TESTIMONY OF LAWRENCE JENSEN

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CONNECTICUT GENERAL ASSEMBLY

MARCH 9, 2017

Good morning Chair Representative Verrengia, Co-Chairs Senator Larson and Senator Guglielmo; Vice Chairs Senator Witkos, Senator Cassano, and Representative Orange; Ranking Member Sredzinski, and other distinguished members of this Committee.

My name is Larry Jensen, and I am here to testify on behalf of MGM Resorts International regarding the approval that the U. S. Department of the Interior ("Interior") must give before Raised Bill No. 957 (the "Bill") could become fully effective.

Prior to entering private practice, I served as the chief legal counsel to the U.S. Bureau of Indian Affairs and as the Deputy Solicitor (i.e., the deputy general counsel) for Interior. The Office of the Solicitor reviews all proposed Tribal-State compacts under the Indian Gaming Regulatory Act ("IGRA") to insure that they do not violate IGRA, other federal law or the federal government's trust responsibility to Indian tribes. My experience in the Solicitor's Office gave me a first-hand view into how Interior evaluates proposed IGRA compacts, and into the legal issues and policies that govern such evaluations.

As you know, the Bill would grant MMCT Venture LLC ("MMCT"), a special, state-created entity owned by the Mashantucket Pequot and Mohegan Tribes, the exclusive right to operate Connecticut's first commercial, off-reservation casino.[1] My testimony will focus on section 13(c) of the Bill, which conditions that authorization on Interior's approval of certain amendments to the Tribes' current gaming compacts with the State. Based on my experience in the Solicitor's Office, I have concluded that there is a substantial risk that Interior would not approve the amendments and, even if Interior did approve the amendments, that it might disapprove the provisions in the current compacts that provide the State with 25% of the slots revenues from the Tribes' Foxwoods and Mohegan Sun casinos.

In short, submitting the proposed compact amendments to the Interior Department would be a high-stakes gamble—even if the amendments are approved, the State could end up losing (perhaps irreversibly) hundreds of millions of dollars in annual revenues from Indian gaming.

I. Overview of the Tribes' Existing Compacts and Revenue-Sharing Agreements

It helps to begin with a brief overview of the current state of affairs in the Connecticut gaming market. Right now, there are two casinos in the State—Foxwoods and Mohegan Sun. Both of those casinos are located on Indian reservations, and both are thus governed by IGRA. Under IGRA, a federally recognized tribe may operate a Las Vegas style casino (often referred to

[1] *See* Bill § 13(b).

as "Class III gaming") on its reservation, so long as the tribe enters into a gaming compact with the state in which the casino is located, obtains Interior Department approval of that compact, and meets other requirements.

A. The Tribes' IGRA Compacts with Connecticut

The Mashantucket Pequot Tribe and the Mohegan Tribe went through the IGRA compact-approval process in the early 1990s. In 1991, the Interior Department approved the Final Mashantucket Pequot Gaming Procedures ("Mashantucket Procedures"), which provide the legal basis for operation of the Foxwoods casino.[2] Then, in 1994, Interior approved the Mohegan Tribe's gaming compact ("Mohegan Compact"), which provides the legal basis for operation of the Mohegan Sun casino.[3] The Tribes and the State also entered into side deals, known as Memoranda of Understanding ("MOUs"), that amended the compacts.[4] The Tribes' compacts and MOUs are identical in most respects, including all the provisions discussed below.

The Tribes' compacts contain moratoria on slot-machine gaming "unless and until" one of three conditions is met: (1) slot-machine gaming is otherwise permitted by agreement between the Tribe and the State; (2) slot-machine gaming is permitted by court order; *or* (3) State law is "amended to expressly authorize" slot-machine gaming "by any person, organization or entity" for "any purpose."[5]

Following litigation and lengthy negotiations, the Tribes and the State settled on the first option in 1994. Specifically, the Tribes and the State signed MOUs that suspend the compacts' slots moratoria—and thus allow the Tribes to operate slot machines at Foxwoods and Mohegan Sun—so long as the Tribes pay the State 25 percent of their annual gross revenues from slot-machine gaming.[6] The Tribes' royalty-sharing obligations remain in force, however, only "so

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[2] *See* Dept. of Interior, Mashantucket Pequot Indian Tribe – Approval Decision (May 31, 1991), https://bia.gov/cs/groups/xoig/documents/text/idc1-026009.pdf. Although the Mashantucket Pequot Tribe operates its casino pursuant to procedures approved by the Secretary of the Interior, rather than a compact, I use the term "compact" when discussing the Mashantucket Procedures because the distinction is not relevant here.

[3] *See* Dept. of Interior, Mohegan Indian Tribe of Connecticut – Approval Decision (Dec. 5, 1994) ("Mohegan Approval Decision"), https://bia.gov/cs/groups/xoig/documents/text/idc1-026002.pdf.

[4] *See* Mem. of Understanding Between the State of Connecticut and the Mohegan Tribe of Indians of Connecticut (May 17, 1994) ("Mohegan MOU"), http://www.ct.gov/dcp/lib/dcp/pdf/gaming/memorandum_of_understanding_mohegan[1].pdf; Second Am. Mem. of Understanding Between the State of Connecticut and the Mashantucket Pequot Tribe (Apr. 25, 1994) ("Mashantucket Pequot MOU"), http://www.ct.gov/dcp/lib/dcp/pdf/gaming/memorandum_of_understanding_foxwoods[1].pdf.

[5] Mashantucket Procedures § 15(a) (emphasis added); *see also* Mohegan Compact § 15(a).

