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## Agency Pragmatism in Addressing Law's Failure: The Curious Case of Federal "Deemed Approvals" of Tribal-State Gaming Compacts

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**AGENCY PRAGMATISM IN ADDRESSING LAW’S FAILURE:  
THE CURIOUS CASE OF FEDERAL “DEEMED APPROVALS”  
OF TRIBAL-STATE GAMING COMPACTS**

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Kevin K. Washburn\*

ABSTRACT

*In the Indian Gaming Regulatory Act of 1988 (IGRA), Congress imposed a decision-forcing mechanism on the Secretary of the Interior related to tribal-state compacts for Indian gaming. Congress authorized the Secretary to review such compacts and approve or disapprove each compact within forty-five days of submission. Under an unusual provision of law, however, if the Secretary fails to act within forty-five days, the compact is “deemed approved” by operation of law but only to the extent that it is lawful. In a curious development, this regime has been used in a different manner than Congress intended. Since the United States Supreme Court held part of IGRA unconstitutional in 1996, the Secretary declined to issue an affirmative approval or disapproval on more than seventy-five occasions—thus, allowing a compact to become approved by operation of law—but has simultaneously issued a letter setting forth legal objections to aspects of the compact. The Secretary’s creative response to a broken regulatory scheme appears to be unique, and it raises interesting questions about how the executive branch should behave in the face of legal uncertainty. It raises questions of administrative law, such as whether the Secretary’s non-action is reviewable as agency action under the Administrative Procedure Act (APA), whether the Secretary’s letter is entitled to deference, and if so, what level of deference. It also raises important questions about whether such action constitutes good policy. This Article examines some of those questions.*

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INTRODUCTION

In the vast history of federal Indian affairs policy, which predates the United States Constitution,<sup>1</sup> Indian gaming is a relatively new phenomenon. The Supreme Court firmly resolved the legality of Indian gaming in a 1987 decision, *California v. Cabazon Band of Mission Indians*, and then codified in law in the 100th Congress’s enactment of the Indian Gaming Regulatory Act of 1988 (IGRA).

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1. Arguably, the first federal Indian policy was the Proclamation of 1763, which, though characterized as one of King George’s Intolerable Acts in the Declaration of Independence, became the blueprint for federal American Indian policy. Indeed, laws with strikingly similar provisions to the Proclamation were enacted in the first Congress ever convened. See Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 B.U. L. REV. 329 (1989).

For nearly the entire 200-plus year history of federal-tribal relations, tribes have complained about the failure of the United States to meet its treaty and trust responsibility through fiscal appropriations for Indian country programs. During the past thirty years, however, Indian gaming has been part of the solution to this problem. Indian gaming has become exceedingly important to Indian country.

When President Reagan and the 100th Congress enacted IGRA “to protect [Indian] gaming as a means of generating tribal revenue”<sup>2</sup> and to “promote tribal economic development, tribal self-sufficiency, and strong tribal government[s],”<sup>3</sup> they could not have imagined how well it would succeed. Comparing Indian gaming revenues to federal Indian country appropriations makes this plain. In Fiscal Year 2016, Congress and the Obama administration appropriated \$2.8 billion for Indian Affairs at the Department of the Interior (the Department of Interior)<sup>4</sup> and more than \$5 billion for Indian Health Service programs. Taken together, the BIA and IHS programs constitute the core of federal treaty and trust responsibilities to tribes. Tribes and Indian people also earned roughly \$1 billion in royalties from natural resources produced on approximately 60 million acres of land owned in trust by the federal government.<sup>5</sup>

Though all of these revenue sources are important to tribes, they pale in comparison to Indian gaming revenues. Gaming tribes earned a total of \$31.2 billion in gross gaming revenue in Fiscal Year 2016.<sup>6</sup> In sum, gaming tribes today collectively earn more than

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2. 25 U.S.C. § 2702(3) (2012).

3. 25 U.S.C. §§ 2701(4) & 2702(1) (2012).

4. U.S. DEP’T OF THE INTERIOR, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION FOR FISCAL YEAR 2018 IA-ES-2 (2018). This source, commonly known as the Green Book, is the President’s appropriation request to Congress and contains historical data for actual appropriations for past years. It is prepared by the Department of the Interior and the Office of Management and Budget in conjunction with other White House staff.

