No. 16-1137

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS; AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC.; TOWN OF AQUINNAH, MA,

Plaintiffs - Appellees

v.

THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH); THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC.; THE AQUINNAH WAMPANOAG GAMING CORPORATION,

Defendants - Appellants

CHARLES D. BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts; MAURA T. HEALEY, in her capacity as Attorney General of the Commonwealth of Massachusetts; STEPHEN P. CROSBY, in his capacity as Chairman of the Massachusetts Gaming Commission,

Third Party - Defendants

On Appeal from the
U.S. District Court for the District of Massachusetts
(CASE NO: 1:13-cv-13286-FDS)

APPELLANTS OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

The Wampanoag Tribe of Gay Head (Aquinnah); the Wampanoag Tribal Council of Gay Head, Inc.; and the Aquinnah Wampanoag Gaming Corporation pursuant to Fed. R. App. P. 26.1, certify that it has no parent corporation and certifies that it has no stock and therefore no publicly held corporation owns 10% or more of its stock.

s/ Scott D. Crowell
SCOTT D. CROWELL

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STATEMENT WHY ORAL ARGUMENT SHOULD BE PERMITTED

Appellant Aquinnah Tribe, pursuant to 1st Cir. R. 34.0(a), requests that the Appeals Court permit oral argument because (i) this is a matter a great importance to the Tribe and its members; (ii) the District Court's Order requires the application and interpretation of two prior decisions of this Court, which reached different results; (iii) none of the exceptions set forth in Local Rule 34(a)(2) apply; and (iv) most importantly, the Tribe believes that the decisional process would be significantly aided by oral argument.

May 28, 2016

s/ Scott D. Crowell
SCOTT D. CROWELL

I. JURISDICTIONAL STATEMENT

This lawsuit originated in Supreme Judicial Court for Suffolk County, Massachusetts and was removed by Appellants pursuant to 28 U.S.C. § 1331, 1441 and 1446. The case was removed because resolution of the issues, including the pendant state law claims, required determinations of federal law. The District Court had federal subject matter jurisdiction over the lawsuit pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction to the Commonwealth's state law claims pursuant to 28 U.S.C. § 1367. The District Court had federal subject matter jurisdiction over the counterclaims filed in this lawsuit pursuant to 28 U.S.C. § 1331.

This Appeals Court has appellate jurisdiction under 28 U.S.C. § 1291.

Final Judgment was entered by the District Court on January 5, 2016. The Notice of Appeal was timely filed on February 1, 2016, within the thirty days allowable for a timely notice of appeal. 28 U.S.C. § 2107(a).

The appeal is from a final judgment that disposes of all parties' claims.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the District Court erred in ruling that MILCSA(Aquinnah)'s[1] application of the Commonwealth's gaming laws remains in effect; IGRA[2] preempts prior legislation regarding gaming on Aquinnah Indian lands.

B. Whether the District Court erred in concluding that the Tribe's struggling efforts to establish and expand its governmental presence are deficient for the Tribe's Indian lands to qualify under IGRA; Aquinnah exercises sufficient governmental power over its Indian lands.

C. Whether the District Court erred in concluding that the Commonwealth's lawsuit could proceed without the National Indian Gaming Commission ("NIGC)" as a party; the United States continues to assert jurisdiction over gaming activities on Aquinnah Indian lands to the exclusion of the Commonwealth.

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[1] Three different Indian Land Claim statutes are discussed extensively throughout this Opening Brief. To facilitate the reading of the brief, the acronyms of the different statutes are followed by a parenthetical that identifies the Tribe or Tribes

[2] The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq.

III. CONCISE STATEMENT OF THE CASE

The crux of this appeal is the whether Congress' enactment of IGRA, and its comprehensive provisions of federal law governing gaming on Indian lands impliedly repealed those provisions in MILCSA(Aquinnah), which had applied the gaming laws and regulations of the Commonwealth to Aquinnah Indian lands. If IGRA applies, the inquiry turns to whether Aquinnah's exercise of governmental power over its Indian lands sufficient for the lands to qualify for gaming under IGRA.

Factual Summary: The Wampanoag Tribe of Gay Head (Aquinnah) is a federally-recognized Indian tribe with trust lands in Dukes County, Massachusetts. The members are direct descendants of the Wampanoag people who have occupied the area since time immemorial.

On September 28, 1983, the Wampanoag Tribal Council of Gay Head, Inc. entered into a Memorandum of Understanding ("MOU") Concerning Settlement of Gay Head, Massachusetts Indian Land Claims with the Town of Aquinnah (formally Town of Gay Head) and the Taxpayers' Association of Gay Head, Inc., resolving a multi-year litigation over aboriginal title to lands located on Martha's Vineyard. (App. Vol. I, 182 at ¶¶11 & 12). For clarification purposes, it is important to note that the Tribe achieved its federally-recognized status on April 11, 1987 through the formal administrative process administered by the

Department of the Interior (App. Vol. I, 182 at ¶¶14-17), and not through the MILCSA(Aquinnah), which was enacted by Congress six months later on August 18, 1987 (App. Vol. I, 182 at ¶¶18–20). MILCSA(Aquinnah) did not confer federal recognition upon the Tribe, but rather, resulted in the Settlement Lands being set aside for the benefit of the Tribe, while extinguishing the Tribe's aboriginal title to lands on Martha's Vineyard. However, many aspects of the were imposed upon the newly federally-recognized Tribe in MILCSA(Aquinnah), 25 U.S.C. 1771 et seq.(App. Vol. I, 182 at ¶18).

In 1988, slightly more than a year after enactment of the MILCSA(Aquinnah), Congress enacted IGRA, establishing a regulatory scheme for Indian gaming in the United States, and creating the National Indian Gaming Commission ("NIGC"), an independent federal regulatory agency within the Department of Interior, to oversee IGRA's administration. In compliance with IGRA, in 2012 the Tribe adopted Gaming Ordinance 2011-01, authorizing gaming activities on the Settlement Lands, as conducted in accordance with IGRA and its implementing regulations (App. Vol. I, 182 at ¶37-39). The United States thereafter approved the Tribe's Gaming Ordinance and issued two legal opinions confirming the Tribe's authority to conduct gaming on the Settlement Lands. First, on August 23, 2013, the Tribe received an opinion letter from the Department of Interior's Office of the Solicitor concluding that the MOU effectuated in part as

MILCSA(Aquinnah), does not prohibit the Tribe from conducting Indian gaming on its Settlement Lands pursuant to IGRA (App. Vol. I, 182 at ¶¶52 & 53). Subsequently, on October 25, 2013, the Tribe received an additional opinion letter from the NIGC's Office of General Counsel concluding that the Settlement Lands are eligible for Indian gaming under IGRA (App. Vol. I, 182 at ¶¶ 58 & 59).

Discussed in greater detail in the argument section below, the Aquinnah Tribe has submitted to the record volumes of ordinances and inter-governmental agreements, and has submitted the transcript of the deposition of Tribal Chairman Tobias Vanderhoop, which evidence the Tribe's exercise of governmental power over Aquinnah Indian lands. Whether that record is sufficient to establish that the Tribe exercises sufficient governmental power for the lands to qualify for gaming is a key issue in dispute in this appeal.

When the Tribe informed the Commonwealth that it would proceed with the establishment of a Class II gaming facility on Aquinnah Indian lands under IGRA in order to generate the needed governmental revenue to fund and establish a myriad of needed governmental programs and opportunities for its members, the Commonwealth responded by filing an action against the Tribe in the Commonwealth's Supreme Court.

Procedural Summary: On December 2, 2013, the Commonwealth filed a Complaint with the Single Justice of the Supreme Judicial Court for Suffolk

County against the Tribe. The Complaint asserts a claim for breach of contract and request a declaratory judgment that the MOU allowed the Commonwealth to prohibit the Tribe from conducting gaming on the Settlement Lands.

On December 30, 2013, the Tribe removed the action to the District Court on grounds of federal-question and supplemental jurisdiction (App. Vol. I, 1). On January 29, 2014, the Commonwealth moved to remand the action to state court (App. Vol. I, 9), which the District Court denied on July 1, 2014 (App.Vol. I, 11).

On July 10, 2014, both the AGHCA and the Town filed motions to intervene (App. Vol. I, 24-42). The District Court granted those motions on August 6, 2014 (App. Vol. I, 69).

On August 27, 2014, the Tribe moved to dismiss the AGHCA complaint on the grounds of sovereign immunity and failure to state a claim upon which relief can be granted (App. Vol. I, 70-73). On that same day, the Tribe separately moved to dismiss all three complaints, with leave to amend, for failure to join the United States, which the Tribe asserted was a required party under Fed.R.Civ.P. 19 (App. Vol. I, 87- 90).

On October 24, 2014, the Tribe filed an amended answer to the Commonwealth's complaint (App. Vol. I, 103-116). The amended answer included counterclaims against the Commonwealth and claims against three third-party defendants, all of whom are government officials of the Commonwealth sued in

their official capacities under *Ex Parte Young*. 209 U.S. 123 (1908). The counterclaims sought declaratory and injunctive relief concerning the Commonwealth's assertion of jurisdiction over gaming that occurs on the Tribe's trust lands. On November 19, 2014, the Commonwealth and the third-party defendants moved to dismiss the counterclaims (App. Vol. I, 134-137).

