Written Testimony of Former U.S. Interior Secretary Ken Salazar

Hearing Before the Public Safety Committee of the Connecticut General Assembly
March 9, 2017

Chairman Verrengia and Members of the Committee, thank you for the opportunity to provide testimony regarding Raised Bill No. 957.

I served as the U.S. Secretary of the Interior under President Obama from 2009 to 2013, having previously served as a U.S. Senator from Colorado from 2005 to 2009, and as the Attorney General of Colorado from 1999 to 2005. As Secretary of the Interior, I was responsible for overseeing all activities of the Department, including its interactions with Indian tribes generally, and its review and approval of tribal-state gaming compacts in particular. My work as a Senator, as Colorado Attorney General, and more recently in private practice has also regularly involved Indian law matters, including gaming matters.

I submit this written testimony in my capacity as an expert retained by MGM Resorts International. My testimony addresses the legal risks posed by the legislation currently under consideration to authorize an off-reservation casino in Connecticut. That legislation (Raised Bill No. 957, which I will refer to simply as the "Bill") would grant the right to operate the off-reservation casino to a limited liability company owned by the State's two federally recognized Native American tribes, the Mashantucket Pequot and the Mohegan (the "Tribes").

To summarize my testimony: The Tribes' anticipated course of action in connection with the Bill, which includes seeking Interior Department approval of amendments to the existing tribal-state gaming compacts, presents substantial risks to the State that I believe the Committee, and if necessary the full General Assembly, should consider.

First, there is a significant risk that the Department would disapprove the amendments, as inconsistent with the text and purposes of the federal Indian Gaming Regulatory Act, or IGRA. Although IGRA focuses solely on gaming on "Indian lands," the Tribes' amendments are designed to facilitate an off-reservation casino. That raises serious questions under IGRA, which provides an alternate mechanism for Tribes to establish tribal-owned casinos in new areas, namely by having the land in question taken into trust. To my knowledge, no tribe has used IGRA's gaming-compact provisions in the way the Tribes intend to, and I expect the novelty of the Tribes' amendments would lead the Department to conduct a particularly careful and searching review.

Second, there is also a substantial risk that the Department, even if it ultimately approved the amendments, would require a reduction of the 25 percent slots-revenue royalty that the Tribes currently pay to the State. The Department does not evaluate amendments in isolation, but rather considers amendments and the underlying compacts together. Two aspects of the Tribes' revenue-sharing agreements are vulnerable under that holistic review process:

a. The 25 percent royalty rate is unusually high—higher than 95 percent of all tribal-state compacts, according to a 2015 report by the U.S. Government Accountability Office.[1] The Department has rejected compacts that included rates even lower than 25 percent, and the risk of disapproval is particularly acute here, including because the Department has not previously approved the Mashantucket Pequot revenue-sharing agreement.

b. The Tribes' revenue-sharing payments are deposited in Connecticut's General Fund, and used for programs unrelated to the regulation of tribal gaming. Courts and the Department have deemed such unrelated uses impermissible under IGRA.

I respectfully submit that the Committee, and if necessary the full General Assembly, should carefully consider these risks before proceeding with the Bill.

I. BACKGROUND

A. Tribal Gaming Regulation

Before turning to the Bill, I will offer an overview of IGRA and the Department's implementing regulations.

As the Supreme Court has explained, "[t]he Indian Gaming Regulatory Act … creates a framework for regulating gaming activity on Indian lands.[2] IGRA, which governs Connecticut's two existing casinos (Foxwoods and Mohegan Sun), allows a federally recognized tribe to conduct "class III" gaming—slot machines, table games, and similar Las Vegas-style betting—only "on Indian lands," and "only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State.[3]

Although such tribal-state gaming compacts govern casino operations and relations between tribes and states, "IGRA limits permissible subjects of [compacts] in order to ensure that tribal-state compacts cover only those topics that are related to gaming and are consistent with IGRA's stated purposes."[4] For example, a compact may address state assessment of fees to "defray the costs of regulating" a casino, "standards for the operation" and "maintenance" of the casino, and other matters "directly related to the operation of gaming activities."[5] But IGRA

[1] U.S. Government Accountability Office, *Indian Gaming* at 19 (June 2015).

