a decision).

¹⁷ FCPC cites *In re Indian Gaming Related Cases*, 331 F.3d at 1113-16, for its holding that labor relations provisions are directly related to gaming, Pls. Mem. P.&A. Supp. Mot. Summ. J. 30, ECF No. 42-2, but does not explain how approval of the labor relations provisions support approval of the 2014 Amendment. In any event, the Department was not a party to that case, its views on the matter were not before the Court, and the Department does not “strictly adhere” to the “but for” test employed in that case because it would permit state regulation of tribal activities beyond that which Congress intended. BIA_003177-78; Decision at FCPCAR001464.

Sherwood Bros. v. District of Columbia, 113 F.2d 162, 163–64 (D.C. Cir. 1940) (considering fairness in construing statute); *Tomlinson Black North Idaho v. Kirk-Hughes*, No. CV06–118, 2006 WL 1663591 (D. Id. June 8, 2006) (same). The references to “fairness in competition” between tribes in this case simply reflect a preference in IGRA to foster tribal gaming to benefit all tribes who choose to engage in gaming. Decision at FCPCAR001466 n.36 (citing S. REP. 100-446, at 13 (1988)). *See also*, Menominee Two-Part Determination at BIA_003085 (it is Department’s “general obligation as trustee to serve all tribes”); 25 U.S.C. § 2702(1) (“[P]urpose of [IGRA] is—to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments.”). *See also Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000) (“Although the IGRA requires the Secretary to consider the economic impact of proposed gaming facilities on the surrounding communities [in making a two-part determination], it is hard to find anything in that provision that suggests an affirmative right for nearby tribes to be free from economic competition.”).

In addition to arguing that mitigation payments generally are permissible under the “catch-all” provision, FCPC also argues that the Decision was arbitrary and capricious insofar as it was based in part on the inclusion of revenues from class II gaming and ancillary activities in the Mitigation Payment calculation. Pls. Mem. P.&A. Supp. Mot. Summ. J. 35, 41-43, ECF No. 42-2. FCPC argues that inclusion of class II revenues is permissible because this represented a concession by the State and a benefit to FCPC, and was consistent with IGRA’s goal of promoting tribal economic viability, and because the reference to “gaming activity” in 25 U.S.C. § 2710(d)(3)(C)(vii) is not limited to class III activity. Pls. Mem. P.&A. Supp. Mot. Summ. J. 41, ECF No. 42-2. These arguments fail because the “catch-all” provision cannot be read as allowing

any provision on any subject simply because it is a benefit to the tribe, and further the Secretary and the D.C. Circuit both construe the reference to “gaming activities” in 25 U.S.C. § 2710(d)(3)(C)(vii) to mean class III gaming activities. Decision at FCPCAR1464 n.29 (quoting Assistant Secretary Washburn’s testimony to Congress; BIA_003249); *Colorado River Indian Tribes v. Nat’l Indian Gaming Comm’n*, 466 F.3d 134, 138 (D.C. Cir. 2006).

The Court need not reach the question whether any compact provision that deals with class II gaming in any way is permissible. That issue is not presented here. The issue here concerns the Assistant Secretary’s Decision that payments to mitigate losses in class II gaming revenues is unrelated to class III gaming activities. FCPC makes no credible argument that such payments are related to class III gaming.

FCPC cites *Flandreau Santee Sioux v. Gerlach*, No. CV 14-4171, 2017 WL 4124242, *10 (D.S.D. Sept. 15, 2017), for the proposition that various activities ancillary to class III gaming were “directly related” to gaming. Pls. Mem. P.&A. Supp. Mot. Summ. J. 35, 41-43. That case is not applicable. It did not address mitigation payments that were based in part on class II revenues, and in fact did not address mitigation payments or class II revenues at all. Nor did it involve the permissibility of provisions in an approved compact or under negotiation.¹⁸ The Department was not a party, and in finding that ancillary activities were directly related to gaming activities, the court gave no deference to the Department’s views, and employed the “but for” test that the Department does not follow. *Id.* at *7 (“the transactions the State seeks to tax ... would not exist but for the Tribe’s operation of a casino”); *id.* at *8 (same). The result in *Flandreau Santee Sioux* may be a benefit to the tribe there, in that it avoided state taxes, but the

