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

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(a), State of Connecticut, Mohegan Tribe of Indians of Connecticut, and Mashantucket Pequot Tribe (collectively "Plaintiffs") respectfully move this Court for entry of an Order granting summary judgment to Plaintiffs. Plaintiffs seek an order (1) declaring that Defendants acted in an arbitrary and capricious manner in violation of the Indian Gaming Regulatory Act ("IGRA") and its implementing regulations by failing to treat their compact amendments and related Memoranda of Understanding (hereinafter the "compact amendments") as deemed approved on or after September 16, 2017, and (2) ordering Defendants to publish notice of the deemed approval of the compact amendments in the Federal Register immediately. There are no genuine issues of material fact, and Plaintiffs are entitled to judgment as a matter of law pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(1), (2)(A), (C).

Pursuant to Local Civil Rule 7, the grounds supporting this Motion are set forth in a Memorandum of Points and Authorities, a Statement of Undisputed Material Facts, the Declaration of Kevin P. Brown with exhibits, and the Declaration of Rodney Butler with exhibits.

Plaintiffs respectfully request that this Court enter the Proposed Order attached.

Dated: December 22, 2017

Respectfully submitted,

STATE OF CONNECTICUT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the (1) Plaintiffs' Motion for Summary Judgment; (2) Memorandum and Points of Authority in Support of Plaintiffs' Motion for Summary Judgment; (3) Plaintiffs' Statement of Undisputed Material Facts; (4) Declaration of Kevin B. Brown; (5) Declaration of Rodney Butler; and (6) Proposed Order, were served this 22nd day of December, 2017 via First Class Certified Mail, postage prepaid, on:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

State of Connecticut, Mohegan Tribe of Indians of Connecticut, and Mashantucket Pequot Tribe, Plaintiffs, v. Ryan Zinke, in his official capacity as Secretary of the Interior, and the U.S. Department of the Interior, Defendants.	Civil Action No. 17-cv-02564-RC

MEMORANDUM AND POINTS OF AUTHORITY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. Introduction

Secretary of the Interior Ryan Zinke and his delegates in the U.S. Department of the Interior (the "Department") failed to comply with the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA") and its implementing regulations when considering amendments to existing Tribal-State gaming compacts submitted for review and approval. IGRA and its implementing regulations provide that, in the event the Secretary fails to affirmatively approve or disapprove a submitted compact amendment within 45 days of receipt, the amendment becomes deemed approved by operation of law. Thereafter the Secretary must publish, no later than 90 days after receipt of the proposed amendments, notice in the Federal Register that the amendment is deemed approved. IGRA and its implementing regulations leave the Secretary no discretion to proceed in any other manner. The Mohegan Tribe of Indians of Connecticut and the Mashantucket Pequot Tribe (the "Tribes") submitted compact amendments entered into with the State of Connecticut (the "State") for approval more than 90 days ago, but, after neither approving nor disapproving them, the Secretary failed to treat the submitted amendments as deemed approved and publish notice to this effect in the Federal Register. Deemed approved compact amendments do not take effect until publication, and thus the Secretary's failure to act is causing the Plaintiffs harm. Given that the Secretary lacks discretion to decline to publish notice, Plaintiffs request that the Court compel the Defendants to acknowledge that the compact amendments are deemed approved and publish notice of the deemed approval in the Federal Register.

II. Background

A. Statutory Background

IGRA provides a comprehensive regulatory framework for Indian gaming activities on tribes' reservations or other qualifying Indian lands, as defined in 25 U.S.C. § 2703(4), that seeks

to balance the interests of tribal governments, the states, and the federal government. IGRA provides that an Indian tribe may conduct Class III gaming on Indian lands in accordance with a gaming compact with the state in which those lands are located. Pursuant to IGRA, Congress directed the Secretary to review these compacts and amendments, but under strict deadlines and conditions. The Department has imposed yet additional deadlines and requirements through notice and comment rulemaking. *See* 25 C.F.R. Part 293.