On February 27, 2015, the District Court denied the Tribe's motions to dismiss, including the motion based on Fed.R.Civ.P. 19, and granted the motion by the Commonwealth to dismiss the counterclaims against it. Remaining are the claims by the Commonwealth, the AGHCA, and the Town against the Tribe, and the Tribe's counterclaims against the government officials (App. Vol. I, 149). The February 27, 2015 Order is one of the Orders to which the Tribe alleges error in this appeal.

On April 22, 2015, all parties filed a Stipulation of Facts Not in Dispute, (App. Vol. I, 182). On May 28, 2015, the Commonwealth, the Town, the AGHCA, and the Tribe all moved for summary judgment (App. Vol. I, 238-316). On November 13, 2015, the District Court granted the motions of the Commonwealth, the Town and AGHCA and denied the Tribe's motion (App. Vol. II, 343). The November 13, 2015 Order is one of the Orders to which the Tribe alleges error in this appeal.

On December 11, 2015, the Tribe filed a Motion for Reconsideration of both the Order of February 27, 2015 and the Order of November 13, 2015 (App. Vol. II, 383). On December 23, 2015, the District Court denied the Motion for Reconsideration (App. Vol. II, 405). The November 13, 2015 Order is one of the Orders to which the Tribe alleges error in this appeal.

On January 5, 2016, the District Court entered Final Judgment and this appeal ensued.

IV. SUMMARY OF ARGUMENT

Appellants[3] Wampanoag Tribe of Gay Head (Aquinnah) and the Aquinnah Wampanoag Gaming Corporation (collectively "Aquinnah" or "Tribe") secured all the proper approvals required by IGRA and the regulations promulgated by the NIGC for the Tribe to proceed with establishing and operating a Class II-only[4]

[3] Although the Complaints named the Wampanoag Tribal Council of Gay Head, Inc. as a party defendant, alleging that the Wampanoag Tribe of Gay Head (Aquinnah) "includes" Wampanoag Tribal Council of Gay Head, Inc., which no longer exists, the Tribe denies that allegation. The District Court did not address the issue. However, if such allegation is true, and Defendant Wampanoag Tribe of Gay Head (Aquinnah) has the capacity for pleading on behalf of Wampanoag Tribal Council of Gay Head, Inc., then this pleading shall also be considered to be filed on behalf of Wampanoag Tribal Council of Gay Head, Inc.

[4] IGRA divides gaming into three categories: Class I includes traditional games and is regulated exclusively by the Tribe; Class II, at issue here, includes bingo and similar games, as well as non-banked card games, and is regulated by the Tribe and the NIGC. Class III gaming includes slot machines and banked table games and is governed by the terms of agreed-upon and approved Tribal/State compacts. 25 U.S.C. § 2703(6-8).

gaming facility on its Indian lands in County of Dukes County, Massachusetts. Due to the unwillingness of the Legislature in the 1990's and more recently, the Patrick and Baker Administrations to negotiate a gaming compact with the Tribe, Aquinnah chose to proceed with a Class II gaming facility because Class II gaming is exclusively governed by federal and tribal law, to the exclusion of the Commonwealth.

In the wake of Aquinnah securing final federal approvals, which resulted in two legal opinions being issued by the United States Department of the Interior and the NIGC stating that IGRA, and not MILCSA(Aquinnah), governs gaming on Aquinnah Indian lands, the Commonwealth, rather than seeking proper redress against the NIGC in federal court under the Administrative Procedures Act, 5 U.S.C. §§ 500 et seq. ("APA"), filed a lawsuit against the Tribe in the Commonwealth's Supreme Court. The Tribe removed the action to federal court, and the Town of Aquinnah and the Aquinnah Gay Head Community Association ("AGHCA") intervened.

Aquinnah finds three critical errors in the District Court's rulings against the Tribe. The District Court erred (1) in its Order dated February 27, 2015, when it denied the Tribe's motion to dismiss with leave to amend to include the NIGC as a party pursuant to Fed.R.Civ.P. 19; (2) in its Order dated November 13, 2015, when it granted cross-motions for summary judgment in favor of the Commonwealth, the

Town of Aquinnah and the AGHCA, and against the Tribe; and (3) in its Order of December 23, 2015, when the District Court denied the Tribe's motion for reconsideration based on recent developments between the NIGC and two tribes with Indian lands in Texas.

First, the District Court erred when it ruled that the MILCSA(Aquinnah), rather than IGRA, governs the Tribe's gaming activities on the Tribe's Indian lands in Dukes County (often referred to as the "Settlement Lands"). As a federally-recognized Indian tribe subject to the plenary authority of the United States Congress, Aquinnah is entitled to benefit from subsequent acts of Congress in its legislation of Indian affairs. IGRA's provisions, particularly as they relate to Class II gaming, which is governed exclusively by federal and tribal law, are inherently repugnant to the application of the Commonwealth's gaming laws that were previously applicable under MILCSA(Aquinnah). The District Court reasoned that certain parenthetical language which acknowledges the obvious, that the civil and criminal laws of the Commonwealth include the Commonwealth's laws regarding gaming, allows the District Court to avoid its obligation of following the clear law articulated by this Appeals Court in *Narragansett.* The District Court instead treats the parenthetical language as if it has the exact same meaning as the language in MICA(Maine), where Congress explicitly stated by express language that subsequent acts of Congress intended for the benefit of Indians would not apply to

Maine tribes unless the subsequent legislation also explicitly stated that it was intended to apply to the Maine tribes.

Second, the District Court erred by ruling that even if IGRA does apply to Aquinnah Indian lands, the Tribe does not exercise its governmental power over those lands in a manner sufficient for the lands to qualify for gaming under IGRA. Rather than follow the direction of this Appeals Court in *Narragansett*, and rather than defer to the federal agencies' determinations that Aquinnah does exercise sufficient governmental power over its Indian lands, the District Court fiats a new and extremely difficult standard. This new standard requires that an Indian tribe have "itself" the immediate capability to provide all needed governmental services to its gaming facility, including tribal law enforcement with the inherent authority to enforce state laws. This new standard rejects the established and frequent use of intergovernmental agreements with non-Indian governments to make sure that needed governmental services are provided.

Third, the District Court erred by twice denying the Tribe's motion under Fed.R.Civ.P. 19 to dismiss the claims against the Tribe with leave to amend to bring the NIGC into the litigation. The United States continues to exercise jurisdiction over gaming on Aquinnah Indian lands to the exclusion of the Commonwealth. Accordingly, the decisions of the District Court, if upheld on appeal, place Aquinnah in an untenable "Catch-22" position wherein proceeding

with gaming under the laws of the Commonwealth will risk enforcement action by the United States and proceeding with gaming under IGRA will similarly risk enforcement action by the Commonwealth and/or the Town of Aquinnah. The District Court initially, on February 27, 2015, denied the Tribe's motion on grounds that the Tribe was unable to show that there was a "substantial risk" the Tribe would face such conflicting circumstances. In October of 2015, the NIGC approved Class II Gaming Ordinances for two Texas Tribes, and in that process, issued a legal opinion that it was asserting jurisdiction to the exclusion of the State of Texas, despite the fact that the Fifth Circuit had ruled in litigation between the State of Texas and the Texas Tribes where the United States was not a party, that Texas law rather than IGRA governed gaming activities on the Texas Tribes' Indian lands. Despite this development of a very real and indisputable "substantial risk," the District Court denied the Tribe's motion.

All three material errors of the District Court, separately and collectively, require that the decisions of the District Court be vacated and reversed.

V. ARGUMENT

A. Standard of Review.

The standard of review of the District Court's rulings on motions for summary judgement is *de novo*. In conducting a "fresh look" at the record, the Appeals Court views the evidence in the light most favorable to the non-moving

party, and draw all reasonable inferences in its favor. Summary judgment is appropriate only if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. To determine whether a trial-worthy issue exists, the Appeals Court looks to all of the record materials on file, including the pleadings, depositions, and affidavits. *Hicks v. Johnson,* 755 F.3d 738 (1st Cir. 2014).

The standard of review of the District Court's denial of the Tribe's motion based on Fed.R.Civ.P. 19 is abuse of discretion. An abuse of discretion exists when the district court makes an error of law, or "relies significantly on an improper factor, omits a significant factor, or makes a clear error of judgment in weighing the relevant factors. *Picciotto v. Continental Cas. Co*., 512 F.3d 9, 15 (1st Cir. 2008).

B. IGRA Preempts Prior Legislation Regarding Gaming on Aquinnah Indian Lands: The District Court Erred in Ruling that MILCSA(Aquinnah)'s Application of the Commonwealth's Gaming Laws Remains In Effect.

1. Application of the First Circuit's Precedent: IGRA Preempts MILCSA(Aquinnah) Regarding Gaming Activity on Aquinnah Indian Lands.

a. The Federal Statutes at Issue: IGRA, MILCSA(Aquinnah), RIILCSA(Narragansett), and MICA(Maine).