¹⁸ The case involved a suit by the tribe to enjoin state taxation of ancillary activities. The tribe argued, *inter alia*, that the ancillary activities were a permissible subject of compacts under the “catch-all” provision, and that IGRA therefore preempted taxation of those activities. *Id.* at *5.

decision illustrates the problem with using the “but for” test, in that, if extended to compact negotiations, it could “permit states to use tribal-state compacts as a means to regulate tribal activities far beyond that which Congress intended when it originally enacted IGRA.”

BIA_003177.

D. Not All Exclusivity Agreements are Permissible Under 25 U.S.C. § 2710(d)(3)(C)(vii), and Not All Have Been Approved

FCPC’s argument that the Secretary has “repeatedly approved” exclusivity provisions, thus demonstrating that they are consistent with the IGRA, Pls. Mem. P.&A. Supp. Mot. Summ. J. 32, ECF No. 42-2, ignores that such agreements are not identical, and that the Secretary takes a case by case approach. The Secretary has refused to approve some such provisions, such as the 2003 Amendment. *See supra* at 8–9. Other compacts containing such provisions have only been deemed approved “to the extent the compact is consistent with the provisions of [IGRA],” 25 U.S.C. § 2710(d)(8)(C), “thus leaving open” the legality of provisions contained in the compact. *Rincon Band*, 602 F.3d at 1041–42. In fact, the Secretary has failed to act on many of the compacts that FCPC relies upon. This was the case with FCPC’s 2005 Amendment, FCPCAR000290, 71 Fed. Reg. 5,068 (Jan. 31, 2006), as well as several others. *E.g.*, BIA_003416-31, BIA_003553-79, BIA_003607-33, BIA_003580-606. In some cases, the Secretary has written to the compacting tribe and state, expressing his or her view that “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,” BIA_003184, or similar language. FCPCAR001659.¹⁹ The disapprovals, and deemed

¹⁹ There are two types of exclusivity agreements: those providing tribes the exclusive right to gaming activities vis-à-vis non-tribal competitors, and those that providing a tribe with an exclusive area around its casino. In the former case, where a compact provides such exclusivity in return for revenue sharing by the tribe, the Secretary may in some cases determine that the

approvals, belie FCPC's contention that "repeated approvals" of such agreements means the Secretary has concluded that such agreements are in all cases consistent with the IGRA and specifically with 25 U.S.C. § 2710(d)(3)(C)(vii).

Where an agency declines to follow past decisions, it should explain the deviation, or distinguish the prior decisions, though no great degree of specificity is required. *See Hall v. McLaughlin*, 864 F.2d 868, 873 (D.C. Cir. 1989) ("[W]here a particular agency action does not appear to be inconsistent with prior decisions, the agency's explanation need not be elaborate.") (citing *United Municipal Distributors Group v. FERC*, 732 F.2d 202 (D.C. Cir. 1984), in which "the court accepted the Commission's laconic explanation as an ample articulation of its reasoning," (internal quotations omitted), and *West Coast Media, Inc. v. FCC*, 695 F.2d 617 (D.C. Cir. 1982), where the court "held that the Commission had engaged in 'eminently reasonable' decisionmaking when it distinguished an asserted precedent by merely reciting the factual differences between the [two cases]."). In this case, the Assistant Secretary addressed provisions in other compacts that were brought to its attention by FCPC, and distinguished them from the 2014 Amendment. Decision, FCPCAR001465-66.

revenue sharing does not constitute a tax or assessment prohibited by 25 U.S.C. § 2710(d)(4)(C) on the grounds that it "provides a tribe with substantial economic benefits in the form of a right to conduct Class III gaming activities that are on more favorable terms than any rights of non-Indians to conduct similar gaming activities in the State." FCPCAR000325. Courts have upheld some such revenue sharing agreements as being permitted by 25 U.S.C. § 2710(d)(3)(C)(vii). *Compare In re Indian Gaming Related Cases*, 331 F.3d at 1111, 1112 (permissible); *with Rincon Band*, 602 F.3d at 1034, 1041–42 (not permissible), discussed *supra* at 30-32.

