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 the U.S. Department of the Interior, Defendants.	Civil Action No. 17-cv-02564-RC ORAL ARGUMENT REQUESTED

MOHEGAN TRIBE OF INDIANS OF CONNECTICUT AND MASHANTUCKET PEQUOT TRIBE'S OPPOSITION TO THE MOTION FOR LEAVE TO INTERVENE BY MGM RESORTS GLOBAL DEVELOPMENT LLC

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I. Introduction

MGM does not belong in this case. To try to justify intervention in a suit concerning agreements to which MGM is not a party, MGM mischaracterizes the case Plaintiffs filed, the relief Plaintiffs seek, and the law applicable to the pending dispute. MGM's dissatisfaction with ongoing commercial gaming matters governed by Connecticut state law cannot be translated into a legally protected interest in the federal process for approval of tribal gaming compacts under the federal Indian Gaming Regulatory Act ("IGRA"). MGM has no standing in this case because it has failed to identify an imminent, concrete, particularized injury that is either causally connected to this controversy or would be redressed by resolution of this case. Further, the same facts that undercut MGM's standing demonstrate that MGM may not intervene as of right—it does not have a legally protected interest that would be impaired by the relief sought as is required by Fed. R. Civ. P. 24(a). The relief sought—publication in the Federal Register confirming that the submitted compact terms have been deemed approved—has no immediate impact on MGM's ability to engage in commercial gaming in either Connecticut or Massachusetts. Additionally, MGM should not be permitted to permissively intervene. MGM has no claim or defense that shares a common question of law or fact with the action brought by Plaintiffs and nothing to contribute to the interpretation of IGRA and its implementing regulations because MGM is neither regulated by, nor protected by, that statute. Finally, MGM has not complied with Rule 24(c) and does not have a colorable claim or defense. The Court should deny MGM's intervention motion so that this lawsuit may proceed without delay and disruption.

II. Preliminary Statement

This is a straightforward Administrative Procedure Act ("APA") case about a mandatory statutory process that Defendants failed to follow. The Mohegan Tribe of Indians of Connecticut and the Mashantucket Pequot Tribe (the "Tribes") each negotiated and entered into compact terms which amended their existing compacts with the State of Connecticut (the "State"), and the Department of Interior (the "Department") received these amendments on August 2, 2017. Decl. of Kevin P. Brown, ECF No. 9-1 ("Brown Decl.") ¶ 8; Decl. of Rodney Butler, ECF No. 9-9 ("Butler Decl.") ¶ 8. Under IGRA and the regulations at 25 C.F.R. Part 293 ("Part 293 Regulations"), within 45 days of receipt the Secretary of the Interior must affirmatively approve or affirmatively disapprove a compact or compact amendment, and may only disapprove for the specific, limited reasons identified in IGRA.[1] 25 U.S.C. § 2710(d)(8)(A)-(C); 25 C.F.R. § 293.12. If the Secretary fails to affirmatively approve or affirmatively disapprove for the specific reasons identified in IGRA, the compact or amendment becomes deemed approved by operation of law. 25 U.S.C. § 2710(d)(8)(C); 25 C.F.R. § 293.12. Consistent with Congress's direction that the Secretary may not through administrative delay prevent tribes and states from implementing mutually-agreed upon compact terms, the Department's own regulations implementing IGRA's publication requirement obligate the Secretary to publish notice of a deemed approval in the Federal Register within 90 days from the date the compact or amendment is received by the Department's Office of Indian Gaming. 25 C.F.R. § 293.15(b).

The Office of Indian Gaming received the compact terms more than 90 days ago. Brown Decl., ECF No. 9-1, ¶ 8; Butler Decl., ECF No. 9-9, ¶ 8. In violation of IGRA, after neither

[1] The Secretary may only disapprove a compact or amendment for three reasons: (i) it violates IGRA, (ii) it violates any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or (iii) it violates the trust obligations of the United States to Indians. *See* 25 U.S.C. § 2710(d)(8)(B); 25 C.F.R. § 293.14.

explicitly approving nor explicitly disapproving the compact amendments, the Secretary failed to treat them as deemed approved and failed to publish notice of the deemed approval in the Federal Register. Brown Decl., ECF No. 9-1, ¶¶ 13-14; Butler Decl., ECF No. 9-9, ¶¶ 13-14. Plaintiffs filed this lawsuit to compel the Defendants to take these mandatory ministerial actions.

The controversy presented by the Complaint is (1) whether defendants acted arbitrarily and capriciously in failing to treat the submitted compact terms as deemed approved when the Secretary did not either affirmatively approve or disapprove and (2) whether the Secretary unlawfully withheld agency action by failing to publish the deemed approval in the Federal Register. *See* Compl., ECF No. 1, ¶¶ 44-60. MGM does not have a legally protected interest in the outcome of those issues and nothing to offer on the resolution of those issues.

MGM seeks to intervene in this lawsuit based on arguments about what the State may or may not do under various state laws and the impact those state laws may have on MGM's future commercial gaming plans. But this dispute concerns compacts to which MGM is not a party and involves only a limited federal Indian law question unrelated to any state law. More specifically, MGM tries to justify its intervention motion by raising concerns about state laws relating to approving commercial casinos (i.e., casinos operated on non-Indian lands under state law), the legislation authorizing MMCT Venture, LLC[2] to operate a commercial gaming facility in East Windsor, Connecticut, state legislative and regulatory approvals that may be triggered in the future for commercial casinos MGM may or may not build, and competitive harms MGM alleges it will suffer if MMCT Venture, LLC is able to open a commercial gaming facility in East Windsor. MGM Mem. in Supp. of Its Mot. for Leave to Intervene ("Mem."), ECF No. 11-1, at 2, 6-12. Not a single one of these issues is governed by IGRA or is relevant to the Secretary's

[2] MMCT Venture, LLC is a limited liability company formed under state law that is jointly and exclusively owned by the Tribes.

mandatory ministerial duties under IGRA. IGRA does not govern any aspect of MMCT Venture, LLC, the commercial venture formed by the Tribes to operate commercial gaming. IGRA neither regulates nor is in any other way applicable to MGM's own commercial gaming activities.