IGRA requires that the Secretary must either approve or disapprove a compact within 45 days of submittal. 25 U.S.C. § 2710(d)(8)(A)-(C). Regulations promulgated by the Department clarify that these statutory requirements also apply to all compact amendments. 25 C.F.R. §§ 293.4(b), 293.12. Pursuant to IGRA and its implementing regulations, 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. If, within the 45 days, the Secretary fails to explicitly approve or disapprove for one of these three reasons, the compact or amendment becomes deemed approved by operation of law, or more specifically "*shall* be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter [IGRA]." 25 U.S.C. § 2710(d)(8)(C) (emphasis added); *see* 25 C.F.R. § 293.12 (extending this mandate to compact amendments).

For a compact or amendment that is affirmatively approved, or deemed approved by operation of law, IGRA and its implementing regulations require that the Secretary "*shall* publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved . . . ." 25 U.S.C. § 2710(d)(8)(D) (emphasis added); *see* 25 C.F.R. §

293.15 (extending this requirement to compact amendments). The Secretary must publish such notice of approval in the Federal Register within 90 days from the date the compact or amendment is received by the Office of Indian Gaming. 25 C.F.R. § 293.15(b). A compact or compact amendment takes effect on the date that notice of its approval is published in the Federal Register. 25 U.S.C. § 2710(d)(3)(B); 25 C.F.R. § 293.15(a). The Secretary has no authority to avoid IGRA's regulatory deadline for publication in the Federal Register by declining to take action and returning the compact or compact amendment. *See* 25 U.S.C. § 2710(d)(8)(D); 25 C.F.R. § 293.15. Nor does the Secretary have authority to refuse to publish notice of an approved or deemed approved compact or compact amendment in the Federal Register. 25 U.S.C. § 2710(d)(8)(D); 25 C.F.R. § 293.15. In sum, to ensure prompt decision-making by the Secretary, Congress imposed a statutory scheme through IGRA that strictly limits the Secretary's discretion in reviewing compacts and compact amendments.

B. Factual Background

The Tribes conduct Indian gaming in Connecticut pursuant to Tribal-State compacts approved by the Secretary. The Secretary reviewed and approved the Mohegan Tribe's Tribal-State Compact with the State and published notice of approval of the compact in the Federal Register in 1994. 59 Fed. Reg. 65,130 (Dec. 16, 1994). The Secretary reviewed the mediator-selected Tribal-State compact for the Mashantucket Pequot Tribe and the State and with minor technical amendments published notice of the compact as prescribed procedures in the Federal Register in 1991.[1] 56 Fed. Reg. 24,996 (May 31, 1991).

The Tribes have plans to build and operate a new commercial casino on non-Indian lands in East Windsor, Connecticut through a joint venture, under state law. As part of the planning process, the Plaintiffs sought to clarify that this new project, and the terms of the State law

[1] These Secretary-approved compacts are hereinafter referred to as "the compacts."

authorizing it, would not compromise the Tribes' and the State's existing obligations to each other under their respective compacts governing gaming on their Indian lands. Thus, in 2015, the State and the Mohegan Tribe and the State and the Mashantucket Pequot Tribe began negotiating respective amendments to their compacts and related Memoranda of Understanding between each Tribe and the State, together hereinafter "compact amendments," to address this issue. Declaration of Kevin P. Brown ("Brown Decl.") ¶ 3; Declaration of Rodney Butler ("Butler Decl.") ¶ 3.

The resulting compact amendments reflect the parties' negotiated agreements with one another that State legislation authorizing a state-regulated casino on non-reservation land operated by a business entity jointly and exclusively owned by the Tribes does not alter or interfere with the parties' existing compact obligations to each other relating to the Tribes' IGRA-based gaming on their reservations, as those obligations are spelled out in the compacts. In particular, the compact amendments clarify that the State legislation does not alter longstanding agreements among the Plaintiffs whereby the Tribes obtained the exclusive right to operate video facsimile games within the State, and in return the Tribes agreed to compensate the State by sharing a percentage of the revenue derived from these machines.