Providing tribes with an exclusive right to conduct gaming vis-à-vis non-Indians is consistent with IGRA's purposes of promoting tribal economic development and ensuring that the tribe is the primary beneficiary of the gaming operation. 25 U.S.C. § 2702. *See In re Indian Gaming Cases*, 331 F.3d at 1115. In contrast, where a tribe seeks approval of a compact provision protecting it from competition by other tribes, the policy concerns are different. FCPACR000326 ("we find a provision excluding other Indian gaming anathema to basic notions of fairness in competition and inconsistent with the goals of IGRA"); *see also* Decision at FCPCAR001466 n.36 (citing S. REP. 100-446, at 13 (1988)).

1. Wisconsin compacts

FCPC asserts that gaming compacts with five Wisconsin tribes are “similar” to the 2014 Amendment, Pls. Mem. P.&A. Supp. Mot. Summ. J. 37, ECF No. 42-2, but the Assistant Secretary distinguished them, stating in part:

The Mitigation Payments envisioned by the 2014 Amendment go well beyond a potential reduction in [FCPC’s] revenue sharing payments that we have permitted in other instances. For example, compact amendments between other tribes and the State of Wisconsin do not specifically call for anything approaching the Mitigation Payments that guarantee the Tribe’s profits by another tribe. Nor do these other compact amendments include Class II gaming and other revenues.

Decision at FCPCAR001465. These statements are factually correct. Not one of the five compacts required a mitigation payment by another tribe.

The Lac Du Flambeau (“LDF”) compact—the only one of the five to have been affirmatively approved—required that the State (not an applicant tribe) either agree to indemnify LDF for reductions in class III gaming revenues in the event the State approved a competing tribal gaming facility within a certain distance, or arbitrate in the event of an impasse.

BIA_003171, ¶ 41. In effect, the compact provides a procedural right to LDF, and leaves it to arbitrators to determine the outcome in an arbitration with the State. The arbitration provision itself suggests LDF’s rights are ephemeral, because nothing in the arbitration provision requires arbitrators to compel the State to make such payments. BIA_003156-58. Further, because nothing in the compact requires the State to indemnify LDF, the State’s refusal to do so would not constitute a breach of compact to justify an award by the arbitrators. BIA_003156-59.

The Ho-Chunk Nation (“HCN”) compact does not require mitigation by an applicant tribe either. Indeed, HCN initially submitted a compact amendment that provided that the Governor not concur in any two-part determination if the new casino would cause a substantial reduction of HCN class III gaming revenues unless the applicant tribe indemnified HCN,

BIA_003426-27, but withdrew it while it was under consideration and replaced it with a provision not requiring such an agreement.²⁰ BIA_003429-31. The replacement provision instead required indemnification by the State, with the indemnification to be paid through reductions in HCN's revenue sharing payments (essentially capping the mitigation payments at the amount of revenue sharing payments). BIA_003430.²¹ The compact amendment was deemed approved. FCPCAR001658-59 (finding that the substitute provision is "anathema to basic notions of fairness in competition, and repugnant to the spirit of IGRA").

The other Wisconsin compacts do not require mitigation by either the "applicant" tribe or by the State. The Stockbridge-Munsee Tribe's deemed approved compact provides only that its revenue sharing provisions would be reduced in the event of tribal competition approved by the State through a two-part determination. BIA_003625. The Oneida Nation and St. Croix Chippewa deemed approved compacts provide that if the State enters into a compact protecting any tribe from gaming by another tribe pursuant to Section 20 of IGRA, then the State will negotiate similar compact amendments with them, the remedy being reductions or return of revenue sharing payments (and not mitigation payments, either by the State or a tribe). BIA_003569, BIA_003596-97. Further, as the Decision noted, "[a]ny amendment resulting from such negotiations must nonetheless be submitted for review to determine whether it complies with IGRA." Decision at FCPCAR001465.

