IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CONNECTICUT, MASHANTUCKET PEQUOT TRIBE, and MOHEGAN TRIBE OF INDIANS OF CONNECTICUT *Plaintiffs*, v. UNITED STATES DEPARTMENT OF THE INTERIOR, and RYAN ZINKE, SECRETARY OF THE INTERIOR, *Defendants*.	)	No. 1:17-cv-02564-RC

MEMORANDUM IN SUPPORT OF MOTION OF MGM RESORTS INTERNATIONAL GLOBAL GAMING DEVELOPMENT LLC FOR LEAVE TO INTERVENE IN SUPPORT OF DEFENDANTS

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GLOSSARY

Amendments	Amendments executed July 20, 2017 to the Gaming Agreements
APA	Administrative Procedure Act
Gaming Agreements	The tribal-state gaming agreements in force between Connecticut and the Tribes (excluding the Amendments, which are not in force)
IGRA	Indian Gaming Regulatory Act, 25 U.S.C. §§ 2501 *et seq*.
Interior	United States Department of the Interior (including the Secretary where applicable)
MGM	Movant-Intervenor MGM Resorts International Global Gaming Development LLC
Ruling	September 15, 2017 decision issued by Interior returning the Tribes' proposed Amendments without approving or disapproving them
Secretary	Secretary of the United States Department of the Interior
State	State of Connecticut
Tribes	Mashantucket Pequot Tribal Nation and Mohegan Tribe of Indians of Connecticut

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, MGM respectfully moves for leave to intervene in support of Defendants, the United States Department of the Interior and Secretary of the Interior Ryan Zinke. MGM seeks to intervene because its ability to do business in Connecticut is directly implicated by the relief Plaintiffs seek—an order directing Interior to take action that would put MGM at an unlawful, perpetual competitive disadvantage in the Connecticut casino-gaming market.

This case concerns proposed Amendments[1] to Gaming Agreements between Connecticut and its two federally recognized Indian tribes, the Mashantucket Pequot Tribe and the Mohegan Tribe of Indians of Connecticut that, respectively, operate the Foxwoods and Mohegan Sun casinos on their reservations in the southeast corner of the State. The State and the Tribes jointly challenge Interior's September 2017 ruling, which returned those Amendments without approving them, and seek a writ of mandamus requiring Interior to approve the Amendments.

The Tribes' Amendments implicate an important distinction between the two types of casinos in the United States: (i) tribal casinos operated by tribes on tribal lands pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, and (ii) commercial casinos, operated by private entities, governed by state law, on non-tribal lands, including casinos in Las Vegas and Atlantic City. Foxwoods and Mohegan Sun are tribal casinos.

MGM has interests in the Connecticut casino-gaming market—both as developer of a proposed commercial casino in Bridgeport and as operator of MGM Springfield, a $960 million commercial casino less than ten miles north of the Massachusetts-Connecticut border, scheduled to open in 2018.

[1] Each of the capitalized terms used in this brief is defined in the Glossary.

Approval of the Amendments would undermine those interests by granting valuable rights exclusively to the Tribes, a rival to MGM in the Connecticut market. Specifically, the Amendments are the lynchpin of a 2017 Connecticut statute designed to protect the Tribes from MGM's competing casino projects by granting the Tribes' joint venture

- the exclusive right to operate a new commercial casino in East Windsor, Connecticut, just 12 miles south of MGM Springfield; and
- a special exemption that would allow the Tribes' venture (but not MGM or others) to operate new commercial casinos without eliminating the State's right to collect hundreds of millions in annual royalties from Foxwoods and Mohegan Sun—putting MGM's Bridgeport proposal (and others) at a disadvantage vis-à-vis competing proposals by the Tribes' venture.

The 2017 statute makes these outcomes contingent on Interior's approval of the Amendments. The reasons for that contingency are explained below, but the point for purposes of this motion is that the ruling demanded by Plaintiffs would, immediately and without further regulatory or legislative action, cause MGM competitive injury the two ways described above. Put differently, approval of the Amendments by Interior is the final step necessary to implement the 2017 statute's discriminatory regime.

Interior properly declined to issue that approval in September 2017—not only did Interior have authority to return the Amendments (rather than issue a decision on their merits), but the Amendments violate IGRA by facilitating commercial, rather than tribal, gaming. As the Supreme Court recently observed, "[e]verything—literally everything—in IGRA affords tools … to regulate gaming on Indian lands, *and nowhere else*." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2034 (2014) (emphasis added).

At bottom, the Court should grant MGM leave to intervene, either as of right under Rule 24(a) or by permission under Rule 24(b), for three reasons. *First*, MGM has standing because it would suffer competitive harm if Interior's Ruling were overturned. *Second*, Interior's

institutional interests differ from MGM's economic interests, and Interior therefore will not adequately represent MGM in this suit. *Third*, and finally, because MGM's motion comes at the outset of the case, intervention will not unfairly prejudice the original parties.