[6] The Tribes' MOUs include a formula for determining each Tribe's annual revenue-sharing obligation. *See* Mashantucket Pequot MOU ¶ 4; Mohegan MOU ¶ 5; *see also* Letter from George C. Jepsen, Conn. Attorney General, to Conn. General Assembly, at 2-4 (Apr. 15, 2015).

long as no change in State law is enacted to permit the operating of [slot machines] or other commercial casino games by any other person."[7]

Although the Tribes' MOUs are nearly identical in terms of substance, they have differing procedural histories. The Mohegan Tribe submitted its MOU to the Interior Department together with the Tribe's gaming compact for approval in 1994, and Interior treated the MOU as part of the Compact.[8] In contrast, I am aware of no evidence that the Mashantucket Pequot Tribe's MOU (and its subsequent amendments) were submitted to Interior for review or approval, probably in reliance on the conclusion of Office of Connecticut Attorney General in 1993 that the Mashantucket Pequot MOU was "not an amendment to the [Compact] that would require approval by the Secretary of the Interior."[9]

B. Allocation of the Tribes' Revenue-Sharing Payments

Together, the MOUs and state law govern allocation of the Tribes' annual revenue-sharing payments. The MOUs provide that the 25 percent royalty must be paid "to the State," without placing further restrictions on how the funds are used.[10] By statute, "all funds received by the state" from the Tribes "shall be deposited into the General Fund."[11] Subject to the exception below, this statute generally does not prescribe how the gaming royalties must be used; rather the funds remain available for any programs supported by the General Fund. The State has received over $7 billion in gaming royalties from the Tribes since 1994; the Tribes paid approximately $265 million to the State in 2016 alone.[12]

A portion of those payments are transferred to the Pequot Fund, "a separate nonlapsing fund" used to make annual grants to municipalities.[13] Although the proportion of the Tribes'

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[7] Mohegan MOU ¶ 1; Mashantucket Pequot MOU ¶ 1.

[8] *See* Mohegan Approval Decision at 1 (noting that the Mohegan MOU was "[s]ubmitted as part of the Compact" and summarizing the terms of the MOU).

[9] Atty. Gen. Op., Hon. Richard Blumenthal (Feb. 11, 1993), http://www.ct.gov/ag/cwp/view.asp?A=1770&Q=281384; *see also* Brief of Town of Ledyard, *Mashantucket Pequot Tribe v. Town of Ledyard*, No. 12-1727, 2012 WL 3548136, *56 (2d Cir. filed Aug. 9, 2012) ("Over the years, the State and the [Mashantucket Pequot] Tribe have supplemented the Gaming Procedures . . . without federal involvement.").

[10] *See* Mashantucket Pequot MOU ¶ 1.

[11] Conn. Gen. Stat. § 3-55i.

[12] *See, e.g.*, Department of Consumer Protection, *Transfers to the General Fund (From Fiscal Year 1972 through Current)*, http://www.ct.gov/dcp/lib/dcp/pdf/gaming/stmt2015.pdf; Office of Legislative Research Report, *Tribal Casino Approval Process and the Effects of Tribal Gaming*, https://www.cga.ct.gov/2013/rpt/2013-R-0373.htm. (1993-2013 totals); Office of Policy and Management, *FY 2013, 2014, and 2015 Estimates of State Formula Aid to Municipalities*, http://www.ct.gov/opm/lib/opm/budget/estimatesofstateaid/eststatformgrantsfy13-fy15.pdf. (2013-2015 totals); Office of Policy and Management, *June 20, 2016 Letter to State Comptroller*, http://www.ct.gov/opm/lib/opm/budget/comptrollerletter/fy2016/2016_june_20_comptrollers_letter.pdf. (2016 totals estimated).

[13] *Id.*

revenue-sharing payments that must be set aside for the Pequot Fund each year is set by the General Assembly, the formula for calculating each municipality's annual Pequot Fund grant is fixed by statute.[14] The State paid out roughly $60 million in Pequot Fund grants in FY 2015; these grants ranged from $6.6 million at the high end (to Hartford) to $8,370 at the low end (to Roxbury); the average grant was approximately $365,000.[15] These grants are provided to all of Connecticut's cities, towns, and boroughs—including municipalities that are located far away from, and have no connection to, the Tribes' on-reservation casinos.[16]

II. The Significant Risk that the Interior Department Will Disapprove the Tribes' Proposed Compact Amendments

Two years ago, Attorney General Jepsen warned that legislation authorizing a new, off-reservation casino would threaten to terminate the Tribes' revenue-sharing obligations under the MOUs and compacts.[17] Section 13(c) of Raised Bill No. 957 seeks to eliminate that threat by making the authorization of the MMCT off-reservation casino conditional on the approval by Interior of certain amendments to the existing tribal-state compacts. Section 13(c) states that the authorization of the MMCT casino

> shall not be effective until the Governor enters into an amendment to the Mashantucket Pequot compact with the Mashantucket Pequot Tribe and an amendment to the Mohegan compact with the Mohegan Tribe of Indians of Connecticut concerning the operation of a casino gaming facility in the state and each amendment is approved by the General Assembly pursuant to section 3-6c of the general statutes and by the Secretary of the United States Department of the Interior pursuant to 25 CFR 291.14 and 25 CFR 293.4, respectively.

Although the Bill unfortunately does not specify what these amendments must accomplish, I am assuming for purposes of my testimony that the amendments would be substantially the same as the amendments drafted by the Tribes and informally provided to Interior in 2016 ("Proposed Compact Amendments").[18]

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[14] *See* Conn. Gen. Stat. §§ 3-55i, 3-55j. For a detailed discussion of the allocation formula, see Office of Policy and Management, *State of Connecticut – FY 2015, FY 2016 and FY 2017 Estimates of State Formula Aid to Municipalities*, at 2–3, 10 (Aug. 28, 2015) ("*Estimates of State Formula Aid to Municipalities*"), http://www.ct.gov/opm/lib/opm/igp/estimat/augmuniaidest2015.pdf.

[15] *See* Office of Policy and Management, *State of Connecticut – FY 2015, FY 2016 and FY 2017 Estimates of State Formula Aid to Municipalities*, at 15-18 (Aug. 28, 2015).

[16] *See* Conn. Gen. Stat. §§ 3-55j(b) (guaranteeing minimum grant to municipalities), 3-55k (defining "municipality" as "any town, consolidated town and city or consolidated town and borough").

[17] *See* Jepsen Letter at 2-5.

[18] *See, e.g.*, Draft Amendment to Agreement Between the Mohegan Tribe of Indians of Conn. and the State of Conn. (Apr. 8, 2016), at 1 (creating exception for "the enactment of any State law to authorize a business entity jointly and exclusively owned by the Tribe and the Mashantucket Pequot Tribe to operate video facsimiles of games of chance").

Because section 13(c) of the Bill makes the Interior Department's approval of the Proposed Compact Amendments a necessary predicate to the authorization of MMCT's casino, I provide a brief overview of Interior's 's review process below, and then explain (i) why the Tribes' Proposed Compact Amendments are unlikely to be approved and (ii) even if they are approved, why submission of the Proposed Contract Amendments to Interior would likely result in a broader review of the Tribes' compacts and MOUs, as a result of which Interior could well disapprove the 25 percent royalty the Tribes currently pay to the State—thus causing a loss to the State of hundreds of millions of dollars of annual revenue.