The crux issue before this Appeals Court is whether Congress, in the passage of IGRA, impliedly repealed the gaming provisions of MILCSA(Aquinnah). Twice

before, this First Circuit Appeals Court has addressed very similar questions: First, in *Rhode Island v. Narragansett*, 19 F.3d 685 (lst Cir.1994), this Court held that IGRA impliedly repealed the provision in "RIICSA(Narragansett), which mandated that the settlement lands "shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708.[5] Second, in *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 790-91 (1st. Cir. 1996), this Court held that IGRA did not impliedly repeal the provision in MICA(Maine) which mandated that the Maine tribes "shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein." 25 U.S.C. § 1725(a). The sole reason for the two different results is that MICA(Maine) also included a provision that expressly limited the circumstances wherein a subsequent act of Congress intended for the benefit of Indian tribes applied to the tribes in Maine:

> The provisions of any federal law enacted after October 10, 1980 [the effective date of the Settlement Act], for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, ... shall not apply

[5] In 1996, the RIICSA (Narragansett) at Section 1708 was amended to expressly preclude Narragansett's Indian lands from qualifying under IGRA. That amendment was a direct result of the First Circuit issuing its opinion in *Narragansett*. No similar amendment has been made to the MILCSA(Aquinnah) at issue here. The 1996 Narragansett Amendment underscores the Appellees' appropriate venue for seeking their desired result; the United States Congress.

> within the State of Maine, *unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.*

25 U.S.C. § 1725(b) (emphasis added).

The relevant language in MILCSA(Aquinnah) and RIILCSA(Narragansett) are very similar to one another. RIILCSA(Narragansett) states:

> [T]he settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island."

25 U.S.C. § 1708. MILCSA(Aquinnah) states:

> The Settlement lands shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).

25 U.S.C. §§ 1771g. In sharp contrast, MICA(Maine) provides the above-stated express savings clause, 25 U.S.C. 1725(b). No similar clause appears in either RIICLSA(Narragansett) or MILCSA(Aquinnah). It is on the basis of that material distinction that the First Circuit held that its analysis in *Narragansett* does not yield the same result for the Maine tribes:

> This realization gets the grease from the goose. The text of the Gaming Act contains not so much as a hint that Congress intended to make that Act specifically applicable within Maine.

75 F.3d at 789.

The analysis here is straightforward. Congress could have imposed the very same savings clause on Aquinnah in MILCSA(Aquinnah), but did not do so.

Accordingly, the same analysis the Court applied to RIILCSA (Narragansett) should also be applied to MILCSA(Aquinnah), yielding the same result as in *Narragansett*, and avoiding the same result as in *Passamaquoddy*.

b. The Law of Implied Repeals

In the absence of a contrary legislative command, when two acts of Congress touch upon the same subject matter, the courts should give effect to both, if that is feasible. *See Narragansett*, 19 F.3d at 703; *Pipefitters Local 562 v. United States*, 407 U.S. 385, 432 n.43, 92 S. Ct. 2247, 2272 n.43 (1972); *United States v. Tynen*, 78 U.S. (11 Wall) 88, 92 (1871). In other words, so long as the two statutes, fairly construed, are capable of coexistence, courts should regard each as effective. *See Narragansett*, 19 F.3d at 703; *Traynor v. Turnage*, 485 U.S. 535, 547-48, 108 S. Ct. 1372, 1381-82 (1988). However, "if the two [acts] are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." *Narragansett*, 19 F.3d at 703; *Tynen*, 78 U.S. (11 Wall) at 92. Even absent outright repugnancy, repeal may be implied in cases where the later statute covers the entire subject "and embraces new provisions, plainly showing that it was intended as a substitute for the first act." *Narragansett*, 19 F.3d at 703-704; *Tynen*, 78 U.S. (11 Wall) at 92.

Applying these standards, the First Circuit concluded that IGRA impliedly repealed the RIILCSA (Narragansett) as to gaming activities on Narragansett's Indian lands:

> It is evident that the Settlement Act and the Gaming Act are partially but not wholly repugnant. The Settlement Act assigned the state a number of rights. Among those rights—and by no means one of the rights at the epicenter of the negotiations leading up to the Act—was the non-exclusive right to exercise jurisdiction, in all customary respects save two, (citation omitted), over the settlement lands. The Gaming Act leaves undisturbed the key elements of the compromise embodied in the Settlement Act. It also leaves largely intact the grant of jurisdiction—but it demands an adjustment of that portion of jurisdiction touching on gaming. Even in respect to jurisdiction over gaming, the two laws do not collide head-on. Thus, in connection with class III gaming, the Gaming Act does not in itself negate the state's jurisdiction, but, instead, channels the state's jurisdiction through the tribal-state compact process. It is only with regard to class I and class II gaming that the Gaming Act *ex proprio vigore* bestows exclusive jurisdiction on qualifying tribes. And it is only to these small degrees that the Gaming Act properly may be said to have worked a partial repeal by implication of the preexisting statute. In the area in which the two laws clash, the Gaming Act trumps the Settlement Act for two reasons. First, the general rule is that where two acts are in irreconcilable conflict, the later act prevails to the extent of the impasse. See *Watt v. Alaska*, 451 U.S. 259, 266, 101 S.Ct. 1673, 1677 (1981); *Tynen*, 78 U.S. (11. Wall.) at 92; see also 2B (Norman J) Singer, Sutherland on Stat. Const., § 51.02, at 121 (5th ed. 1993). Second, in keeping with the spirit of the standards governing implied repeals, courts should endeavor to read antagonistic statutes together in the manner that will minimize the aggregate disruption of congressional intent. Here, reading the two statutes to restrict state jurisdiction over gaming honors the Gaming Act and, at the same time, leaves the heart of the Settlement Act untouched. Taking the opposite tack—reading the two statutes in such a way as to defeat tribal jurisdiction over gaming on the settlement lands—would honor the Settlement Act, but would do great violence to the essential structure and purpose of the Gaming Act. Because the former course

> keeps disruption of congressional intent to a bare minimum, that reading is to be preferred. Based on our understanding of the statutory interface, we hold that the provisions of the Indian Gaming Regulatory Act apply with full force to the lands in Rhode Island now held in trust by the United States for the Narragansett Indian Tribe.

19 F.3d at 704-705. This same analysis leads to the same result when applying MILCSA(Aquinnah) at issue here to IGRA.

IGRA and MILCSA(Aquinnah) cannot be read in harmony and are therefore repugnant. MILCSA(Aquinnah) clearly applies Commonwealth law, including gaming law, to the Settlement Lands. 25 U.S.C. § 1771g. This application grants the Commonwealth "the non-exclusive right to exercise jurisdiction" over the Settlement Lands and limits the exercise of the Tribe's jurisdiction to that which conforms to Commonwealth law. *Id.*.

IGRA provides an entirely different framework than MILCSA(Aquinnah) for the Tribe's gaming activities. IGRA mandates exclusive tribal jurisdiction over the Tribe's Class I and Class II gaming. 25 U.S.C. § 2710(a). Although IGRA may permit the Commonwealth to exercise its jurisdiction over Class III gaming as prescribed and negotiated under the terms of an approved tribal-state compact, 25 U.S.C. § 2710(d), such exercise is still dependent on the Tribe entering into such an agreement in accordance with IGRA's terms[6]. Congress in the passage of IGRA

[6] The Tribe has pursued a tribal/state compact with the Commonwealth, (App. Vol. I, 182 at ¶¶29–35, which compact would provide an opportunity for the

expressly provided that the only mechanism by which state law may govern tribal gaming activities on Indian lands is by means of a negotiated tribal-state compact approved by the Department of the Interior. *See Sycuan Band v. Roache*, 54 F.3d 535, 538 (9th Cir.1995); S.Rep. No. 446, 100th Cong.2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-76 ("[U]nless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.").

Since *Narragansett*, the First Circuit has been consistent in applying these same criteria and while acknowledging that implied repeals are disfavored, has found implied repeals where the requisite criteria are met. *See Greenpack of Puerto Rico Inc. v. American President Lines,* 684 F.3d 20, 24 n.4 (1st Cir. 2012); *Greenless v. Almond*, 277 F.3d 601, 608 (1st Cir. 2002); *Granite State Chapter v. Federal Labor Relations Authority*, 173 F.3d 25 (1st Cir. 1999); *Complaint of Metlife Capital*, 132 F.3d 818 (1st Cir. 1997).

Commonwealth to exercise jurisdiction over Class III gaming on the Tribe's Indian lands. However, the Commonwealth rejected the Tribe's requests. Accordingly, the Tribe has restricted its gaming activities in its Gaming Ordinance to Class II gaming activities, which are governed and regulated by the Tribe and the federal government, to the exclusion of the State.

2. The District Court Erred in Ruling that MILCSA(Aquinnah)'s Provisions applying the Commonwealth's Gaming Laws to Aquinnah Indian Lands Remain In Effect.

The District Court below transformed/morphed/mutated the illustrative parenthetical language in MILSCA (Aquinnah) into an express savings clause that renders the same result as the express language in MICA(Maine). It is at this juncture that the District Court clearly erred. The District Court seized upon the parenthetical language in MILCSA(Aquinnah) that is not in RIILCSA (Narragansett), and elevated the parenthetical to have the exact same effect as the savings clause in MICA(Maine):

> That parenthetical is critical. It singlehandedly takes a law that, like the Rhode Island Settlement Act in *Narragansett*, is otherwise a general grant of jurisdiction, and transforms it into a law that specifically prohibits gaming on the Settlement Lands. By its plain meaning, the Massachusetts Settlement Act is a federal law that specifically prohibits gaming on the Settlement Lands

App. Vol. II, 343 at 31.

> The statutes are "capable of co-existence because the Settlement Act's parenthetical triggers IGRA's exemption.

App. Vol. II, 343 at 32.

The District Court's analysis should not survive the scrutiny of this Appeals Court. In addition to setting out the straightforward analysis regarding implied repeals set forth above, Aquinnah finds ten specific errors in the District Court's analysis in its Order of November 13, 2015 (App. Vol. II 343).