5. Tribes and Indian people earned \$853 million in royalties from mineral leases for oil, gas and coal on their federal lands in FY 2015, the latest year for which data could be found. U.S. DEP’T OF THE INTERIOR, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION FOR FISCAL YEAR 2017 154 (2017) (the President’s request to Congress for funding for FY 2017). Royalties were almost certainly lower in 2016 because the price of crude oil declined markedly from 2014 to early 2016. U.S. ENERGY INFO. AGENCY, *With Low Oil Prices in 2016, Federal Revenues from Energy on Federal Lands Again Declined*, (Jan. 24, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=29652>; Clifford Krauss, *Oil Prices: What to Make of the Volatility*, N.Y. TIMES (June 14, 2017), <https://www.nytimes.com/interactive/2017/business/energy-environment/oil-prices.html?mtrref=www.google.com&gwh=2C677243D28B52C8AC434E49BCBAFFD&gwt=pay>.

6. Press Release, Nat’l Indian Gaming Comm’n, 2016 Indian Gaming Revenues Increased 4.4% (July 12, 2017).

thirty times the revenue that tribes earn from natural resources, ten times more than they receive from the Department of the Interior Indian Affairs program, and several multiples of the amount provided to tribes and Native American people through Indian Health Services appropriations. As discussed below, a not insignificant amount of that top-line number gaming revenue figure is paid to states under revenue-sharing agreements, so Indian gaming also supports state government programs.<sup>7</sup>

Put simply, the importance of gaming as an economic engine in Indian country cannot be overstated. Though not all tribes engage in gaming, for many of those that do, gaming revenues represent a very significant source of funding for tribal government programs.

Perhaps because of the magnitude of gaming revenues, Indian gaming has produced unusual behavior at one of the agencies that has responsibility for oversight of Indian gaming. This Article is about that unusual behavior.

During congressional debate on the legislation that became IGRA, states sought a regulatory role in Indian gaming. States asserted that gaming attracted organized crime and that they needed authority to regulate Indian gaming to prevent crime and other evils associated with it. In the final version of the bill, Congress gave interested states an opportunity to address those concerns. In IGRA, Congress provided that Class III casino-style gaming may not be lawfully offered by an Indian tribe unless the tribe negotiates a “tribal state compact” with the state in which the gaming operation is located.<sup>8</sup> However, Congress also provided that a state would not be allowed to hold Indian gaming hostage by refusing to negotiate. If the state refused to negotiate in good faith, the tribe could sue in federal court.<sup>9</sup>

The compact requirement ultimately gave interested states the ability to negotiate the role that they wish to play in the regulation of Indian gaming. Congress was concerned about states overreaching in compact negotiations, however, so it assigned the Secretary of the Interior the responsibility of reviewing gaming compacts entered between Indian tribes and states.<sup>10</sup>

Secretarial review, though important, introduced a new problem of potential bureaucratic delay, which has plagued Indian affairs

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7. See generally Steven Andrew Light; Kathryn R. L. Rand; Alan P. Meister, *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657 (2004).

8. 25 U.S.C. § 2710(d)(1)(C) (2012).

9. 25 U.S.C. §§ 2710(d)(3)(A) & 2710(d)(7)(A)(i) (2012).

10. 25 U.S.C. § 2710(d)(3)(B) (2012).

since the beginning of the Republic.<sup>11</sup> To prevent delay in the Secretary's review, Congress provided a strict time limit of only forty-five days. Under IGRA, if the Secretary fails to act within forty-five days, a compact is deemed to be approved, but only to the extent that it is consistent with IGRA.<sup>12</sup>

Congress presumably intended the provision to be a decision-forcing mechanism that prevents important or controversial decisions from languishing. If the Secretary fails to act in a timely way, the issue resolves itself; approval occurs automatically, by operation of law. By attaching a short fuse, the forty-five-day provision forces the Secretary to act within a very short period of time or allows the parties to proceed if the Secretary fails to act.<sup>13</sup> As a practical matter, the provision has generally achieved its intended effect of settling the matter of compact validity within forty-five days of submission.