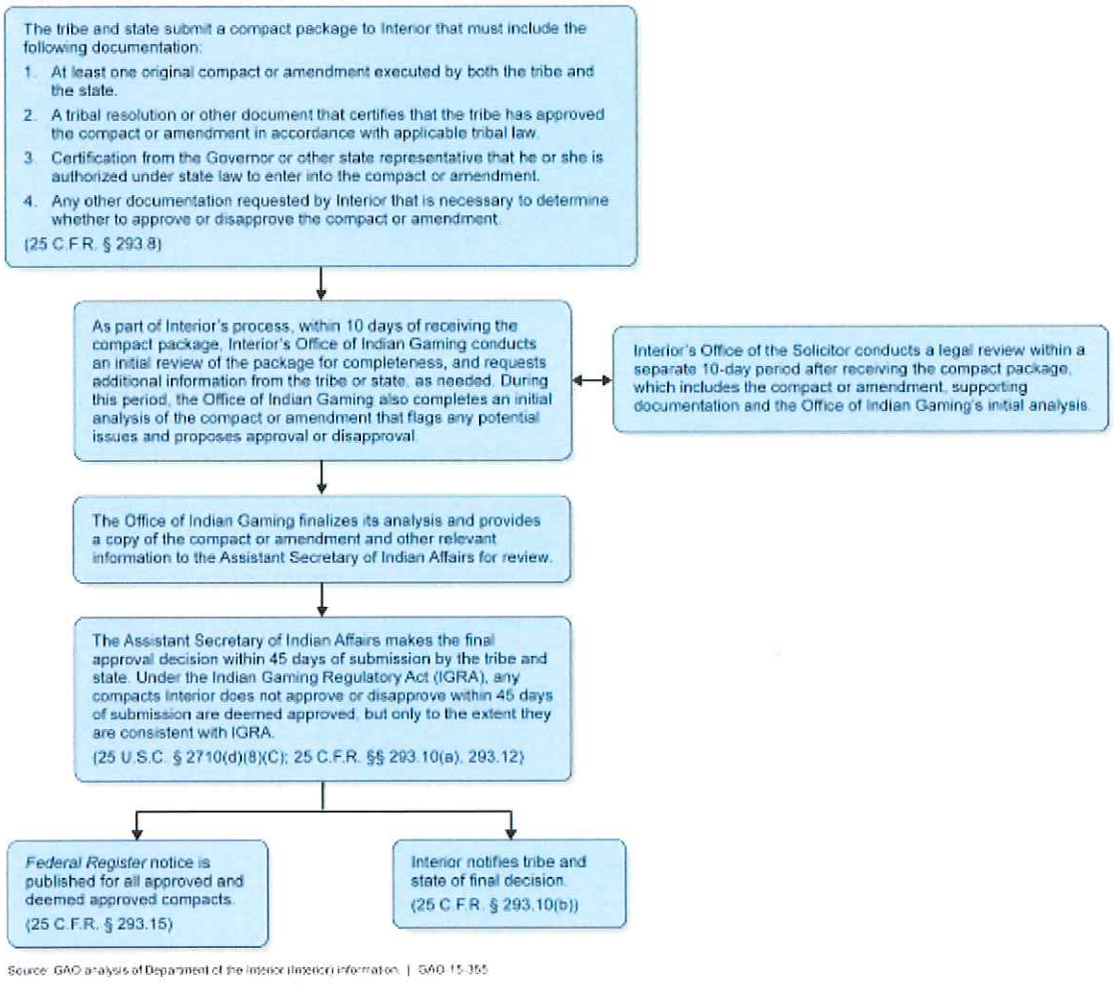
A. Overview of the Department's Review Process

A 2015 report from the Government Accountability Office provides a succinct summary of the process used by the Department to review proposed compacts and compact amendments:

> Interior's Office of Indian Gaming is the lead agency responsible for managing a multistep process for reviewing all compacts [and amendments] submitted by tribes and states. The Office of Indian Gaming conducts an initial review of compacts to ensure that all necessary information was included and develops a draft briefing memo identifying any potentially problematic areas for Interior's Office of the Solicitor's review. The Solicitor's Office conducts a legal review to ensure that compacts do not violate: (1) IGRA; (2) [other] federal laws . . . ; or (3) the trust obligation of the United States to Indians. After the Solicitor's Office's legal review is complete, the Office of Indian Gaming finalizes its analysis and submits a recommendation to the Assistant Secretary of Indian Affairs who makes a final decision on whether to approve the compact. Interior has 45 days to approve or disapprove a compact once it receives a compact package from a state and tribe. Under IGRA, any compacts Interior does not approve or disapprove within 45 days of submission are deemed approved, but only to the extent they are consistent with IGRA. According to Interior officials, decision letters accompany all approved and disapproved compacts. Deemed approved compacts only have decision letters in cases where Interior has policy guidance to share related to issues in the compact.[19]

[19] *See* U.S. Government Accountability Office, Indian Gaming: Regulation and Oversight by the Federal Government, States, and Tribes, at 15-16 (June 2015) ("GAO Report"), http://www.gao.gov/assets/680/670603.pdf.

This multi-step process is illustrated in the following flow chart:



Source: GAO analysis of Department of the Interior (Interior) information. | GAO-15-355

The substantive requirements imposed by IGRA and the Department's regulations are particularly relevant here. In conducting its review, it is Department policy to review not just the amendments, but "to insure that the terms of the compact, as amended and considered as a whole, do not violate any provision of IGRA" or other federal laws.[20]

B. Risk that the Department Would Disapprove the Proposed Compact Amendments

Based on my experience in the Solicitor's Office and my review of the applicable law, I conclude that there is a significant risk that the Department would disapprove the Proposed Compact Amendments.

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[20] 73 Fed. Reg. 74,004, 74,005 (Dec. 5, 2008); *see also* Letter from Paula L. Hart, Director, Office of Indian Gaming, Dept. of Interior, to Hon. Peter S. Yucupicio, Chairman, Pascua Yaqui Tribe of Ariz., at 2 (June 15, 2012) ("Yaqui Guidance Letter").