The Department has long been aware of, and has expressed no concerns with, the Plaintiffs' plans. Through letters dated April 11, 2016 and April 12, 2016, the Tribes requested technical assistance from the Department's Office of Indian Gaming concerning the proposed compact amendments.[2] Brown Decl. ¶ 4, Ex. A; Butler Decl. ¶ 4, Ex. A. Through separate

[2] The Office of Indian Gaming regularly provides technical assistance to Indian tribes with respect to potential compact provisions before the actual submission of such compacts, based on long-standing policy that informal advice provided by the Department is very useful to tribes and states in crafting compact provisions that will not be objectionable to the Department. *See* Letter dated November 12, 2002, from Secretary Gale Norton to Cyrus Shindler, President, Seneca

letters dated April 19, 2017, the Tribes again requested technical assistance on the compact amendments. Brown Decl. ¶ 6, Ex. C; Butler Decl. ¶ 6, Ex. C. The Department provided technical assistance to the Tribes on the compact amendments through letters dated April 25, 2016, and May 12, 2017. Brown Decl. ¶¶ 5, 7, Ex. B, Ex. D; Butler Decl. ¶¶ 5, 7, Ex. B, Ex. D.

As set forth in the Plaintiffs' Statement of Undisputed Material Facts, a minimum of facts are material to this dispute, and upon consideration of those facts, judgment granting the requested relief is required:

- First, by separate letters dated July 31, 2017, and August 1, 2017, the Tribes sent the Office of Indian Gaming formal requests for approval of their compact amendments. Plaintiffs' Statement of Undisputed Material Facts ¶ 3 (hereinafter "Plaintiffs' Statement").
- The compact amendments were approved and executed by the appropriate authorities of the Tribes in accordance with the applicable tribal laws. *Id.* ¶ 4.
- The compact amendments also were approved and executed by the appropriate authorities of the State of Connecticut in accordance with Conn. Pub. Act No. 17-89 § 14(c)(1)(A), (c)(3), (c)(4), which was signed into law on June 27, 2017. *Id.* ¶ 5.
- Defendants received the Tribes' requests for approval of the compact amendments on August 2, 2017. Plaintiffs' Statement ¶ 6.
- The Secretary did not affirmatively approve the compact amendments within 45 days of receipt, *i.e.*, by September 16, 2017. *Id.* ¶¶ 7-8.

Nation, footnote 1, *available at* https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc-038394.pdf.

- The Secretary did not disapprove the compact amendments within 45 days of receipt, *i.e.*, by September 16, 2017. *Id.* ¶¶ 7, 9.
- Instead, then Acting Assistant Secretary - Indian Affairs Michael S. Black sent the Tribes substantially identical letters dated September 15, 2017, in which the Department returned the compact amendments without action. *Id.* ¶ 10.
- The Secretary has not treated the compact amendments as deemed approved. *Id.* ¶ 11.
- The Secretary did not publish notice of the deemed approval of the compact amendments in the Federal Register on or before 90 days after receipt, *i.e.*, October 31, 2017. *Id.* ¶ 12.
- The Secretary has not published notice of the deemed approval of the compact amendments since October 31, 2017 either. *Id.* ¶ 13.

III. Applicable Legal Standards

A. Legal Standard For A Motion For Summary Judgment

Summary judgment must be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). In particular, summary judgment is appropriate when "the issues presented for the Court's resolution are primarily questions of law." *Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 42 (D.D.C. 2013) (citations omitted); *see also In re Medicare Reimbursement Litig.*, 414 F.3d 7, 10, 13 (D.C. Cir. 2005) (affirming grant of summary judgment to plaintiffs to compel the Secretary of Health and Human Services to act).

A dispute of fact does not preclude summary judgment if the fact is not material. A fact is only material if it comprises an essential element of a claim or defense that will impact the outcome of the suit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex,* 477 U.S. at 322. Importantly, the nonmoving party cannot rely on conclusory statements or allegations. *See Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993) (finding that a "mere unsubstantiated allegation" does not create a "genuine issue of fact") (internal quotations omitted). Finally, an issue of material fact cannot be considered genuine if it is "merely colorable" or "not significantly probative." *Anderson*, 477 U.S. at 249-50 (internal citations omitted).