²⁰ Although the documents in the record do not address the reasons for the submission of a substitute provision, the procedural history suggests that, as with FCPC's 2003 Amendment, the Department threatened to disapprove the original compact amendment.

²¹ The compact provides that if reductions in class III revenues exceed revenue sharing payments, then the Governor would seek an appropriation to pay the difference, BIA_003430, but the Legislature is not (and cannot be) required by the compact to make the appropriation. *See* BIA_003081-83 (Governor cannot bind State to make mitigation payments that require an appropriation). Further, the provision provides that in the event the State breaches the agreement, by either not agreeing to mitigate the reductions or not entering into binding arbitration, then HCN is relieved of its obligation to make revenue sharing payments. BIA_003431.

2. Michigan compacts

The Assistant Secretary distinguished compacts with Michigan tribes on the grounds that all of the tribal signatories agreed to the model compact. Decision at FCPCAR001465-66. In fact, each Michigan tribe agreed in its own gaming compact that it would not submit an application for a Section 20 determination unless it first entered into a revenue sharing agreement with the other tribes in the state. *See e.g.*, BIA_003265; BIA_003394. Such an agreement is clearly distinguishable from one tribe imposing limitations on another tribe.

FCPC cites the Michigan compacts approvals for the proposition that they “demonstrate[] that payments between tribes can be permissible under the statute.” Pls. Mem. P.&A. Supp. Mot. Summ. J. 38, ECF No. 42-2. In fact, the Assistant Secretary’s approval undermines this assertion. She 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 the revenue. Thus, this Section does not violate Federal law.” BIA_003251.

3. Seneca Nation compact

The Decision found that the Seneca Nation compact “does not make another tribe the guarantor of Seneca’s profits.” FCPCAR001466. FCPC accurately notes that although the compact was only deemed approved, the Secretary stated that the competition-protection provision did not itself contravene IGRA, Pls. Mem. P.&A. Supp. Mot. Summ. J. 39-40, but again, the Secretary did not have before her a compact like the 2014 Amendments, which essentially obligates Menominee to make mitigation payments.

Further, FCPC fails to acknowledge other matters that distinguish the Seneca Nation compact and limit its precedential impact. There, the two impacted tribes, the Tuscarora and the

Tonawanda, “are regarded as traditionally opposed to gaming” (from which we can infer that there were no two-part applications pending for those tribes), and the exclusion applied to those tribes only within a radius of twenty-five miles of the Seneca casinos, and excepted the tribes’ existing lands. BIA_003183-84. Most importantly, Secretary Norton qualified her decision, stating: “While I understand that the State is required to negotiate in good faith with all Indian tribes and it has assured us that it understands its obligation under the 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.” BIA_003184.

FCPC cites the Seneca Nation decision for the proposition that under IGRA, there is no “absolute right” to engage in off-reservation gaming, *id.*, but that letter did not address a situation such as that presented here where a tribe impacted by an anti-competitive compact provision was actively pursuing off-reservation gaming, had a compact provision governing the same, and a two-part determination pending gubernatorial concurrence.

The Assistant Secretary further distinguished all of the above compacts on the grounds that “none of the examples involve a revenue guarantee for a tribe that is operating gaming on so-called ‘off-reservation’ lands acquired by the Secretary in trust under a two-part determination.” Decision at FCPCAR001466. FCPC does not address this distinction, essentially conceding it. The Assistant Secretary also distinguished the compacts cited by FCPC on the grounds they protected not only class III gaming revenues, but other revenues as well: “Finally, 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.” *Id.* at FCPCAR001466. FCPC does not disagree with this statement as a factual

matter, and it is supported by the record. As noted above, the LDF and HCN compacts—the only ones with mitigation payments—protect class III revenues only. *See supra* at 37-38.

E. FCPC’s Argument that the Decision Deprives It of the Benefit of Its Bargain is Erroneous and Irrelevant

FCPC’s argument that the Decision deprives it of the benefit of its bargain with the State, Pls. Mem. P.&A. Supp. Mot. Summ. J. 41, 43, ECF No. 42-2, is wrong and irrelevant.