[2] *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2028 (2014).

[3] *Id.* (citing 25 U.S.C. § 2710(d)(1)(C)); *see also* 25 U.S.C. § 2703(6)-(8) (defining the three gaming classes).

[4] *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1028-1029 (9th Cir. 2010) (footnotes omitted)

[5] 25 U.S.C. § 2710(d)(3)(C).

prohibits states from "impos[ing] any tax, fee, charge, or other assessment upon an Indian tribe" except for assessments needed to defray the state's actual costs of regulating the tribal casino.[6]

The Department reviews proposed tribal-state compacts and proposed amendments to compacts to ensure that they comply with IGRA and other federal law, and may disapprove any compact or amendment that fails to do so.[7] A compact amendment is not effective until it has been both approved by the Department and published in the Federal Register.[8]

B. Groundwork Is Laid for a New Casino

The Tribes operate their respective Connecticut casinos pursuant to tribal-state compacts executed in the early- and mid-1990s. The gaming procedures that govern Foxwoods, for example, were adopted in May 1991.[9] Memoranda of understanding, or MOUs, were executed between the Tribes and the State not long thereafter. The MOUs require each Tribe to give the State 25 percent of the slot-machine revenues generated by its casino. This revenue-sharing obligation terminates, however, if Connecticut allows "any other person" or any "person or entity" to open a new in-state casino.

Two years ago, the Tribes proposed to open a third casino in Connecticut—the state's first off-reservation casino.[10] In response, the General Assembly enacted Special Act 15-7, which has provided the Tribes with a dedicated pathway for developing the third casino. Although the act does not itself allow the Tribes to operate a new casino (that requires additional legislation), it permits them to: (i) form a joint "tribal business entity" to develop and manage a new casino, (ii) request proposals from municipalities, and (iii) execute a contract with a municipality to develop and operate the casino.

Following the enactment of Special Act 15-7, the Tribes created a joint business entity, MMCT Venture LLC, that they own and operate exclusively. Over the past 18 months, MMCT has issued a request for site proposals, reviewed applications from interested municipalities, and selected the town of East Windsor as the host community for its proposed casino. Last week, MMCT representatives signed a casino-development agreement with the town.[11]

At least two principal steps remain before the Tribes can open the planned casino, however. First, the General Assembly must enact legislation to grant MMCT a license to operate the casino. The Bill now before the Committee would do just that. Second, the Tribes must

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[6] *Id.* § 2710(d)(4).

[7] *See id.* § 2710(d)(8); 25 C.F.R. § 293.14.

[8] 25 C.F.R. § 293.15; *see also id.* § 293.15(b) (providing timeline for publication of approved compacts and amendments in Federal Register).

[9] *See Notice of Final Mashantucket Pequot Gaming Procedures*, 56 Fed. Reg. 24,996 (May 31, 1991).

[10] *See* Letter from Attorney General George C. Jepsen to General Assembly (Apr. 15, 2015).

[11] *See* Hallenbeck, "Tribes, East Windsor Sign Third-Casino Agreement," *The Day* (Mar. 2, 2017), http://www.theday.com/article/20170302/BIZ02/170309821.

(pursuant to section 13(c) of the Bill) amend their compacts with the State. The Bill requires such amendments because without them, the Tribes' 25-percent revenue-sharing obligation—which provides hundreds of millions of dollars to the State annually—would terminate if the Bill were enacted. That is because the Tribes' gaming agreements with Connecticut provide, as noted, that the obligation terminates if the State authorizes "any new person or entity" (even the Tribes' own LLC) to operate a new in-state casino.