1. *The Proposed Compact Amendments Are Vulnerable Because They Would Facilitate Off-Reservation, Rather Than On-Reservation Gaming.*

IGRA is addressed exclusively to gaming "on Indian lands," a term defined as "lands within the limits of any Indian reservation" or "held in trust by the United States for the benefit of any Indian tribe."[21] The IGRA Senate Report, which courts have described as "provid[ing] guidance on how Congress intended [IGRA] to be interpreted,"[22] likewise characterizes IGRA as "a framework for the regulation of gaming activities *on Indian lands*."[23] As the U.S. Supreme Court recently observed, "[e]verything—literally everything—in IGRA affords tools . . . to regulate gaming on Indian lands, *and nowhere else*."[24] Despite this focus, the Tribes' proposed amendments are designed to facilitate a commercial casino that will *not* be located on "Indian lands." IGRA's compacting process was never intended to be used in that fashion.[25]

Indeed, Interior has previously affirmed this very principle. Interior explained in 2002 that using the compact-approval process to facilitate off-reservation gaming would "stretc[h]" IGRA's "principles . . . in ways Congress never imagined."[26] In keeping with that view, Interior has disapproved a compact amendment that was designed to facilitate gaming on lands that "are not now Indian lands of the Tribe, and thus cannot be the subject of a compact between the Tribe and the State."[27] And Interior has rejected compacts that exceed IGRA's scope in other respects.[28]

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[21] 25 U.S.C. §§ 2703, 2710(d)(1).

[22] *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010).

[23] S. Select Comm. on Indian Aff., Indian Gaming Regulatory Act, S. Rep. No. 100-446, at 5 (Aug. 3, 1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 1988 WL 169811 (1988) ("Senate Report") (emphasis added); 25 U.S.C. § 2702(3) (IGRA is intended to "establis[h] . . . independent Federal regulatory authority for gaming *on Indian lands*" and to provide "Federal standards for gaming *on Indian lands*").

[24] *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2034 (2014) (emphasis added).

[25] *See* Senate Report at 6 (IGRA designed "to expressly preempt the field in the governance of gaming activities on Indian lands"); Seneca Nation of Indians – Deemed-Approval Decision, at 3 (Nov. 12, 2002) ("Seneca Deemed Approval Decision"), https://bia.gov/cs/groups/xoig/documents/text/idc-038394.pdf (using the compact-approval process to facilitate off-reservation gaming would "stretch[]" IGRA's "principles . . . in ways Congress never imagined").

[26] Seneca Deemed Approval Decision at 3.

[27] Dept. of Interior, Ewiiaapaayp Band of Kumeyaay Indians – Disapproval Decision, at 1 (Mar. 18, 2008), https://bia.gov/cs/groups/xoig/documents/text/idc1-024667.pdf.

[28] *See, e.g.*, Mashpee Disapproval Decision at 5–8; Dept. of Interior, Forest County Potawatomi Community of Wisconsin – Disapproval Decision, at 6 n.29 (Jan. 9, 2015) ("Potawatomi Community Disapproval Decision"), https://bia.gov/cs/groups/xoig/documents/text/idc1-029286.pdf (Department "disapproves compacts that do not squarely fall within the topics delineated in IGRA." (quoting testimony of Kevin K. Washburn, Asst. Secretary – Indian Affairs, before the S. Comm. on Indian Aff., July 23, 2014)); *see also* Dept. of Interior, Stockbridge-Munsee Community of Mohican Indians – Disapproval Letter (Feb. 18, 2011), https://bia.gov/cs/groups/xoig/documents/text/idc1-024497.pdf (Department will disapprove compacts that "ope[n]

There is a significant risk that Interior would follow suit if called upon to review the Tribes' Proposed Compact Amendments, given the fundamental mismatch between IGRA's design and the Proposed Compact Amendments' aim. I am not aware of any prior instance in which a tribe has used the amendment process to facilitate development of an off-reservation commercial casino, and the lack of clear precedent for this approach may in itself lead to rigorous scrutiny or even disapproval of the amendments.

2. The Proposed Compact Amendments Are Vulnerable Because They Would Circumvent IGRA's Land-In-Trust Process.

Congress included an express mechanism in IGRA to allow tribes to develop casinos on newly-acquired lands. But this process is carefully crafted and requires tribes to go through a multi-step approval process before opening such a casino.[29] First, the newly acquired casino site must be taken into trust by the United States,[30] and lands generally may be taken into trust only if they are within or contiguous to the tribe's reservation.[31] Second, the Secretary must consult with state and local officials, in order to determine that the casino would not be detrimental to the surrounding community.[32] And third, the Governor must concur in the Secretary's determination for the approval to become effective.[33]

The Proposed Compact Amendments are designed to sidestep this process, as they seek to permit development of a commercial, off-reservation casino free of IGRA procedures and constraints, rather than a tribal casino located "on Indian lands" and governed by IGRA. In this scenario, the Secretary would not be statutorily required to consult with local officials or determine whether the new casino would be detrimental to the surrounding community. The Proposed Compact Amendments thus represent an unprecedented attempt to use IGRA's compact-amendment procedure to obtain approval of an off-reservation commercial casino.

Similarly, Interior has emphasized that "IGRA does not envision that off-reservation gaming would become pervasive,"[34] but the framework proposed by the Tribes could lead to that result. Interior could well conclude that if it allows the Tribes to use the compact-amendment process to secure the right to operate an off-reservation casino, tribes in other states would have an incentive to follow suit—and avoid the time consuming land-in-trust process prescribed by

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the door to areas of negotiation" that "Congress never intended under IGRA," such as "taxation, water rights, environmental regulation, and land use." (quoting 134 Cong. Rec. S12643-01, at S12651)).

[29] *See* 25 U.S.C. § 2719; *see also* Dept. of Interior, Confederated Tribes of the Warm Springs Reservation of Oregon – Disapproval Decision, at 1 (May 20, 2005), https://bia.gov/cs/groups/xoig/documents/text/idc1-025217.pdf (describing IGRA's land-in-trust process as "rigorous").

[30] *See* 25 U.S.C. § 476.

[31] *See* 25 C.F.R. § 292.4.

[32] *See* 25 U.S.C. § 2719(b)(1).

[33] *Id.*

[34] Seneca Deemed Approval Decision at 2.

IGRA. This result would significantly undermine the land-in-trust scheme adopted by Congress and enacted as part of IGRA.