Beginning with its 1998 compact amendment, FCPC agreed to make revenue sharing payments to the State in exchange for the right to conduct class III gaming activities that the State does not allow non-Indians to conduct. FCPCAR000237-40. Under its compact, as amended (including “deemed approved” amendments), if the State permits non-Indians to conduct gaming not allowed them now, then FCPC is relieved of the requirement to make revenue sharing payments and, in some cases, the State would also have to return to FCPC a portion of revenue sharing payments it had made. FCPCAR000083-84, § XXXI.B.1, G.1. This exclusivity vis-à-vis non-Indians is of substantial economic value to FCPC, and provides consideration for the revenue sharing payments. In fact, when the 2003 Amendment was pending, and after FCPC had withdrawn the anti-competitive provision to protect its casino from a competing Menominee casino, the Assistant Secretary, addressing the increased revenue sharing payments in the remaining 2003 Amendment, FCPCAR000107, stated that FCPC “reassured [the Department] that it will receive the benefit of the bargain,” that it had shown that net revenues would increase under the 2003 Amendment, and that it could afford the increased payments. FCPCAR000325. It is telling that when FCPC withdrew the 50-mile radius provision, it did not then submit a replacement provision, nor did it agree with the State to a reduction in its revenue sharing payments. Nor did FCPC and the State replace the provision later in 2003 following the deemed approval of the 2003 Amendment when they executed and submitted for

approval additional compact amendments. FCPCAR00314-22. In effect, the payments agreed to in 2003 were for exclusivity vis-à-vis non-Indian gaming only.

What FCPC agreed to in 2005 was simply a provision to reach a substitute provision chosen by an arbitrator, which itself would be subject to approval by the Secretary. If in fact the 2005 Amendment was in return for some part of the revenue sharing payments, then FCPC should have negotiated for a reduction or refund of those payments in the event the Secretary disapproved the compact amendment chosen through arbitration.

FCPC's argument on being deprived of the benefit of the bargain fails for the fundamental reason that IGRA requires the Secretary to review compacts, and to disapprove those that are contrary to IGRA. Any time the Secretary disapproves a compact, he is of course depriving the tribe of the benefit of its bargain with the state.

II. Menominee is Entitled to Summary Judgment on Count II

In Count II of its Complaint, FCPC asserts that the Secretary had a "ministerial duty" to approve the 2014 Amendment because it was the product of the arbitration pursuant to the 2005 Amendment that had been deemed approved. Compl. ¶¶ 82-85, ECF 1. (FCPC has not moved for summary judgment on this Count.) Menominee is entitled to summary judgment on this count.

First, as the Assistant Secretary found in his Decision, under the applicable regulations, "all compacts and amendments ... must be submitted for review and approval by the Secretary under IGRA," Decision at FCPCAR001459 n.1 (citing 25 C.F.R. § 293.4), and one compact cannot bind the Secretary to approve a later compact amendment. *Id.*, FCPCAR001465 n.34. *See* 25 U.S.C. § 2710(d)(8)(B).

Second, and more fundamentally, the 2005 Amendment is itself contrary to the IGRA, and so cannot bind the Secretary. The Secretary declined to expressly approve the 2005 Amendment, allowing it to go into effect only to the extent that it is consistent with the terms of

the IGRA. FCPCAR000290, 71 Fed. Reg. 5,068 (Jan. 31, 2006). The deemed approval left open the legality of provisions contained in the amendment, *Rincon Band*, 602 F.3d at 1041–42, and FCPC has put the legality of those provisions at issue in this case.