Another judge of this Court last year granted a third-party casino developer's motion for leave to intervene in nearly identical circumstances in *Forest County Potawatomi Community v. United States*, 317 F.R.D. 6 (D.D.C. 2016), and the same result is warranted here.

STATUTORY AND REGULATORY BACKGROUND

This case arises under the Administrative Procedure Act, 5 U.S.C. § 702, and IGRA, which provides a comprehensive regulatory framework for gaming activities by tribes on Indian lands, *see* 25 U.S.C. §§ 2710, 2719. Under IGRA, tribes may conduct "Class III" casino gaming—blackjack, slot machines, and similar games—subject to three principal conditions.

First, gaming must occur on "Indian lands," a category principally comprised of "lands within the limits of any Indian reservation." 25 U.S.C. §§ 2703(4), 2710(d)(1). Courts have enforced this limitation, holding that "gaming on non-Indian lands is not authorized by or regulated under IGRA," *N. Cty. Cmty. All., Inc. v. Salazar*, 573 F.3d 738, 744 (9th Cir. 2009), because "IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, *and nowhere else*," *Bay Mills*, 134 S. Ct. at 2034 (emphasis added).

Second, gaming must be permitted by agreement between the tribe and the state in which the tribe's lands are located. *See* 25 U.S.C. § 2710(d)(1).[2]

Third, and finally, the gaming agreement must be reviewed and approved by the Secretary. *See* 25 U.S.C. § 2710(d)(8); 25 C.F.R. §§ 291.11, 293.15. The Secretary may

[2] Although these agreements ordinarily take the form of a tribal-state "compact," federal regulations authorize an alternative form of gaming "procedures" issued by the Interior Department in lieu of a traditional compact. *See* 25 C.F.R. Parts 291, 293.

disapprove a tribal-state gaming agreement if it violates "any provision" of IGRA, "any other provision of Federal law," or "the trust obligations of the United States to Indians." 25 U.S.C. § 2710(d)(8)(B); *see also* 25 C.F.R. §§ 291.11(b), 293.14.

Interior's regulations allow states and tribes to amend existing gaming agreements, subject to approval by the Secretary. *See* 25 C.F.R. §§ 291.14, 293.2-293.15. Amendments are generally subject to the same rules as underlying agreements: they must be accompanied by adequate documentation, 25 C.F.R. §§ 291.14, 293.8, and must comply with IGRA, other federal laws, and the United States' trust obligations, 25 C.F.R. §§ 291.11(b), 293.14.

Critically, an amendment to a tribal-state gaming agreement is not effective unless (i) it is approved by the Secretary (or "deemed approved" by operation of law) and (ii) Interior publishes a notice of approval in the Federal Register. *See* 25 C.F.R. §§ 291.13, 293.15.

FACTUAL BACKGROUND

A. Tribal Gaming in Connecticut

Foxwoods and Mohegan Sun are the only casinos in Connecticut. The Mashantucket operate Foxwoods on their reservation pursuant to procedures issued by the Secretary in 1991, *see* 56 Fed. Reg. 24,996 (May 31, 1991), and the Mohegan operate Mohegan Sun on their reservation pursuant to a compact executed in 1994, *see* 59 Fed. Reg. 65,130 (Dec. 16, 1994).

Two features of these Gaming Agreements bear mention. *First*, they permit slot-machine gaming at Foxwoods and Mohegan Sun so long as the Tribes pay the State a 25 percent royalty on revenue from such gaming. These payments, which Connecticut uses to fund statewide programs, exceeded $250 million in 2016.[3] *Second*, the Gaming Agreements provide that if the

[3] *See* State of Connecticut, *FY 17 General Fund Revenue Estimates*, *available at* https://www.cga.ct.gov/ofa/Documents/year/PROJ/2017PROJ-20170505_May%205,%202017%20Revenue%20Detail.pdf.

State allows "any other person" to offer "casino games," the Tribes may operate slot machines at Foxwoods and Mohegan Sun *without* paying the 25 percent royalty to the State. Thus, the State cannot license a new casino—even one jointly owned by the Tribes—without losing the right to collect hundreds of millions in annual royalty payments.[4]

B. MGM's Development Strategy and Springfield Casino

MGM's parent company, MGM Resorts International, operates a world-renowned portfolio of destination resorts, including 15 casino resorts in the United States. *See* Declaration of Uri Clinton ("Clinton Decl.") at ¶¶ 2-3.