In fact, MGM concedes that IGRA has no relevance to gaming conducted under state law on non-Indian lands[3]—the only issue to which it claims an interest. *See* Mem., ECF No. 11-1, at 3 (citing *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014)). MGM further concedes that the MMCT Venture, LLC's proposed East Windsor commercial gaming facility is governed exclusively by state law—Connecticut Public Act 17-89. Mem., ECF No. 11-1, at 7. Accordingly, MGM has no legal interest in this suit to compel the Secretary to comply with IGRA and nothing to offer relevant to the Secretary's mandatory obligations relating to the compacts and their amendments which govern IGRA-based gaming on *Indian lands*.[4]

Contrary to MGM's assertions, the new compact terms entered into by the Tribes and the State to amend their respective compacts do not govern or authorize MMCT Venture, LLC's East Windsor commercial gaming facility. Mem., ECF No. 11-1, at 2. Rather, these compact amendments confirm the agreements entered into by the Tribes and State relating to the revenue

[3] "Indian lands" is a defined term in IGRA meaning lands within the limits of any Indian reservation, or other qualifying Indian lands such as lands held in trust by the United States for the benefit of a tribe and lands over which an Indian tribe exercises governmental power. *See* 25 U.S.C. § 2703(4). The land in East Windsor on which MMCT Venture, LLC proposes to build a casino is not "Indian lands" as defined by IGRA.

[4] In *Bay Mills Indian Community*, 134 S. Ct. at 2034, the Supreme Court explained the relationship between state and federal authority over gaming. Through IGRA, Congress, exercising its plenary power over Indian matters, delegated to states some limited measure of authority over tribal gaming on Indian lands as such lands are defined in 25 U.S.C. § 2703(4), whereas states already have existing state-law based authority over gaming conducted on non-Indian lands within their borders. The Tribes proposed casino falls under the latter whereas this dispute is governed by IGRA.

sharing provisions contained in the existing compacts. Brown Decl., ECF No. 9-1, ¶ 3 & Ex. F; Butler Decl., ECF No. 9-9, ¶ 3 & Ex. F.

MGM has been engaged in a protracted lobbying and litigation campaign for the sole purpose of protecting the commercial facility it is building in southern (Springfield) Massachusetts from any competition emanating from northern (East Windsor) Connecticut. *See, e.g.,* Nick Juliano, *Zinke's agency held up Indians' casino after MGM lobbying*, Politico (Feb. 1, 2018), https://www.politico.com/story/2018/02/01/zinkes-indian-casino-interior-312671; *MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 51 (2d Cir. 2017) (failed challenge to state public law authorizing the Tribes to form a joint venture); Decl. of Uri Clinton, ECF No. 11-2 ("Clinton Decl.") ¶¶ 6, 8-9. As part of its protectionist campaign, MGM inappropriately inserted itself in the compact amendment approval process at the Department. A close look at Secretary Zinke's calendar and MGM's lobbying registrations reveals that the Secretary and other senior Department officials tasked with evaluating the Tribes' compact amendments held many meetings and calls with MGM lawyers and lobbyists, and with members of MGM's home state (Nevada) congressional delegation shortly before the Department purported to "return" the compact terms without taking explicit action on them. *See* Juliano, *supra* ("Interior's Sept. 15 [letters] came two weeks after Zinke invited several lobbyists for MGM to join him and other guests for a social visit on his office balcony. . ."); Clinton Decl., ECF No. 11-2, ¶ 28. The Department, the primary federal agency which owes a fiduciary trust responsibility to the Tribes,[5] never made the Tribes or the State aware of these repeated overtures

[5] *See Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (the Supreme Court has long recognized "the distinctive obligation of trust incumbent upon the Government" in Indian affairs); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (this trust relationship charges the Secretary with an "overriding duty . . . to deal fairly with Indians.").

from MGM, nor provided the Tribes or the State with an opportunity to respond to the arguments MGM was asserting. Regardless, the Department is not free to modify the required statutory process under IGRA, it may not "return" the compact terms without taking explicit action, and it continues to be subject to IGRA's requirement that it now publish a notice that the compact terms are deemed approved by operation of law.

MGM's intervention effort is not about the requirements of IGRA. It is part of MGM's effort to quash commercial competition. And, MGM has not told the full story of the Massachusetts/Connecticut market. MGM neglects to mention that its Massachusetts license agreement for its proposed Springfield, Massachusetts facility prohibits it from developing a casino within 50 miles of its Springfield casino, an area that covers a large portion of the State of Connecticut, including East Windsor.[6] *MGM Resorts*, 861 F.3d at 44 n.1. Thus, through its own choices, MGM has contracted itself out of nearly the entire Connecticut market.

MGM has not gained state approval for a commercial casino in Bridgeport, Connecticut. Further, despite MGM's claims in its submissions to this Court about imminent plans to open a casino in Bridgeport, MGM's CEO represented to its investors on a conference call late last year that MGM will build no more U.S.-based casinos after it completes its Springfield project. *Compare* Mem., ECF No. 11-1, at 9 and Clinton Decl., ECF No. 11-2, at 7-11 *with* Thomas Moore, *MGM likely to focus on Strip remodels rather than new U.S. casinos, CEO says*, Las Vegas Sun (Nov. 15, 2017), https://vegasinc.lasvegassun.com/business/gaming/2017/nov/15/mgm-likely-to-focus-on-strip-remodels-rather-than/ ("MGM Resorts International *is done building new casinos in the U.S.* and will likely spend future development dollars on remodeling

[6] In support of intervention, MGM also alleges it owns property in East Windsor. Clinton Decl., ECF No. 11-2, ¶ 12. But this fact has no relevance because MGM is not permitted to develop a casino in East Windsor due to its 50-mile radius restriction on competing with its own facility in Springfield. *See MGM Resorts*, 861 F.3d at 44 n.1.

its Strip properties in the same way it's remodeling Monte Carlo, the company's CEO says . . . 'And Springfield, Mass., will be the home of our newest property, and *our last major development* project here in the United States when it opens in September.'") (emphasis added). Thus, MGM's Bridgeport plans appear to be neither concrete nor imminent. MGM's summary of the dire competition consequences it allegedly will suffer is an inaccurate representation of the Connecticut market.

In sum, MGM wishes to graft a myriad of state law questions relating to commercial gaming onto this narrow APA case about a federal Indian law issue related to agreements to which MGM is not a party. The issues MGM seeks to inject here are irrelevant to the relief Plaintiffs are seeking or the mandatory duty IGRA has imposed on the Secretary to publish a deemed approval. MGM's motion should be denied.