First, the language at issue does not prohibit gaming on Aquinnah lands. Rather it subjects the Tribe to the Commonwealth's gaming laws. Those laws do not prohibit gaming on Aquinnah lands. Indeed, the law of the Commonwealth since 2011 embraces and taxes full blown casino-resort gaming and slot parlors, Mass. Gen. Laws, ch. 23K ("Massachusetts Expanded Gaming Act"). Pursuant to the Massachusetts Expanded Gaming Act, the Commonwealth has entered into a gaming compact with the Mashpee Wampanoag Tribe of Massachusetts for gaming on lands yet-to-be taken into trust status. Federal Register, vol.79, No. 22, Monday, February 3, 2014 at p. 6213. The law allows for the Commonwealth to reach a similar agreement with Aquinnah Mass General Laws, ch. 23K, §67. Separately, Mass. Gen. Laws ch. 10, §§ 22-35A allows for thousands of outlets for the expansive Massachusetts Lottery, one of the oldest and most successful lotteries in the country, including a keno game every four minutes. Still further, Mass. Gen. Laws ch. 10, §§ 37-38 allows for charitable gaming including bingo, Las Vegas nights, raffles and charitable pull tabs. Further still, Mass. Gen. Laws ch. 128A allows for horse and greyhound dog pari-mutuel racing. It would be more appropriate for the parenthetical language in MILCSA(Aquinnah) to be characterized as expressly authorizing gaming. See also the Solicitor's Opinion (App. Vol. I, 213 at n.95) "Although section 1771g of the Settlement Act does specifically apply Commonwealth gaming law to the Settlement Lands, it does not

'prohibit' gaming activity").

Second, the District Court's conclusion that the parenthetical language changes the analysis when both statutes, RIILCSA(Narragansett) and MILCSA(Aquinnah) apply state gaming laws to Indian lands, is inexplicable and erroneous. In *Narragansett*, this First Circuit Appeals Court found RIILCSA (Narragansett)'s provision regarding the civil and criminal laws of Rhode Island to include Rhode Island's gaming laws and regulations, including local laws because local government derives its authority from the State of Rhode Island. 19 F.3d at 696-97. It is precisely and only because RIILCSA(Narragansett) applied Rhode Island's gaming laws and regulations to Narragansett Indian lands that the First Circuit found RIILCSA(Narragansett) to be repugnant to IGRA. 19 F.3d at 704-705. Both statutes have the same effect of applying state gaming laws, with or without the parenthetical language.

Third, the District Court's error is buttressed by basic grammar rules regarding the use of parentheticals:

> Brackets (parentheses) are punctuation marks used within a sentence to include information that is not essential to the main point. Information within parentheses is usually supplementary; were it removed, the meaning of the sentence would remain unchanged.

Scrbendi,https://www.scribendi.com/advice/how_to_use_brackets_properly.en.html. *See also Chickasaw Nation v. United States*, 534 U.S. 84, 85 122 S. Ct. 528, 530 (2001) ("The use of parentheses emphasizes the fact that that which is within is

meant simply to be illustrative"); *The Macmillan Handbook of English* (4th ed., 1960) at p.312, ("Parentheses are used to enclose material that is supplementary, explanatory, or interpretative"); *Webster's New Collegiate Dictionary* (1959 ed.), p. 1151; (Parentheses, or marks of parenthesis, are used to set off a word, phrase, or sentence which is inserted by way of comment, explanation, translation, etc., in a sentence but which is structurally independent of it."). Both MILCSA(Aquinnah) and RIILCSA(Narragansett) as a matter of federal law, applied state gaming laws and regulations to respective Aquinnah and Narragansett Indian lands.

Fourth, the District Court's error is further fortified by it concluding that the presence of the parenthetical language, is "unambiguous" language evidencing Congressional intent that IGRA not apply to Aquinnah (App. Vol. II, 343 at pp. 33-34). The District Court reaches this conclusion based entirely upon the parenthetical language and actually cites to *Passamaquoddy* for the proposition that the Indian Canon of Construction applies only where the statute is ambiguous. That is quite a stretch and shows the error here. The "unambiguous" language at issue in *Passamaquoddy* is the savings clause that clearly states that subsequent federal legislation intended for the benefit of Indians does not apply to the Maine tribes unless Congress expressly provides for its application. Essentially, the District Court has ruled that the parenthetical language in MILCSA(Aquinnah) means exactly the same thing as express and clear provision in MICA(Maine).

Certainly, the two provisions do not have the same meaning. Certainly, the parenthetical language does not unambiguously preclude Congress from applying IGRA to Aquinnah Indian lands. If Congress intended for such a result, Congress would have utilized the clear language it used in MICA(Maine), and would not have simply added the parenthetical language in MILCSA(Aquinnah). *Whitfield v. United States*, 543 U.S. 209, 216 (2005) ("Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so."); *See also Meghrig v. KFC Western, Inc*., 516 U.S. 479, 485 (1996); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 (1954); *Estate of Bell v. Commissioner*, 928 F.2d 901, 904 (9th Cir. 1991). Accordingly, the Indian Canons of Construction should be applied. *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982).

Fifth, the District Court's error is further fortified by the First Circuit's analysis of IGRA's legislative history regarding RIILCSA(Narragansett). Rhode Island directed the Court to language in the Senate Report and to a colloquy on the Senate floor wherein a chief sponsor of IGRA assured the then-Senator from

Rhode Island that RIILCSA(Narragansett)'s gaming restrictions would remain in effect. *Narragansett,* 19 F.3d at 688-90. The First Circuit noted that earlier drafts of IGRA, which would have expressly exempted Indian lands in Rhode Island from IGRA's reach, were deleted from IGRA's final language, and rejected Rhode Island's analysis. In contrast, there is no legislative history suggesting that Indian lands in Massachusetts were to be excepted from IGRA's reach. This point underscores Aquinnah's position, that, twice, Congress could have made clear that IGRA was not to apply to Aquinnah Indian lands. First, in the passage of MILCSA(Aquinnah), Congress could have included a savings clause similar to the one at issue in MICA(Maine). Second, in the passage of IGRA, Congress could have included language that IGRA did not apply to Aquinnah Indian lands. Congress did not do so in either piece of legislation, and the District Court erred by essentially writing such language into both statutes, which of course, it cannot do.

Sixth, the District Court's error is further fortified by the thorough and well-reasoned opinions of the United States Department of the Interior (App. Vol. I, 213) and the NIGC (App. Vol. I, 232), which found that gaming on Aquinnah Indian lands is governed by IGRA and not by MILCSA(Aquinnah). In particular, the Department of the Interior's opinion goes into great detail regarding the very legal issues that are the subject of the instant appeal and concluded that IGRA and

MILCSA(Aquinnah) are repugnant to one another and that IGRA repealed the application of MILCSA(Aquinnah) to the Tribe's gaming activities:

> We will follow the *Narragansett* court's framework to determine whether IGRA applies to the Tribe's Settlement Lands. We begin by asking whether the Tribe possesses sufficient jurisdiction over the Settlement Lands so that IGRA applies. Next, we examine the interface between IGRA and the Settlement Act to determine whether they can be harmonized or whether an implied repeal occurred. For the reasons stated below, we find that IGRA applies and impliedly repealed those portions of the Settlement Act related to gaming.

August 23, 2013 Opinion of the Office of the Solicitor for the Department of the Interior at p. 7 (App. Vol. I, 213)

The District Court asserts that it need not give any deference to these well-reasoned opinions. App. Vol. II, 343 at p.32, n.23. The Court's error in failing to provide *Chevron* and/or *Skidmore* deference to the federal government's formal opinions is discussed in greater detail below. The very fact that the Solicitor of the Department of the Interior and the District Court reached entirely opposite conclusions should at a minimum demonstrate that the District Court wrongfully concluded that the parenthetical language used in MILCSA(Aquinnah) is an unambiguous statement that removes Aquinnah from IGRA's reach.

Seventh, The District Court's error is further fortified by its improper embrace of *dictum* in litigation brought by the Narragansett Tribe against the NIGC after Congress adopted the Chafee Amendment. App. Vol. II, 343 at p.31, n.22. After the First Circuit's decision in *Narragansett,* Congress enacted

legislation expressly stating that IGRA does not apply to the Narragansett Tribe. The District Court seizes on *dictum* where the D.C. Circuit observed that "[t]he Catawba Indians' and the Wampanoag Tribal Council's settlement acts specifically provide for exclusive state control over gambling." *Narragansett v. National Indian Gaming Commission*, 158 F.3d 1335, 1341 (D.C. Cir. 1998). That *dictum* runs contrary to the First Circuit's analysis that subjecting a tribe to state civil and criminal laws does not constitute a divestment of the tribe's jurisdiction. Even if IGRA had never become law, and MILCSA(Aquinnah) clearly governed Aquinnah's gaming activities, the Tribe would still be able to govern gaming on its lands to the extent it was not in contravention with Commonwealth or Town law. The Tribe would be free to require tribal licenses of tribal employees and tribal vendors. The Tribe would be free to impose strict minimum internal controls and procedures and otherwise dictate how business would be conducted, so long as such tribal actions did not contravene state law. MILCSA(Aquinnah) was not at issue in Narragansett's litigation over the Chafee Amendment, and Aquinnah was not a party to the litigation. The District Court's reliance on the *dictum* in Narragansett's litigation over the Chafee Amendment is simply wrong.