MGM is the casino-development arm of MGM Resorts International, and it regularly pursues development opportunities throughout the United States. *Id.* ¶ 3. In that role, MGM stays apprised of proposals to expand commercial casino gaming and competes with other operators (including the Tribes) for licenses when new jurisdictions open their doors to casino gaming. *Id.* ¶ 4. In recent years, MGM has evaluated potential expansion opportunities arising out of proposed legislation in Georgia, Maryland, Massachusetts, and New Jersey. *Id.*

Reflecting this strategy, in 2014 MGM obtained a license to develop MGM Springfield in Massachusetts. *Id.* ¶ 13. MGM began construction of MGM Springfield in 2015 and expects it to be completed in 2018. *Id.* ¶ 15. MGM has invested hundreds of millions of dollars in MGM Springfield and expects that the project will cost nearly a billion dollars overall. *Id.* ¶ 16. MGM Springfield would compete with the Tribes' proposed East Windsor casino, which relies on Interior's approval of the Amendments at issue here (as described below). *See id.* ¶ 20.

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[4] A commercial casino jointly owned by the Tribes would constitute "any other person" under state law. *See* Letter from George C. Jepsen, Conn. Attorney General, to Conn. General Assembly, at 3 (Apr. 15, 2015), *available at* https://www.cga.ct.gov/ps/related/20170223_Informational%20Forum%20On%20Gaming/Informational%20Forum%20On%20Gaming%20MGM%20Background%20Information.pdf (reprinted at pages 5-10) ("Jepsen Letter").

C. Connecticut's Commercial Gaming Expansion

Although Connecticut law has long prohibited commercial casino gaming, in 2015 the State began considering laws to allow such gaming. In May 2015, Connecticut enacted Special Act 15-7, which authorized creation of a "tribal business entity … owned exclusively by the" Tribes and vested that entity with the express right (unavailable to all others) to execute a development contract for Connecticut's first commercial casino. Special Act 15-7 §§ 1(a)-(f).[5]

As soon as Special Act 15-7 became law, the Tribes moved quickly. In August 2015, they registered the tribal business entity authorized by the legislation, naming it MMCT Venture LLC. *See* Clinton Decl. ¶ 18. In February 2017, MMCT executed a contract with the Town of East Windsor, Connecticut for construction and operation of a new commercial casino in a retail plaza 12 miles south of MGM Springfield, as depicted in the map below. *See id.* ¶¶ 17, 19.[6]

That casino would not be on "Indian lands" or governed by IGRA, but would instead be operated under state law by a corporation (MMCT) on private property.

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[5] Special Act 15-7 is available at https://www.cga.ct.gov/2015/ACT/sa/pdf/2015SA-00007-R00SB-01090-SA.pdf.

[6] *See also* Kenneth R. Gosselin, *Tribes Pick East Windsor for Possible Third State Casino*, Hartford Courant (Feb. 28, 2017), http://www.courant.com/business/hc-mmct-picks-east-windsor-casino-20170227-story.html.

Prompted by Connecticut's newfound openness to commercial gaming, MGM determined in 2015 that a Connecticut-based casino could be commercially desirable and began taking steps to secure authorization to develop and operate such a casino. Clinton Decl. ¶ 5. MGM concluded that (among other locations) a casino in southwestern Connecticut, near New York City, presents a particularly valuable opportunity. *Id.* MGM thus began advocating for adoption of a competitive selection process for the right to operate Connecticut's first commercial casino. *See id.* ¶ 6.[7] MGM championed this competitive process, including in hearings before the Connecticut General Assembly and meetings with the Governor and other state leaders. *Id.* MGM has spent more than $3.2 million in support of this legislative effort. *Id.*

The General Assembly considered MGM's proposal alongside a bill promoted by the Tribes that would grant a casino license exclusively to MMCT by legislative fiat.

In June 2017, Connecticut opted for the latter approach, enacting Public Act 17-89, which conditionally authorizes MMCT to operate its proposed East Windsor casino. The Act states that "MMCT Venture, LLC, is authorized to conduct [casino] gaming … at 171 Bridge Street, East Windsor," but provides that "[s]uch authorization shall not be effective unless":

1. the Tribes and the Governor execute "amendments to" the Gaming Agreements creating a special exemption for MMCT, such that "authorization of MMCT … to conduct [casino] games in the state does not terminate" the Tribes' duty to pay the State a 25 percent royalty on slots revenues from Foxwoods and Mohegan Sun;

2. the amendments "are approved by" the Connecticut legislature; and

3. the amendments "are approved or deemed approved by the Secretary of the United States Department of the Interior pursuant to the federal Indian Gaming Regulatory Act … and its implementing regulations."

[7] MGM has a history of involvement in the Connecticut market. In 1995, Mirage, a company later acquired by MGM, unsuccessfully pursued a Bridgeport casino. *See Las Vegas Company Ups Ante In Bid to Build Bridgeport Casino*, N.Y. Times (Apr. 18, 1995), http://www.nytimes.com/1995/04/18/nyregion/las-vegas-company-ups-ante-in-bid-to-build-bridgeport-casino.html.