III. Standard of Review For An Intervention Motion

A. Intervention As Of Right

A motion to intervene may be evaluated on the basis of the "well pleaded matters in the motion, the complaint, and any responses of opponents to intervention." *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981); *see also Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 8-9 (D.D.C. 2016) (quoting *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001)). A party seeking to intervene as of right under Rule 24(a) must demonstrate: "(1) that the application to intervene is timely; (2) the party has a legally protected interest in the action; (3) the action threatens to impair that interest; and (4) no party to the action can adequately represent that interest." *Cigar Ass'n of Am. v. U.S. Food & Drug Admin.*, No. 1:16-CV-1460 (APM), 2017 WL 4675735, at *3 (D.D.C. Oct. 16, 2017) (citing Fed. R. Civ. P. 24(a)).

In the D.C. Circuit, a would-be intervenor also must demonstrate Article III standing to intervene as of right. *See, e.g., Fund for Animals v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). Article III standing is a "threshold jurisdictional concept" that must be addressed first before the Court proceeds to consider the Rule 24(a) intervention as of right analysis. *Deutsche Bank Nat'l Tr. Co. v. FDIC*, 717 F.3d 189, 194 n. 4 (D.C. Cir. 2013); *Keepseagle v. Vilsack*, 307 F.R.D. 233, 240 (D.D.C. 2014) (finding that if a would-be intervenor "lack[s] standing, the Court need not–and, indeed, ought not–address Rule 24(a)."). To meet the constitutional minimum of Article III standing, "(1) [the intervenor] must demonstrate an injury in fact; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely that a favorable decision on the merits will redress the injury." *Envtl. Integrity Project v. McCarthy*, 319 F.R.D. 8, 12 (D.D.C. 2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

An injury in fact must be "concrete, particularized, and actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation marks omitted). The purpose of the imminence requirement "is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly impending*." *Id*. (quotation marks omitted) (emphasis added). Accordingly, the Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Id.* at 409; *see also Delta Air Lines, Inc. v. Export-Import Bank of United States*, 85 F. Supp. 3d 250, 261 (D.D.C. 2015) ("[A]ny petitioner alleging only future injuries confronts a significantly more rigorous burden to establish standing." (internal quotations and citations omitted)). "Plaintiffs here also must overcome a significant hurdle in that 'when the plaintiff is not himself the object of the government action or inaction he

challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.'" *Id.* (quoting *Lujan*, 504 U.S. at 562) (internal citations omitted).

B. Permissive Intervention

Permissive intervention under Rule 24(b) grants the Court discretion to allow intervention by movants who have a claim or defense that shares a "common question of law or fact" with the primary action. Fed. R. Civ. P. 24(b)(1). In exercising this discretion, "the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). As a threshold matter, although the D.C. Circuit has not ruled on the issue, Article III standing should be required for permissive intervention just as is it for intervention as of right. *See, e.g.*, *Deutsche Bank*, 717 F.3d at 195-96 (Silberman, J., concurring); *Sierra Club v. McCarthy*, 308 F.R.D. 9, 13 n.2 (D.D.C. 2015) (citing *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013)). In deciding whether permissive intervention is appropriate, the Court also evaluates whether the proposed claim or defense is valid and colorable and whether the putative intervenor would add anything to the adjudication. *See Ctr. for Biological Diversity v. EPA*, 274 F.R.D. 305, 313 (D.D.C. 2011) ("In exercising its discretion under Rule 24(b), the Court . . . may also consider 'whether parties seeking intervention will significantly contribute to . . . the just and equitable adjudication of the legal question presented.'") (quoting *Aristotle Int'l, Inc. v. NGP Software, Inc.*, 714 F. Supp. 2d 1, 18 (D.D.C. 2010)); *Envtl. Integrity Project*, 319 F.R.D. at 17 (declining to permit intervention where intervenor had nothing to offer on the issue at hand).

IV. Argument

A. MGM Does Not Have Article III Standing, And Thus Cannot Intervene

MGM has a long history of trying to stop the MMCT Venture, LLC from developing a commercial gaming facility. The Second Circuit just recently determined MGM has no standing

to pursue such challenges. *MGM Resorts*, 861 F.3d at 45-51 (finding MGM lacked standing to challenge the Connecticut state law allowing the Tribes to form a joint venture for purposes of pursuing commercial gaming in Connecticut because Connecticut law allowing Tribes to enter Connecticut market with a commercial joint venture did not exclude MGM from market and alleged competitive harms were not imminent). Similarly, MGM cannot establish standing in this case. First, MGM is not at all like the intervenor Menominee Tribe in *Forest County Potawatomi Community v. United States*, 317 F.R.D. 6 (D.D.C. 2016). Second, the competitor standing doctrine does not apply because MGM has no legally protected interest that could be harmed by the decision in this action. And finally, MGM's alleged injuries are speculative and not imminent, there is no causal connection between this controversy and its alleged injuries, and an order in this case will not redress its alleged injuries.

1. *Forest County* Does Not Support MGM's Claim of Standing

MGM relies almost exclusively on *Forest County*, 317 F.R.D. 6, to support its claim of Article III standing and right to intervene, but the fact pattern there bears little substantive resemblance to the facts of this case. *Forest County* concerned whether the Menominee Indian Tribe of Wisconsin ("Menominee Tribe") could intervene as of right in the Forest County Potawatomi Community's ("Potawatomi Tribe's") suit seeking to reverse the Department's disapproval of the Potawatomi Tribe's compact amendment. The Department had disapproved the compact amendment because it created a "50-mile non-competition zone," *Forest Cty.*, 317 F.R.D. at 9, that was specifically targeted at the Menominee Tribe. As the Department explained in its decision to disapprove the Potawatomi amendment, "[g]iven that the . . . Amendment specifically addresses the Menominee, the parties made it impossible for us to avoid that Tribe's interests." Letter from Kevin K. Washburn, Assistant Sec'y - Indian Affairs, to Hon Harold Frank, Chairman, Forest Cty. Potawatomi Cmty., at 8 (Jan. 9, 2015) ("Washburn Letter"),

https://www.indianaffairs.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/as-ia/oig/oig/pdf/idc1-029286.pdf. The Department further explained that the Potawatomi compact amendment violated IGRA because "IGRA does not allow one tribe [Potawatomi] to use the state compact process to impose upon another tribe [Menominee] the obligation to guarantee the [Potawatomi] tribe's gaming and other profits when the other tribe was not even at the negotiation table and has not consented to this arrangement." *Id.* at 2.