Relatedly, there is also a significant risk that Interior will determine that the Proposed Compact Amendments are inconsistent with IGRA because they enhance the Tribes' ability to conduct off-reservation gaming at the expense of on-reservation gaming. Because IGRA is designed solely to authorize and facilitate Indian gaming on Indian lands,[35] a deal that harms on-reservation gaming in exchange for the opportunity to conduct gaming off of Indian lands could be seen as contrary to IGRA—even if that off-reservation gaming is conducted by an entity controlled by the Tribes. Any new MMCT casino would draw customers and revenue from Foxwoods and Mohegan Sun; it could therefore be viewed as running afoul of this principle.

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Interior has required applicants to "remov[e] ... 'poison pill,' anti-competitive provision[s]" in the past,[36] and may take the same approach when reviewing the Proposed Compact Amendments. At a minimum, the amendments' novel and untested nature would likely lead Interior to conduct a particularly careful and searching review. The recent change in administration compounds this uncertainty, as it is not yet clear how Interior will approach Indian gaming issues under Secretary Zinke's leadership—although the President's history with those issues suggests that federal approval may be even more difficult to obtain than in the past.

Finally, it bears mention that mutual support for the Proposed Compact Amendments from the Tribes and the State would not immunize the Proposed Compact Amendments from Interior Department scrutiny. When a proposed amendment violates IGRA, "it is immaterial whether the Tribe or the [State] requested that th[e] provision be included in the compact"—Interior cannot approve provisions that "would extend" beyond "what Congress has allowed."[37] Thus, if Interior concludes that the Proposed Compact Amendments are inconsistent with IGRA's structure and purposes, it would be required to disapprove them even if they are adamantly supported by both the State and the Tribes. Interior has repeatedly disapproved compacts in the past even when they have such support.[38]

III. The Significant Additional Risk that the Interior Department Will Invalidate the 25 Percent Royalty the State Receives from Foxwoods and Mohegan Sun

Even if Interior were to approve the Proposed Compact Amendments, that would not be the end of the matter. Under established policy, the Department would then consider whether the

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[35] *See, e.g.*, 25 U.S.C. §§ 2701(5), 2710(d)(1).

[36] Potawatomi Community Disapproval Decision at 3.

[37] Mashpee Disapproval Decision at 8; *see also Rincon*, 602 F.3d at 1039 ("IGRA does not permit the State and the tribe to negotiate over any subjects they desire; rather, IGRA anticipates a very specific exchange of rights and obligations.").

[38] *See infra* Part III.B.1.

amended compacts "as a whole" are consistent with IGRA and other federal law.[39] Because the Proposed Compact Amendments, if approved, would redefine the scope of the exclusivity that the Tribes' on-reservation casinos currently enjoy, the focus of such a review would necessarily be on the money that the Tribes are paying the State for the privilege of exclusivity. Based on past decisions by courts and Interior, such a review might well lead Interior to disapprove the current 25% royalty that is paid to the State as excessive, thus jeopardizing an important stream of State revenue.

Thus submitting the Proposed Compact Amendments to the Interior Department for review is a high-stakes gamble—even if the Proposed Compact Amendments are approved, the State could end up losing (perhaps irreversibly) hundreds of millions of dollars in annual revenues from Indian gaming.

A. The Department Reviews Amendments and Underlying Compacts as a Whole.

The risk of such a damaging loss is inherent in Interior's review process for proposed compact amendments. As noted above, it is established Department policy to "review amendments to insure that the terms of the compact, *as amended and considered as a whole*, do not violate any provision of IGRA."[40] In other words, Interior does not limit its review to the four corners of a proposed compact amendment, but rather conducts a holistic analysis of the entire compact as amended to determine its compliance with law and policy. This approach reflects the reality that a new and different compact results any time an amendment is adopted.

That Interior has approved the current compacts between the Tribes and the State is of no moment. As Interior has explained, prior "approval of a compact—either by affirmative action or inaction—cannot bind the Secretary to approve a subsequent amendment to that compact where . . . the terms of the amendment are unlawful."[41]

For three reasons, the focus of the Department's review of the amended compacts "as a whole" would fall on the Tribes' revenue-sharing agreements with the State. First, the Proposed Compact Amendments would redefine the scope of the exclusivity afforded the Tribes' on-reservation casinos by allowing a new off-reservation casino to enter the Connecticut market.[42] Because exclusivity provides the principal basis for allowing tribal revenue-sharing payments,[43]

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[39] Of course, as a practical matter, Interior might not make a decision on the Proposed Compact Amendments until it decides whether approving them would cause the compacts "as a whole" to violate IGRA.

[40] 73 Fed. Reg. at 74,005; *see also* Yaqui Guidance Letter at 1–2 (holistic-review principle applies in context of a proposed Memorandum of Understanding "that would substantively amend [a] Tribe's existing [casino] gaming compact").

[41] Potawatomi Community Disapproval Decision at 7 n.34.

[42] *See* Cheyenne-Arapaho Disapproval Decision at 3 (benefits, such as exclusivity, must be "proportional" in value to the tribe's revenue-sharing payments); *see also* Dept. of Interior – Habematolel Pomo Nation Disapproval Decision, at 3 (Aug. 17, 2010), https://bia.gov/cs/groups/xoig/documents/text/idc1-024698.pdf.

[43] *See* Habematolel Pomo Disapproval Decision at 3.

a redefinition of its scope would necessarily invite Department review of the revenue-sharing provisions that are tied to that exclusivity in the compacts. Second, review of the revenue-sharing provisions in the Mohegan MOU would be likely because they are actually part of the compact, and even though they were previously approved in 1994, they would need to be reconciled with the new exclusivity provisions. Third, review of the revenue-sharing provisions in the Mashantucket Pequot MOU would be likely for the additional reason that there is no evidence that the Department has ever approved them, even though they are clearly a substantive component of the Tribe's arrangement with the State. That omission contravenes the Department's rule that "[a]ll amendments, regardless of whether they are substantive or technical amendments, are subject to review and approval by the Secretary."[44]

B. There Is a Serious Risk that the Department Would Invalidate the Tribes' Royalty Agreements with the State.

The Department evaluates revenue-sharing provisions "with great scrutiny" and "has sharply limited the circumstances in which Indian tribes can make direct payments to a State."[45] These principles are founded in the Department's trust obligations to Indian tribes as well as IGRA's command that states may not "impose any tax, fee, charge, or other assessment upon an Indian tribe" except to recoup "such amounts as are necessary to defray the costs of regulating" on-reservation gaming, and that compacts may only address "subjects that are directly related to the operation of gaming activities."[46]

Courts have provided additional guidance regarding IGRA's requirements for revenue-sharing provisions. In the *Rincon* case, the Ninth Circuit held that a revenue-sharing provision may be approved only if it is "(a) for uses 'directly related to the operation of gaming activities'. . . , (b) consistent with the purposes of IGRA, and (c) not 'imposed' because it is bargained for in exchange for a 'meaningful concession.'"[47] The *Rincon* decision has been widely cited with approval, including by the Second Circuit[48] and the Interior Department, which has described *Rincon* as "[a]n important part of [the agency's] analysis."[49]

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[44] 25 C.F.R. § 293.4(b); *see also* Cheyenne and Arapaho Tribes – Disapproval Decision, at 4–5 (Aug. 1, 2013), https://bia.gov/cs/groups/xasia/documents/text/idc1-028608.pdf.