Following enactment of IGRA, the Secretary appeared to have three options when reviewing a compact: approval, disapproval, or no action. Presumably, Congress intended the no-action option to be exercised when the Secretary lacked the time or resources to make a decision on short notice. The process proceeded as Congress intended through the early 1990s following IGRA's enactment in 1988.

In 1996, the context changed dramatically when the Supreme Court found part of IGRA unconstitutional in *Seminole Tribe v. Florida*.<sup>14</sup> In *Seminole Tribe*, the court overruled previous precedent<sup>15</sup> and held that the state had Eleventh Amendment immunity, which

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11. *Backlogs at the Department of the Interior: Land into Trust Applications; Environmental Impact Statements; Probate; Appraisals and Lease Approvals, Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 100-224 (2007) (statement of Hon. Byron L. Dorgan, Chairman of Comm. on Indian Affairs and U.S. Sen. of North Dakota) (stating "delays at the Department of the Interior in performing its duties have dramatically slowed the growth and the development of tribal communities and their economies"); *see also The Indian Tribal Energy and Self-Determination Act Amendments of 2011, Hearing on S. 1684 Before the S. Comm. on Indian Affairs*, 112th Cong. 112-636 (2012) (testimony of Hon. James M. Olguin, Vice Chairman of Southern Ute Indian Tribal Council) (noting "bureaucratic delays in federal approval of Indian mineral leases and drilling permits").

12. 25 U.S.C. § 2710(d)(8)(C) (2012) ("If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.")

13. Technically, the compact does not take effect until notice of the approved or "deemed approved" compact is published by the Secretary in the Federal Register. Since this is a ministerial act, however, publication tends to occur promptly.

14. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

15. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

Congress lacked the power to abrogate.<sup>16</sup> The effect of the decision was to deprive tribes of their right to force states to negotiate in good faith. Suddenly, tribes had no way to bring states to the negotiation table.

In response to the Supreme Court decision, something unexpected happened. In 1997, then-Secretary Bruce Babbitt received a compact for approval that gave him serious concerns that a state had taken advantage of a tribe. Babbitt declined to either approve or disapprove the compact, allowing the compact to become “deemed approved” by operation of the law. But, he sent a short letter to the parties explaining his views and identifying the terms in the compact that he believed were illegal. In the letter, Babbitt criticized the significant gaming revenue the tribe would pay to the state, as well as a large regulatory fee paid to the state.<sup>17</sup>

Secretary Babbitt’s letter effectively created a fourth compact decision option, which Congress likely had not envisioned when it enacted IGRA. In addition to the existing options of approval, disapproval, or a “no action deemed approval,”<sup>18</sup> an additional option existed: a “no action deemed approval with the Agency’s views expressed.”

Babbitt’s action was unprecedented.<sup>19</sup> It was the first time, in at least 161 compact approvals since 1990,<sup>20</sup> that a Secretary had de-

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16. *Seminole Tribe v. Florida*, 517 U.S. at 76.

17. Letter from Bruce Babbitt, U.S. Sec’y of the Interior, to Wendell Chino, President of the Mescalero Apache Tribe (Aug. 23, 1997).

18. At least one court has referred to the no-action option as a “no-action approval.” It involved a case in which there was no accompanying letter. *Amador County v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011).

19. Deemed approval letters had been sent at least twice during the George H.W. Bush Administration and once previously during the Clinton Administration, but the letters were perfunctory. The first instance, in 1991, was one of the first compacts ever submitted. In this letter, the Department expressed concerns about payments to a state government, but it took the Department more than ninety days to issue the letter, suggesting that the letter was not the result of a deliberate strategy to avoid a formal approval or disapproval decision. *See* Letter from Assistant Sec’y Eddie F. Brown, U.S. Dep’t of the Interior, to Chairman Russell Hawkins, Sisseton-Wahpeton Tribal Council (Nov. 26, 1991). In the second instance, in 1992, the deemed approval appears to have occurred because the Department had noted a troublesome provision in the review process and the parties amended the compact to address that provision. But the Department, curiously, did not restart the time clock following the amendment and concluded that the compact had been deemed approved. *See* Letter from Acting Assistant Sec’y Richard Whitesell, U.S. Dep’t of the Interior, to Chief Keith Davenport, Sac and Fox Tribe of the Mississippi in Iowa (April 20, 1992); Letter from Eddie F. Brown to Russell Hawkins, *supra*. In the third prior instance, which was issued roughly sixty days after receipt of the compact, it appears that the Department was merely late. The Department did not indicate that it had any concerns about the compact, but the forty-five days had already run, meaning that the compact had been deemed approved by operation of law. Letter from Assistant Sec’y Ada Deer, U.S. Dep’t of the Interior, to Chairman Stanley G. Jones, Sr., Tulalip Tribes of Wash. (Dec. 7, 1993).