MGM's position is not at all like the Menominee's position in *Forest County*. First, the Mohegan and Pequot compacts neither refer to, nor in any way address, another Departmentally-approved tribal compact to which MGM is or could be a party.

Second, the Department has no authority to approve or disapprove what MGM does under IGRA. By contrast, in *Forest County*, the Department had issued a "two-part determination" under IGRA's provisions governing the acquisition of new "Indian lands" finding that a Menominee casino in Kenosha, Wisconsin (within the proposed Forest County Potawatomi 50-mile non-competition zone) was (1) in the best interest of Menominee and (2) not detrimental to the surrounding community. *Forest Cty.*, 317 F.R.D. at 9 n.3; *see also* 25 U.S.C. § 2719(b)(1)(A) (setting forth a two-step Departmental and gubernatorial concurrence process for lands taken into trust for gaming). Accordingly, the Department had already taken action to assist the Menominee in its efforts to develop a gaming operation within the 50-mile non-competition zone. *Forest Cty.*, 317 F.R.D. at 10, 12. Unlike the Department's duty to Menominee, the Department has no duty under IGRA to facilitate MGM gaming opportunities.

Third, the Department has a unique trust obligation to Menominee to assist in and facilitate Menominee's economic development. 25 U.S.C. § 2701 (stating the "principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and

strong tribal government"); *see supra* note 5. The trust obligations of the Department to all tribes create a strict obligation to consider the views and interests of both Menominee and Potawatomi when evaluating Potawatomi's compact amendment. *See* Washburn Letter at 2; *see also Forest Cty*., 317 F.R.D. at 9. The Department has no similar obligation to MGM.

Finally, unlike *Forest County*, this case does not involve a challenge to the disapproval of compact amendments (which can only be disapproved for certain statutorily-limited reasons). Plaintiffs' Complaint does not raise the content and substance of the compact amendments. This case raises the procedural question of what the Department must do under IGRA if it fails to approve or disapprove a compact amendment within 45 days – it must publish notice in the Federal Register that the compact amendments are deemed approved by operation of law. 25 U.S.C. § 2710(d)(8)(C)-(D); 25 C.F.R. § 293.15(b). Compact amendments are deemed approved only to the extent they are consistent with IGRA. *Id.* Thus, MGM has no interest in and nothing to add to this narrow procedural question governed by IGRA.

Accordingly, this Court should reject MGM's claim that this case is "essentially a replay of *Forest County*." Mem., ECF No. 11-1, at 15. *Forest County* has no bearing on a non-tribe's attempts to intervene in the enforcement of a ministerial duty to publish compact amendments under IGRA. And, unlike Menominee, MGM's alleged injury is attenuated from any decision the Court may issue in this case.

2. <u>The Competitor Standing Doctrine Does Not Apply</u>

Under MGM's theory of standing and intervention, any competitor in the United States could intervene and interfere in any action involving an entity in the same industry/line of business or geographical region regardless of the statutory issue at hand and no matter how remote its connection to the relevant agency action or inaction. This is not the law. The D.C. Circuit and this Court have held that increased competition is not a *per se* basis for standing. *See*

Delta Airlines, 85 F. Supp. 3d at 267-68; *New World Radio v. FCC*, 294 F.3d 164, 172-73 (D.C. Cir. 2002). Moreover, as a general matter, "when the [litigant] is not himself the object of the government action or inaction he challenges, standing is not precluded, but *it is ordinarily 'substantially more difficult' to establish.*" *Lujan*, 504 U.S. at 562 (citations omitted) (emphasis added). To have standing, the litigant must have a legally protected interest that is invaded. *Id.* at 560. Thus, MGM cannot insert itself into someone else's lawsuit under a statute to which it bears no connection by merely claiming it is some kind of competitor in a geographic sense. Rather, MGM's position must be evaluated against the actual requirements and limitations of Article III and the competitor standing doctrine.

First, in competitor standing cases, the nature of the plaintiff's complaint and the applicable statute is central to the analysis of whether there is an invasion of a legal interest (i.e., an injury-in-fact). *See, e.g.*, *Delta Airlines*, 85 F. Supp. 3d at 268 (evaluating whether there was a relevant harm as defined by the Bank Act and concluding plaintiff competitors did not have standing); *Sherley v. Sebellius*, 610 F.3d 69 (D.C. Cir. 2010) (holding potential beneficiaries of federally administered NIH grants for stem cell research had standing); *La. Energy & Power Auth. v. FERC*, 141 F.3d 364 (D.C. Cir. 1998) (involving the setting of rates of competitors under the Federal Power Act scheme that applied to all competitors); *New World Radio*, 294 F.3d 164 (evaluating licensing under Federal Communication Act in concluding competitor standing doctrine did not apply).

Second, the alleged impact of the agency action being challenged or defended must be direct and imminent, not speculative and hypothetical. *See, e.g.*, *Nw. Airlines, Inc. v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986) ("the fact that the party (and the court) can 'imagine circumstances in which the party *could* be affected by the agency's action' is not enough" for

standing) (citation and alterations omitted, emphasis in original); *Arpaio v. Obama*, 797 F.3d 11, 23 (D.C. Cir. 2015) ("[W]e have not hesitated to find competitor standing lacking where the plaintiff's factual allegations raised only some vague probability that increased competition would occur.") (internal quotations omitted).