[45] Habematolel Pomo Disapproval Decision at 3; Dept. of Interior, Jena Band of Choctaw Indians – Disapproval Decision, at 1 (Mar. 7, 2002) ("Jena Band Disapproval Decision"), https://bia.gov/cs/groups/xoig/documents/text/idc1-029778.pdf; Potawatomi Community Disapproval Decision at 5-7.

[46] 25 U.S.C. §§ 2710(d)(3)(C)(iii), 2710(d)(4).

[47] Rincon, 602 F.3d at 1033; see also Indian Gaming Related Cases, 331 F.3d at 1112; Wisconsin v. Ho-Chunk Nation, 512 F.3d 921, 932 (7th Cir. 2008) ("[T]he legitimacy of . . . revenue-sharing provisions is far from a settled issue.").

[48] *See Town of Ledyard*, 722 F.3d at 472.

[49] *See, e.g.*, Habematolel Pomo Disapproval Decision at 3.

The Proposed Compact Amendments run afoul of these tests in two principal respects, either of which would be sufficient for the Department to invalidate the 25 percent royalty received by the State.

1. The 25 Percent Royalty Rate Is An Outlier.

The Tribes' compacts and MOUs were executed early in IGRA's history, at a time when the Department had not fully developed its framework for scrutinizing revenue-sharing agreements. The casino market in the Northeast was also fundamentally different at the time, with virtually no other casinos in the region except Foxwoods and Mohegan Sun.

Much has changed since then. The Department now reviews revenue-sharing provisions with "great scrutiny," particularly if they require payments beyond that necessary simply to "defray the costs [states incur] of regulating" Class III gaming on Indian lands.[50] Indeed, the Government Accountability Office observed in 2015 that excessive royalty rates have become "the most common reason for disapproving compacts."[51] At the same time, the gaming market is now increasingly competitive, with casinos now operational or under construction in New York, Massachusetts, Rhode Island, and other nearby states.[52] Thus, even if the Tribes' revenue-sharing agreements were acceptable when they were originally adopted, that may no longer be the case.

The Department's precedent amplifies that risk. Over the past 15 years, the Department has rejected at least five compacts that included revenue-sharing rates well below the 25 percent rate prescribed by the Tribes' MOUs. Consider the following outcomes:

- In 2012, the Department rejected a compact between Massachusetts and the Mashpee Wampanoag Tribe that called for a 21.5 percent royalty.[53] Applying the "great scrutiny" standard, and citing a 1996 decision regarding a similar compact, the Department determined that the 21.5 percent royalty was "legally vulnerable" and that it was "very likely, if litigated, a court would find that such payments are beyond the scope of IGRA." The Department also explained that it had "longstanding concerns with the type of revenue sharing" authorized by the Massachusetts-Mashpee compact and that the State had not "justif[ied] a revenue sharing rate above and beyond 6.5 percent." Any greater royalty rate, the Department concluded, would "constitute an impermissible tax ... in violation of IGRA.[54]

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[50] *See* Kevin K. Washburn, *Recurring Issues in Indian Gaming Compact Approval*, 20 Gaming L. Rev. and Econ. 388, 396 (2016) (indicating that the Department "has asserted itself more and more in recent years as issues of concern arise").

[51] GAO Report at 15, 20.

[52] *See* GAO Report, Appendix III (describing casino market in each state).

[53] *See* Mashpee Disapproval Decision at 15-17.

[54] The Department subsequently permitted a revised compact that called for a 17 percent royalty rate to be "deemed approved" by operation of law, without determining whether the 17 percent rate complied with IGRA. *See* Dept. of

- In 2011, the Department disapproved a proposed compact between California and the Pinoleville Pomo Nation that called for the tribe "to pay 15 percent of its net win to the State's general fund" in exchange for gaming exclusivity within a 75-mile radius.[55] The Department concluded that, under the longstanding "great scrutiny" test, the exclusivity offered by California "d[id] not justify a 15-percent revenue sharing rate." One year later, the Department allowed a revised compact to be "deemed approved."[56] Unlike the initial compact, the revised version included a maximum effective royalty rate of 8.89 percent. The Department advised that this rate "may be excessive," but allowed the new compact to go into effect because market conditions suggested that the actual rate would likely be less than 6 percent.[57] Finally, the Department warned that "neither the State of California nor any other state should assume that this Compact's revenue sharing structure may be applied to other tribes in a manner consistent with IGRA."[58]

- Similarly, in 2011, the Department disapproved a proposed compact between New York and the Stockbridge-Munsee Community of Mohican Indians that called for a 25 percent royalty on the tribe's net slot win.[59]

- In 2010, the Department disapproved a proposed gaming compact between California and the Habematolel Pomo of Upper Lake that called for a 15 percent royalty on the tribe's net gaming win.[60] The following year, the Department allowed a revised compact to be deemed approved by operation of law.[61] This agreement called for a maximum royalty effective royalty rate of 6.4 percent and was accompanied by a similar warning that parties should not "assume that this Compact's revenue sharing structure may be applied to other tribes in a manner consistent with IGRA."[62]

- In 2002, the Department disapproved a proposed compact between Louisiana and the Jena Band of Choctaw Indians that called for a 15.5 percent royalty on the tribe's net

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Interior, Mashpee Wampanoag Tribe – Deemed Approval Decision (Jan. 6, 2014), https://bia.gov/cs/groups/webteam/documents/document/idc1-028231.pdf.