Public Act 17-89, § 14(c)(1)-(2).[8]

The amendments required by Public Act 17-89 are necessary from the State's perspective because, as noted, the Gaming Agreements allow the Tribes to stop making royalty payments to the State if "any other person" is permitted to operate a casino in Connecticut.[9] As a private corporation, MMCT is a separate "person" from the Tribes, such that a law allowing it to operate a casino would end the royalty obligation and cost the State hundreds of millions in annual payments.[10] Public Act 17-89 addresses that problem by requiring amendments to the Gaming Agreements that exempt MMCT from the definition of "any other person."

Public Act 17-89's legislative history shows that it was designed to insulate the Tribes from MGM's competing casino projects. Senator Looney, one of the Act's sponsors, stated that Connecticut's "Native American gaming" is "threatened by competition from … the very large MGM casino soon to open in Springfield" and touted the Act as a way to "hel[p] to protect" the Tribes,[11] and Representative Davis, another sponsor, similarly noted that MMCT's proposed East Windsor casino would "compet[e] for a share of gamblers who otherwise would go to [MGM] Springfield."[12] Legislators thus explained that Public Act 17-89 was "precipitated by

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[8] Public Act 17-89 is available at https://www.cga.ct.gov/2017/act/pa/pdf/2017PA-00089-R00SB-00957-PA.pdf.

[9] *See* Jepsen Letter, *supra* n.4, at 3-4.

[10] *See id.* at 4.

[11] Conn. General Assembly, Senate Debate on Public Act 17-89 (May 23, 2017) (Statement of Sen. Martin Looney), *available at* https://www.cga.ct.gov/2017/trn/S/2017STR00523-R00-TRN.htm (hereinafter "May 2017 Debate").

[12] *See* Mark Pazniokas, *Hartford's 11th-hour casino game is 'Let's Make a Deal'*, The Connecticut Mirror (June 5, 2017), https://ctmirror.org/2017/06/05/hartfords-11th-hour-casino-game-is-lets-make-a-deal/.

the development of the MGM property in Springfield"[13] and expressed "concer[n]" that "MGM [would] somehow fin[d] a way to open a casino elsewhere in Connecticut."[14] Connecticut Governor Malloy added that "the State should be a partner" to the Tribes "in protecting" their casino "investments";[15] Lieutenant Governor Wyman likewise told supporters that there are "three letters we don't want to talk about … Let them stay out of our state"—remarks news reports interpreted to be "[c]learly … referring to M-G-M."[16]

Despite Public Act 17-89's enactment, MGM remains committed to the Connecticut market. Clinton Decl. ¶ 7. Thus, in September 2017, MGM unveiled a proposal for a $675 million casino in Bridgeport. The proposal includes a waterfront casino site, renderings of the casino's design, and a comprehensive list of gaming features and other amenities to be offered at the new venue.[17] MGM has secured contractual rights to the proposed development site, a prime real estate parcel located near down Bridgeport. *Id.* ¶¶ 8–9. The mayors of Bridgeport and New Haven have expressed their support for MGM's Bridgeport proposal, *id.* ¶ 11; all that is required for the project to proceed is legislative authorization. Accordingly, MGM presented its proposal to Connecticut legislators in September 2017 and has announced its intent to seek legislative approval during the General Assembly's 2018 session, which begins February 7. *Id.* ¶ 10.

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[13] May 2017 Debate, *supra*, (statement of Sen. Len Suzio).

[14] *Id.* (statement of Sen. Michael McLachlan).

[15] Christine Stuart, *Tribes Get Closer To Third Casino*, CT News Junkie (July 20, 2017), http://www.ctnewsjunkie.com/archives/entry/tribes_get_closer_to_third_casino/.

[16] Brian Hallenbeck, *Mohegan Chairman Says BIA's Letters Constitute Approval of Third Casino*, The Day (Sept. 25, 2017), http://www.theday.com/article/20170925/BIZ02/170929611.

[17] *See* MGM Bridgeport, About the Project, https://www.mgmresorts.com/en/hotels/united-states/bridgeport/about-the-project.html; Kenneth R. Gosselin, *MGM Announces Plan for Waterfront Casino in Bridgeport*, Hartford Courant (Sept. 18, 2017), http://www.courant.com/business/hc-bridgeport-casino-mgm-steelpointe-20170918-story.html.

D. The Gaming Amendments At Issue In This Lawsuit

The Amendments contemplated by Public Act 17-89 are the subject of this lawsuit. The Tribes and Governor Malloy executed the Amendments in July 2017, and the General Assembly approved them shortly thereafter. *See* Complaint, ECF 1, ¶ 33.

The Amendments provide that the Tribes must continue to pay Connecticut a royalty on slots revenues at Foxwoods and Mohegan Sun so long as no person "*other than* a business entity jointly and exclusively owned by the" Tribes—*i.e.*, no one other than MMCT—is authorized to conduct casino gaming within the State. *See* Clinton Decl. Ex. C at 4, 7 (emphasis added). Because this exemption is not restricted to the proposed East Windsor casino, but applies instead to *any* MMCT casino, the Amendments would provide MMCT, a commercial entity, with an advantage unavailable to MGM (and others) as it bids for State authorization: the ability to open new casinos without divesting the State of hundreds of millions in annual royalty payments. And because neither the Amendments nor the underlying Gaming Agreements contain a sunset date, MMCT would enjoy that competitive advantage in perpetuity.