Anticipating the requirement of amendments to their gaming agreements, the Tribes last year sought "technical assistance" from the Interior Department regarding such amendments. These amendments would keep the 25-percent revenue-sharing obligation in place notwithstanding the opening of a new MMCT-operated casino. On April 25, 2016, the Department issued a non-binding response to the Tribes' inquiry, tentatively concluding that the proposed compact amendments would preserve the Tribes' revenue-sharing obligations. It declined to take a position, however, on whether the amendments comply with IGRA or other federal laws.

II. THERE IS A SIGNIFICANT RISK THAT THE DEPARTMENT WILL REJECT THE TRIBES' PROPOSED COMPACT AMENDMENTS.

Based on my five years of experience as Secretary of the Interior (and my other work on Native American legal matters), I believe that there is a substantial risk that the Department would not approve the Tribes' proposed compact amendments.

A. The Department's Compact-Review Process Is Rigorous and Holistic

The Department may reject any proposed tribal-state compact or amendment that violates (i) "any provision of [IGRA]," (ii) "any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands," or (iii) "the trust obligations of the United States to Indians."[12] The Department has stated that it evaluates revenue-sharing provisions in particular "with great scrutiny,"[13] and "has sharply limited the circumstances in which Indian tribes can make direct payments to a State."[14]

Appellate courts have provided additional guidance regarding IGRA's requirements for revenue-sharing provisions. In its *Rincon* decision, for example (see footnote 4, above), the Ninth Circuit held that under IGRA, "a state may … request revenue sharing *if* the revenue sharing provision is (a) for uses 'directly related to the operation of gaming activities' …, (b) consistent with the purposes of IGRA, and (c) … bargained for in exchange for a 'meaningful

[12] 25 U.S.C. § 2710(d)(8); *accord* 25 C.F.R. § 293.14.

[13] U.S. Interior Dep't, *Habematolel Pomo Nation – Disapproval Decision* at 3 (Aug. 17, 2010) (hereafter "*Habematolel Disapproval Decision*"), *available at* https://bia.gov/cs/groups/xoig/documents/text/idc1-024698.pdf.

[14] U.S. Interior Dep't, *Jena Band of Choctaw Indians – Disapproval Decision* at 1 (Mar. 7, 2002) (hereafter "*Jena Band Disapproval Decision*"), *available at* https://bia.gov/cs/groups/xoig/documents/text/idc1-029778.pdf.

concession.'"[15] The Second Circuit, which hears appeals from federal district courts in Connecticut, has cited *Rincon*,[16] and the Department has explained that *Rincon* is "[a]n important part of [its] analysis" and "provid[es] guidance on the extent to which revenue sharing agreements comply with IGRA."[17]

Several additional points regarding the Department's review process are particularly relevant here. To begin with, the Department does not review proposed amendments in isolation, but rather considers them together with the underlying compacts. As IGRA's implementing regulations put it, the Department "review[s] amendments to [e]nsure that the terms of the compact, *as amended and considered as a whole*, do not violate any provision of IGRA, any other provision of Federal law …, or the trust obligations of the United States to Indians."[18] Accordingly, review by the Department of the Tribes' proposed amendments would encompass all of the underlying compacts' provisions, including the revenue-sharing clauses. Moreover, 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."[19] Finally, the Department regularly disapproves all of an amendment or compact if any part of it violates IGRA, rather than severing or disapproving only the offending provisions.[20]

B. There Is a Substantial Risk that the Department Would Deem the Proposed Compact Amendments Inconsistent with IGRA's Structure and Purposes

IGRA is addressed exclusively to gaming "on Indian lands," a term the statute defines 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] Indeed, Congress made this limitation clear in declaring the statute's purposes to include the "establishment of independent Federal regulatory authority for gaming *on Indian lands*" and the provision of "Federal standards for gaming *on Indian lands*." 25 U.S.C. § 2702(3) (emphases added). The Senate report that accompanied IGRA—which the Ninth Circuit has described as "provid[ing] guidance on how Congress intended [IGRA] to be

[15] 602 F.3d at 1033.

