IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF

I. INTRODUCTION

Plaintiffs Mashantucket Pequot Tribe ("Mashantucket") and the State of Connecticut ("State") misstate Federal Defendants' position in this litigation in an attempt to persuade this Court that Federal Defendants have taken a position inconsistent with their position in *Stand Up for California! v. U.S. Department of the Interior*, No. 2:16-cv-02681-AWI-EPG, 2018 WL 3473975 (E.D. Cal. July 18, 2018). Plaintiff Mashantucket operates gaming pursuant to Class III gaming procedures prescribed by the Secretary ("Secretarial procedures") because the State refused to enter into a tribal-state compact with Mashantucket nearly thirty years ago. IGRA allows Class III gaming to take place pursuant to either tribal-state compacts or Secretarial procedures. Federal Defendants do not argue that approved Secretarial procedures are not the legal equivalent of tribal-state compacts or are inferior to tribal-state compacts, as Plaintiffs assert. Federal Defendants' position is simply that the plain language of IGRA's compact review and approval provision that requires the Secretary to approve or disapprove a tribal-state compact or compact amendment within forty-five days of submission, after which time the

compact or amendment is deemed approved, does not apply to Secretarial procedures or, as here, requests to amend Secretarial procedures. In other words, the legal impact of either authorization — a tribal-state compact or Secretarial procedures — is the same. The processes for arriving at the authorization, however, are different. Federal Defendants' position here and in *Stand Up* are not at odds, and therefore judicial estoppel does not apply.

II. LEGAL STANDARD

Judicial estoppel is an equitable doctrine applied at the court's discretion. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). "Courts may invoke judicial estoppel 'where a party assumes a certain position in a legal proceeding, succeeds in maintaining that position, and then, simply because his interests have changed, assumes a contrary position.'" *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 792 (D.C. Cir. 2010) (quoting *Comcast Corp. v. FCC,* 600 F.3d 642, 647 (D.C. Cir. 2010) and *New Hampshire,* 532 U.S.at 749 (alterations omitted)). The Supreme Court has cautioned that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," but provided "several factors [that] typically inform the decision whether to apply the doctrine in a particular case." *New Hampshire*, 532 U.S. at 750 (citation omitted). "First, a party's later position must be 'clearly inconsistent' with its earlier position." *Id.* (citation omitted). "Doubts about inconsistency often should be resolved by assuming there is no disabling inconsistency, so that the second matter may be resolved on the merits." *Comcast*, 600 F.3d at 647 (quoting 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4477, at 594 (2d ed. 2002)).

Second, the party must have "succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" *New*

Hampshire, 532 U.S. at 743. The D.C. Circuit has also held that there must be a meaningful connection between the two proceedings. *Moses*, 606 F.3d at 799 ("In short, a court may not invoke judicial estoppel against a party who has engaged in misconduct in a separate proceeding if that proceeding is unrelated to the current proceeding.").

"A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire*, 532 U.S. at 751.

III. BACKGROUND

A. The *Stand Up* Litigation

In 2016, the Secretary issued Secretarial procedures for the purpose of authorizing Class III gaming on a parcel of land in California owned by the United States in trust for the benefit of North Fork Rancheria of Mono Indians, a federally-recognized Indian tribe. *Stand Up*, 2018 WL 3473975, at *2. North Fork and California had been unable to negotiate and conclude a compact, and California did not consent to the mediator-selected compact. *Id.* The *Stand Up* plaintiffs brought suit against the Department of the Interior and other federal defendants to prevent gaming from taking place on the site, arguing that the Secretary's issuance of gaming procedures violated the Johnson Act, 15 U.S.C. § 1175, which "prohibits the possession or use of 'any gambling device . . . within Indian country.'" *Id.* at 5 (quoting 15 U.S.C. § 1175(a)). The plaintiffs argued that the "IGRA provides an exception to the general prohibition on use of slot machines in Indian country *only when* a valid Tribal-State compact has been entered into to govern gaming on the Indian land." *Id.* Thus, they argued that because North Fork's gaming was governed by Secretarial procedures instead of a tribal-state compact, the use of slot machines violated the Johnson Act. *Id.*

In response, the federal defendants argued "that gaming under Secretarial Procedures should be considered the functional equivalent of gaming under a Tribal-State compact." *Id.* at 6. They asserted that based on IGRA's purpose, and particularly the remedial process under which the Secretary issues procedures, "Secretarial procedures are designed to operate as a complete substitute to existence of an effective Tribal-State compact." *Id.*

The court concluded that Secretarial procedures are the legal equivalent of tribal-state compacts for purposes of the Johnson Act. *Id.* at *6–*8. To conclude otherwise "would result in internal inconsistencies within IGRA, . . . would render the issuance of Secretarial Procedures inoperative in every case, and . . . would undermine the carefully crafted statutory scheme and goals of IGRA and its remedial process." *Id.* at *6. In short, the court found that Class III gaming can be conducted pursuant to Secretarial procedures as an "alternative mechanism permitted under IGRA." *Id.* at *8 (quoting *Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226, 1236 (10th Cir. 2017)).