All but one of Public Act 17-89's preconditions for operation of MMCT's proposed East Windsor casino have been satisfied: The Governor has executed the Amendments and the General Assembly has approved them, leaving Interior's approval as the sole remaining requirement. *See* Public Act 17-89, § 14(c)(1)-(5). If the Tribes obtain that approval, MMCT's authorization to operate the proposed East Windsor casino would immediately become "effective." *Id.* § 14(c). In other words, Interior's approval would, without further legislative or regulatory action, (i) activate MMCT's right to operate a new commercial casino in East Windsor, subjecting MGM Springfield to additional (and, in MGM's view, unlawful) competition just 12 miles away and (ii) grant MMCT a perpetual competitive advantage over

MGM (and others) in pursuing additional casino projects in Connecticut (including in Bridgeport) by virtue of the special exemption described above.

The Tribes submitted the Amendments for review by Interior, which received them on August 2, 2017. *See* Complaint ¶¶ 32, 34.

Interior then reviewed the Amendments to determine whether they were lawfully submitted and, if so, whether they should be approved. MGM participated in this review process by meeting with Interior officials and submitting written comments arguing that (i) Interior has authority to return amendments not lawfully submitted and (ii) the Amendments violate IGRA and therefore must be disapproved. *See* Clinton Decl. ¶ 28.

On September 15, 2017, Interior issued its Ruling. *See* Clinton Decl. ¶ 29 & Ex. D. The Ruling "return[ed] the Amendment[s]" to the Tribes without approving them, explaining that the Tribes had provided "insufficient information upon which to make a decision." *Id.* As a result, the Amendments have not taken effect. *See* Complaint ¶ 58.

The Tribes and the State jointly filed this suit on November 29, 2017, seeking a declaration that the Amendments "are deemed approved" and a writ of mandamus "directing [Interior] to publish a notice of approval … in the Federal Register." Complaint ¶¶ 51, 60.[18] Interior has not yet entered an appearance or filed a responsive pleading.

Finally, on December 6, 2017, the Tribes announced their own proposal for a Bridgeport casino, stating that although they are "moving forward with" the "new facility in East Windsor," they also "want to be part of th[e] discussion" regarding "putting a casino in Bridgeport."[19] An

[18] On December 22, Plaintiffs filed a motion for summary judgment, requesting the same relief.

[19] *See* Clinton Decl. ¶ 21; Letter from Hon. Rodney Butler, Chairman, Mashantucket Pequot Tribal Nation, and Hon. Kevin Brown, Chairman, Mohegan Tribe, to Martin Looney, Connecticut Senate President Pro Tempore, et al., at 1-2 (Dec. 6, 2017), *available at*

MMCT spokesman touted the advantage provided by the Amendments, arguing that the State should select MMCT rather than MGM for a Bridgeport casino because choosing MGM "would cost the state $1 billion or more in lost revenue."[20] That differential cost to the State would exist only if the Amendments were approved by Interior, making MMCT (but not MGM or others) exempt from the "no other person" royalty-termination clauses in the Gaming Agreements. The Mohegan Tribe's top gaming executive echoed this point on December 23, asserting that MGM "will have a very long, uphill climb" establishing a casino "in Bridgeport or elsewhere in the state" because a law authorizing a MGM casino "would free the [T]ribes of their [royalty] obligation" to the State.[21]

As is apparent from this discussion, MGM and the Tribes are competitors. The Tribes' proposed East Windsor casino would compete with MGM Springfield, while the Tribes' Bridgeport proposal competes with MGM's plan for a waterfront casino resort in Bridgeport. Both of the Tribes' projects (East Windsor and Bridgeport) would receive a competitive advantage if Interior were to approve the Amendments. *See* Clinton Decl. ¶¶ 20, 22, 27.

ARGUMENT

MGM should be granted leave to intervene—either as of right under Rule 24(a) or by permission under Rule 24(b)—because it has legally protected interests at stake in this litigation, its motion is timely, and no other party would adequately represent MGM's interests. Another

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http://www.ctnewsjunkie.com/upload/2017/12/MMCT_Bridgeport_Letter_1.pdf.

[20] Brian Hallenbeck, *MGM Urges Competitive Bidding for a Bridgeport Casino*, The Day (Dec. 7, 2017), http://www.theday.com/business/20171207/mgm-urges-competitive-bidding-for-bridgeport-casino.

[21] Brian Hallenbeck, *For Casinos, New Competition Expected From All Directions in 2018*, The Day (Dec. 23, 2017), http://www.theday.com/article/20171223/NWS01/171229693. The same article notes that the Tribes "also can be expected to face additional competition from [new casinos in] New York, New Jersey, and Rhode Island in 2018." *Id*.

judge of this Court granted a casino developer's motion for leave to intervene in nearly identical circumstances, *see Forest County*, 317 F.R.D. at 11-15, and the same result is warranted here.

