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

FEDERAL DEFENDANTS' OPPOSITION TO MGM RESORTS INTERNATIONAL'S MOTION TO INTERVENE

Federal Defendants Ryan Zinke in his official capacity as Secretary of the Interior and United States Department of the Interior (collectively, the "Secretary") hereby oppose MGM Resorts International Global Development LLC's ("MGM") motion for leave to intervene (ECF No. 11). The issues in this case involve interpretation of the Indian Gaming Regulatory Act (IGRA) and its regulations regarding amendment of compacts between an Indian tribe and a state, and a tribe's request to amend procedures authorizing Indian gaming issued by the Secretary pursuant to IGRA's remedial provisions ("Secretarial gaming procedures").[1] MGM, a commercial casino operator, does not have standing to intervene in this case to weigh in on the

[1] IGRA's remedial provisions at 25 U.S.C. § 2710(d)(7)(B)(vii) direct the issuance of Secretarial gaming procedures proscribing terms under which class III gaming can be conducted on Indian lands over which the Indian tribe has jurisdiction if a tribe and a state do not enter into a tribal-state compact after following the process described in the regulations. While the distinction between the tribal-state compact and the Secretarial gaming procedures is significant for purposes of the Secretary's motion for partial dismissal (ECF No. 18), in this brief, they are collectively referred to as the "Gaming Amendments."

proper interpretation of IGRA. The Secretary's return of the Gaming Amendments also is not directly connected to MGM's asserted economic injury. In addition, any interest that MGM or other competitors might have in this dispute will be adequately represented by the government. Thus, MGM should not be permitted to intervene as of right. And for the same reasons, MGM should not be permitted permissive intervention. Accordingly, the Secretary respectfully requests that this Court deny MGM's motion to intervene.

I. BACKGROUND

On August 2, 2017, the Secretary received proposed amendments to a tribal-state compact between Mohegan Tribe of Indians of Connecticut ("Mohegan") and Connecticut and to Secretarial gaming procedures authorizing the gaming operations by the Mashantucket Pequot Tribe ("Mashantucket," and together with Mohegan, the "Tribes"). Compl. ¶¶ 32, 34, ECF No. 1. In September 2017, the Secretary returned both of the proposed amendments to the respective Tribes, stating that he did not have sufficient information to make a decision and that a decision may not be necessary. Plaintiffs argue that IGRA required the Secretary to either approve or disapprove the proposed amendments within forty-five days or they would be deemed approved. *Id.* ¶¶ 2, 22. Plaintiffs assert, therefore, that the Secretary is in violation of IGRA and the Administrative Procedure Act (APA) by not deeming the amendments approved and publishing notice of the deemed approval in the Federal Register. *Id.* ¶¶ 45–60.

This approval is important to Plaintiffs because of a Connecticut statute that allows the Tribes to jointly operate a commercial casino upon the fulfillment of certain conditions, one of which is the Secretary's approval or deemed approval of the Gaming Amendments. 2017 Conn. Pub. Act 17-89 § 14(c)(2). MGM argues that the Tribes' proposed commercial casino will injure it in two ways: (1) by directly competing with a casino MGM is building and intends to open sometime in 2018 in Springfield, Massachusetts, which it asserts is twelve miles from the Tribes'

proposed commercial casino; and (2) by providing incentives against Connecticut allowing MGM to open a casino in Connecticut. Mem. in Supp. of Mot. to Intervene 5–9, ECF No. 11-1 ("Mot. to Intervene"). Currently, the only casinos operating in Connecticut are two Indian casinos operated by each of the Tribes. *Id.* at 4. Under Connecticut law, any commercial casino requires a contract with a municipality and state legislative approval before it can begin operations. *See MGM Resorts Int'l Global Gaming Devel., LLC v. Malloy*, 861 F.3d 40, 46 (2d Cir. 2017).

II. STANDARDS FOR INTERVENTION

A. Intervention as of Right

Under Federal Rule of Civil Procedure 24(a), intervention as a matter of right should be granted only when the movant:

> 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 movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Four prerequisites must be established in order to intervene of right: "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008) (quoting *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)). Failure to satisfy any of these elements is grounds for denial of intervention as of right. *Prudential*, 136 F.3d at 156.