MGM has no interest in the statutory matters at hand and an order for or against the Department will have no direct and immediate impact on MGM's ability to compete. Therefore, MGM cannot meet any of these standards and lacks standing and a basis to intervene as of right. *See Crossroads Grassroots Policy Strategies v. FEC, 788* F.3d 312, 316 (D.C. Cir. 2015) ("[W]here a party tries to intervene as another defendant, we have required it to demonstrate Article III standing, reasoning that otherwise any organization or individual with only a philosophic identification with a defendant—or a concern with a possible unfavorable precedent—could attempt to intervene and influence the course of litigation.") (quoting *Deutsche Bank*, 717 F.3d at 195 (Silberman, J., concurring)).

a. MGM Has No Legally Protected Interest In The Narrow Subject Matter Of This Lawsuit Governed By IGRA And The APA

MGM cannot establish an injury in fact because it has no legally protected interest that can be directly impacted by a decision in this case. To establish an "injury in fact," a litigant must show "an invasion of a *legally protected interest* which is (a) concrete and particularized, . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (emphasis added). It is not enough to show the invasion of any interest remotely related to the issues in the litigation. It has to be a legitimate legally protected interest. Plaintiffs, as the masters of their own complaint, have raised two very narrow procedural questions of whether the Secretary has (1) violated IGRA by failing to treat the compact amendments as

deemed approved; and (2) whether the Secretary must perform the non-discretionary ministerial duty of publishing notice of the deemed approval of the Tribes' compact amendments as prescribed by the timetable set forth in the regulations. Compl., ECF No. 1, ¶¶ 44-60. MGM has no legitimate legally protected interest in these procedural questions regarding the Department's compliance with IGRA. *See Envtl. Integrity Project*, 319 F.R.D. at 14 (finding that "the challenged agency (in)action is that of the Administrator, and an order granting plaintiffs relief would simply bind her to undertake procedural steps, causing no injury-in-fact to movants.").

The substance of the Secretary's decision is not at issue because failing to approve or disapprove a compact amendment leaves only one option—deemed approval and publication in the Federal Register. 25 U.S.C. § 2710(d)(8)(C); 25 C.F.R. § 293.15(b). Whether the Connecticut laws and acts allowing MMCT Venture, LLC to pursue a commercial gaming facility in East Windsor are constitutional is also not at issue in this lawsuit, nor are these claims ripe for MGM to challenge because Connecticut has never stated MGM cannot compete in the Connecticut market. Unlike in the cases relied upon by MGM where there was a very direct connection between the intervenor and the government action at issue,[7] here MGM has no legitimate interest in this procedural question of the statutory requirements of IGRA.

MGM's costly lobbying in the Connecticut General Assembly against the State's authorization of a commercial gaming facility by MMCT Venture, LLC does not create a valid

[7] *See Fund For Animals*, 322 F.3d 728 (allowing Mongolian ministry to intervene in challenge to listing of Mongolian sheep as threatened rather than endangered due to expected impact of tourist dollars); *100Reporters LLC v. U.S. Dep't of Justice*, 307 F.R.D. 269 (D.D.C. 2014) (intervenors had trade secrets and confidential business information in documents subject to FOIA lawsuit); *Crossroads*, 788 F.3d 312 (overturning favorable precedent at issue would subject intervenor to immediate risk of a FEC enforcement action); *WildEarth Guardians v. Jewell*, 320 F.R.D. 1 (D.D.C. 2017) (states seeking intervention received specific financial benefits from the specific federal oil and gas leases being challenged and were part of the economic and regulatory scheme for those leases).

legal interest in this action. *See, e.g., LPA, Inc. v. Chao*, 211 F. Supp. 2d 160, 165 (D.D.C. 2002) ("it is settled that a plaintiff cannot show injury simply by pointing to an expenditure of resources such as increased litigation costs or lobbying expenses."); *Crossroads*, 788 F.3d at 317 ("the litigation expenses rationale has already been rejected in this Circuit."). MGM is simply trying in yet another forum to prevent commercial competition, an issue that is entirely outside the scope of IGRA.

In sum, competitor standing does not exist when there may be competitive harm generally, but rather only when the competitive harm is caused by the agency action under the particular statutory or regulatory scheme under review. MGM relies on the D.C. Circuit's broad statement in *Sherley v. Sebelius*, 610 F.3d at 72, that economic competitors "suffer [an] injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them." As this Court has noted, however, "fundamental to the decision in *Sherley*, as well as in competitor harm cases generally, was the underlying requirement that the agency has made a decision that increased, or imminently will increase, competition *in a certain manner*." *Delta Airlines*, 85 F. Supp. 2d at 267 (emphasis added). The competitive impact must be related to the statutory scheme under review. *See supra* Section IV.A.2 (analyzing competitor standing authority, which all focus on statutory schemes). Here, IGRA is the statute under review. Unlike the competitors in the cases discussed above, MGM has not, cannot, and will not compete for a government benefit under IGRA. MGM is not a federally recognized tribe and it is not a state. There is nothing in IGRA that protects a commercial entity's ability to compete in a commercial market.

b. MGM's Alleged Injuries Are Speculative And Not Imminent

MGM also lacks standing because its alleged injuries are too conjectural and speculative, and lack sufficient imminence, to satisfy Article III standing requirements. An injury in fact must be actual or imminent not a mere allegation of possible future injury or the first step on the road to a speculative future injury. *See, e.g.*, *Deutsche Bank*, 717 F.3d at 193 (finding that an economic injury is not sufficient for Article III standing when "major contingencies" must occur before actual harm results); *New World Radio*, 294 F.3d at 172 (concluding there can be no injury in fact if "an agency action . . . is, at most, the first step in the direction of future competition."). This requirement reflects the understanding that putative intervenors may raise claims at a later date when and if they arise. For example, this Court analyzed the D.C. Circuit's decision in *New World Radio* and noted that "this distinction between agency action that imposes a direct and imminent competitive injury and agency action that is a 'first step' towards a future, still remote competitive injury following the occurrence of yet-unknown substantial intervening events 'is critical because [a plaintiff] *will* have an opportunity to challenge any [agency] decision that directly affects it as a competitor' once the necessary 'chain of events' plays out.'" *Delta Airlines*, 85 F. Supp. 3d at 268 (citing *New World Radio*, 294 F.3d at 172).