B. The Litigation at Bar

The original Plaintiffs in this case (Mashantucket, the Mohegan Tribe of Indians of Connecticut and the State) brought suit alleging that Federal Defendants had a duty to deem approved proposed amendments to the Mashantucket's Secretarial procedures and the tribal-state compact between the Mohegan Tribe and Connecticut under 25 U.S.C. § 2710(d)(8) because the Secretary did not expressly approve or disapprove the proposed amendments within forty-five days. Federal Defendants in this case moved for dismissal of all claims related to the Mashantucket. *See* Mot. for Partial Dismissal ("Mot. to Dismiss"), ECF No. 18.[1] Federal

[1] The motion is for partial dismissal because at the time, there were claims pending related to the Mohegan Tribe's tribal-state compact with Connecticut. Mohegan has since stipulated to

Defendants showed that the Mashantucket operate pursuant to Secretarial procedures, and the plain language of IGRA's "deemed approval" provision applies only to tribal-state compacts, not Secretarial procedures. Mot. to Dismiss at 2. IGRA's process for approving tribal-state compacts and amendments is different than the process for approving Secretarial procedures. *Id.* at 6–8. Because Mashantucket does not operate Class III gaming pursuant to a tribal-state compact, IGRA's "deemed approval" provision does not apply and Plaintiffs have therefore failed to establish this Court's subject matter jurisdiction over the case and failed to state a claim upon which relief can be granted. *Id.* at 8–10.

IV. ARGUMENT

Judicial estoppel should not apply here, as Plaintiffs cannot meet any of the elements. The *Stand Up* case and the litigation at bar posed different issues. Notwithstanding the differing issues, Federal Defendants' position has been consistent. Nothing in the *Stand Up* decision demonstrates that Federal Defendants have taken inconsistent positions, much less that the courts have been "misled." The two proceedings also are not connected, and Plaintiffs' own differing representations about the Secretarial procedures should be considered. Finally, Plaintiffs have not met the high standard for estoppel against the government.

A. Federal Defendants did not take an inconsistent position in *Stand Up*.

As an initial matter, Plaintiffs mischaracterize Federal Defendants' position in an effort to suggest that Federal Defendants have taken inconsistent positions. Federal Defendants' position in this litigation is that IGRA's requirements for approval or disapproval of tribal-state compacts or amendments do not apply to requests by a tribe to amend its Class III gaming procedures

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dismissal of its claims, ECF No. *, so the motion for partial dismissal seeks to dismiss all remaining claims in this case.

issued by the Secretary under IGRA's remedial procedures. *See* Mot. to Dismiss at 6–8; Reply Br. in Supp. of Mot. for Partial Dismissal ("Reply Br.") at 10–13, ECF No. 32. Plaintiffs expand that position to an argument that Secretarial procedures "are not the legal equivalent of negotiated compacts," and should be treated as "'second class compacts' that are not entitled to the same protections, safeguards, and legal status as negotiated compacts." Supp. Br. at 1, 8. Federal Defendants do not take and have not asserted the broad position Plaintiffs claim. Instead, Federal Defendants' position is that while the final prescribed Secretarial procedures and approved tribal-state compacts have the same legal effect under IGRA, the specific provisions of IGRA that address Secretarial approval, disapproval, or deemed approval of tribal-state compacts do not apply to Secretarial procedures. *See* Mot. to Dismiss at 6–8 (comparing 25 U.S.C. § 2710(d)(7) with § 2710(d)(8)).

1. *Stand Up* presented different issues than the case at bar.

The issues presented in the two cases differ greatly and thus Plaintiffs cannot establish that the Federal Defendants have taken "clearly inconsistent" positions. "Doubts about inconsistency often should be resolved by assuming there is no disabling inconsistency, so that the second matter may be resolved on the merits." *Comcast*, 600 F.3d at 647 (quoting 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4477, at 594 (2d ed. 2002)); *see also Winmar Constr., Inc. v. Kasemir*, 233 F. Supp. 3d 53, 58–59 (D.D.C. 2017) (finding that plaintiff's positions, "although somewhat inconsistent, [were] not clearly inconsistent to warrant the equitable application of judicial estoppel").