clined to make an affirmative decision yet issued what might be called a “quasi-decisional” letter that explained in-depth the Agency’s concerns. It was a clever but unexpected use of IGRA’s provision that allows compacts to go into effect without formal action by the Secretary. It is likely that Congress did not contemplate this turn of events, just as it likely did not anticipate the Supreme Court’s holding in *Seminole Tribe* that an important part of IGRA was unconstitutional.

Since Secretary Babbitt’s original “deemed approval” letter, at least sixty other compacts have been “deemed approved,” many with a “views letter” from an Interior official.<sup>21</sup> Babbitt was acting as a member of the Clinton administration, but such letters have since been issued by officials of both Republican and Democratic presidential administrations, including the Trump Administration.<sup>22</sup> In the Department of the Interior and the gaming industry, these letters are now routinely called “deemed approved letters” or “deemed approval letters.”

The deemed approval letter is a curious development. It is not forbidden by IGRA but was likely not contemplated either. It is a creative solution by the agency to circumstances that Congress likely did not anticipate when it enacted IGRA. The practice has raised a host of legal and policy questions. First, is this type of agency behavior legitimate? Is its use consistent with the purposes of IGRA? Second, how should parties, courts, arbitration forums, and the public regard the content of the deemed approval letters? Does a deemed approval constitute agency action for purposes of administrative law? What level of scrutiny or deference should adjudicative bodies apply to the views expressed in a deemed approval letter? Third, how should deemed approvals be viewed from a policy perspective? Does the Secretary deserve credit for transparency in formally providing views in a letter following a deemed approval, or should the Secretary be condemned for avoiding difficult decisions? A deemed approval creates some legal uncertainty because the compact is considered approved only to the extent it is lawful. In other words, the approval does not extend to illegal provisions. But those provisions tend not to be self-identifying. Does a deemed

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20. See discussion *supra* note 19.

21. U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-743T, INDIAN GAMING Preliminary Observations on the Regulation and Oversight of Indian Gaming 8 (2014).

22. Letter from Gavin Clarkson, Deputy Assistant Sec’y, Policy and Economic Development—Indian Affairs, U.S. Department of the Interior to the Honorable Joseph Talachy, Governor, Pueblo of Pojoaque (Oct. 23, 2017).



approved letter increase or decrease the uncertainty caused by the fact of the deemed approval itself?

The purpose of this Article is to explore this unusual agency action in hopes of shedding light on the issue for courts, policy makers, parties to compacts, and others who must make sense of deemed approvals. Part I explains the development of the deemed approval provision and the deemed approval letter. Part II addresses the status of such letters under administrative law and suggests how courts and arbitration panels ought to interpret them. Part III explores the normative questions surrounding this kind of agency behavior—does it reflect good policymaking?

## I. THE DEVELOPMENT OF THE DEEMED APPROVAL PROVISION AND LETTER

The legislative history is devoid of guidance about the specific reasons for the deemed approval provision.<sup>23</sup> When Congress enacted IGRA in 1988, however, it was well aware of the frequent problems caused by delay in decision-making processes in Indian affairs at the Department of the Interior. Congressional drafters likely understood the need for a forty-five-day time limit to force resolution of the issue. Indeed, several other statutory and regulatory provisions in Indian affairs mirror the deemed approval provision in IGRA.<sup>24</sup>

### A. *The Need for the Deemed Approval Provision*

It is well known that decisions related to Indian affairs can languish at the Department of the Interior for a number of reasons. One reason might be characterized as “benign neglect.” Staff members are stretched thin and may lack adequate time or resources to devote to the work of carefully reviewing a file and preparing a decision memorandum for the Secretary. In the absence

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23. The legislative history notes the provision but does not provide much explanation. S. REP. NO. 100-446, at 19 (1988).