In this procedural APA case, there is only one required step, and that step is the publication of notice in the Federal Register of the deemed approval of the Tribes' compact amendments. This ministerial action will have no direct impact on MGM. Publishing notice already required by federal law of compact amendments governing casinos on Indian lands cannot alone impose a competitive injury. Indeed, MGM itself discusses the extensive approvals of legislatures, municipalities, and others that are necessary to develop and operate a commercial gaming facility. *See* Clinton Decl., ECF No. 11-2, ¶¶ 6, 10, 11, 14, 23. An entity cannot

establish standing when the actions of third parties, such as state legislators, will ultimately govern whether there is a competitive impact. An "alleged injury is [too] . . . conjectural or hypothetical" to support standing where it "depends on how legislators respond" to future circumstances and how those legislators exercise their "policy judgment committed to the broad and legitimate discretion of lawmakers, which the courts cannot presume either to control or to predict." *Daimler-Chrysler Corp. v. Cuno*, 547 U.S. 332, 344-45 (2006) (internal quotation marks omitted). "Under such circumstances, we have no assurance that the asserted injury is 'imminent'-that it is 'certainly impending.'" *Id.* at 345 (internal quotation marks omitted); *see also Delta Air Lines*, 85 F. Supp. at 267 ("the case law is clear that when the prospect and nature of future competition remains indeterminable and amorphous pending future clarifying events that postdate the filing of the complaint, as is the case here, the competitive injury requirement is not satisfied.").

Furthermore, as discussed above in Section II, what the State will or will not do in its regulation of gaming is not at issue in this action. In *New World Radio*, the D.C. Circuit specifically rejected competitor standing where the litigant would have a later opportunity to challenge any "decision that directly affects it as a competitor." *New World Radio*, 294 F.3d at 172. MGM will have its opportunity to raise its state regulatory issues if and when they do arise with the appropriate parties, including the State legislature, State regulatory agencies, and MMCT Venture, LLC. Put simply, MGM is in the wrong place at the wrong time, and thus has no standing for its unripe claims.

Finally, MGM's Bridgeport injuries are inherently speculative. After the Second Circuit held that MGM's Bridgeport plans were too speculative to establish standing, MGM appears to have attempted to repair the standing deficiencies the Second Circuit correctly identified. *MGM*

Resorts, 861 F.3d at 42-43; Mem., ECF No. 11-1, at 9; Clinton Decl., ECF No. 11-2, ¶¶ 7-11. MGM's CEO, however, recently stated that Springfield is its last major U.S.-based project. *See supra* Section II. Given these contemporaneous remarks, the Court should reject MGM's attempts to manufacture standing. *Clapper*, 133 S. Ct. at 1151 (litigants "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending").[8]

MGM's alleged harms are too many steps removed from the issues in this action. MGM is in no better position than it was in *MGM Resorts v. Malloy*, 861 F.3d at 45-51, which concluded that MGM had no standing because its alleged competitive harms were too "conjectural."

3. MGM Cannot Prove Causation And A Ruling Affirming The Secretary Would Not Redress MGM's Claimed Injuries

For many of the same reasons that MGM cannot establish an injury in fact, MGM also cannot establish causation or redressability. To establish Article III standing, there must be a causal connection between the injury and the conduct complained of, and it must be likely that a favorable decision on the merits will redress the injury. *Lujan*, 504 U.S. at 560-61. There is no causal connection between adjudication of the conduct complained of in this action (that the Department failed to publish notice of the deemed approval in the Federal Register as required by IGRA relating to the Tribes' gaming on Indian lands) and MGM's alleged harm (the State's alleged discriminatory scheme for allowing gaming and related impacts on its Springfield and alleged Bridgeport facilities).

[8] The Court need not take as true challenged allegations in MGM's Motion to Intervene. *See Forest Cty.*, 317 F.R.D. at 8-9 (quoting *Sw. Ctr. for Biological Diversity*, 268 F.3d at 820 (finding courts need not accept as true allegations that are based on "sham, frivolity or other objections.")); *Cook v. Boorstin*, 763 F.2d 1462, 1470 (D.C. Cir. 1985) (same).

An order in this case requiring the Department to comply with its mandatory duty under IGRA and publish notice of the deemed approval in the Federal Register is a simple procedural decision that will not cause harm to MGM. That order will not authorize MMCT Venture, LLC to build or operate a commercial gaming facility in East Windsor. Such authorization is governed by state law. Thus, any argument that an East Windsor facility would illegally compete with MGM Springfield is a matter of the legality of state law that cannot be redressed here in a procedural case about IGRA.[9]

Nor will an order in this case keep MGM from competing in Connecticut. Indeed, MGM already has cut itself out of a large portion of the Connecticut market by agreeing to a 50 mile radius non-compete zone in its Massachusetts license agreement for its upcoming Springfield facility. This fact belies any claim that an order in this case could cause it to suffer "perpetual competitive disadvantage in the Connecticut casino-gaming market." Mem., ECF 11-1, at 1; *MGM Resorts*, 861 F.3d at 44 n.1. Through its own choices, MGM voluntarily has competitively disadvantaged itself in the Connecticut casino-gaming market.

Moreover, the order would not prevent MGM from seeking legislative and regulatory approvals necessary for gaming in the few remaining areas of Connecticut. It is not predictable what third party agency regulators and legislators will decide about applications MGM may one day file. The D.C. Circuit has held that when the injury complained of depends on the actions of third parties, there is no causal connection. *See Arpaio*, 797 F.3d at 19 (finding that 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.") (internal quotations omitted).

[9] In addition to not being causally related, such efforts may be unripe and/or futile. *See MGM Resorts*, 861 F.3d 40.

Finally, an order directing compliance with the IGRA duty to publish in the Federal Register cannot and will not redress MGM's complaints that the Connecticut regulatory scheme is somehow discriminatory. *See supra* Section II. The validity of the Connecticut gaming regulatory scheme is not before this Court and, regardless, those issues are not ripe given the infant stages of MGM's state licensing process. Thus, a ruling in this case cannot redress MGM's alleged injuries it thinks will be caused by a State regulatory scheme. For these reasons, MGM cannot establish the causation or redressability standing factors, and thus lacks standing and a basis to intervene.

B. Under Fed. R. Civ. P. 24(a), MGM Cannot Demonstrate An Interest That Will Be Impaired By A Decision In This Matter

Rule 24(a)(2) requires an intervenor to have "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." MGM cannot satisfy the impairment factor because MGM has no legally protected interest. Tellingly, MGM identifies zero legally protected interests in its Motion. Rather, it just identifies claimed injuries. *See, e.g.*, Mem., ECF No. 11-1, at 2. MGM's argument is that it has an interest in stopping any competitor. That interest is not an interest that supports intervention in this lawsuit under Rule 24(a).