Eighth, the District Court's error is further fortified by its faulty speculation as to the timing of the passage of MILCSA(Aquinnah) vis-à-vis IGRA. The District Court reasons that the "virtually concurrent enactment" of

MILCSA(Aquinnah) and IGRA deprives Aquinnah of the implied repeal analysis in *Narragansett*. App. Vol. II, 343 at p.36. Congress was deliberating a comprehensive statute to occupy the field and govern gaming activities on Indian lands at the time MILCSA(Aquinnah) was passed. Indeed, Congress had considered several different approaches to a comprehensive scheme to govern Indian gaming beginning in 1983, with the introduction of HR 4566. *See* Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where are We Going?*, 26 Creighton L. Rev. 387, 396 (1993) Several bills were introduced and committee hearings were convened each year thereafter through 1988. Yet, no consensus was reached with enough votes for passage until the passage of IGRA. Accordingly, it was prudent for Congress to address the matter in 1987 in the context of MILCSA(Aquinnah) to serve as a placeholder to govern Aquinnah's gaming activities while Congress was deliberating comprehensive legislation. The District Court's conjecture that Congress must have intended the language in MILCSA(Aquinnah) to control over IGRA because the two statutes were enacted one year and two months apart has no basis in the language or in the legislative history of either Act. The true context is that Congress was aware at the time of enacting MILCSA(Aquinnah) that it would likely pass legislation establishing a comprehensive scheme for the regulation of Indian gaming, but Congress was not aware of what the comprehensive scheme ultimately would be. The Solicitor's

Opinion regarding the NIGC's approval of the Class II Gaming Ordinance for the Isleta del Sur Pueblo (Tigua) came to a similar conclusion:

> The Restoration Act was enacted in order to restore the Federal trust relationship with the Ysleta del Sur Pueblo and the Alabama and Coushatta Tribes in Texas. Because it was enacted when there was a great deal of uncertainty concerning the law of Indian gaming, section 107 of the Act was drafted to fill any gap in the law. That gap, however, was subsequently filled by the enactment of the IGRA, scarcely one year after the Restoration Act.

(Add. 104 at p.21).

The cases cited by the District Court can all be distinguished by their respective specific facts and circumstances. The Supreme Court in *Traymor v. Turnage,* 485 U.S. 535 (1988) did note that the two statutes at issue were adopted in the same year, but based its decision on the standard criteria to determine that there was not an implied repeal between the anti-discriminatory provisions of the Rehabilitation Act and the statutory limitations to review decisions of the Veterans Administration. *Id.* at 547. The *Traymor* Court did not conclude that its decision would have been different if the statutes had been passed in separate sessions of Congress. The District Court also cites an old case from the Second Circuit, *Pullen v. Morgenthau*, 73 F.2d 281 (2nd Cir. 1934), which does state that the presumption against implied repeal is stronger when the subject statutes are passed by the same Congress. *Id.* at 283. The admiralty statutes at issue, however, were passed within nine days of each other and the opinion fails to inform how

the timing would undo an otherwise proper analysis of implied repeal. The District Court also cites a dissenting opinion where then-Justice Rehnquist criticized the Court majority for having found an implied repeal where the statutes at issue were passed by the same Congress. *Washington County v. Gunther,* 452 U.S. 161, 188, 193 (1981). The majority of the *Gunther* Court was not persuaded by the argument.

Ninth, the District Court's error is further fortified by its faulty application of the Canon of Construction that where two statutes conflict, the more specific statute controls. Nov. 13, 2105 Order at p.36. MILCSA(Aquinnah)'s purpose is to resolve long-standing disputes of aboriginal title, while IGRA only and specifically sets forth the tribal/state relationship regarding gaming. This Appeals Court rejected Rhode Island's use of the same argument. 19 F.3d at 704 n.21. See also (App. Vol. I, 213 at p.17). The District Court again attempts to distinguish *Narragansett* based on the parenthetical language in MILCSA(Aquinnah), but as this Court held in that decision, IGRA still remains as the more specific statute providing extensive detail as to the place, manner, scope and regulation of gaming on Indian lands, imposing an exclusive tribal/NIGC regulatory scheme for the Class II gaming at issue here.

Tenth, the District Court's error is further fortified by its improper use of the legislative history of a different, earlier piece of legislation (App. Vol. II, 343 at

pp.37-38). The District Court references the April 9, 1986 Senate Committee testimony of a former tribal leader and her understanding that the draft legislation would forever prohibit gaming on Indian lands. That testimony provides no insight whatsoever as to Congress' intent, and contradicts the reality of the circumstances. The legislation that was under consideration in 1986 included an absolute prohibition of the Tribe exercising any jurisdiction over the lands to be transferred to the Tribe. H.R. 2868, 99th Cong. § 107(a) (1986). *See also* H. Rep. No. 99-918, at 5(1986). The Wampanoag Tribe of Gay Head (Aquinnah) at the time, had not received federal recognition and the outcome of its pending administrative application for such recognition was unknown. The testimony runs contrary to the express language in MILCSA(Aquinnah) that applies state gaming laws rather than creating an outright prohibition. Further, the testimony was given prior to the Supreme Court's affirmation of Indian tribes' right to offer gaming on their Indian lands over the objection of the states in the 1987 landmark case, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The District Court's reliance on the testimony is improper.

C. Aquinnah Exercises Sufficient Governmental Power over its Indian Lands for Aquinnah Indian Lands to Qualify for Gaming Under IGRA: The District Court Erred in Concluding That the Tribe's Struggling Efforts to Establish and Expand its Governmental Presence are Deficient.

1. Aquinnah Exercises Sufficient Governmental Power over its Indian Lands For the Lands to Qualify for Gaming Under IGRA.

The provisions of IGRA related to Class I and Class II gaming mandate that a tribe must have jurisdiction over the land and IGRA's provision defining the elements of "Indian lands" mandates that a tribe must exercise "governmental power" over the land. 25 U.S.C. §§ 2703(4), 2710(b)(1) and 2710(d)(3)(A). *See Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) ("[B]efore a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity. must have jurisdiction over that land."); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D. Kan. 1998) (stating that a tribe must have jurisdiction in order to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) ("[T]he NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land.").

All parties in this litigation stipulated that "[t]he Commonwealth, the Town, and the Tribe have each exercised jurisdiction over the Settlement Lands pursuant

to the provisions of the Federal Act" (App. Vol. I, 182 at ¶ 22). As discussed below, that stipulated fact is alone sufficient to meet the *Narragansett* two-step analysis.

The Tribe's actual exercise of its jurisdiction over the Settlement Lands, however, far exceeds the threshold requirements. The Tribe regularly asserts its jurisdiction over its Settlement Lands. The tribal government is responsible for stewarding the Settlement Lands, including providing a full range of services to the Tribe's members, including education, health and recreation, public safety and law enforcement, public utilities, natural resources management, economic development, and community assistance. Furthermore, the Tribe polices the Settlement Lands and applies tribal laws to its members on the Settlement Lands. The record below [7] provides examples of several ordinances enacted and

[7] The exercise of the Tribe's jurisdiction is manifested by the Tribe's enactment and implementation of a range of tribal laws, *see* May 28, 2015 Declaration of Chairman Tobias J. Vanderhoop at App. Vol._I, 308 ¶¶ 4-14 and exhibits (Docs. 119-2 thru 119-18), including but not limited to: (1) Tribal Ordinance regarding building, health, fire and safety; (2) Tribal Ordinance regarding the establishment of an Historic Preservation Office; (3) Tribal Ordinance regarding fish, wildlife and natural resources; (4) Tribal Ordinance regarding housing; (5) Tribal Ordinance regarding lead paint; (6) Tribal Ordinance regarding enrollment; (7) Tribal Ordinance regarding elections: (8) Tribal Ordinance regarding the judiciary; (9) Tribal Ordinance regarding criminal background checks; (10) Tribal Ordinance regarding notice and reporting of child abuse and neglect; (11) Tribal Environmental Agreement between the Tribe and the United States Environmental Protection Agency; (12) Agreement between the National Park Service, U.S. Department of the Interior and the Tribe for the assumption by the Tribe of certain

implemented by the Tribe, including ordinances dealing with such diverse topics as building codes, health, fire, safety, historic preservation, fish, wildlife, natural resources, housing, lead paint, enrollment, elections, judiciary, criminal background checks, and reporting of child abuse and neglect. The record also provides examples of several intergovernmental agreements between the Tribe and the U.S. Environmental Protection Agency, the National Park Service, the Bureau of Indian Affairs, the Commonwealth and the Town. The Tribe's exercise of its jurisdiction over its Settlement lands is robust and extensive, far in excess of the minimal threshold required to satisfy the *Narragansett* Court's analysis.

Federal courts consistently recognize that Indian tribes retain attributes of sovereignty over both their members and their territories. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978); *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975). Jurisdiction is an integral part of a tribe's retained sovereignty. *Narragansett*, 19 F.3d at 701. It is well-settled that tribes possess aspects of sovereignty not

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responsibilities pursuant to the National Historic Preservation Act; (13) Fire Cooperative Agreement, No. CTS50T03041, between the Tribe and the Eastern Region Bureau of Indian Affairs; (14) an Intergovernmental Agreement between the Tribe and the Commonwealth, regarding Indian child welfare matters; (15) an Intergovernmental Agreement on Cooperative Land Use and Planning between the Tribe and the Town; and (16) Operational Plan, pursuant to an Agreement between the Tribe and the Town.

withdrawn by treaty or statute or by implication as a necessary result of their dependent status. *Wheeler*, 435 U.S. at 323; *Narragansett*, 19 F.3d at 701. Congressional intent to delegate exclusive jurisdiction to a state must be clearly and specifically expressed. *Bryan v. Itasca County*, 426 U.S. 373, 392 (l976). The First Circuit in *Narragansett* found that the tribe's retained jurisdiction, even if concurrent with the jurisdiction of the State of Rhode Island, was "substantial enough" for the tribe's lands to qualify for gaming under IGRA. 19 F. 3d at 701.