Stand Up addressed whether Class III gaming conducted pursuant to Secretarial Procedures violates the Johnson Act's prohibition on Class III gaming not conducted pursuant to a tribal-state compact. In other words, are Secretarial procedures an alternative legal mechanism to tribal-state compacts for Class III gaming? The issue in the case at bar is whether the specific

provisions in IGRA regarding "deemed approval" of tribal-state compacts also apply to Secretarial procedures. Plaintiffs argue that the Federal Defendants violated IGRA, 25 U.S.C. § 2710(d)(8), which provides that the Secretary must approve or disapprove a "Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe" within forty-five days of its submission to the Secretary for approval, or have the compact be deemed approved to the extent it is consistent with IGRA. Federal Defendants have argued that the plain language of those specific provisions for approval of tribal-state compacts do not apply to a request for an amendment of Secretarial procedures. Mot. to Dismiss at 6–8. This case has solely to do with whether the forty-five day deadline in IGRA for approval or disapproval of tribal-state compacts applies to amendment of Secretarial procedures. It does not address whether the Johnson Act allows gaming pursuant to Secretarial procedures.

In addition, even setting aside that the issues are different, Federal Defendants' position is consistent between the two cases. The Federal Defendants' brief supporting its motion for summary judgment in *Stand Up* states that "there is not a hard deadline imposed on the Secretary to prescribe Procedures." Mem. in Supp. of Fed. Defs.' Mot. for Summ. J. at 26 (filed in this case as ECF 54 at 43). That is fully consistent with the Federal Defendants' argument here that IGRA's forty-five day deadline to approve or disapprove tribal-state compacts does not apply to Secretarial procedures. *See* Mot. to Dismiss at 6 ("IGRA does not require that the Secretary take action on amendments to gaming procedures issued by the Secretary within a specific period of time."); *id.* at 9 ("IGRA contains no mandatory deadlines — or any deadlines at all — for the approval or disapproval of proposed amendments to Secretarial procedures.").

Similarly, Federal Defendants' briefing in this case discusses the Johnson Act and specifically notes the Secretary's position that under the Johnson Act, Secretarial procedures

have the same legal effect as tribal-state compacts. *See* Reply Br. at 10–12 ("The Secretary has concluded that criminal prohibitions in section 23 of IGRA, 25 U.S.C. § 2710(d)(6), and in the Johnson Act, 18 U.S.C. § 1166, making gaming in Indian country illegal unless conducted under a tribal-state compact that is in effect also exempt gaming conducted under procedures."). Federal Defendants explained that this position — that Secretarial procedures are a full legal substitute for tribal-state compacts for the purposes of criminal prohibitions on gaming — is consistent with the argument that the approval deadlines in IGRA for tribal-state compacts do not apply to Secretarial procedures. *Id.* at 11–12 ("Further, a finding that procedures are 'a full substitute' for a tribal-state compact for the purposes of criminal prohibitions on gaming is not the same as concluding that all reference to 'tribal-state compact' in IGRA include procedures."). Federal Defendants also reiterated the same argument in response to Plaintiffs' notice of supplemental authority and noted that the Secretary interprets IGRA to allow gaming under either prescribed Secretarial procedures or a tribal-state compact. *See* Fed. Defs.' Resp. to Pls.' Notice of Suppl. Auth. at 2, ECF No. 50.

Plaintiffs' assertion that Federal Defendants have taken inconsistent positions on these issues is wrong on all counts. This Court should conclude that Federal Defendants have not taken positions that are "clearly inconsistent," and reject Plaintiffs' judicial estoppel argument.

B. The *Stand Up* court did not accept an argument inconsistent with those made here.

For the same reasons, the second *New Hampshire* factor — that the Federal Defendants succeeded in maintaining a certain position, creating the perception that the courts were misled — is also not met here. While Federal Defendants prevailed in *Stand Up*, the court did not find that IGRA's deadlines and deemed approval provision for tribal-state compacts applies to Secretarial procedures. Instead, the court held that Secretarial procedures must be treated as a functional equivalent of a tribal-state compact, and noted that "many courts recognize that

Secretarial Procedures issued at the final stage of IGRA's remedial process operates as an 'alternative mechanism permitted under IGRA' for conducting class III gaming." 2018 WL 3473975, at *8 (collecting cases). The court did not address whether tribal-state compacts and Secretarial procedures must follow the same process for approval, much less find that § 2710(d)(8)'s deadlines and deemed approval provision applies to Secretarial procedures.

Plaintiffs also have not shown that the two proceedings are connected, given that the cases involve different issues, different agency actions, different states, and different plaintiffs. *See Moses*, 606 F.3d at 799 (noting that "a court may not invoke judicial estoppel against a party who has engaged in misconduct in a separate proceeding if that proceeding is unrelated to the current proceeding").