Analysis of whether MGM can show its interests would be impaired by a decision in the matter involves many of the same facts as the standing analysis. *See Safari Club Int'l v. Salazar*, 281 F.R.D. 32, 38 (D.D.C. 2012) ("The injury-in-fact and causation connection with the challenged action requirements for standing are closely related to the second and third factors under Rule 24(a), which require a showing of interest in the subject matter of the lawsuit and the potential impairment of that interest absent intervention in the suit."). The Plaintiffs have

statutory rights under IGRA to have the compact amendments published in the Federal Register as deemed approved. MGM has no legally protected interests under IGRA. MMCT Venture, LLC will not enter the commercial gaming market under IGRA, but under Connecticut state law. MGM has fought MMCT Venture, LLC's plans for a commercial gaming facility in many forums. The decision the Court will make here is at most one step in a convoluted and messy fight in various legislatures, regulatory bodies, and courts. Accordingly, this case is not like the authorities on which MGM relies. Mem., ECF No. 11-1, at 17. It is not like *WildEarth Guardians* in which the states seeking to intervene had a direct economic and regulatory interest in the federal oil and gas leases being challenged by the plaintiff. *See WildEarth Guardians*, 320 F.R.D. at 3-4. And, as noted above, this case is nothing like *Forest County*. *See supra* Section IV.A.1. This decision alone will not impair MGM's interests.

C. MGM Should Not Be Permitted To Permissively Intervene

The Court should exercise its discretion to deny MGM's request to intervene on a permissive basis for five main reasons. *See Ctr. for Biological Diversity*, 274 F.R.D. at 313 ("[T]he decision whether to grant permissive intervention resides largely in the discretion of the district court.") (internal quotations omitted). First, MGM's lack of standing also should bar its efforts to permissively intervene under Rule 24(b). *See, e.g.*, *Deutsche Bank*, 717 F.3d at 195 (Silberman, J., concurring) (stating that a party seeking permissive intervention must establish standing); *Ctr. for Biological Diversity*, 274 F.R.D. at 313 (noting standing may be required for permissive intervention); *see supra* Section IV.A (explaining why MGM has no Article III standing). Second, MGM does not have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(b). Third, intervention will prejudice the parties and delay the action. Fourth, MGM offers no persuasive legal authority in support of

permissive intervention. Finally, the Court in its discretion should deny intervention because MGM will add nothing to the process of resolving the issues in this case.

Critically for review under Rule 24(b), MGM does not have a claim or defense that shares with the main action a common question of law or fact. MGM's "claim" that the amendments do not comply with IGRA, s*ee* Mem., ECF No. 11-1, at 20, does not share a common question of law or fact with the main action. The simple claims in this case are (1) whether defendants acted arbitrarily and capriciously in failing to treat the submitted amendments as deemed approved when the Secretary did not either affirmatively approve or disapprove them and (2) whether the Secretary unlawfully withheld agency action by failing to publish the deemed approval in the Federal Register. The question of whether the amendments violate IGRA is not relevant to this dispute because amendments are deemed approved by the Department *only to the extent they are consistent with IGRA*. 25 U.S.C. § 2710(d)(8)(C). Thus, a ruling in this action does not weigh on MGM's purported claim and there is no common question of law or fact.[10]

In any event, "[e]ven where a party 'clears the claim-or-defense threshold,' the Court has considerable latitude to deny intervention based on the particular circumstances of the case." *Ctr. for Biological Diversity*, 274 F.R.D. at 313 (citations omitted). Rule 24(b)(3) requires that when exercising its discretion, the Court "must consider whether the intervention will unduly delay or prejudice the adjudications of the original parties' rights." The positions taken by MGM in its Motion to Intervene demonstrate that MGM will only unnecessarily complicate and delay this

[10] Notably, MGM did not present this "claim" against Defendants in a pleading in violation of Rule 24(c) because it knows it would risk its chances of intervention by raising something outside the scope of the Plaintiffs' complaint. MGM cannot do informally what it is not allowed to do formally. *See infra* Section IV.D. MGM's purported "defense" similarly fails as a basis for permissive intervention because it is not colorable. *See id.*

action. MGM wholly mischaracterizes the scope of IGRA and the evaluation of the compact amendments under IGRA. Accordingly, the Court should deny permissive intervention to avoid prejudice and delay.

Specifically, MGM attempts to expand the issues before this Court by calling the failure to act on a compact amendment a "ruling." Mem., ECF No. 11-1, at 1-2, 11, 15. MGM's previously undisclosed participation "in this review process by meeting with Interior officials and submitting written comments" does not transform the consideration of the compact into an adjudicatory process. MGM attempts to characterize the September 2017 letters as a "ruling" to fit MGM into the factual circumstances that allowed intervention to protect a "status quo" ruling that would have had an immediate and direct impact on the intervenor. *See Crossroads*, 788 F.3d at 318 (allowing Crossroads to intervene because Crossroads would have been directly subject to an enforcement proceeding if the agency's "ruling" in another similar case was overturned). Here, the September 2017 letters are not rulings, Interior's failure to comply with IGRA does not involve MGM in any way, and the outcome of this suit will have no direct or imminent impact on MGM. Therefore, MGM's comparison of this case to *Crossroads* is not compelling.

Moreover, the Court should not grant permissive intervention because MGM is raising unrelated issues and claims which are not ripe and involve parties not before this Court. *See* Section II. All that is before this Court is what the Department must do when it fails to approve or disapprove a compact amendment, and thus allows a compact amendment to become deemed approved by operation of IGRA. Issues related to the alleged discriminatory Connecticut legislation are not before this Court. MGM should not be permitted to intervene to introduce extraneous issues. *See Envtl. Integrity Project*, 319 F.R.D. at 13 (finding plaintiffs are "the

masters of their complaint" and intervenors may not "muddy the waters" by making the case about something outside the scope of the plaintiff's allegations). Thus, the Court should deny MGM's motion because MGM will delay the action and prejudice the parties who seek prompt adjudication as evidenced by their early summary judgment motion.

MGM also has not identified any authorities to support permissive intervention. MGM cites only two cases in support of its permissive intervention. *See Sierra Club v. Antwerp*, 523 F. Supp. 2d 5 (D.D.C. 2007); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967). MGM claims it is "similarly situated" to the developer intervenor in *Sierra Club*, but that is incorrect. Mem., ECF No. 11-1, at 20. In *Sierra Club*, the putative intervenor was the holder of the Clean Water Act permit that the plaintiffs sought to overturn in the case. Thus, that intervenor had an obvious, direct connection and common question of law and fact.