To defeat IGRA's low threshold for the Tribe's exercise of jurisdiction over its Indian lands, the Commonwealth must first prove that the MILCSA(Aquinnah) completely divested the Tribe of jurisdiction over the Settlement Lands. Congress knew well how to employ language to achieve such a result. *See e.g.,* California Rancheria Termination Act of 1958, Public Law 85-671, August 18, 1958, [H.R. 2824] 72 Stat. 619 at § 10(b) ("After the assets of a rancheria or reservation have been distributed pursuant to this Act, the Indians who receive any part of such assets, and the dependent members of their immediate families, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians *because of their status as Indians shall be inapplicable to them*, and the laws of the several States shall apply to them in the same manner as they apply to other citizens or persons within their jurisdiction.")(emphasis added); Western Oregon

Indian Termination Act, Public Law 588. Chapter 733, August 13, 1954, [S. 2746] 68 Stat. 724 at § 13(a) ("the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians, excluding statutes that specifically refer to the tribe and its members, shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.")

Each and all of the Appellees have stipulated that the Tribe possesses and "*exercises*" the requisite jurisdiction (App. Vol. I, 182 at ¶22). The MILCSA(Aquinnah)'s grant of jurisdiction to the Commonwealth provides:

> Except as otherwise expressly provided in this Act or the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).

25 U.S.C. § 1771g. Nothing in the statute's language suggests that the Commonwealth's jurisdiction was intended to be complete to the exclusion of the

Tribe. See *Narragansett*, 19 F.3d at 701; *United States v. Cook*, 922 F.2d 1026, 1032-33 (2d Cir. 1991) (Congress knew how to include language to provide for exclusive jurisdiction and the omission of such language evidences its intent that state jurisdiction not be to the exclusion of tribal jurisdiction). MILCSA(Aquinnah) explicitly limits the exercise of the Tribe's jurisdiction over the Settlement Lands, but in doing so, it acknowledges rather than completely divests the Tribe's jurisdiction:

> The Wampanoag Tribal Council of Gay Head, Inc., shall not have any jurisdiction over nontribal members and shall not exercise any jurisdiction over any part of the settlement lands in contravention of this Act, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable Federal laws.

25 U.S.C. § 1771e(a). The Tribe's jurisdiction over the land is apparent when compared with the language divesting the Tribe of jurisdiction over nontribal members. The statute states that the Tribe "shall not have any jurisdiction" over nontribal members, but preserves the Tribe's jurisdiction over the land by stating that any jurisdiction exercised must not contravene Commonwealth or federal law.

Importantly, H.R. 2868, an older (1986) version of the legislation that eventually culminated in the MILCSA(Aquinnah), would have barred the Tribe from exercising any form of jurisdiction over the land, but Congress ultimately changed the text before it became law:

> No Indian tribe or band may exercise any form of jurisdiction (whether or not such tribe or band is a federally recognized Indian Tribe or band) over any part of the settlement lands, or any other land that may now or in the future be owned by or held in trust for such Indian entity in the town of Gay Head, Massachusetts, except to the extent provided in this Act, the State Implementing Act, or the Settlement Agreement.

H.R. 2868, 99th Cong. § 107(a) (1986). *See also* H. Rep. No. 99-918, at 5(1986) (explaining the Bill "provide[d] that no Indian tribe may exercise any form of jurisdiction over the settlement lands or any other lands owned by such Indian entity within the town of Gay Head except to the extent provided in this Act, the State Implementing Act or the Settlement Agreement"). Based on this discarded and more stringent language, it is clear that Congress contemplated divesting the Tribe of jurisdiction but ultimately chose not to do so. Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended. *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *Narragansett* 19 F.3d at 700. The House Report on MILCSA(Aquinnah) further supports the Tribe:

> [W]hile the civil and criminal laws of Massachusetts will be applicable on the settlement lands, the [T]ribe will be able to assume concurrent jurisdiction over its own members with the State and the [T]own as long as such jurisdiction is consistent with the civil and criminal laws of the State and the Town."

H. R. Rep. No. 100-238, at 6 (1987). In their legal opinions issued in the fall of 2013, the Department of the Interior and the NIGC opined that Aquinnah exercises sufficient governmental power for the lands to qualify under IGRA.

2. The District Court Erred in Concluding That the Tribe's Struggling Efforts to Establish and Expand its Governmental Presence are Deficient.

The District Court ruled that Aquinnah does have jurisdiction over its Indian lands concurrent with the Commonwealth, but found that the Tribe does not exercise sufficient governmental power for the lands to qualify for gaming under IGRA. In analysis that is frankly bewildering to the Tribe, the District Court engages in an extensive critique of the Tribe's genuine efforts to exercise its governmental power and its many manifestations of governmental services. The District Court correctly cites to this First Circuit's decision in *Narragansett* as to the concrete manifested examples of Narragansett governmental power:

> In the post-recognition period, the Tribe has taken many strides in the direction of self-government. It has established a housing authority, recognized as eligible to participate in the Indian programs of the federal Department of Housing and Urban Development, see 24 C.F.R., Part 905 (1993). It has obtained status as the functional equivalent of a state for purposes of the Clean Water Act, after having been deemed by the Environmental Protection Agency as having "a governing body carrying out substantial governmental duties and powers," 33 U.S.C. § 1377(e) (1988), and as being capable of administering an effective program of water regulation, see 40 C.F.R. § 130.6(d) (1993). It has taken considerable advantage of the Indian Self–Determination and Education Assistance Act (ISDA), a statute specifically designed to help build "strong and stable tribal governments." 25 U.S.C. § 450a(b) (1988). The Tribe administers

> health care programs under an ISDA pact with the Indian Health Service, and, under ISDA contracts with the Bureau, administers programs encompassing job training, education, community services, social services, real estate protection, conservation, public safety, and the like. These activities adequately evince that the Tribe exercises more than enough governmental power to satisfy the second prong of the statutory test.

19 F.3d at 703. The District Court complained that the case law provided little guidance on the issue, while neglecting to even recognize the rich history on the issue that has been developed by the NIGC in the context of approvals of gaming ordinances and the issuance of formal determinations of whether lands qualify for gaming. Despite the NIGC being the agency delegated by Congress to make the determinations regarding governmental power, the District Court proceeds to fiat out of thin air holding that the Tribe must demonstrate that it has the means "itself" to provide the requisite governmental services to the gaming facility. App. Vol. II, 343 at pp.24-25. The District Court proceeds to find the lack of sufficient governmental power because (1) the fledgling tribal police department cannot enforce state law without cross-deputization by a non-tribal authority; (2) the Town of Aquinnah[8], rather than the Tribe, provides most services regarding law

[8] The District Court fails to mention that the Town's Fire Department is a volunteer fire department manned in part by members of the Tribe who are typically the first responders. Nor does the District Court mention that the emergency services on the Island of Martha's Vineyard are an amalgamation of resources from various municipalities, as well as the Tribe, that are made available through a series of inter-governmental agreements.

enforcement and public safety services including police, fire and emergency services; and (3) those programs the Tribe does have that are manifestations of governmental power are inadequate. We take each of these in turn.

First, no tribal police department for any tribe anywhere in the United States has inherent jurisdiction to enforce state law (or derivatively municipal law). See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 1023 (1978) (principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians). Although Congress has since enacted legislation that allows for tribal enforcement and criminal jurisdiction in limited circumstances for violations of federal law, such legislation does not extend to authorize tribes to enforce state law. Many tribes, including many tribes offering gaming on their lands, do not have police departments at all. 25 U.S.C. § 1301(2) (known as the "Duro Amendment" authorizes tribal criminal jurisdiction over non-member Indians); Violence Against Women Reauthorization Act of 2013, 42 U.S.C. §§ 13701 et seq, (allowing for tribal prosecution of non-Indians for domestic violence in tribal court). Many more, however, address the issue by entering into cross-deputization agreements with state and non-Indian local law enforcement. *See American Indian Law Deskbook at § 14.10 Law Enforcement Activities* (2016); *Fresh Pursuit From Indian Country: Tribal Authority to Pursue Suspects Onto State Land*, 29 Harv. L. Rev. 1685, 1694-95 (April 8, 2016). The

execution of these intergovernmental agreements is itself an exercise of tribal governmental power. Under the District Court's standard, however, many tribes with gaming facilities around the country are operating illegally.

Second, many if not most of the tribal gaming operations around the country involve tribes that do not themselves provide basic law enforcement, fire and EMS services. Rather, they enter into inter-governmental agreements or memoranda of understanding with county and local government to provide those services. See *Intergovernmental Compacts In Native American Law: Models For Expanded Usage,* 112 Harv. L. Rev. 922, 927-28 (1999); Walking on Common Ground: Tribal-State Collaborations, Law Enforcement and Cooperative Agreements, walkingoncommonground.org (includes extensive list with links to agreements). Again, the acts of entering into such agreements to ensure that governmental responsibilities are fulfilled are themselves exercises of tribal governmental power. To impose a standard that the tribe itself must provide such services would cripple or close many tribal gaming facilities around the country. While it is true that many tribes now have sophisticated police, fire and EMS protection as mature branches of tribal government, none of them started out that way, and many of them rely heavily on revenue from tribal gaming facilities to allow them to fund and grow such programs to maturity.

