IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CONNECTICUT,
MOHEGAN TRIBE OF INDIANS OF
CONNECTICUT, AND MASHANTUCKET
PEQUOT TRIBE,

Plaintiffs,

v.

RYAN ZINKE in his official capacity as Secretary
of the Interior, and UNITED STATES
DEPARTMENT OF INTERIOR,

Defendants,

Case No. 17-cv-2564-RC

MOTION FOR PARTIAL DISMISSAL

Federal Defendants Ryan Zinke in his official capacity as Secretary of the Interior and United States Department of the Interior hereby move pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure for dismissal of the claims with regard to the Mashantucket Pequot Tribe. The grounds for this motion are set forth in the accompanying Memorandum of Points and Authorities in Support of Motion to Dismiss.

Respectfully submitted this 5th day of February, 2018.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CONNECTICUT, MOHEGAN TRIBE OF INDIANS OF CONNECTICUT, AND MASHANTUCKET PEQUOT TRIBE, Plaintiffs, v. RYAN ZINKE in his official capacity as Secretary of the Interior, and UNITED STATES DEPARTMENT OF INTERIOR, Defendants.	))))))))))))))))	Case No. 17-cv-2564-RC

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR PARTIAL DISMISSAL

I. INTRODUCTION

Defendants Ryan Zinke in his official capacity as Secretary of the Interior ("Secretary") and United States Department of the Interior hereby move pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure for dismissal of the Mashantucket Pequot Tribe as a plaintiff and of the claims regarding the Mashantucket Pequot Tribe. Plaintiffs State of Connecticut ("State"), Mohegan Tribe of Indians of Connecticut ("Mohegan"), and Mashantucket Pequot Tribe ("Mashantucket") allege that the Indian Gaming Regulatory Act ("IGRA") and its regulations provide certain deadlines for the approval or disapproval of amendments to tribal-state gaming compacts and for publication of such amendments in the Federal Register. Compl. ¶ 1 (ECF No. 1). Plaintiffs allege that the Secretary has violated these deadlines.

The claims regarding Mashantucket should be dismissed because that tribe does not operate its gaming pursuant to an approved tribal-state compact, but instead operates under Class III gaming procedures prescribed by the Secretary ("procedures"). Nothing in IGRA mandates that the Secretary approve or disapprove proposed amendments to the Secretary's gaming procedures within a particular time frame, nor does IGRA require the Secretary to publish notice in the Federal Register. As such, the allegations with regard to Mashantucket are without merit. Accordingly, Mashantucket must be dismissed as a plaintiff and the claims relating to Mashantucket must be dismissed.

II. BACKGROUND

IGRA provides that Indian tribes can engage in Class III gaming, including slot machines, on Indian land under a tribal-state compact. 25 U.S.C. § 2710(d). Under IGRA, a tribe that proposes to allow Class III gaming activities on its land must first request that the state enter into negotiations to result in a tribal-state compact governing the conduct of gaming activities, and the state is required to negotiate in good faith. 25 U.S.C. § 2710(d)(3)(A). If the state and tribe reach an agreement, the proposed compact must be submitted to the Secretary for review. 25 U.S.C. § 2710(d)(8)(A). The Secretary may approve or disapprove the compact, but if he takes no action within forty-five days the compact is "considered to have been approved . . . but only to extent the compact is consistent with the provisions of [IGRA]" (also known as "deemed" approved"). 25 U.S.C. § 2710(d)(8)(C). An approved or deemed approved compact becomes effective only upon publication of the Secretary's notice of approval in the Federal Register. 25 U.S.C. § 2710(d)(3)(B).

If the state either does not respond to the tribe's request to negotiate a compact or does not respond to such request in good faith, the tribe may sue the state in federal court under IGRA's remedial provisions. 25 U.S.C. § 2710(d)(7)(A)(i). If the court finds that the state

failed to negotiate in good faith over the compact, the court shall order that the compact be concluded within a sixty-day period. 25 U.S.C. § 2710(d)(7)(B)(iii).[1]

Should the state and tribe fail to conclude the tribal-state compact within sixty days, "the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact." *Id.* § 2710(d)(7)(B)(iv). IGRA then requires that the mediator "select from the two proposed compacts the one which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court," and submit the selected compact to the state and the tribe. *Id.* § 2710(d)(7)(B)(iv), (v). If the state consents to the selected proposed compact, it will be treated as a tribal-state compact. *Id.* § 2710(d)(7)(B)(vi). If the state does not consent, the mediator notifies "the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures" for Class III gaming activities that are consistent with the mediator's selected compact. *Id.* § 2710(d)(7)(B)(vii).