I. MGM Is Entitled to Intervene As Of Right Under Rule 24(a).

In essence, there are five factors in the intervention-as-of-right analysis.

As a threshold matter, a party seeking to intervene as of right must possess Article III standing. *See Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003). Where "a party seeks to intervene as a defendant in order to … defend an agency action," the party must show that (i) it "would suffer a concrete injury-in-fact if the action were to be set aside," (ii) its "injury would be fairly traceable to the setting aside of the agency action," and (iii) the injury "would be prevented if the agency action were to be upheld." *Forest County*, 317 F.R.D. at 11; *see also Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998).

Once standing is established, a party is entitled to intervene as of right if it "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2); *see also Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015) (setting out four-factor test for applying Rule 24(a)(2)).

MGM meets all those requirements.

A. MGM Has Article III Standing To Participate In This Suit.

MGM has Article III standing here for largely the same reasons that the Menominee Indian Tribe of Wisconsin had standing in *Forest County*: because approval of the Amendments would put MGM's casino projects at a disadvantage vis-à-vis the Tribes' competing proposals.

The underlying suit in *Forest County* closely resembles this one. The Forest County Potawatomi Community sued Interior under the APA, challenging Interior's decision "to

disapprove an amendment to a gaming compact between [the Potawatomi] and the State of Wisconsin." 317 F.R.D. at 8. That amendment—much like the Amendments at issue here—would have granted the Potawatomi an advantage over rival casino operators by requiring Wisconsin to compensate the Potawatomi for lost revenue resulting from approval of another casino within 50 miles of the Potawatomi's facility in Milwaukee. *Id.* at 9 (describing amendment as creating "50-mile non-competition zone"); *compare* p. 10, *supra* (Tribes' Amendments would require Connecticut to forgo hundreds of millions in annual royalty payments if State authorized anyone *other than* MMCT to conduct casino gaming, essentially creating a *statewide* non-competition zone).

Similar to MGM, the Menominee sought to intervene in the Potawatomi's suit based on competitive injuries that they would have suffered were the suit successful. *Forest County*, 317 F.R.D. at 10. The Menominee had been pursuing their own casino within 50 miles of the Potawatomi's and thus would have been hindered in their efforts if the Potawatomi's amendment were approved. *Id.* at 11-12. The Menominee thus benefitted from Interior's ruling disapproving the amendment. *Id.*

Another judge of this Court held that the Menominee had Article III standing, invoking the principle that "sufficient injury" exists for standing where a prospective intervenor "benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefits." *Id.* at 12 (quoting *Crossroads*, 788 F.3d at 317). Approval of the Potawatomi's amendment would have injured the Menominee by putting them at "a competitive disadvantage" in establishing their own casino. *Id.* (citation and quotation marks omitted). "Such an alteration in competitive conditions clearly amounts to a concrete injury" under Article III. *Id.* (citation and quotation marks omitted).

MGM has standing because this case is essentially a replay of *Forest County*. Both cases involve competition between the plaintiff and a prospective intervenor in a state's casino-gaming market as well as amendments to tribal-state gaming agreements that would give one competitor an advantage the other. *See* pp. 10-12, *supra*. In both cases, Interior declined to approve the proposed amendments, prompting their sponsors to file an APA lawsuit. And finally, MGM, like the Menominee, would suffer competitive harm if Interior were ordered to approve the Amendments, which would (i) allow MMCT to open new commercial casinos without depriving the State of hundreds of millions in annual royalty payments, thus giving the State an incentive to prefer MMCT's proposals (in Bridgeport or elsewhere) over MGM's, and (ii) activate MMCT's exclusive right to operate a new commercial casino in East Windsor, thus creating new (and in MGM's view, unlawful) competition just 12 miles from MGM Springfield. These injuries, like the Menominee's, would be traceable to the order sought by Plaintiffs and would be prevented if Interior's Ruling were upheld. *See Forest County*, 317 F.R.D. at 11; *see also Crossroads*, 788 F.3d at 317-19 (standing based on same theory); *Fund For Animals*, 322 F.3d at 733-34 (same).

The D.C. Circuit's competitor-standing doctrine provides further support for that conclusion. Under that doctrine, economic actors "suffer [an] injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them." *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (alteration in original; citation and quotation marks omitted); *see also La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 366-67 (D.C. Cir. 1998). Here, MGM has competitor standing because an order requiring Interior to approve the Amendments would expose MGM to added competition in the ways described above. The D.C. Circuit has held that a third-party competitor, like MGM here, has Article III

standing and is entitled to intervene in such circumstances. *See, e.g.*, *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074-75 (D.C. Cir. 1998).