B. Legal Standard for Judicial Review Under The APA

The Administrative Procedure Act ("APA") provides that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, within the meaning of the relevant statute is entitled "to judicial review thereof." 5 U.S.C. § 702. Under the APA, an agency's decision must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Tourus Records, Inc. v. Drug Enforcement Admin.*, 259 F.3d 731, 736 (D.C. Cir. 2001). An agency action is considered to be arbitrary or capricious if

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

Additionally, the APA defines reviewable "agency action" to include an agency's "failure to act." 5 U.S.C. § 551(13). Section 706 of the APA provides that a court may "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The "unlawfully

withheld" provision provides the Court with authority to compel an agency "to take a *discrete* agency action that it is *required* to take" because it is "demanded by law (which includes, of course, agency regulations that have the force of law)." *Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55, 64-65 (2004) (emphasis in original). Therefore, a party may invoke the APA to compel an agency to perform a clear, mandatory, ministerial nondiscretionary act. *See id.*

IV. The State And The Tribes Are Entitled To Summary Judgment

IGRA and its implementing regulations allow the Secretary only two options for action. He can either (1) approve the compact amendments or (2) disapprove them, but only for one of three permissible reasons. IGRA does not allow the Secretary to create for himself a third option of simply "returning" the compact amendments. Accordingly, when the Secretary failed to approve or disapprove the compact amendments, they became deemed approved by operation of law. Yet the Secretary continues to refuse to publish notice of the deemed approval of the compact amendments in the Federal Register according to the deadlines set by law. IGRA allows the Secretary no such discretion, and his continued failure to publish is contrary to law. The APA provides a check on such unbridled agency action, and the Plaintiffs are entitled to obtain relief to ensure the Secretary complies with congressional mandates and the Department's own regulations which have the force and effect of law.

A. The Secretary Violated IGRA By Failing To Treat The Compact Amendments As Deemed Approved

In reviewing the Tribes' requests for approval of compact amendments, the Secretary violated IGRA and its implementing regulations. Under IGRA and its implementing regulations, the Secretary was limited to two courses of action in responding to the Tribes' requests for approval of their compact amendments. The Secretary could either (1) affirmatively approve the compact amendments, or (2) affirmatively disapprove the compact amendments for any of the

three permissible reasons provided by IGRA and its implementing regulations: (i) they violate IGRA, (ii) they violate any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or (iii) they violate the trust obligations of the United States to Indians. *See* 25 U.S.C. § 2710(d)(8)(B); 25 C.F.R. § 293.14. IGRA and its regulations required the Secretary to make this decision within 45 days of receipt of the request for approval. 25 U.S.C. § 2710(d)(8)(C); 25 C.F.R. §§ 293.10(a), 293.11.[3] Thus, through IGRA, Congress circumscribed the Secretary's discretion, and through the Department's own regulations, the Secretary's discretion is further constrained. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 295–96 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.'"); *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. E.P.A.*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (finding it is "'axiomatic'. . . 'that an agency is bound by its own regulations.'"); *Fuller v. Winter*, 538 F. Supp. 2d 179, 186 (D.D.C. 2008) ("It is a fundamental principle of administrative law that an agency is bound to adhere to its own regulations. . . . Indeed, failure to do so can lead to arbitrary and capricious decision-making in violation of the APA.") (internal citations omitted). But the Secretary has not followed these mandates in reviewing Plaintiffs' submission of compact amendments.

The Secretary received the Plaintiffs' requests for approval of the compact amendments on August 2, 2017. Plaintiffs' Statement ¶ 6. IGRA and its implementing regulations required an affirmative approval or disapproval in writing within 45 days, or by September 16, 2017. *Id.*

[3] Congress' regulatory scheme for Class III gaming relies on tribal and state governments reaching carefully-crafted agreements on the regulation of that gaming. As one of IGRA's co-sponsors, Senator Daniel Evans, explained, the tribal-state compacting provisions "intend[] that two sovereigns will sit down together in a negotiation on equal terms and at equal strength and come up with a method of regulating Indian gaming." 134 Cong. Rec. 24027 (Sept. 15, 1988). IGRA's 45 day rule ensures that inaction by the Secretary will not delay the implementation of these mutually-agreed upon regulatory agreements.

¶ 8; 25 U.S.C. § 2710(d)(8)(C); 25 C.F.R. §§ 293.10(a), 293.10(b), 293.11. But the Secretary neither approved nor disapproved the compact amendments in writing by September 16, 2017. Plaintiffs' Statement ¶¶ 8-9.