In addition, "because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit," the movant also must establish standing to participate in the action. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003) (quoting *City*

of Cleveland v. NRC, 17 F.3d 1515, 1517 (D.C. Cir. 1994)). "Article III, in turn, requires that the movant demonstrate that an unfavorable decision would cause it to suffer an injury in fact that is 'actual or imminent, not conjectural or hypothetical.'" *Amgen Inc. v. Hargan*, No. 17-1006 (RDM), 2017 WL 4857417, at *6 (D.D.C. Oct. 24, 2017) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)). The movant must also show that the injury is "fairly traceable to the challenged conduct of the defendant, and . . . is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. "Where, as here, standing is 'premised on future injury, the party must demonstrate a realistic danger of sustaining a direct injury.'" *Cigar Ass'n of Am. v. FDA*, No. 1:16-cv-1460 (APM), 2017 WL 4675735, at *4 (D.C. Cir. Oct. 26, 2017) (quoting *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015)).

B. Permissive Intervention

Courts have discretion to grant permissive intervention on a timely motion where the applicant's" claim or defense . . . shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). "'[P]ermissive intervention is an inherently discretionary enterprise' and the court enjoys considerable latitude under Rule 24(b)." *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 10 (D.D.C. 2008) (quoting *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998)). In exercising its discretion, the court must not only consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights," but also "may also consider whether parties seeking intervention will significantly contribute to . . . the just and equitable adjudication of the legal questions presented." *In re Endangered Species Act Section 4 Deadline Litig.*, 277 F.R.D. 1, 8 (D.D.C. 2011) (internal quotations and citations omitted), *aff'd sub nom. In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704 F.3d 972 (D.C. Cir. 2013).

III. ARGUMENT

MGM's motion to intervene should be denied because this case is based on statutory interpretation of IGRA's tribal-state compact review and remedial provisions. MGM is a commercial gaming operator that does not have an adequate interest in this dispute to justify its intervention either as of right or permissively. In addition, any interest that MGM or other competitors might have in this dispute will be adequately represented by the government.

A. MGM lacks standing.

MGM asserts solely an economic interest that is insufficient to demonstrate standing. In addition, MGM's asserted injury is speculative and contingent upon other events and parties not before this Court. MGM also cannot show causation between its asserted injury and Defendants' action, especially because as a commercial casino operator, it is not injured directly by the Secretary's interpretation of the IGRA.

1. MGM has not established a clear and imminent injury.

MGM asserts economic standing on the basis of the "competitor standing" doctrine, arguing that if this Court requires the Secretary to consider the Gaming Amendments deemed approved and publish notice in the Federal Register,[2] the tribes' joint commercial casino would increase competition for MGM's yet-to-be-opened Massachusetts casino and would make it more difficult for MGM to enter the Connecticut gaming market. Neither of these injuries is sufficiently concrete or particularized so as to establish Article III standing.

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[2] The Secretary does not agree that the proper remedy if the Court should find against the Secretary on the merits would be to consider the Gaming Amendments deemed approved and require the Secretary to publish notice of such in the Federal Register. The Complaint, however, seeks such relief. Compl. ¶¶ 51, 60; *see, e.g.*, *Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 12 (D.D.C. 2016) ("The requested relief, if granted, would, as a practical matter, impede the Menominee's efforts to obtain a gubernatorial concurrence and would thereby impede their efforts to develop a gaming facility in Kenosha.").

Insofar as MGM bases its standing on its desire to enter the Connecticut gaming market, its injury is too speculative. "When considering any chain of allegations for standing purposes, we may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties), as well as predictions of future injury that are not normally susceptible of labelling as 'true' or 'false.'" *Arpaio*, 797 F.3d at 21 (quoting *United Transp. Union v. ICC*, 891 F.2d 908, 912 (D.C. Cir. 1989) (internal quotation marks omitted)). "The 'causal connection between the injury and the conduct complained of' must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Id.* at 19 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and alterations omitted)).