Third, the District Court's criticism of the Tribe's programs suggests an even more difficult standard. Although a stated purpose of IGRA is to promote strong tribal government, the District Court is suggesting that only the strongest of tribal governments can qualify for gaming under IGRA. In a blistering criticism of the Tribe, the District Court writes:

> The Tribe has no health board or health inspector. And while the Tribe contends that it is responsible for providing health services on the Settlement Lands, its health clinic is staffed by only one part-time nurse and a doctor who visits only a few times a year. The Tribe does not have a public school. Nor does the Tribe provide any public housing beyond that which is funded by the U.S. Department of Housing and Urban Development. There is no tribal criminal code, prosecutor, or jail. The Tribe's judiciary, which was organized two years ago, offers only a limited judicial function. Its cases are heard by a judge who is hired on a case-by-case basis and who presides by teleconference from Washington State over proceedings that are conducted in a building off the Settlement Lands. And, importantly, the Tribe has no tax system in place on the lands to fund any future governmental services.

App. Vol. II, 343 at p.27. Through this blistering criticism, however, the District Court concedes that the Tribe does maintain a health clinic, does provide public housing, and does have a tribal court. Through this blistering criticism, the District Court strongly suggests that it would reach a different result if the Tribe implemented a tax system. Of course, the decision not to implement a tax system where the trust land is not taxable and a tax would impose an undue burden on tribal members seeking to establish businesses is, in and of itself, an exercise of governmental power. The District Court fails to acknowledge the Tribe's extensive

involvement in the self-governance programs of the United States wherein the Tribe compacts with the federal government to implement and operate governmental programs that had previously been operated by the Bureau of Indian Affairs or Indian Health Services. Indeed, Aquinnah was the first tribe on the east coast to obtain self-governance status and begin operating directly programs that previously been operated by federal agencies. The District Court fails to acknowledge the multiple "Treatment in the Same Manner as State" agreements with the United States Environmental Protection Agency – the same programs identified by the *Narragansett* Court as sufficient manifestations of governmental power. 19 F.3d at 703. The District Court criticized Aquinnah for only having federal funds for its public housing program even though the *Narragansett* Court expressly identified the tribe's use of federal self-governance funds to run tribal programs as a sufficient manifestation of governmental power. *Id.* The District Court sets a standard that Aquinnah and many tribes now gaming under IGRA cannot meet.

The irony is not lost on Aquinnah that while it has struggled (but succeeded) to accomplish much in the maturation and expansion of critical governmental programs on extremely limited funds and resources such maturation and expansion of critical governmental programs could be much more easily accomplished with Aquinnah governmental revenue generated from a tribal gaming facility. Yet, the

District Court looks to unfulfilled needs of the Tribe as the basis for its conclusion that the Tribe is not eligible for gaming under IGRA.

3. The District Court Erred in Disregarding the NIGC's Determination as to the Sufficiency of the Tribe's Exercise of Governmental Power.

In the context of the District Court acknowledging the paucity of case law on the sufficiency of the manifestation of governmental power, it is important to note that the District Court fails to even mention that agency legal opinions are a necessary part of the NIGC's final agency action; the NIGC will not approve a site-specific gaming ordinance without making the determination that the Indian lands qualify and that the Tribe exercises sufficient governmental authority over the lands. The NIGC engages in that analysis in every site-specific gaming ordinance it reviews and every Indian Lands Determination it makes. See nigc.gov/reading room/ gaming ordinances. *See Miami Tribe of Oklahoma v. United States*, 198 Fed. Appx. 686, 2006 WL 2392194 at *4 (10th Cir. 2006) (describing inter-agency process between DOI and NIGC for Indian lands opinion in the context of NIGC taking final agency action).

The District Court concludes that it can disregard the opinions of the Department of the Interior and the NIGC regarding the issues in this appeal because the opinions do not themselves constitute final agency action, and because there is not agency expertise required to do the statutory analysis regarding an implied repeal. App. Vol. II, 343 at p.31, n.22. The determination of whether a

tribe has the requisite manifestation of governmental power is a circumstance where there *is* special expertise. Further, the approval of the gaming ordinance is a final agency action, and the legal determination by the Solicitor's Office is a necessary part of that decision. Indeed, negative opinions result in the NIGC's disapproval of the gaming ordinance. Even if the District Court need not give deference to the issues of implied repeal, deference should be given to the fact-based issue of exercising governmental power.

This Appeals Court should apply the framework established in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Under such a framework, a court first asks whether Congress has directly spoken to the precise question at issue, in which case the court must give effect to the unambiguously expressed intent of Congress. *Deppenbrook v. Pension Benefit Guar. Corp*, 778 F.3d 166, 172 (D.C. Cir. 2015) (citation omitted). If the statute is silent or ambiguous with respect to the specific issue, however, the court moves to the second step, and defers to the agency's interpretation as long as it is based on a permissible construction of the statute. *Id.* To trigger deference, Congress must have delegated authority to the agency to make rules carrying the force of law, and the agency interpretations for which deference is claimed must have been promulgated in the exercise of that authority. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1136 (D.C.

Cir. 2014). As such, "the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue." *Barnhart v. Walton*, 535 U.S. 212, 222, 122 S. Ct. 1265, 1272 (2002).

The federal government's decisions as to the sufficiency of the Tribe's exercise of governmental authority fall within the scope of *Chevron*[9]. They were prepared as part of the NIGC's Final Agency Action allowing the Tribe's Gaming Ordinance to go into effect. Congress delegated to the NIGC the responsibility to interpret and implement IGRA. 25 U.S.C. § 2706(b)(10). Congress delegated to the Department of the Interior the responsibility to interpret and implement MILCSA(Aquinnah). 25 U.S.C. §§2 and 9. The two agencies with the requisite authority for interpretation and implementation of the two federal statutes at issue cooperated and appropriately applied the expertise of both agencies. Applying

[9] The Tribe believes that deference should also be given to the federal government's position regarding implied repeals, but concedes that issue involves different agency expertise. As the agency responsible for addressing the interface of statutes intended for the benefit of Indians and the exercise of the government's trust responsibility regarding the implementation and enforcement of those statutes, and in its adherence to 25 U.S.C. § 9, the Department of the Interior has indeed developed an expertise and deference should be afforded its decision.

Chevron, because the Department of the Interior's and the NIGC's collective interpretation is reasonable, such interpretation should not be overturned.

Even if this Court does not give the federal government's position *Chevron* deference, it should still afford *Skidmore* deference. *Skidmore v. Swift Co.*, 323 U.S.134, 139, 65 S. Ct. 161, 164 (1944). The Supreme Court has reasoned that even if the agency interpretation is part of a formal interpretive agency action, if that interpretation is "made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case," the Court should give it "considerable and in some cases, decisive weight." *Skidmore*, 323 U.S. at 139. The First Circuit has recently reasoned that the degree of *Skidmore* deference is based on a mix of factors, including the thoroughness evident in the agency's consideration, the validity of its reasoning, and the consistency of its interpretation with earlier and later pronouncements. *Merrimon v. Unum Life Ins. Co. of America*, 758 F.3d 46, 54-55 (1st Cir. 2014). All of those factors weigh heavily in favor of substantial deference here. Two agencies were cooperative and thorough, providing very detailed research and sourced reasoning that is consistent with similar pronouncements. Further, the opinions were issued in the context of necessary analysis for a final agency action. If *Chevron* deference is not warranted here,

substantial *Skidmore* deference is warranted, and this Court should uphold the agency interpretations.

A separate but related error is found in the District Court's granting of summary judgment against the Tribe. If the District Court's interpretation of the law is correct, the appropriate ruling on cross-motions for summary judgment would be to deny the cross-motions and allow the factual question of the extent/adequacy of the Tribe's exercise of governmental power to proceed to discovery and trial. In the context of deliberation of the Appellees' cross-motions for summary judgment, the District Court must view "the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." *Noonan v. Staples, Inc.*, 556 F.3d 20, 25 (1st Cir. 2009). When "a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed.R.Civ.P. 56(e)). The Tribe's extensive showing of governmental power should establish that IGRA's threshold has been reached, but if not, the Tribe's extensive showing informs the Court that at worst, it is a disputed issue of material fact such that the District Court erred in granting summary judgment against the Tribe.

D. The United States Continues to Assert Jurisdiction Over Gaming Activities on Aquinnah Indian Lands to the Exclusion of the Commonwealth: The District Court Erred in Concluding that the Commonwealth's Lawsuit Could Proceed Without the National Indian Gaming Commission as a Party.