B. MGM's Motion Is Timely.

The Tribes filed this suit less than a month ago. Courts regularly hold that motions for leave to intervene are timely when filed on similar timelines. *See, e.g.*, *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (motion filed "less than two months after" complaint and "before the defendants filed an answer" was timely); *100Reporters LLC v. U.S. Dep't of Justice*, 307 F.R.D. 269, 274-75 (D.D.C. 2014) (motion filed three months after Complaint was timely). Moreover, because Interior has not yet filed a responsive pleading or entered an appearance, allowing intervention would not "unduly disrup[t] [the] litigation." *100Reporters*, 307 F.R.D. at 275 (citations and quotation marks omitted).

C. MGM Has A Legally Protected Interest In This Suit.

Intervention is proper here because MGM has "a legally protected interest in the action"—a requirement that focuses on "disposing of disputes with as many concerned parties as may be compatible with efficiency and due process." *Forest County*, 317 F.R.D. at 10; *see also 100Reporters*, 307 F.R.D. at 275.

Where, as here, a prospective intervenor "has constitutional standing, it *a fortiori* has 'an interest relating to the property or transaction which is the subject of the action.'" *Crossroads*, 788 F.3d at 320 (quoting Fed. R. Civ. P. 24(a)). In other words, "the standards for constitutional standing and the second factor of the test for intervention as of right are the same." *Id.*; *see also WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 3 n.3 (D.D.C. 2017).

Because MGM has Article III standing to participate in this suit, *see* Part I.A, *supra*, it follows that MGM meets Rule 24(a)(2)'s interest test as well.

D. MGM's Interests May Be Impaired By Disposition Of This Suit.

Intervention is also warranted because "the action may as a practical matter impair or impede [MGM's] ability to protect its interest." Fed. R. Civ. P. 24(a)(2). This test "is not a rigid one": in applying it, "courts look to the 'practical consequences' of denying intervention." *Forest County*, 317 F.R.D. at 10-11 (quoting *Fund For Animals*, 322 F.3d at 728).

In particular, MGM satisfies Rule 24's requirement because its "economic and regulatory interests … likely would be impaired" if Plaintiffs "were successful." *WildEarth Guardians*, 320 F.R.D. at 4.[22] The circumstances here track those in *Forest County*, where the Court held that the Potawatomi's suit threatened to impair the Menominee's competitive interests because Interior's ruling on the Potawatomi's gaming amendment "was favorable to the Menominee," and the Potawatomi's APA suit (like the Plaintiffs' here) was "a direct attack on that decision." 317 F.R.D. at 14. Just as in *Forest County*, MGM would have a more difficult time establishing its proposed Bridgeport casino if MMCT obtains the special exemption set forth in the Amendments. *See* pp. 10-12, *supra*.

E. Interior Would Not Adequately Represent MGM's Commercial Interests.

The exception for instances in which the "existing parties adequately represent" the movant's "interest," Fed. R. Civ. P. 24(a)(2), is inapplicable here because MGM and Interior have differing interests at stake in this litigation.

Rule 24(a)(2) "is satisfied if the applicant shows that representation of his interest '*may* be' inadequate," such that a prospective intervenor's "burden of making that showing should be

[22] Even where a third-party movant could seek to protect its interests in subsequent litigation, Rule 24(a)(2) is satisfied if a ruling in the plaintiff's favor "would make the task of reestablishing the status quo more difficult and burdensome." *Crossroads*, 788 F.3d at 312 (alteration, citation, and quotation marks omitted).

treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (emphasis added); *see also Crossroads*, 788 F.3d at 321.

Moreover, the D.C. Circuit has "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors" in APA lawsuits. *Fund For Animals*, 322 F.3d at 736; *see also Crossroads*, 788 F.3d at 321 (courts "look skeptically on government entities serving as adequate advocates for private parties"). This approach derives from the fact that federal agencies "are charged by law with representing the public interest," whereas private parties seek to vindicate their own "narrow[er]" and "parochial" interests "not shared by" the public at large. *Fund For Animals*, 322 F.3d at 737 (citation and quotation marks omitted); *see also Trbovich*, 404 U.S. at 538-39.

Here, intervention is warranted because Interior would not adequately represent MGM's competitive interests in (i) protecting its ability to compete on equal footing for a Bridgeport casino and for any other Connecticut casino projects and (ii) safeguarding MGM Springfield from unlawful competition (including from MMCT's proposed East Windsor casino). As the agency charged with administering the federal government's trust obligations to Indian tribes, Interior is guided by a different set of institutional interests. *Cf.* 25 U.S.C. § 2710(d)(8)(B). Thus, although the two sets of interests may overlap, Interior's duty to serve the public and its trust obligations to the Tribes are distinct from MGM's commercial considerations, which could lead to different positions in litigating this case. *See Fund for Animals*, 322 F.3d at 737 (agency would be "shirking" its duty if it focused on prospective intervenor's private interests); *see also id.* (movant entitled to intervene despite "partial congruence of interests" because it was "not hard to imagine how the interests of" movant and agency "might diverge"); *Forest County*, 317 F.R.D. at 14-15 (Interior would not adequately represent Menominee despite sharing "same

ultimate legal objective" because Menominee were "concerned with preserving their own rights and opportunities, including their specific economic development goals").