Rather, the Department sent the Tribes substantially identical letters dated September 15, 2017 in which the Department stated it was returning the compact amendments. *Id.* ¶ 10. The letters dated September 15, 2017 do not use the terms "approve" or "disapprove," nor does their content remotely suggest either course of action. *Id.* ¶ 10. Neither IGRA nor its regulations contemplate "returning" a compact amendment unconnected to an affirmative decision to approve or disapprove. "Returning" a compact or compact amendment is neither an approval nor a disapproval of the Tribes' requests. Indeed, the Department *explicitly acknowledged* in its letter that it was taking no action on the compact amendments. Accordingly, the compact amendments were deemed approved by operation of law on September 16, 2017. 25 U.S.C. § 2710(d)(8)(C); 25 C.F.R. § 293.12.

Despite not issuing an approval or a disapproval for any of the permissible reasons allowed by IGRA, the Secretary has failed to treat the compact amendments as deemed approved as evidenced by his failure to publish notice of deemed approval in the Federal Register within 90 days of receipt of the request for approval – October 31, 2017. 25 C.F.R. § 293.15(b) (requiring publication within 90 days for receipt). The Secretary's failure to recognize and treat the compact amendments as deemed approved is not in accordance with law, is arbitrary and capricious, and is short of statutory right. 5 U.S.C. §§ 706(2)(A), (C). Accordingly, the Plaintiffs are entitled to relief pursuant to Sections 706(2)(A) and 706(2)(C) of the APA, and the Court should declare the compact amendments deemed approved by operation of law on September 16, 2017.

B. The Secretary Unlawfully Withheld Agency Action That Was Required And Nondiscretionary

The Secretary had a clear, mandatory legal duty to publish notice of deemed approval of the Plaintiffs' compact amendments in the Federal Register by October 31, 2017, but unlawfully withheld this agency action. Under Section 706(1), agency action is "unlawfully withheld . . . where the law makes 'a specific unequivocal command,' and the requirement is for a 'precise, definite act about which an official ha[s] no discretion whatever.'" *Skalka v. Kelly*, 246 F. Supp. 3d 147, 152 (D.D.C. 2017) (quoting *S. Utah Wilderness Alliance*, 542 U.S. at 63). The Court must grant relief because IGRA and its implementing regulations require publication, the Secretary has no discretion to ignore that mandate, and the Secretary violated the deadlines set by the statute and implementing regulations.

IGRA requires the Secretary to publish notice of the deemed approval of a compact amendment: "[t]he Secretary *shall* publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph." 25 U.S.C. § 2710(d)(8)(D) (emphasis added). The implementing regulations, which clarify that this rule extends to compact amendments, further specify and provide that:

> (a) An approved or considered-to-have-been-approved compact or amendment takes effect on the date that notice of its approval is published in the Federal Register.
>
> (b) The notice of approval *must* be published in the Federal Register within 90 days from the date the compact or amendment is received by the Office of Indian Gaming.

25 C.F.R. § 293.15 (emphasis added). Both the statute and implementing regulations include a specific command, not a discretionary option.[4]

[4] This specific command, like the requirement that the Secretary make his approval or disapproval decision within 45 days of receipt, fulfills Congress' intent that the Department not prevent the two cooperating sovereigns — the tribe and the state — from deciding how Class III

The Secretary does not have *any* discretion to refuse to act when Congress uses "shall" to impose a mandatory duty upon the agency or official. The courts have made clear that when Congress uses the word "shall" in a statute, it imposes a mandatory duty upon the subject of the command. *See United States v. Monsanto*, 491 U.S. 600, 607 (1989) (by using "shall" in civil forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied"); *Pierce v. Underwood*, 487 U.S. 552, 569-70 (1988) (Congress' use of "shall" in a housing subsidy statute constitutes "mandatory language"); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 n.15 (1981) (same under Fair Labor Standards Act); *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 41 (D.D.C. 1999), *aff'd & remanded by Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001) ("It is clear that 'shall' places a mandatory duty on the Secretary of the Interior to take the enumerated action. Shall means shall.") (citing *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999)). Thus, in Section 2710(d)(8)(D), Congress *required* that the Secretary publish notice of any deemed approval in the Federal Register; the Secretary cannot stray from that statutory command.