24. For example, because of agency delay in signing tribal self-determination contracts, Congress provided that such contracts would be deemed approved if the Secretary did not reject them within a certain period of time. *See, e.g.*, 25 U.S.C. § 450f(a)(2) (2012); 25 C.F.R. § 900.18 (2018). For a practical explanation of how the process works, see *Yurok Tribe v. Dep’t of the Interior*, 785 F.3d 1405 (Fed. Cir. 2015) (holding that the dismissal for failure to state a claim upon which relief may be granted was proper because the Tribe had not yet been awarded a contract).

of a deadline, staff must focus on urgent matters or those matters that do have a deadline. Both the Department of the Interior and its principal Indian agency, the Bureau of Indian Affairs (BIA), have been notorious for slow decision making on matters affecting Indian tribes.<sup>25</sup> Indian tribes and their business partners have complained for decades about the time it takes to obtain a decision from the Department.<sup>26</sup> IGRA was enacted against a backdrop of more than a century of administrative inefficiency.<sup>27</sup>

A second reason that decisions might languish in Indian gaming is because of their political difficulty. Gaming decisions are often controversial.<sup>28</sup> At the time IGRA was enacted, gaming in general was still highly controversial. Ordinary commercial casinos existed only in a few limited locations in the United States. As Congress knew well from hearings and lobbying around the passage of IGRA, significant hostility to Indian gaming existed in some quarters, and some had a desire to prevent its expansion. Opposition ranged from law enforcement officials concerned about organized crime<sup>29</sup> to competitors in Nevada, New Jersey, and other gaming industries<sup>30</sup> to those who held moral opposition to any form of gambling. Opposition has since come to include environmentalists opposed to large-scale gaming developments and neighbors with a not-in-my-backyard (NIMBY) view toward new gaming developments.<sup>31</sup> For all of these reasons, a decision maker at Interior may

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25. See, e.g., Yair Listokin, *Confronting the Barriers to Native American Homeownership on Tribal Lands, the Case of the Navajo Partnership for Housing*, 33 URB. LAW. 433, 466 (2001) (discussing BIA delays in approving homesite leases).

26. *Addressing the Housing Crisis in Indian Country: Levering Resources and Coordinating Efforts: Hearing before S. Comm. on Banking, Hous., and Urban Affairs*, 112th Cong. 17 (2012) (statement of Sen. Tim Johnson, Chairman, S. Comm. on Banking, Hous., and Urban Affairs) (“I have heard numerous horror stories related to the delays in approving leases over the years.”).

27. References to BIA administrative inefficiency abound in governmental reports. See generally Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 5–8 (2004).

28. See generally STEVEN A. LIGHT & KATHRYN R.L. RAND, *INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE* (2005) (exploring history, law, and politics related to Indian gaming).

29. *Establish Federal Standards and Regulations for the Conduct of Gaming Activities Within Indian Country: Hearing on S. 902 before S. Comm. on Indian Affairs*, 99th Cong. 47 (1986) (testimony of Victoria Toensing, Deputy Assistant Att’y Gen. of the United States) (explaining that gaming involves large sums of cash and draws peripheral service industries that are likely to attract organized crime and other criminal elements).

30. See, e.g., Franklin Ducheneux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ ST. L.J. 99, 129 (2010) (describing opposition from California card rooms, charity bingo operations, and horse tracks).

31. See Jon Marcus, *Why Casinos are Becoming Like Landfills*, TIME (Dec. 23, 2013), <http://nation.time.com/2013/12/23/why-casinos-are-becoming-like-landfills/>.

wish to avoid or delay the political ramifications of a gaming decision.