Mashantucket's Class III gaming operates under procedures prescribed by the Secretary. In the late 1980s, Mashantucket requested that the State of Connecticut enter into negotiations to form a tribal-state compact for Class III gaming activities. *Mashantucket*, 913 F.2d at 1026–27. The state refused, and ultimately the Second Circuit found that the state had not negotiated in good faith and upheld the district court's order for the state and the tribe to conclude a tribal-state

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[1] There are also regulations that allow the Secretary to prescribe procedures in situations where a state brings an Eleventh Amendment sovereign immunity defense to a tribe's lawsuit alleging that the state did not negotiate in good faith. *See* 25 C.F.R. § 291.3 (describing the necessary elements for a tribe to request that the Secretary issue Class III gaming procedures). Those regulations do not apply here because the state did not assert an Eleventh Amendment defense and the court ordered that a compact be concluded within sixty days. *See Mashantucket Pequot Tribe v. State of Connecticut* 913 F.2d 1024, 1032 (2d Cir. 1990); *see also* 56 Fed. Reg. 15,746 (Apr. 17, 1991).

compact within sixty days. *Id.* at 1032–33. After negotiations failed, the parties submitted their last, best offer compacts, whereupon the mediator selected the state's compact. The state, however, failed to consent to the selected compact within sixty days. 56 Fed. Reg. at 15,746. As directed by IGRA, the mediator submitted the compact to the Secretary, who prescribed Class III gaming procedures largely in accordance with the mediator's selected compact, and Mashantucket has been operating under those procedures since they were issued in 1991. 56 Fed. Reg. 24,996 (May 31, 1991).

Plaintiffs filed their Complaint in this Court on November 29, 2017. Plaintiffs raise two claims for relief. Count I asserts that the Secretary's "[f]ailure to treat the submitted compact amendments as deemed approved is arbitrary and capricious and otherwise not in accordance with law." Compl. ¶ 49. Count II asserts that "Defendants have a mandatory duty to publish notice of approvals of compact amendments in the Federal Register," and that "Defendants' failure to publish notice in the Federal Register that the compact amendments were deemed approved is agency action 'unlawfully withheld'" under the APA, 5 U.S.C. § 706(1). Compl. ¶¶ 54, 56.

III. STANDARD OF REVIEW

A. Motion to Dismiss Under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction

Jurisdiction is a threshold issue that must be addressed before considering the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–96 (1998). Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of a claim for lack of subject matter jurisdiction. The burden of proving subject matter jurisdiction rests with plaintiff, the party invoking the federal court's jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Rempfer v. Sharfstein*, 583 F.3d 860, 868–69 (D.C. Cir. 2009). "Federal courts are courts of limited jurisdiction," and are presumed to lack jurisdiction unless a plaintiff establishes its

existence. *Kokkonen*, 511 U.S. at 377. "The court may look beyond the allegations contained in the complaint to decide a facial challenge, 'as long as it still accepts the factual allegations in the complaint as true.'" *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 539 F. Supp. 2d 331, 337–38 (D.D.C. 2008) (quoting *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253–54 (D.C. Cir. 2005)).

The elements of standing are "an indispensable part of the plaintiff's case," and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). At the pleading stage, a plaintiff's factual allegations must be more than merely conclusory legal statements to the effect that standing exists or that the plaintiff was injured. As the Supreme Court has stated, "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin*, 422 U.S. 490, 518.