Despite not having discretion to avoid publishing, the Secretary ignored the legal deadlines for action. Violating a clear nondiscretionary legal deadline is agency action "unlawfully withheld." *See, e.g.*, *Skalka*, 246 F. Supp. 3d at 152; *Forest Guardians*, 174 F.3d at 1190-91. Pursuant to IGRA and its implementing regulations, the compact amendments became deemed approved when the 45-day review period expired. 25 U.S.C. § 2710(d)(8)(C); 25 C.F.R. § 293.12. The Secretary was then required to perform the mandatory ministerial act of publishing notice of the deemed approval in the Federal Register within 90 days from the date that the Office of Indian Gaming received the compact amendments – *i.e.*, on or before October

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gaming may proceed on Indian lands in furtherance of tribal self-government and economic independence. *See supra* note 3.

31, 2017. *See* 25 U.S.C. § 2710(d)(8)(D); 25 C.F.R. § 293.15(b); Plaintiffs' Statement ¶¶ 11-12. The Secretary is bound by both Congress's command and the Department's own regulations interpreting IGRA's mandatory publication requirement and setting a specific 90-day deadline for that act. *See Chrysler Corp.*, 441 U.S. at 295–96; *Nat'l Envtl. Dev. Ass'n's Clean Air Project*, 752 F.3d at 1009; *Fuller*, 538 F. Supp. 2d at 186. The Secretary nevertheless failed to publish notice of the compact amendments as deemed approved in the Federal Register by October 31, 2017. Plaintiffs' Statement ¶ 12.

Because the Secretary failed to take a mandatory nondiscretionary act with a clear deadline, the Secretary "unlawfully withheld" action under Section 706(1) of the APA.[5] Accordingly, the Plaintiffs seek an order compelling the Secretary to publish notice of the deemed approval. 5 U.S.C. § 706(1) ("reviewing court *shall* compel agency action unlawfully withheld or unreasonably delayed") (emphasis added). The APA's use of the word "shall" places a mandatory duty on this Court, just as IGRA's use of "shall" places a mandatory duty on the Secretary.[6]

[5] It is also "arbitrary and capricious" for the Secretary to violate the Department's own regulatory deadlines. *Nat'l Envtl. Dev. Ass'n's Clean Air Project*, 752 F.3d at 1009 (An agency's action is arbitrary and capricious "if the agency fails to comply with its own regulations.") (internal quotations omitted)); *see also Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 378 (D.D.C. 2017) (holding that the National Park Service "violated the unambiguous language" of its own regulations rendering its "decision arbitrary and capricious"); *Environmentel, LLC v. FCC*, 661 F.3d 80, 84-85 (D.C. Cir. 2011) (finding it is arbitrary and capricious for an agency to fail to comply with its own regulations).

[6] Alternatively, relief is available under the Mandamus and Venue Act. That Act grants district courts original jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. The standard by which a court reviews action unlawfully withheld by an agency is essentially the same under both 5 U.S.C. § 706(1) and the Mandamus and Venue Act, 28 U.S.C. § 1361. *See, e.g.*, *Skalka*, 246 F. Supp. 3d at 152 (citing *S. Utah Wilderness Alliance*, 542 U.S. at 63-64). Mandamus relief is available if "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the

V. Conclusion

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Summary Judgment, and (1) declare that Defendants violated IGRA and its implementing regulations by failing to treat the compact amendments, as defined herein, as deemed approved on or after September 16, 2017, and (2) order Defendants immediately to publish notice of the deemed approval of these compact amendments, as submitted by the Tribes, in the Federal Register.