The 2005 Amendment is contrary to IGRA for the same reasons as the 2014 Amendment—namely, through an arbitration mechanism, it either imposed upon a tribe applying for a Section 20 determination within 50 miles of Milwaukee (i.e., Menominee) the burden of agreeing to make mitigation payments to FCPC (the last best offer required of the State), or else required reductions or repayment of FCPC revenue sharing payments by the State (FCPC’s last best offer). 2005 Amendment at FCPCAR000291-92, FCPCAR000297-98, § XXII.A.11. Such reductions or even repayment of millions of dollars in FCPC revenue sharing payments, like the mitigation payments, would make a concurrence on the two-part determination all but impossible; and in the unlikely event of a concurrence, the State would invariably in turn seek an agreement with Menominee to make it whole for such payments as a condition of concurring. Regardless, the mere fact that the provision requires one of the last best offers to require the applicant (Menominee) to make the mitigation payments, and leaves it to an arbitrator whether or not to pick that provision (binding the parties to then execute and submit the provision so chosen as a compact amendment for Secretarial approval), renders the provision beyond the purview of the “catch-all” provision for the same reasons as the 2014 Amendment.

III. FCPC is not Entitled to the Remedies it Seeks in Count III of its Complaint, or in the Conclusion to its Memorandum

In Count III of its Complaint, FCPC seeks a declaration that the 2014 Amendment is deemed approved under IGRA. Compl. ¶¶ 85-87, ECF 1. FCPC does not address this count in its motion for summary judgment or memorandum in support. In the conclusion to its memorandum, however, FCPC asks that the Court not only vacate the Decision, but further to

find that the 2014 Amendment is permissible under IGRA. Pls. Mem. P.&A. Supp. Mot. Summ. J. 43, ECF No. 42-2. It requests, in the alternative, remand, but subject to an order that the 2014 Amendment be deemed approved if the Secretary does not act on it within 45 days. FCPC provides no legal argument supporting these remedies.

When a reviewing court finds that an agency action is unlawful, a court of “appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions Rather, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (internal quotations omitted). Remand is appropriate because it prevents a reviewing court from “‘intrud[ing] upon the domain which Congress has exclusively entrusted to an administrative agency.’” *I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88, (1943)). Remand also “makes sense ... for reasons of agency expertise.” *Yue Zhang v. United States Citizenship & Immigration Servs.*, No. CV 17-706 (EGS), 2017 WL 3190559, at *2 (D.D.C. July 26, 2017).

Here, IGRA entrusts the Secretary with compact decisions, and the Secretary has considerable expertise in reviewing compacts. Even if the Court were to hold that there is some defect in the Decision, it is possible that the defect could be corrected on remand, or that the Secretary could reach the same result on other grounds.²² The Assistant Secretary did not address several additional grounds for disapproval that were brought to its attention by Menominee. *See*

²² For the same reasons, any remand should be without vacatur, at least not without the Court first holding another round of briefing and determining that vacatur is warranted. *See e.g., Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 147–48 (D.D.C. 2017) (finding deficiencies in agency decision; requiring further briefing “on whether remand with or without vacatur is appropriate in light of the deficiencies herein identified and any disruptive consequences that would result....”).

FCPCAR000387-91; FCPCAR001160-61; FCPCAR001162-74; FCPCAR000392-96. The Court could not hold that the 2014 Amendments were permissible as a matter of law without addressing all of Menominee's arguments raised in the administrative record.

At this juncture, Menominee has not briefed these alternative grounds, because if the Decision is not affirmed, then it should be remanded to the Secretary. In the event that the Court were to overturn the Decision and, for any reason, were to conclude that remand was not appropriate, and that it is appropriate for the Court to determine the lawfulness of the 2014 Amendment, then it should enter a schedule for briefing summary judgment motions on the other grounds asserted for disapproval of the 2014 Amendment.

CONCLUSION

For the foregoing reasons, the Court should DENY FCPC's Motion for Summary Judgment and GRANT Menominee's Cross-Motion for Summary Judgment.

s/ Michael L. Roy
Michael L. Roy (DC Bar No. 411841)
Caroline P. Mayhew (DC Bar No. 1011766)
Hobbs, Straus, Dean & Walker, LLP
2120 L Street NW, Suite 700
Washington, DC 20037
202-822-8282 (Tel.)
202-296-8834 (Fax)
Attorneys for the Menominee Indian Tribe of
Wisconsin and the Menominee Kenosha Gaming
Authority

DATED: January 18, 2018