B. Motion to Dismiss Under Rule 12(b)(6) for Failure to State a Claim

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a complaint." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). A court considering a Rule 12(b)(6) motion presumes the factual allegations of the complaint to be true. *See, e.g., United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 135 (D.D.C. 2000). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561–62 (2007). The court need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *Warren v. District of Columbia*, 353 F.3d 36, 39

(D.C. Cir. 2004); *Browning*, 292 F.3d at 242. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

IV. ARGUMENT

Plaintiffs' Complaint misapprehends the Secretary's responsibilities under IGRA's separate and distinct compact review and remedial provisions. Plaintiffs allege that the Secretary violated mandatory timeframes in IGRA by failing to publish notice in the Federal Register of the asserted deemed approval of Mohegan's compact amendment and Mashantucket's procedures amendment because, they allege, the Secretary did not act on either amendment within forty-five days of their submission. Crucially (and fatal to Plaintiffs' claims), Mashantucket does not have a tribal-state compact approved under 25 U.S.C. § 2710(d)(8) but instead operates pursuant to gaming procedures prescribed by the Secretary under IGRA's remedial provisions at 25 U.S.C. § 2710(d)(7). IGRA's requirements for approval or disapproval of compacts therefore do not apply to Mashantucket's submission. *See* 25 U.S.C. § 2710(d)(8)(D) (stating that the Secretary "shall publish in the Federal Register notice of any *Tribal-State compact* that is approved, or considered to have been approved" (emphasis added)); 25 C.F.R. § 293.15 (noting deadlines for "approved or considered-to-have-been-approved compact or amendment"). Plaintiffs have therefore failed to establish this Court's subject matter jurisdiction over the case and failed to state a claim for which relief can be granted with regard to Mashantucket's proposed procedures amendment.

A. IGRA does not Provide Mandatory Deadlines for Approving or Disapproving Amendments to Gaming Procedures Prescribed by the Secretary.

IGRA does not require that the Secretary take action on amendments to gaming procedures issued by the Secretary within a specific period of time. In fact, IGRA does not

address amendments to procedures issued by the Secretary at all. While IGRA does contain provisions addressing the approval or disapproval of compacts, those provisions are specifically applicable only to tribal-state compacts and amendments to such compacts. *See* 25 U.S.C. § 2710(d)(8)(C) ("If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, 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 this chapter."); 25 C.F.R. § 293.10(a) ("The Secretary must approve or disapprove a compact or amendment within 45 calendar days after receiving the compact or amendment.").

Both IGRA and the regulations address time limits on tribal-state compacts and specifically define "tribal-state compact" to include only those agreements entered into between the state and the tribe. For example, IGRA states that "If the Secretary does not approve or disapprove a compact described in subparagraph (A)" within forty-five days of submission to the Secretary for approval, "the compact shall be considered to have been approved by the Secretary." 25 U.S.C. § 2710(d)(8)(C). Subparagraph (A) describes the compact as "any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe." 25 U.S.C. § 2710(d)(8)(A). Similarly, Part 293 of the regulations contains procedures for the submission and review of tribal-state compacts and compact amendments. *See* 25 C.F.R. §§ 293.1–293.15. These regulations specify that "amendment means an amendment to a class III Tribal-State gaming compact," and a "Compact or Tribal-State Gaming Compact means an intergovernmental agreement executed between Tribal and State governments under the Indian Gaming Regulatory Act that establishes between the parties the

terms and conditions for the operation and regulation of the tribe's Class III gaming activities." 25 C.F.R. § 293.2.

Here, Mashantucket submitted a proposed amendment to its Secretarial gaming procedures prescribed under IGRA's remedial provisions but nonetheless seeks to avail itself of IGRA's forty-five day deemed approved deadline that applies only to compacts or compact amendments. Mashantucket compounds its misapprehension of the applicability of IGRA's compact review provisions by demanding that this Court order the Secretary to publish notice of its allegedly deemed approved procedures amendment in the Federal Register. Mashantucket's position is unsupported by the plain language of IGRA and the regulations because the time provisions that address publication of a notice of approval or a deemed approval apply only to tribal-state compacts. 25 U.S.C. § 2710(d)(8)(C); 25 C.F.R. § 293.15. IGRA's time provisions for compact amendments simply do not apply to gaming procedures prescribed by the Secretary.

B. Plaintiffs' Claims Regarding Mashantucket Must Be Dismissed for Lack of Subject Matter Jurisdiction Because Plaintiffs have not Alleged a Discrete Duty the Secretary is Required to Take.