As MGM admits, it cannot engage in commercial casino gaming in Connecticut without local government and legislative approval, neither of which it has yet secured. Mot. to Intervene 9 (noting that the project requires legislative approval to proceed and that MGM "has announced its intent to seek legislative approval during the General Assembly's 2018 session"). MGM indicates only that it "unveiled a proposal" for a casino in Bridgeport, Connecticut, in September 2017 — after the Secretary returned the proposed Gaming Amendments to the Tribes — and that the mayors of Bridgeport and New Haven "expressed their support for" MGM's proposal. Thus, MGM at this time has only the hope that it will develop gaming operations in Connecticut sometime in the future — and particularly because it depends on third parties' action, as MGM must win both local government and legislative approval — any purported injury is too remote and speculative to support standing. *See New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) ("In addition, New World's 'chain of events' argument depends on the independent actions of third parties, distinguishing its case from the 'garden variety competitor

standing cases' which require a court to simply acknowledge a chain of causation 'firmly rooted in the basic law of economics.'" (citation omitted)).

MGM also has not shown sufficient injury even as to its Springfield, Massachusetts, facility. "A party seeking to establish standing on the basis of the competitor standing doctrine 'must demonstrate that it is a *direct* and *current* competitor whose bottom line may be adversely affected by the challenged government action.'" *Mendoza v. Perez*, 754 F.3d 1002, 1013 (D.C. Cir. 2014) (quoting *KERM, Inc. v. FCC*, 353 F.3d 57, 60 (D.C. Cir. 2004)); *see also Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 249 F. Supp. 3d 524, 546 (D.D.C. 2017). MGM's facility is not yet open, and MGM has not shown that a casino to be developed by the Tribes in another state would necessarily draw customers away from MGM Springfield. There is no showing that the two casinos would have the same customer base, or that the market cannot bear two casinos in different states within that distance. Accordingly, MGM's injury is hypothetical and not sufficiently concrete to demonstrate standing.

In any event, MGM's economic interest does not provide a sufficient basis for standing. The Supreme Court has "repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to legally question the legality of any aspect of its competitor's operations." *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 5–6 (1968). "[T]he theory that 'a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful . . . [is] a boundless theory of standing' that has 'never been accepted.'" *Wash. All.*, 249 F. Supp. 3d at 539–40 (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013)). Competitive injury provides no basis for standing when "the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury." *Hardin*, 390 U.S. at 6. Nothing in

IGRA's tribal-state compact review section at 25 U.S.C. § 2710(d)(8) or its remedial provisions directing the issuance of Secretarial gaming procedures at 25 U.S.C. § 2710(d)(7)(B)(vii) concerns or otherwise contemplates preventing competitive injury, particularly competitive injury to a non-Indian casino. *See* 25 U.S.C. § 2702 (noting IGRA's purposes, including "promoting tribal economic development, self-sufficiency, and strong tribal governments").

The competitor standing doctrine does not apply here. "The competitor standing doctrine recognizes 'parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition.'" *Mendoza*, 754 F.3d at 1011 (quoting *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998)); *see also Sherley v. Sebelius*, 610 F.3d 69, 72–73 (D.C. Cir. 2010). "The law of the circuit is clear that 'any one competing for a governmental benefit . . . [may] assert competitor standing when the Government takes a step that benefits his rival and therefore injures him economically.'" *Delta Const. Co. v. EPA*, 783 F.3d 1291, 1299 (D.C. Cir. 2015) (quoting *Sherley*, 610 F.3d at 72).

In cases where courts have found competitor standing, the agency's action directly affected the market because the statutory scheme contemplated market regulation of competitors. *See Hardin*, 390 U.S. at 6. The D.C. Circuit has

> explained that the competitive harm doctrine applies only "to an agency action that itself imposes a competitive injury, *i.e.*, that provides benefits to an existing competitor or expands the number of entrants in the petitioner's market, not an agency action that is, at most, the first step in the direction of future competition."

Delta Air Lines, Inc. v. Exp.-Imp. Bank of U.S., 85 F. Supp. 3d 250, 267–68 (D.D.C. 2015) (quoting *New World Radio*, 294 F.3d at 172). For example, in *Mendoza*, the rules at issue led to "an increased supply of labor — and thus competition — in that market." *Mendoza*, 754 F.3d at 1101. Similarly, *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060 (D.C. Cir. 1998),

involved interpretation of "a statute by which Congress sought to regulate the timing of generic drug manufacturers' entry into the market." 140 F.3d at 1075.