MGM claims *Nuesse v. Camp*, 385 F.2d at 700, supports the proposition that "flexibility [is] required in applying the [permissive intervention] Rule in the administrative-law context." Mem., ECF No. 11-1, at 20. To the contrary, *Nuesse* addresses revisions to Rule 24(b) expanding how and when *government officials and agencies* can intervene. *Nuesse*, 385 F.2d at 704-05. *Nuesse* does not create a generalized rule of flexibility for private intervenors in any APA action. Since MGM is not a governmental official or agency, *Nuesse* has no application here.

The Court also should decline to allow MGM to intervene because MGM has nothing to offer the parties or the Court. "In exercising its discretion under Rule 24(b), the Court . . . may also consider 'whether parties seeking intervention will significantly contribute to . . . the just and equitable adjudication of the legal question presented.'" *Ctr. for Biological Diversity*, 274 F.R.D. at 313 (internal citations omitted). IGRA does not benefit MGM or regulate MGM; thus

MGM has no particular expertise or interest to offer in interpreting IGRA and will add nothing to resolution of the narrow controversy in this case.

D. MGM Has Not Complied With Fed R. Civ. P. 24(c) And Does Not Have A Colorable Claim Or Defense

MGM may not intervene as of right or on a permissive basis because it has failed to comply with Rule 24(c). Rule 24(c) requires that a motion to intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Moreover, "[w]hether of right or permissive, intervention under Rule 24 is conditioned by the Rule 24(c) requirement that the intervenor state a *well-pleaded* claim or defense to the action." *R.I. Fed'n of Teachers v. Norberg*, 630 F.2d 850, 854 (1st Cir. 1980) (emphasis added); 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* ("The proposed pleading must state a good claim for relief or a good defense"). MGM failed to submit its purported "claim" in an attached proposed pleading, and the "defense" that it submitted is not colorable.

MGM seeks to have it both ways. It seeks to intervene on the side of Defendants by presenting a defense in an answer (*see* MGM [Proposed] Answer, ECF No. 11-7) but also states it has a claim against the Defendants. *See* Mem., ECF No. 11-1, at 20 (discussing a purported claim *and* defense); MGM [Proposed] Answer, ECF No. 11-7 (not a complaint, cross-claim, or counterclaim). MGM has not submitted any proposed pleading with a claim, and thus its Motion to Intervene should be denied.

MGM's defense also fails to qualify under Rule 24(c). MGM's invented defense on behalf of Defendants does not comport with the actual facts or law of the case. MGM misconstrues the content of the September 15, 2017 letters by stating that the compact amendments were returned to the Tribes for "*failure to provide sufficient supporting documentation*." Mem., ECF No. 11-1, at 2 (emphasis added). The September 2017 letters

plainly do not state the compact amendments were returned because of insufficient documentation nor do they specifically identify any missing documentation.[11] Brown Decl., ECF No. 9-1, Ex. G; Butler Decl., ECF No. 9-9, Ex. G. Moreover, IGRA does not allow the Department to return a compact amendment because of missing documentation without disapproving it in compliance with IGRA. Pursuant to IGRA, the Department only has three options with respect to evaluating a compact amendment: it may approve, disapprove (for three reasons only, *see supra* note 1), or allow the amendment to become deemed approved. 25 U.S.C. § 2710(d)(8)(A)-(C). Here, the Department never approved or disapproved the compact amendments and they, therefore, are deemed approved.

MGM has the burden of presenting a colorable argument before it can intervene, particularly given it plainly seeks to disrupt and delay the action. *See R.I. Fed'n of Teachers*, 630 F.2d at 855 ("Although the requirement that the intervenors' legal theory have some merit in the case in which they seek to intervene places a burden on intervenors, the burden is justified by the possibility that the intervention will obstruct or delay vindication of the rights of the original parties."). MGM has not met this burden, and thus the Motion to Intervene should be denied.

[11] Thus, the Department's letter disapproving attempted amendments to the Cheyenne-Arapaho Tribes' compact, on which MGM relies, is wholly inapposite. *See* Mem., ECF No. 11-1, at 20 n.24; Letter from Kevin K. Washburn, Assistant Sec'y - 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/idc1-028608pdf. That letter specifically stated that the submission included neither a tribal resolution stating that the Tribe had approved the amendment in accordance with applicable tribal law nor a certification or other explanation demonstrating that the governor was empowered to bind the State. The Cheyenne-Arapaho failed to submit critical documentation of their authority to enter into the compact amendments. *Id.* Plaintiffs' submissions in contrast were fully supported. Brown Decl., ECF No. 9-1, Ex. G; Butler Decl., ECF No. 9-9, Ex. G.

E. Even If The Court Permits MGM To Intervene, MGM's Role Should Be Subject To Conditions

If the Court disagrees with Plaintiffs, at a minimum the Court should set restrictions on MGM's intervention to ensure the prompt adjudication of the matter without prejudice. *See, e.g.*, *WildEarth Guardians v. Salazar*, 272 F.R.D. 4, 20 (D.D.C. 2010) ("[e]ven where the Court concludes that intervention as a matter of right is appropriate, its inquiry is not necessarily at an end: district courts may impose appropriate conditions or restrictions upon intervenor's participation in the action").

MGM should not be allowed to pursue cross-claims or counterclaims. *See Fund for Animals*, 322 F.3d at 778 n.11 (describing with approval a district court's restriction of intervenors claims to "the claims raised by the original parties" and order barring intervenors from raising "collateral issues"); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 11 n.8 (D.D.C. 2009) (granting intervention of right but prohibiting intervenors from raising new claims or collateral issues); *Cty. of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 48 n.17 (D.D.C. 2007) (limiting intervention of right to claims within the scope of the complaint, but declining to impose other conditions). Given the extraneous issues it raises (*see supra* Sections II & IV.D), MGM should be limited to presenting arguments related to Plaintiffs' two causes of action. Additionally, MGM should not be allowed to seek additional time or alter the schedule by seeking leave of court.

V. Conclusion

For the foregoing reasons, MGM's Motion for Intervention should be denied.

Dated: March 5, 2018

Respectfully submitted,

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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 as well as counsel for putative intervenor, MGM Resorts Global Development LLC.

/s/ Tami Lyn Azorsky
Tami Lyn Azorsky