[16] *See Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 472 (2d Cir. 2010).

[17] *Habematolel Pomo Decision* at 3.

[18] *Class III Tribal State Gaming Compact Process*, 73 Fed. Reg. 74,004, 74,005 (Dec. 5, 2008) (emphasis added).

[19] U.S. Interior Dep't, *Forest County Potawatomi Community of Wisconsin – Disapproval Decision* at 7 n.34 (Jan. 9, 2015) (hereafter "*Potawatomi Community Disapproval Decision*"), *available at* https://bia.gov/cs/groups/xoig/documents/text/idc1-029286.pdf.

[20] *See, e.g.*, *Habematolel Disapproval Decision* at 2, 6; U.S. Interior Dep't, *Pinoleville Pomo Nation – Disapproval Decision* at 1, 6 (Feb. 25, 2011) (hereafter "*Pinoleville Disapproval Decision*"), *available at* https://bia.gov/cs/groups/xoig/documents/text/idc1-024673.pdf; U.S. Interior Dep't, *Mashpee Wampanoag Tribe – Disapproval Decision* at 1, 18 (Oct. 12, 2012) (hereafter "*Mashpee Disapproval Decision*"), *available at* https://bia.gov/cs/groups/webteam/documents/text/idc1-028222.pdf.

[21] 25 U.S.C. §§ 2703, 2710(d)(1).

interpreted,"[22] likewise characterizes IGRA as "a framework for the regulation of gaming activities *on Indian lands*."[23] Consistent with these legislative declarations, the U.S. Supreme Court has observed that "[e]verything—literally everything—in IGRA affords tools … to regulate gaming on Indian lands, *and nowhere else*."[24] Yet the Tribes' proposed amendments are designed to facilitate a commercial casino that will *not* be located on "Indian lands."

I believe there is a serious question whether this is a permissible use of IGRA's compacting process—a question the Department has already recognized. In 2002, one of my predecessors explained that using the compact-approval process to facilitate off-reservation gaming would "stretch[]" IGRA's "principles … in ways Congress never imagined."[25] Consistent with that view, the Department has disapproved a compact amendment 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."[26]

IGRA's structure confirms the questionably validity of the Tribes' proposed amendments. The act already establishes a mechanism for tribes to game on land outside their reservations. First, the land must be taken into trust by the United States, a "rigorous" process[27] that is generally permitted only if the land is within or contiguous to the tribe's reservation.[28] Second, the Secretary of the Interior must consult with state and local officials, determine that the casino would not be detrimental to the surrounding community, and obtain approval from the governor.[29]

The Tribes' proposed compact amendments envision a different process, one in which they would game on off-reservation land without having that land taken into trust. Such an effort to use IGRA's compact-amendment process to secure approval of an off-reservation casino is to my knowledge unprecedented—and I expect the Department to regard that effort skeptically.

There is also a significant risk that the Department would deem the Tribes' proposed amendments inconsistent with IGRA because they enhance the Tribes' ability to conduct off-

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[22] *Rincon*, 602 F.3d at 1027.

[23] Senate Select Committee on Indian Affairs, *Indian Gaming Regulatory Act*, S. Rep. No. 100-446, at 5 (Aug. 3, 1988), 1988 WL 169811 (1988) (emphasis added).

[24] *Bay Mills*, 134 S. Ct. at 2034 (emphasis added).

[25] U.S. Interior Dep't, *Seneca Nation of Indians – Deemed-Approval Decision* at 3 (Nov. 12, 2002), *available at* https://bia.gov/cs/groups/xoig/documents/text/idc-038394.pdf.

[26] U.S. Interior Dep't, *Ewiiaapaayp Band of Kumeyaay Indians – Disapproval Decision* at 1 (Mar. 18, 2008), *available at* https://bia.gov/cs/groups/xoig/documents/text/idc1-024667.pdf.