Notably, MGM and Interior have already disagreed on an important legal issue relating to the Amendments. MGM argued earlier this year that Interior lacks authority to review amendments, like the ones at issue here, designed to facilitate commercial, off-reservation gaming—*i.e.*, gaming that will not take place on "Indian lands." *See* Clinton Decl. ¶ 23. Interior considered, but tentatively rejected MGM's argument in its non-binding May 2017 technical assistance letters to the Tribes, asserting that Interior "has authority" to review such amendments notwithstanding the "contrary view … expressed by" MGM's representatives. *See id.* ¶¶ 24–25 & Ex. B at 1. This disagreement illustrates the potential for MGM's interests to diverge from Interior's, such that Interior would not adequately represent MGM's views in the litigation. *See Crossroads*, 788 F.3d at 321 (movant entitled to intervene where movant and agency "disagree about" key legal issues).

II. Alternatively, MGM Should Be Permitted To Intervene Under Rule 24(b).

Rule 24(b) "gives the Court discretion, on a timely motion, to permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." *100Reporters*, 307 F.R.D. at 286 (quoting Fed. R. Civ. P. 24(b)(1)). This test was "tailored to fit ordinary civil litigation" and thus "require[s] other than literal application in … [a]dministrative cases." *Neusse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

MGM should be permitted to intervene under Rule 24(b) for three reasons.

First, MGM's motion is timely because it is filed less than one month after Plaintiffs' Complaint. Allowing MGM to intervene thus will not "unduly … prejudice the adjudication of the original parties' rights." *100Reporters*, 307 F.R.D. at 286 (quoting Fed. R. Civ. P. 23(b)(3)).

Second, MGM has both a claim and a defense that derive from the same legal and factual core as the underlying suit. MGM's affirmative claim is that the Amendments violate IGRA and other federal laws and should therefore be disapproved. *See* 25 U.S.C. § 2710(d)(8)(B); 25 C.F.R. §§ 291.4, 291.11(b), 293.14.[23] MGM presented this claim to Interior during its review of the Amendments. *See* Clinton Decl. ¶ 28. MGM's defense (which MGM also presented to Interior) is that Interior acted within its authority in returning the Amendments because an amendment is not lawfully submitted—and thus cannot be approved or "deemed approved"—if not supported by the required documentation.[24] *See* Proposed MGM Answer ¶ 61; 25 C.F.R. §§ 291.4, 293.8. Although Interior has not yet filed a responsive pleading, it will presumably join MGM in raising that defense. *See 100Reporters*, 307 F.R.D. at 286 (granting permissive intervention where intervenor and agency advocated for same outcome).

These contentions satisfy Rule 24(b), particularly given the flexibility required in applying the Rule in the administrative-law context. *See Nuesse*, 385 F.2d at 700. In *Sierra Club v. Van Antwerp*, for example, another judge of this Court granted a third-party developer permission to intervene in an environmental group's lawsuit against the Army Corps of Engineers because the suit threatened the developer's planned shopping-mall project. 523 F. Supp. 2d 5, 7-10 (D.D.C. 2007). MGM is similarly situated because the Amendments for which Plaintiffs seek Interior approval would (among other things) undermine MGM's ability to pursue its proposed Bridgeport casino.

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[23] For example, MGM contends that the Amendments violate IGRA by facilitating a commercial casino not located on Indian lands, whereas "[e]verything … in IGRA affords tools … to regulate gaming on Indian lands, and nowhere else." *Bay Mills*, 134 S. Ct. at 2034.

[24] *See, e.g.*, 25 C.F.R. §§ 291.4, 291.14, 293.8; Letter from Kevin K. Washburn, Assistant Secretary – Indian Affairs, Dep't of the Interior, to Hon. Janice Prairie Chief-Boswell, Governor, Cheyenne-Arapaho Tribes, at 4-5 (Aug. 1, 2013), https://www.bia.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/as-ia/oig/pdf/idc1-028608.pdf.

Third, and finally, permitting MGM to intervene makes sense because Public Act 17-89 and its implementing Amendments were designed to protect the Tribes from MGM's competing casino projects. *See* pp. 7-9, *supra*. MGM's interests thus lie at the heart of this matter and would be affected by a ruling in Plaintiffs' favor. MGM has institutional knowledge of this case's factual and legal background, having participated at every stage of the matter over the past two years. *See* pp. 7-11, *supra*. Allowing MGM to intervene will make that knowledge available to the Court and ensure a full adversarial presentation.

CONCLUSION

For the foregoing reasons, MGM's motion for leave to intervene in support of Interior should be granted.

Respectfully submitted,

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