[55] Dept. of Interior, Pinoleville Pomo Nation – Disapproval Decision, at 2-6 (Feb. 25, 2011), https://bia.gov/cs/groups/xoig/documents/text/idc1-024673.pdf.

[56] *See* Dept. of Interior, Pinoleville Pomo Nation – Deemed Approval Decision (Feb. 9, 2012), https://bia.gov/cs/groups/xoig/documents/text/idc1-024610.pdf.

[57] *Id.* at 4-6.

[58] *Id.* at 6.

[59] *See* Stockbridge-Munsee Community Disapproval Decision (2011), https://bia.gov/cs/groups/xoig/documents/text/idc1-024497.pdf. The Stockbridge-Munsee Community subsequently abandoned its efforts to develop a New York casino.

[60] *See* Habematolel Pomo Disapproval Decision at 2-6.

[61] *See* Dept. of Interior, Habematolel Pomo – Deemed Approval Decision (Aug. 31, 2011), https://bia.gov/cs/groups/xoig/documents/text/idc1-026874.pdf.

[62] *Id.* at 6.

gaming revenues, which royalty would have been paid into a fund used for state education programs.[63] The Department explained that it had "approved more than 200 tribal-state compacts," and that "[o]nly a few ha[d] called for tribal payments to States other than for direct expenses to defray the costs of regulating a gaming activity." Although the Department has permitted royalty agreements for "a very small percentage of net revenue," it has rejected larger royalty rates. The Department also expressed concern that the proposed casino was not located on the tribe's reservation, concluding that the compact had tried to exploit "a potential loophole" in IGRA's regulatory framework.

These examples illustrate a broader trend. The Government Accountability Office determined in 2015 that over 95 percent of compacts that include revenue-sharing agreements impose a royalty rate of less than 25 percent.[64] This report also stressed that "Interior officials . . . pay close attention to provisions that dictate terms for revenue sharing between tribes and states to ensure that states are not imposing taxes or fees on Indian gaming revenues prohibited by IGRA."[65]

It is unclear how the Tribes' 25 percent royalty agreements could survive Interior Department review given these authorities. Compounding this risk, the fate of the State's revenue stream would be entirely out of the State's hands once the Tribes submitted their Proposed Compact Amendments to the Department for review—the determination of whether a royalty is appropriate, and if so what rate is acceptable, would be up to the Trump Administration.

2. The Department May Reject the Revenue-Sharing Provisions Because The Tribes' Payments Are Not Used for Purposes "Directly Related" to Indian Gaming.

There is also a significant risk that the Department will conclude that the amended compacts violate IGRA by directing the Tribes' royalty payments to the State's General Fund (and, through the Pequot Fund, to municipalities that lack any connection to the Tribes' on-reservation casinos). Under IGRA, the Department seeks "to ensure that [compacts] regulate only those activities that are directly related to the operation of gaming activities."[66] In the revenue-sharing context, this means that states may use gaming royalties only for gaming-regulation purposes[67]—and that royalties may not be used for programs with no gaming nexus.[68]

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[63] Jena Band Disapproval Decision at 1-2.

[64] *See* U.S. Government Accountability Office, *Indian Gaming: Regulation and Oversight by the Federal Government, States, and Tribes*, at 18-19 (June 2015).

[65] *Id.* at 18.

[66] Mashpee Disapproval Decision at 7.

[67] *See* 25 U.S.C. §§ 2710(b)(2)(B), 2710(d)(4); *see also Seminole Tribe of Fla. v. Florida*, No. 4:15-cv-516-RH/CAS, 2016 WL 6637706, at *2 (N.D. Fla. Nov. 9, 2016).

The Ninth Circuit's widely-cited *Rincon* decision rejected a proposed compact amendment for violating this "long-standing" direct-relationship principle.[69] In that case, an existing compact permitted a tribe to operate 1,600 slot machines in exchange for paying royalties into a fund used by the state to "fulfill . . . regulatory and police functions contemplated by IGRA."[70] The proposed amendment, on the other hand, would have permitted another 900 slot machines in exchange for royalty payments into the state's general fund, which was available for any use.[71] The court rejected the proposed amendment because the revenue was not directed toward gaming-regulation activities.[72]

Connecticut's revenue-sharing framework shares that defect. The Tribes' MOUs direct the Tribes' royalty payments to the State's General Fund, without any restriction on their use.[73] And state law further provides that tribal revenue-sharing payments "shall be deposited in the General Fund," again without any requirement that they be used for gaming-related purposes.[74] The *Rincon* court rejected a proposed amendment precisely because it would have taken this type of unrestricted approach to the use of gaming royalties.[75] Because Interior treats *Rincon* as "[a]n important part of [its] analysis,"[76] there is a substantial chance that it will reach the same conclusion regarding the Tribes' revenue-sharing agreements with the State.[77] If those

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[68] *See* Sac and Fox Nation Disapproval Decision at 2 (IGRA "impose[s] very specific limitations on the use of gaming revenues"); Jena Band Disapproval Decision at 1 ("The Department has sharply limited the circumstances under which Indian tribes can make direct payments to a State for purposes other than defraying the costs of regulating Class III gaming activities."); Potawatomi Community Disapproval Decision at 9 (A "provision violates IGRA [if] it contemplates payments to the State from [a tribe] for purposes other than defraying the State's cost of regulating Class III gaming activities."); Mashpee Disapproval Decision at 11–12 ("payments to the State beyond the cost of regulation" are likely "beyond the scope of the statute").

[69] Potawatomi Community Disapproval Decision at 9.

[70] *Rincon*, 602 F.3d at 1024. These funds were used, for example, to provide "grants for programs designed to address gambling addiction" and to fund the state's gaming commission. *Id.*

[71] *Id.*

[72] *Id.* at 1033; *see also Indian Gaming Related Cases*, 331 F.3d at 1113 (distinguishing legitimate revenue-sharing payments from payments that "go into the pocket of the State"); *Ho-Chunk Nation*, 512 F.3d at 932–33 (questioning the legality of "payments to the State" that "are made without any restrictions or limits on the manner in which may use th[e] funds" and contrasting those payments with the more targeted payments upheld in the *Indian Gaming Related Cases*).

[73] *See, e.g.*, Mashantucket Pequot MOU ¶ 1 (providing that revenue-sharing payments must be "to the State," without placing further restrictions on their use).

[74] Conn. Gen. Stat. § 3-55i.