[27] U.S. Interior Dep't, *Confederated Tribes of the Warm Springs Reservation of Oregon – Disapproval Decision* at 1 (May 20, 2005), *available at* https://bia.gov/cs/groups/xoig/documents/text/idc1-025217.pdf.

[28] *See* 25 U.S.C. § 2719; 25 C.F.R. § 292.4.

[29] *See* 25 U.S.C. § 2719(b)(1).

reservation gaming at the expense of on-reservation gaming. A new casino in East Window undoubtedly would draw customers and revenue from Foxwoods and Mohegan Sun, and therefore could be viewed as running afoul of this principle. But because IGRA is designed to authorize Indian gaming only on Indian lands, a deal that undermines on-reservation gaming in exchange for the opportunity to conduct gaming outside of Indian lands could be seen as contrary to IGRA—even if that gaming is conducted by an entity controlled by the Tribes.

Finally, it bears mention that agreement between the Tribes and the State would not immunize the proposed amendments from Interior Department scrutiny. When an amendment would violate IGRA, "[i]t is immaterial whether the Tribe or the [State] requested that th[e] provision be included in the compact"—the Department cannot approve provisions that would extend beyond what Congress has allowed.[30] Thus, if the Department concludes that the amendments are unlawful, support by both the State and the Tribes would not provide a basis for approval.

III. THERE IS A SIGNIFICANT RISK THAT THE DEPARTMENT WOULD INVALIDATE THE 25-PERCENT ROYALTY OBLIGATION IN THE TRIBES' EXISTING GAMING AGREEMENTS

Submission of the Tribes' proposed compact amendments to the Department would also imperil the 25 percent royalty in the Tribes' existing agreements with the State. As discussed, when amendments to a compact are submitted, the Department reviews the entire agreement—which here would include the revenue-sharing clauses—rather than just the amendments.[31] And in my opinion, there is a significant chance that such review would lead the Department to require a reduction of the 25-percent royalty provision in the current compacts. This is so for two principal reasons.

First, the 25-percent rate is, as noted, higher than the rate in the overwhelming majority of other compacts—and the Department has rejected even lower rates. These include a 21.5 percent rate in Massachusetts,[32] a 15 percent rate in California (on two separate occasions),[33] a 15.5 percent rate in Louisiana,[34] and a 12.5 percent rate in Kansas.[35] In several of these cases, the Department subsequently approved (actively or passively) a revised compact that imposed a lower rate. For example, the Department allowed a 17 percent rate in Massachusetts (down from

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[30] *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.").

[31] *See Class III Tribal State*, 73 Fed. Reg. at 74,005, *quoted supra* p.5.

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

[33] *See Pinoleville Disapproval Decision* at 2-6; *Habematolel Disapproval Decision* at 2-6.

[34] *See Jena Band Disapproval Decision* at 1-3.

[35] *See* U.S. Interior Dep't, *Sac and Fox Nation – Disapproval Decision* (July 10, 1992) (hereafter "*Sac and Fox Disapproval Decision*"), *available at* https://bia.gov/cs/groups/xoig/documents/text/idc1-025986.pdf.

21.5 percent),[36] and rates of 8.89 percent and 6.4 percent in California (each down from 15 percent).[37]

Put simply, "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."[38] The unusually high royalty rate paid by the Tribes' makes it likely that the attention Interior officials would pay would be particularly close. While a rate reduction would of course not deprive the state of all of the royalty revenue, it could still create a substantial loss. For example, if the Department determined that the State may collect a royalty of no more than 15 percent from Foxwoods and Mohegan Sun, the State would lose approximately $100 million per year.