This Court has jurisdiction under the APA on claims for failure to take an agency action only where Plaintiffs allege that that the Secretary failed to perform a nondiscretionary duty. *See Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 103 F. Supp. 3d 113, 119 (D.D.C. 2015) (noting that conditions for subject matter jurisdiction are met when federal defendants "[have] a duty to perform a nondiscretionary act by ascertainable deadlines and [have] failed to do so"); *Hamandi v. Chertoff*, 550 F. Supp. 2d 46, 50 (D.D.C. 2008) ("Thus, a plaintiff may invoke subject matter jurisdiction under the APA only if the defendant had a duty to perform a ministerial or nondiscretionary act.") (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004)). "[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency

failed to take a *discrete* agency action that it is *required to take*." *S. Utah Wilderness All.*, 542 U.S. at 64. "The existence of an actionable duty is a jurisdictional issue; if a plaintiff alleges only discretionary duties, the Court must dismiss the case for lack of jurisdiction." *Shawnee Trail Conservancy v. Nicholas*, 343 F. Supp. 2d 687, 700 (S.D. Ill. 2004); *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999) ("Courts have permitted jurisdiction under the limited exception to the finality doctrine only when there has been a genuine failure to act."). Here, where IGRA does not require the Secretary act within a certain time on amendments to procedures prescribed by the Secretary, Plaintiffs have failed to allege a nondiscretionary duty the Secretary failed to take and this Court thus lacks subject matter jurisdiction.

C. Plaintiffs have Failed to State a Claim upon which Relief can be Granted Because They have not Alleged a Mandatory Duty the Secretary Failed to Take.

For the same reasons, Plaintiffs have not stated a claim upon which relief can be granted. "In order to state a 'failure-to-act cause of action under the Administrative Procedure Act,' a complaint must . . . 'identify a legally required, discrete act that the [agency] has failed to perform — a threshold requirement for a § 706 failure-to-act claim.'" *Ikon Global Mkts., Inc. v. Commodity Futures Trading Comm'n*, 859 F. Supp. 2d 162, 168 (D.D.C. 2012) (quoting *Montanans For Multiple Use v. Barbouletos*, 568 F.3d 225, 227 (D.C. Cir. 2009)). Plaintiffs have not identified a legally required, discrete duty because IGRA's time provisions related to Secretarial action on tribal-state compact amendments do not apply to Secretarial procedures. IGRA contains no mandatory deadlines — or any deadlines at all — for the approval or disapproval of proposed amendments to Secretarial procedures. The Secretary therefore has no discrete and mandatory obligation to take action on proposed amendments to the Secretary's procedures that were prescribed for Mashantucket in 1991 within forty-five days of submission

of the procedures amendments or to publish notice of approval of the procedure amendments in the Federal Register within ninety days.

D. The State and Mohegan Lack Standing to Assert Claims Regarding Mashantucket's Gaming Procedures, and Mashantucket Lacks Standing to Assert Claims Regarding the Mohegan's Gaming Compact.

In addition, the State and Mohegan both lack standing to assert claims regarding Mashantucket. Mashantucket operate pursuant to Secretarial procedures precisely because the State did not enter into a Tribal-State compact with the tribe. 25 U.S.C. § 2710(d)(7)(B)(vii). If, as happened here, the state declines its last opportunity to be involved in the authorization of Class III gaming on tribal lands by failing to consent to the mediator's compact selection, the Secretary "shall prescribe" procedures for the tribe. *Id.* Neither the State nor Mohegan are parties to the Secretary's procedures prescribed for Mashantucket. Thus, neither has standing to assert any claims with regard to Mashantucket.

Similarly, Mashantucket is not a party to the tribal-state gaming compact between Mohegan and the State, and thus Mashantucket lacks standing to assert any claims with regard to Mohegan.

V. CONCLUSION

IGRA does not provide mandatory deadlines for the Secretary's action on proposed amendments to gaming procedures prescribed by the Secretary. Consequently, Plaintiffs' claims that the Secretary violated IGRA by not meeting the time limits for tribal-state compacts must be dismissed as to Mashantucket for lack of jurisdiction and failure to state a claim. Mashantucket should be dismissed as a plaintiff and its claims should be dismissed. In addition, this Court should hold that neither the state nor Mohegan have standing to assert claims with regard to

Mashantucket's gaming procedures, nor does Mashantucket have standing to assert any claims with regard to Mohegan's compact with the state.

Respectfully submitted this 5th day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of February, 2018, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ Devon Lehman McCune
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