[75] *Rincon*, 602 F.3d at 1036.

[76] Habematolel Pomo Disapproval Decision at 3.

[77] *See also* Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39 (2007) (criticizing Connecticut's revenue-sharing agreements with the Tribes and observing that "states have been able to impose revenue-sharing agreements of questionable legality and fairness on tribes").

agreements were nullified, the State would lose the right to collect hundreds of millions in annual revenues.

IV. The Interior Department's Non-Binding "Technical Assistance" Letter

On April 11, 2016, the Mohegan Tribe asked the Interior Department to provide "technical assistance" regarding the Proposed Compact Amendments.[78] Specifically, the Mohegan Tribe asked whether, if the Proposed Compact Amendments were adopted, legislation authorizing a new MMCT casino would disturb the Tribes' existing revenue-sharing agreements with the State (regarding royalties on slot machine revenues at Foxwoods and Mohegan Sun).

The Interior Department responded by issuing a non-binding "technical assistance" letter to the Tribes.[79] As Interior stated in its letter, "technical assistance" letters are issued only to ensure stakeholders "have accurate information about the Department's past decisions, regulatory requirements, and current policies." Although the letter stated that "the Tribe[s'] existing exclusivity arrangement would not be affected by a new State-authorized casino that is jointly and exclusively owned by the" Tribes, it did not cite to any past decision, regulatory requirement, or current policy that supports its statement. Nor did it even identify, let alone analyze, the concerns discussed above, which are based on past decisions, regulatory requirements, and current policies. Moreover, the Department emphasized that its letter was not a preliminary decision or advisory opinion regarding the amendments' legality because the Tribes had not "formally submitted [the amendments] to the Department for review and approval."

Just as important, the "technical assistance" letter does not bind the Trump Administration. On its own terms, the letter is not a "preliminary decision or advisory opinion," and so sets no precedent. Federal agencies have inherent power to reconsider their own decisions, and there is no apparent barrier to the Interior Department exercising that authority here.[80] Indeed, the Department has in the past reversed course on Indian gaming matters.[81]

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[78] The Mashantucket Pequot Tribe wrote to Interior at around the same time and received a substantially identical response.

[79] *See* Letter from Lawrence S. Roberts, Acting Asst. Secretary – Indian Affairs, Dept. of Interior, to Kevin Brown, Chairman, Mohegan Tribe of Indians of Conn. (Apr. 25, 2016).

[80] *See, e.g., Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) ("an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time"); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360 (Fed. Cir. 2008) ("[T]he courts have uniformly concluded that administrative agencies possess inherent authority to reconsider their decisions, subject to certain limitations, regardless of whether they possess explicit statutory authority to do so.").

[81] In 2005, while reviewing a compact submitted by the Confederated Tribes of the Warm Springs Reservation of Oregon, the Department overturned its past practice of "approv[ing] compacts for the regulation of class III gaming activities before the specified lands qualified as Indian lands under IGRA." Confederated Tribes Disapproval Decision at 2. Although the Department acknowledged that it had previously approved such compacts, it concluded that "on closer examination of the statute" the land-in-trust process "must be complete before Departmental action on a compact can occur." *Id.*

Thus, the State would be well-advised not to put much stock in the technical assistance letter obtained by the Tribes.

V. Judicial Review of Interior Department Compact-Approval Decisions

The Interior Department's compact-review decisions are subject to judicial review under the federal Administrative Procedure Act.[82] Accordingly, even if the Trump Administration approved the Proposed Compact Amendments (or allowed them to be "deemed approved" by operation of law), that decision could be challenged in court by third parties.[83] The court hearing such a suit could hold that the Amendments do not satisfy IGRA's requirements and so must be invalidated. (Although it is outside the scope of my testimony, a court could also hold that the Bill violates the Equal Protection or Commerce Clauses of the federal Constitution, as Attorney General Jepsen warned in 2015.[84])

A party challenging the Department's approval decision could assert any of the arguments I have discussed, as well as arguments that the Amendments violate the Constitution or other federal laws.[85] In reviewing those arguments, the court would not afford significant deference to the Department's interpretation of IGRA.[86]

Third parties may also sue tribal officials to block the Amendments. Although Indian tribes enjoy sovereign immunity, that immunity "does not bar . . . a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct."[87]

The possibility of post-approval litigation makes it even more difficult to determine the level of risk associated with enactment of the Bill and submission of the Proposed Compact Amendments for Interior Department review.

VI. Conclusion

Section 13(c) of the Bill, which requires Interior approval of the Proposed Compact Amendments before the MMCT casino is authorized, would commit the State to a high-stakes

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[82] *See Amador Cnty.*, 640 F.3d at 379–383; *Artichoke Joe's*, 216 F. Supp. 2d at 1090–91. The Department's disapproval decisions become judicially reviewable when they are issued in writing. The timing for review is less clear with respect to instances in which the Department approves an amendment. In those cases, a plaintiff may file suit either (i) as soon as the decision is issued in writing, or (ii) on the date when the decision is published in the Federal Register.

Judicial review is likewise available when the Department allows an amendment to be "deemed" approved by declining to act on it within the statutory 45-day review period. *See Amador Cnty.*, 640 F.3d at 383.

[83] *See, e.g.*, *Amador Cnty. v. Salazar*, 640 F.3d 373, 378 (D.C. Cir. 2011).

[84] *See* Jepsen Letter at 2 n.1.

[85] *See* 25 U.S.C. § 2710(d)(8)(B); *Artichoke Joe*'s, 216 F. Supp. 2d at 1090.

[86] The court would not afford *Chevron* deference to the Department's interpretation of IGRA. *See, e.g.*, *Fort Independence Indian Community*, 679 F. Supp. 2d 1177.

[87] *Bay Mills*, 134 S. Ct. at 2035.

gamble. Because the Interior Department reviews proposed compacts amendments in the context of the amended compacts "as a whole," and because the Proposed Compact Amendments would redefine the exclusivity currently enjoyed by the Tribes' two on-reservation casinos, Interior is likely to review the appropriateness of the revenue-sharing provisions in the compacts, which are based on the grant of exclusivity. For the reasons explained above, there is a significant risk that as a result of such a review Interior would disapprove the 25 percent royalty currently paid by the Tribes to the State, even if the amendments themselves were otherwise unobjectionable. That outcome would result in the immediate and potentially irreversible loss of hundreds of millions of dollars in annual State revenues.