Dated: December 22, 2017

Respectfully submitted,

STATE OF CONNECTICUT

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plaintiff." *In re Medicare Reimbursement Litig.*, 414 F.3d at 10 (citations omitted). As with Section 706(1), the Court can compel nondiscretionary duties pursuant to its mandamus authority. *See Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 121 (1988). Given the Secretary had a clear, mandatory, nondiscretionary duty to publish notice of deemed approval in the Federal Register, mandamus relief is appropriate.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

State of Connecticut, Mohegan Tribe of Indians of Connecticut and Mashantucket Pequot Tribe, Plaintiffs, v. Ryan Zinke, in his official capacity as Secretary of the Interior, and the U.S. Department of the Interior, Defendants.	Civil Action No. 17-cv-02564-RC **Oral Argument Requested**

PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

1. Secretary of the Interior Bruce Babbitt reviewed and approved the Mohegan Tribe's Tribal-State Compact with the State of Connecticut and published notice of approval of the compact in the Federal Register on December 16, 1994. 59 Fed. Reg. 65,130 (Dec. 16, 1994).

2. Secretary of the Interior Manuel Lujan reviewed the mediator-selected Tribal-State compact for the Mashantucket Pequot Tribe and the State of Connecticut and with minor technical amendments published notice of the compact as prescribed procedures in the Federal Register on May 31, 1991. 56 Fed. Reg. 24,996 (May 31, 1991).

3. By separate letters dated July 31, 2017, and August 1, 2017, the Mohegan Tribe and Mashantucket Pequot Tribe sent the Office of Indian Gaming formal requests for approval of amendments to their compacts and related Memoranda of Understanding (hereinafter the "compact amendments") pursuant to IGRA and its implementing regulations. Decl. of Kevin P. Brown ¶ 8, Ex. E; Decl. of Rodney Butler ¶ 8, Ex. E.

4. The compact amendments were approved and executed by the appropriate authorities of the Tribes in accordance with the applicable tribal laws. Decl. of Kevin P. Brown ¶ 10; Decl. of Rodney Butler ¶ 10.

5. The compact amendments also were approved and executed by the appropriate authorities of the State of Connecticut in accordance with Connecticut Public Act No. 17-89 § 14(c)(1)(A), (c)(3), (c)(4), which was signed into law on June 27, 2017. *See* Decl. of Kevin P. Brown ¶ 9, Ex. F (Mohegan amendments signed by the Governor); Decl. of Rodney Butler ¶ 9, Ex. F (Pequot amendments signed by the Governor); H.R.J. Res. 301, 2017 Gen. Assemb., Spec. Sess., (Conn. 2017) (approving the compact amendments signed by the Governor).

6. Defendants received the Tribes' requests for approval of the compact amendments on August 2, 2017. Decl. of Kevin P. Brown ¶¶ 8-9, Ex. F; Decl. of Rodney Butler ¶¶ 8-9, Ex. F.

7. The 45-day review period ran from August 2, 2017 to September 16, 2017. Decl. of Kevin P. Brown ¶ 13; Decl. of Rodney Butler ¶ 13.

8. The Secretary did not affirmatively approve the compact amendments on or before September 16, 2017, within 45 days of receipt. Decl. of Kevin P. Brown ¶ 13, Ex. G; Decl. of Rodney Butler ¶ 13, Ex. G.

9. The Secretary did not disapprove the compact amendments on or before September 16, 2017, within 45 days of receipt. Decl. of Kevin P. Brown ¶ 13, Ex. G; Decl. of Rodney Butler ¶ 13, Ex. G.

10. Instead, then Acting Assistant Secretary - Indian Affairs Michael S. Black sent the Tribes substantially identical letters dated September 15, 2017, in which the Department returned

the compact amendments without action. Decl. of Kevin P. Brown ¶ 14, Ex. G; Decl. of Rodney Butler ¶ 14, Ex. G.

11. The Secretary has not treated the compact amendments as deemed approved. Decl. of Kevin P. Brown ¶¶ 14, 17, Ex. G; Decl. of Rodney Butler ¶¶ 14, 17, Ex. G.

12. The Secretary did not publish notice of the deemed approval of the compact amendments in the Federal Register on or before October 31, 2017, within 90 days of receipt. Decl. of Kevin P. Brown ¶¶ 15-17; Decl. of Rodney Butler ¶ 15-17.

13. The Secretary has not published notice of the deemed approval of the compact amendments since October 31, 2017. Decl. of Kevin P. Brown ¶ 18; Decl. of Rodney Butler ¶ 18.

Dated: December 22, 2017

Respectfully submitted,

STATE OF CONNECTICUT

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