This case is unlike the cases where competitor standing was found based on an agency decision that directly affected market competition. The challenged Secretarial decision here only implicates the Gaming Amendments between the Tribes and the state. The agency action challenged here is not the lifting of regulatory restrictions or the under-regulation of a competitor. *See State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 55 (D.C. Cir. 2015). The Secretary's return of the Gaming Amendments does not involve competition between Plaintiffs and MGM for a governmental benefit. *See Delta*, 783 F.3d at 1299. Nor does the Secretary's return of the Gaming Amendments give any group a competitive advantage or directly affect the market in any way. Therefore, even if the Court ordered the Secretary to approve the Gaming Amendments, such a ruling would not amount to a regulatory restriction that affects a market, but would be a discrete decision that would indirectly affect the market by at most a single casino. There is no direct connection between that decision and MGM's asserted economic harm. The competitor standing doctrine thus does not apply, and MGM has not demonstrated injury for standing purposes.

2. MGM's injury is not fairly traceable to the Secretary's actions.

In addition, MGM has not shown that its injury would be traceable to the Federal Defendants' action. There is a disconnect between the issues in this case — which involve statutory construction of IGRA and specifically provisions relating to review and approval of a proposed tribal-state compact amendments and amendments to Secretarial gaming procedures under IGRA's remedial provisions — and the purported economic injury to MGM. IGRA is intended to "affirmatively help Indian tribes enter and conduct the business of gaming, where gaming is not prohibited by state laws of general application, as a means of 'promoting tribal

economic development, self-sufficiency, and strong tribal governments.'" *Texas v. United States*, 497 F.3d 491, 515 (5th Cir. 2007) (quoting 25 U.S.C. § 2702(1)); *see also Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 469 (D.C. Cir. 2007) ("IGRA was designed primarily to establish a legal basis for Indian gaming as part of fostering tribal economic self-sufficiency, not to respond to community concerns about casinos . . . ."); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1308 (D.C. Cir. 2007) (holding that IGRA's purpose is to ensure economic development and self-sufficiency of Indian tribes through gaming). IGRA does not provide a mechanism for third parties such as MGM to be involved in the tribal-state compact review and approval process or review and approval of proposed amendments to Secretarial gaming procedures. *See* 25 U.S.C. § 2710(d)(8); 25 U.S.C. § 2710(d)(7)(B)(vii). As such, MGM cannot show that it is injured by the Secretary's decision, even if it is overturned, because IGRA and its tribal-state compact or remedial provisions simply do not affect MGM.

Further, the Secretary's decision to return the proposed Gaming Amendments to the Tribes, even if overturned, does not directly result in injury to MGM. Instead, injury is contingent on several other steps and actors. MGM's injury stems from Connecticut's Public Act 17-89 and the Tribes' proposal to build a commercial casino in Connecticut, not the Secretary's determination with regard to the proposed Gaming Amendments. Without Public Act 17-89, the Secretary's decision to return the Gaming Amendments to the Tribes would have no impact on MGM at all. As MGM asserts, Public Act 17-89 sets out several preconditions to a commercial casino operated by the Tribes, all of which have been satisfied except the Secretary's approval of the proposed Gaming Amendments. Mot. to Intervene 10. That the Secretary's action remains the last condition to be satisfied does not shift the cause of the injury from the

Public Act to the Secretary. In other words, MGM's injury stems not from the Secretary's decision on the Gaming Amendments per se, but from the Public Act itself.

Thus, MGM's injury is not sufficiently traceable to the Secretary's action in this case and MGM has not demonstrated that it has standing to intervene.[3]

B. MGM has failed to make a compelling demonstration of inadequate representation.

MGM has also failed to show that its interests are not adequately represented by the federal defendants. "The most important factor to determine whether a proposed intervenor is adequately represented by a present party to the action is how the [intervenor's] interest compares with the interest of existing parties." *Perry v. Proposition 8 Official Opponents*, 587 F.3d 947, 950–51 (9th Cir. 2009) (citations and internal quotation marks omitted). Here, MGM and the federal defendants share the same ultimate objective: to uphold the Secretary's decision.