Second, there is a significant risk of the Department concluding that the compacts violate IGRA because the Tribes' royalty payments go into Connecticut's General Fund. Pursuant ot IGRA, the Department seeks "to ensure that [compacts] regulate only those activities that are directly related to the operation of gaming activities."[39] In the revenue-sharing context, this direct-relationship principle limits use of gaming royalties to gaming-regulation purposes,[40] thereby forbidding use of royalties for programs with no gaming nexus.[41]

In *Rincon*—which as noted the Department has cited favorably—the Ninth Circuit rejected a proposed compact amendment for violating this direct-relationship principle. The compact there 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."[42] The proposed amendment, however, would have permitted another 900 slot machines

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[36] *See* U.S. Interior Dep't, *Mashpee Wampanoag Tribe – Deemed Approval Decision* (Jan. 6, 2014), *available at* https://bia.gov/cs/groups/webteam/documents/document/idc1-028231.pdf.

[37] *See* U.S. Interior Dep't, *Pinoleville Pomo Nation – Deemed Approval Decision* (Feb. 9, 2012), https://bia.gov/cs/groups/xoig/documents/text/idc1-024610.pdf; U.S. Interior Dep't, *Habematolel Pomo – Deemed Approval Decision* (Aug. 31, 2011), *available at* https://bia.gov/cs/groups/xoig/documents/text/idc1-026874.pdf.

[38] *Indian Gaming*, *supra* n.1, at 18.

[39] *Mashpee Disapproval Decision* at 7.

[40] *See* 25 U.S.C. §§ 2710(b)(2)(B), 2710(d)(4).

[41] *See Sac and Fox Disapproval Decision* at 2 ("IGRA impose[s] very specific limitations on the use of gaming revenues."); *Potawatomi Community Disapproval Decision* at 9 (concluding that a "provision violates IGRA because it contemplates payments to the State from [the tribe] for purposes other than defraying the State's cost of regulating Class III gaming activities."); *Jena Band Disapproval Decision* at 1, *quoted supra* p.4.

[42] 602 F.3d at 1024. The funds were used, for example, to provide "grants for programs designed to address gambling addiction" and to fund the state's gaming commission. *Id.*

in exchange for royalty payments into the state's general fund.[43] The court rejected the amendment because the revenue was not directed toward gaming-regulation activities.[44]

Connecticut's revenue-sharing framework shares that defect. The Tribes' MOUs direct the Tribes' royalty payments to the State's general fund, without restriction on their use.[45] State law similarly provides that the revenue-sharing payments "shall be deposited in the General Fund."[46] This approach provides further reason to believe that submission of the Tribes' proposed compact amendments would threaten the current revenue-sharing arrangement.

IV. THE 2016 "TECHNICAL ASSISTANCE" LETTER DOES NOT ADDRESS THESE ISSUES

The April 25, 2016, "technical assistance" letter that the Tribes obtained from the Interior Department does not alter the views expressed above. The letter expressly states that it "should not be construed as" even "a preliminary decision[] or advisory opinion[] regarding" a compact amendment that has not been "formally submitted to the Department for review or approval."[47] The letter manifestly does not bind the Department; it should have no bearing on this Committee's consideration of the Bill.

V. CONCLUSION

The Bill poses important risks to the State. Based on my experience as Secretary of the Interior and Colorado Attorney General, I believe there is a significant chance that the Interior Department could reject not only the amendments the Tribes will apparently submit if the Bill passes, but also the 25-percent royalty provisions in the Tribes' gaming agreements. That outcome would deprive the State of hundreds of millions of dollars each year. The Committee should carefully consider these risks before proceeding with the Bill.

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[43] *Id.*

[44] *Id.* at 1033; *see also Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 932-933 (7th Cir. 2008) (questioning the legality of "payments to the State" that "are made without any restrictions or limits on the manner in which may use the State may use those funds")

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

[46] Conn. Gen. Stat. § 3-55i.

[47] Letter from Lawrence S. Roberts, Acting Assistant Secretary – Indian Affairs, Dept. of Interior, to Hon. Kevin Brown, Chairman, Mohegan Tribe of Indians of Connecticut (Apr. 25, 2016).