C. Applying judicial estoppel would be inappropriate given Plaintiffs' representations about the Mashantucket's Secretarial procedures.

Judicial estoppel is an equitable doctrine, to be invoked at the court's discretion. *See id.* In this case, applying the doctrine would be inappropriate given Plaintiffs' own changed positions about whether the Mashantucket Secretarial procedures are equivalent to a tribal-state compact. *See Gagliardi v. Bennett*, No. Civ. A. 96-5469, 1998 WL 544954, at *5 (E.D. Penn. Aug. 21, 1998) (declining to apply judicial estoppel because "both parties have asserted inconsistent legal theories"); *Vaughn v. Fed. Express Corp.*, No. CIV A. 96-1259, 1997 WL 625495, at *2 (E.D. La. Oct. 7, 1997) ("As the positions of both parties in this action are inconsistent with their statements in the joint petition, the Court declines to exercise the doctrine of judicial estoppel in favor of either party.").

Plaintiffs argued in their opposition to Federal Defendants' motion for partial dismissal that the Mashantucket and Connecticut operate under a de facto tribal-state compact. As shown in Federal Defendants' reply brief in support of their motion for partial dismissal, both

Mashantucket Pequot and Connecticut have previously asserted that the Mashantucket's procedures are not the equivalent of a tribal-state compact. *See* Reply Br. at 15–17. The Mashantucket have specifically argued in federal court that they did not waive their sovereign immunity because they operate pursuant to Secretarial procedures, not a compact. *See id.* at 16; *Tassone v. Foxwoods Resort Casino*, No. 3:11-01718-WWE, 2012 WL 12548954 (D. Conn. filed Mar. 23, 2012); *Tassone v. Foxwoods Resort Casino*, No. 12-2436-CV, 2012 WL 6622638, at *17 (2d Cir. filed Dec. 12, 2012). Given Plaintiffs' inconsistent positions, this Court should exercise its discretion and decline to apply judicial estoppel against Federal Defendants.

D. Plaintiffs have not met the high bar for estoppel against the government.

The Supreme Court has recognized the well-settled rule "that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Cmty. Health Servs. Of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984); *see also New Hampshire*, 532 U.S. at 755 (noting that judicial estoppel may not apply when "broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests" (citation and internal quotation marks omitted); *Mingo Logan Coal Co. Inc. v. U.S. Envtl. Prot. Agency*, 70 F. Supp. 3d 151, 174 (D.D.C. 2014)*, aff'd sub nom. Mingo Logan Coal Co. v. Envtl. Prot. Agency*, 829 F.3d 710 (D.C. Cir. 2016) (citing *Heckler* and *New Hampshire*). "Where courts have permitted equitable defenses to be raised against the government, they have required that the agency's misconduct be egregious and the resulting prejudice to the defendant rise to a constitutional level." *Bartko v. SEC*, 845 F.3d 1217, 1227 (D.C. Cir. 2017) (quoting *SEC v. Elecs. Warehouse, Inc.*, 689 F. Supp. 53, 73 (D. Conn. 1988), *aff'd*, 891 F.2d 457 (2d Cir. 1989)).

Plaintiffs have not made a sufficiently strong showing here. Federal Defendants' argument in this case is based on IGRA's text, the regulations, and principles of statutory

construction. Given the differences in the issues presented in *Stand Up* and the case at bar and the basis for Federal Defendants' arguments, even if the Court finds that Federal Defendants took inconsistent positions, it should not find that Federal Defendants engaged in egregious misconduct.

Nor can Plaintiffs show that they would be unfairly harmed "at a constitutional level" by the *Stand Up* decision, particularly given the lack of relevance to the case at bar. There is no issue in this case regarding whether Class III gaming can take place under Secretarial procedures in light of the Johnson Act.

V. CONCLUSION

Despite Plaintiffs' assertions otherwise, Federal Defendants have not taken inconsistent positions. The issues posed in *Stand Up* and the case at bar are different, but Federal Defendants have nonetheless been consistent in their position. Finalized Secretarial procedures and tribal-state compacts have the same legal impact as IGRA provides for Class III gaming under both processes. IGRA, however, provides two different procedures for the adoption of tribal-state compacts and Secretarial procedures and amendments thereto. In addition, the two cases are not connected and Plaintiffs have themselves taken inconsistent positions about the Mashantucket Secretarial procedures. In short, Plaintiffs have not cleared the high hurdle of judicial estoppel running against the government and this Court should reject Plaintiffs' argument.

Respectfully submitted this 24th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 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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