The United States continues to assert jurisdiction, to the exclusion of the Commonwealth, over gaming activities on Aquinnah Indian lands. The position set forth in the two opinions of the Department of the Interior and the NIGC has not changed. The NIGC's approval of Aquinnah's site-specific Class II Gaming Ordinance remains in effect. The recent developments of the approval of Class II Gaming Ordinances for the Isleta del Sur Pueblo (Tigua) and the Alabama Coushatta Tribe of Texas (discussed in further detail below) demonstrate that the federal government's position will likely not be changed even by an adverse decision of this Appeals Court. The District Court twice denied the Tribe's efforts to have the NIGC included as a party-defendant to the Appellees' claims. First, on February 7, 2015, the District Court denied the Tribe's Motion, based on Fed.R. Civ.P. 19 that the action be dismissed with leave to amend with a claim under the Administrative Procedures Act to challenge the NIGC's approval of Aquinnah's site-specific, Class II Gaming Ordinance. The District Court denied that motion in large part because it concluded:

> Pursuant to Rule 19(a)(1)(B)(ii), an absent party is a "required" party if it "claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party's] absence may . . . leave an existing party subject to a substantial risk of incurring

> double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(B)(ii). The Tribe contends that a decision in plaintiffs' favor in the absence of the United States would yield such a result. Such a decision would subject the Tribe to regulation under Massachusetts state law, but it would not bind the NIGC; consequently, the Tribe would remain subject to federal law as well. According to the Tribe, it would be placed in an "untenable" "Catch-22" in which "[p]roceeding under State law would require that the Tribe violate State law. It is unclear how the Tribe would be "required" to violate either state or federal law by a ruling in favor of the Commonwealth. Applying for a state gaming license would not necessarily violate federal law; in our federal system, parties must often comply with the regulations of multiple sovereigns in order to engage in certain activities. **While it is conceivable that the Tribe's obligations under federal and state law could conflict, the Tribe has not shown that there is a real possibility, much less a "substantial risk," that that would occur.**

February 27, 2015 Order at pp.23-24 (emphasis added). In the first week of October, 2015 developments occurred wherein the NIGC approved Class II Gaming Ordinances for the Isleta del Sur Pueblo (Tigua) and the Alabama Coushatta Tribe of Texas (collectively referred to herein as the "Texas Tribes", and the approvals by the NIGC relative to the Texas Tribes being collectively referred to herein as the "Texas Developments")[10]. Through the Texas Developments, the

[10] Letter dated October 5, 2015 from Jonodev O. Chaudhuri, Chairman of the NIGC to Governor Hisa, Ysleta del Sur Pueblo, with Attachment A (Add. 78), and opinion letter dated September 10, 2015, from Venus McGhee Prince, Deputy Solicitor for Indian Affairs, Office of the Solicitor, United States Department of the Interior, to Michael Hoenig, General Counsel, NIGC (Add. 78); and
Letter dated October 8, 2015 from Jonodev O. Chaudhuri, Chairman of the NIGC to Nita Battise, Chairperson, Alabama-Coushatta Tribe of Texas, with Attachment A (Add. 104), and opinion letter dated September 10, 2015, from Venus McGhee

federal government has sent a clear message that it intends for the NIGC to exclusively regulate Class II gaming, as defined under IGRA, on the Indian lands of the Texas Tribes to the exclusion of the State of Texas. The Texas Developments demonstrates a "substantial risk" that the "Tribe's obligations under federal and state law could conflict."

The parallels between the Texas Developments and the instant case are significant and material. Aquinnah and the Texas Tribes have all grappled with language, contained in federal statutes passed in 1987 (collectively referred to herein as the "Pre-IGRA Statutes"), which the Commonwealth of Massachusetts and the State of Texas, respectively, maintain exclude Aquinnah and the Texas Tribes from conducting gaming under IGRA. Congress enacted IGRA in 1988, less than a year after passage of each of the Pre-IGRA statutes. The Commonwealth does not object to one Indian tribe, the Wampanoag Mashpee, conducting gaming within the exterior boundaries of the Commonwealth, while simultaneously and vigorously opposing Aquinnah conducting gaming within its exterior state boundaries, just as the State of Texas does not object to one Indian tribe, the Traditional Kickapoo, conducting gaming within the exterior boundaries of Texas, while simultaneously and vigorously opposing the Texas Tribes conducting

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Prince, Deputy Solicitor for Indian Affairs, Office of the Solicitor, United States Department of the Interior, to Michael Hoenig, General Counsel, NIGC (Add. 78).

gaming within its exterior state boundaries. Just as the Commonwealth has massively expanded non-Indian gaming since the passage of MILCSA(Aquinnah), Texas has massively expanded non-Indian gaming since the passage of the Restoration Act[11]. Just as the Commonwealth is litigating the question of whether MILCSA(Aquinnah) precludes Aquinnah from conducting gaming under IGRA, without including the federal government in the litigation, the State of Texas has litigated the question of whether the Restoration Act precludes the Texas Tribes from conducting gaming under IGRA, without including the federal government in the litigation. Just as the Commonwealth has currently prevailed in its litigation with Aquinnah, pending this appeal, Texas has prevailed in its litigation with the Texas Tribes. *See Texas v. Ysleta del Sur Pueblo*, 36 F.3d 1325 (5th Cir. 1994); *Alabama-Coushatta Tribes of Texas v. Texas*, 208 F. Supp. 2d 670 (E.D. Tex. 2002), *aff'd*, 66 Fed. Appx. 525, 2003 WL 21017542 (5th Cir. 2003). Just as the NIGC approved the Class II Gaming Ordinance for Aquinnah based upon a formal opinion of the Solicitor for the Department of the Interior (the "DOI"), the NIGC has approved Class II gaming ordinances for the Texas Tribes based upon a formal opinion of the Solicitor for the Department of the Interior.

[11] Texas del Sur Pueblo and Alabama and Coushatta Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (codified at 25 U.S.C. §§ 1300g et seq. and 25 U.S.C. §§ 731 et seq.).

In its legal review in the context of the federal action approving the Texas Tribes' Class II gaming ordinances, the Solicitor acknowledged and expressly rejected the *Ysleta* decision:

> [W]e recognize that the Fifth Circuit in *Ysleta del Sur* held that the Restoration Act, and not the IGRA, governs gaming on the Tribe's lands. **However, the Department was not a party to the *Ysleta* litigation and is not bound by the Fifth Circuit's interpretation of the Restoration Act.**

Add. 104 at p.9 (emphasis added). Significantly, the Solicitor's Opinion re Texas Developments includes a footnote that sets out Supreme Court case law regarding the Department of Interior's prerogative to reject the federal court's interpretation of the statute even where the Department of Interior is a party:

> An agency charged with implementing a statute may "choose a different construction" of the statute than that embraced by a circuit court, "since the agency remains the authoritative interpreter (within the limits of reason) of such statutes." *Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). With regard to the Restoration Act, the Department is the executive agency charged with administering the statute. Restoration Act, *supra* note 2, § 2 ("The Secretary of the Interior or his designated representative may promulgate such regulations as may be necessary to carry out the provisions of this Act."); cf. *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 794 (1996) (holding that administration of a tribe's settlement act is a "role that belongs to the Secretary of the Interior"). *See also Northern Arapaho Tribe v. Hodel*, 808 F.2d 741, 749 (10th Cir. 1987) ("Congress has delegated to the Secretary [of the Interior] broad authority to manage Indian affairs" (citing 25 U.S.C. § 2)). **Therefore, the Department may choose a different interpretation of the Restoration Act than the interpretation chosen by the Fifth Circuit. Here, the Department does so.**

Add. 104 at p.9, n.79 (emphasis added). Aquinnah is now in the untenable position where proceeding in a manner consistent with the District Court's decision will subject it to enforcement action by the NIGC. The Solicitor's Opinion re Texas Developments noted that the Texas Tribes are in very same "Catch-22 dilemma" of which Aquinnah complains:

> However, the Restoration Act and the IGRA provide for different remedies for gaming conducted in violation of their provisions. The Restoration Act provides that the violations of Section 107(a) "shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas." Furthermore, the Restoration Act provides the State with an independent avenue for enforcement of a violation of Section 107(a), to wit, an equitable action in Federal district court to enjoin gaming on the Tribe's reservation or tribal lands that violates Section 107(a). The IGRA and its implementing regulations, on the other hand, provide for an entirely different enforcement scheme. Because the enforcement regime provided in Section 107 of the Restoration Act cannot be reconciled with the enforcement regime provided in the IGRA, we conclude that the two statutes are repugnant to one another.

Add. 104 at p.19

The District Court below denied the Tribe's Motion without providing any reasoning for its decision, yet by the Court's own analysis in its February 27, 2015 Order, it is clear that this development should have caused the Court to grant the Tribe's Rule 19 Motion. The District Court's error now brings into question of the propriety of moving forward with the instant appeal knowing that the NIGC will likely maintain that it has jurisdiction over Aquinnah Class II gaming activities regardless of the decision of this Appeals Court. The appropriate and prudential

resolution of this appeal is to vacate and remand with instructions to grant the Tribe's Rule 19 Motion. The Texas Developments make clear that the dispute over gaming on Aquinnah Indian lands cannot be resolved without the involvement of the NIGC as a party.

VI. CONCLUSION

For the reasons set forth herein and in the pleadings below, this Appeals Court should vacate the judgement against the Tribe and direct the District Court to grant the Tribe's motion for summary judgment, deny the summary judgment motions of the Commonwealth, the Town of Aquinnah and AGHCA, and enter Final Judgment in favor of the Tribe. Alternatively, the case should be remanded with instructions that partial summary judgement be entered in favor of the Tribe that IGRA, rather than MILCSA(Aquinnah) governs gaming on the Tribe's Indian lands and allow the question of whether the Tribe exercises sufficient governmental power over its Indian lands to proceed to trial. Alternatively, the Appeals Court should vacate the judgement and remand the matter with instructions to dismiss the Complaints against the Tribe with leave to amend to include claims against the NIGC to be brought pursuant to the APA.

Dated: May 28, 2016

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,986 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2011 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2016 I electronically filed the foregoing documents with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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