While courts have often cast doubt on the government's ability to represent private parties, *see, .e.g., Crossroads*, 788 F.3d at 318, here, MGM has not shown why it has a different interest than the Federal Defendants in the context of this litigation. *See Alfa Int'l Seafood v. Ross*, 321 F.R.D. 5, 8 (D.D.C. 2017) (noting that intervention was inappropriate when proposed intervenor did not demonstrate any reason why the government could not represent its interest). The only issues in this case involve statutory interpretation of IGRA and whether the Federal Defendants' interpretation is supported by the statute and its regulations. MGM's competitive

[3] MGM also has not demonstrated a protectable legal interest that will be impaired by a decision in this case. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 143 Fed. Appx. 751, 753 (9th Cir. 2005) (finding that "pure economic expectancy" was insufficient to show legally protected interest). Because this argument overlaps substantially with the standing argument, we do not restate it here. *See, e.g., Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 318 (D.C. Cir. 2015) (noting when group had constitutional standing, "it *a fortiori* has 'an interest relating to the property or transaction which is the subject of the action'" (quoting *Fund for Animals*, 322 F.3d at 735)).

interests are not relevant to the statutory interpretation, as MGM has the same interest as the government in ensuring the Federal Defendants' interpretation is upheld.

Where, as here, an existing party and the proposed intervenor share "the same ultimate objective," "a presumption of adequate representation exists," and the proposed intervenor must "rebut this presumption by demonstrating special circumstances that make the representation inadequate, such as 'adversity of interest, collusion, or nonfeasance.'" *Cobell v. Jewell*, No. 96-01285 (TFH), 2016 WL 10704595 (D.D.C. Mar. 30, 2016) (citing *Atl. Refinishing & Restoration, Inc. v. Travelers Cas. & Surety Co. of Am.*, 272 F.R.D. 26, 30 (D.D.C. 2010), *Moosehead Sanitary Dist. v. S. G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979)). MGM has not made such a showing here. The Federal Defendants have already moved for partial dismissal of the case, which demonstrates that the Federal Defendants intend to vigorously defend the case.

Further, MGM will not offer any necessary elements that the Secretary would neglect. The Court will judge the reasonableness of the Secretary's actions based on the Secretary's proffered statutory construction. It is the Secretary, not a private party, who is best suited to make arguments about proper statutory construction and the reasonableness of the Secretary's actions. Any argument MGM would offer along those lines would either be duplicative of the Secretary's arguments or an argument that the Federal Defendants have not put forward. Because the Federal Defendants are adequate representatives of any interest that MGM might have in this dispute, its intervention motion should be denied.

C. *Forest County Potawatomi Community* does not support intervention here.

In another case in this district, relied upon heavily by MGM in its brief, the court allowed the intervention of a federally-recognized Indian tribe that was eligible for IGRA gaming and directly affected by the challenged decision. *Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6 (D.D.C. 2016). The Secretary disapproved proposed amendments to the Forest County

Potawatomi Community's ("Potawatomi") tribal-state compact based on his interpretation of the amendments "as obligating Putative Intervenor Menominee Indian Tribe of Wisconsin — also a federally-recognized Indian Tribe in Wisconsin that is eligible to conduct gaming under the IGRA — to compensate Potawatomi for lost revenue resulting from a proposed Menominee casino . . . ." *Id.* at 9. The Secretary's decision in that case therefore was explicitly based on the proposed tribal-state compact amendment's impact on the Menominee Tribe. *See* Forest County Potawatomi decision, found at www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-029286.pdf. The Menominee had been seeking to open a facility in Kenosha for fifteen years, had a tribal-state gaming compact that would allow gaming on the site, and the Secretary had approved taking the land into trust for the Menominee for gaming purposes. *Potawatomi,* 317 F.R.D. at 10, 12. The only remaining step for the Menominee to begin gaming was gubernatorial approval, which had been explicitly denied because of the indemnification provisions in the proposed amendments to the Potawatomi tribal-state compact. *Id.* at 12–13.

Overturning the Secretary's decision would have a direct and concrete impact on the Menominee by either obligating it to pay large sums to the Potawatomi or making it less likely that the governor would approve the Menominee's proposed gaming facility. In fact, the governor had denied a Menominee gaming application and specifically identified "the cost of indemnifying" Potawatomi as a factor in the denial. *Id*. at 12. The impact on the Menominee was therefore explicit and direct.

Here, the impact on MGM is far less direct. Neither the Secretary's decision nor the proposed Gaming Amendments address MGM explicitly. If the Secretary's decision is overturned, MGM would not be required to make payments to the Tribes as a condition of having its casino operation approved. In addition, while approval of the Gaming Amendments

may indirectly make it more difficult for MGM to game in Connecticut, MGM does not currently have the ability to game in Connecticut. Indeed, there are already a number of obstacles MGM must surmount before it is allowed to game in Connecticut — most notably, approval from a local government and the Connecticut legislature. No non-Indian casinos currently exist in Connecticut, and MGM's own papers indicate resistance from Connecticut officials to MGM operating a casino in Connecticut. Mot. to Intervene 8–9.

Indeed, Connecticut granted exclusivity to the Connecticut tribes, in exchanges for a share of the gaming revenue when gaming procedures and the original Mohegan compact was made. MGM argues that the basis for Public Act 17-89 was "to insulate the Tribes from MGM's competing casino projects." Mot. to Intervene 8. Thus, in contrast to *Potawatomi*, where the Menominee needed only gubernatorial concurrence to engage in gaming and the governor had specifically listed the cost of indemnification as a reason for denying the Menominee's application, 317 F.R.D. at 12, MGM cannot point to the Secretary's decision as the key to its gaming operation in Connecticut. The injury to the Menominee from the Secretary's decision was concrete and direct; MGM's alleged injury is speculative and indirect.

Further, MGM characterizes *Potawatomi* as allowing "a third party casino developer" to intervene, but in actuality, the intervenor was a federally-recognized tribe eligible for gaming under IGRA with a gaming compact with the State of Wisconsin. *Id.* at 10. The Menominee intended to engage in Indian gaming and therefore had an interest in IGRA's provisions. MGM, as a commercial gaming operator, does not share an interest in Indian gaming or IGRA's interpretation, and its purported injury is both hypothetical and speculative.

The case at bar also involves largely legal questions: namely, whether IGRA required the Secretary to either approve or deny the proposed Gaming Amendments or have them deemed

approved if neither action was taken within forty-five days of submission. *Potawatomi* involved an APA challenge to the Secretary's disapproval of the proposed compact amendments, based on the Secretary's finding in the administrative record.

In conclusion, in *Potawatomi*, a federally-recognized Indian tribe eligible to game under IGRA and directly impacted by the agency's decision was allowed to defend the decision. There is no corresponding basis for this Court to allow a business interest to weigh in on statutory interpretation of IGRA. This Court should not deny MGM's motion to intervene.

D. The Court should exercise its discretion to deny MGM permissive intervention.

Under Rule 24(b), the Court has broad discretion to deny permissive intervention. Adequate representation by the government is a basis for denying permissive intervention. *See United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 756 (9th Cir. 1993). Permissive intervention should be denied because MGM has only an economic interest in the case and has no protectable interest in IGRA's interpretation. The Secretary's interpretation of IGRA is at issue, and it is the Secretary's responsibility to defend that interpretation. MGM will not meaningfully add to the litigation.

MGM's lack of standing should also prevent it from intervening permissively. The D.C. Circuit has "declined to review the denial of a Rule 24(b) motion once we determined the potential intervenor lacked standing." *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013) (citing *Section 4 Deadline Litig.*, 704 F.3d at 979, *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 32(D.C. Cir. 2000). As demonstrated above, MGM lacks standing and this Court should thus not permit it to intervene permissively.

IV. CONCLUSION

MGM is a commercial casino operator that lacks sufficient interest in the Secretary's interpretation of IGRA, and particularly IGRA's provisions on tribal-state compacts and

Secretarial gaming procedures. The Secretary is the only necessary defendant here, and will more than adequately represent MGM's asserted interest. The Secretary therefore respectfully requests that this Court deny MGM's motion to intervene.

Respectfully submitted this 5th day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 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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