By requiring a quick decision or an automatic approval, Congress could prevent any of these groups from pressuring the Secretary to withhold compact approvals and thereby delay the gaming development that might depend on compact approval. Thus, the forty-five-day time limit and the deemed approved provision partially depoliticized the decision-making process, making life somewhat easier for the Secretary.<sup>32</sup> Although lobbying by parties in favor of or opposed to a gaming compact nevertheless occurs, the forty-five-day clock means that it never lasts more than forty-five days after the compact is submitted. And, if the lobbying produces indecision or political gridlock, the compact is still approved automatically.

Given how controversial gaming was thirty years ago when IGRA was enacted, the forty-five-day clock may have been necessary to achieve the Congressional purposes of IGRA, such as promoting tribal economic development and self-sufficiency.<sup>33</sup> Indeed, the forty-five-day clock likely reflected Congress's and the Reagan Administration's commitment to prevent obstruction and ensure that future Secretaries of the Interior would not be able to stop or delay Indian gaming, even surreptitiously, through bureaucratic delay. To block a compact, an Interior Secretary would need to act quickly and decisively.

A third reason that Indian gaming decisions languish might be characterized as "malign neglect." To the chagrin of some tribes, tribal lands also tend to be federal lands, so federal officials have significant control over those lands and economic transactions on them. The Secretary has not always exercised his power to approve economic transactions involving tribes in the best interest of tribes. Indeed, it has sometimes been used to harm tribes and undermine

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32. Today, the reasons that gaming decisions can languish is even more politically nuanced. Hostility to new gaming establishments often includes other tribes with existing casinos who would prefer to avoid additional competition. A tribal leader with an existing casino in such circumstances can argue that new competition will have a negative effect on the gaming tribe's community, usually because it interferes with their monopolistic or oligopolistic market power. Because most Indian communities, even those with casinos, face difficult economic challenges and poverty, these arguments can be compelling. Frequently, the tribe with an existing casino will suggest that the United States has a trust responsibility to the tribe with the existing casino too and should not make a decision that will harm that tribe. See, e.g., Thomas Clouse, *Kalispel Tribe Files Federal Lawsuit to Halt Spokane Tribe's Casino*, SPOKESMAN REV. (Apr. 18, 2017), <http://www.spokesman.com/stories/2017/apr/18/kalispel-tribe-files-federal-suit-to-halt-spokane/>.

33. 25 U.S.C. § 2702(3) (2012).

their negotiating power. For example, when the Navajo Nation sought to set an increased royalty rate for coal mining with the Peabody Coal Company in the 1980s, the Secretary used the final approval power as a lever to prevent the tribe from raising the royalty rate.<sup>34</sup> The United States had negotiated a two percent royalty rate decades earlier.<sup>35</sup> Consistent with market rates, the Navajo Nation, under a new law that authorized the tribe to set the rate for future coal mining, sought to raise the rate to twenty percent.<sup>36</sup> The Navajo Nation was required to obtain approval from a local BIA official and successfully obtained that approval.<sup>37</sup> The coal company appealed the decision, however, and the Navajo Nation received the old two percent rate until the appeal was decided.<sup>38</sup> While the appeal was pending before Department officials, the coal company lobbied the Secretary.<sup>39</sup> To cause delay, the Secretary instructed a staffer to tell the tribe that a decision on the appeal would not be forthcoming anytime soon. Because the Navajo Nation only earned the two percent rate until the issue was resolved, the delay placed enormous pressure on the Navajo Nation, ultimately forcing the tribe to negotiate a settlement with Peabody.<sup>40</sup> To resolve the issue and obtain higher royalties, the Navajo Nation ultimately agreed to a much lower royalty rate of 12.5 percent, which was then the absolute federal minimum for such rates.<sup>41</sup> These events unfolded from 1984 to 1987, just prior to and during Congress's consideration of various Indian gaming bills that eventually produced IGRA in 1988.

When the Peabody Coal issue came to light, it was exceedingly embarrassing to the federal government,<sup>42</sup> but it revealed an activity that could occur in any context in which a tribe negotiated a business deal requiring Secretarial approval. The ensuing litigation made the public—and several outraged federal judges—aware of that which tribal officials had long known: Political actors within the Department of the Interior could use delay as a tactic to benefit others at tribal expense. Accordingly, tribes since have tended to

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34. *United States v. Navajo Nation*, 537 U.S. 488 (2002).

35. *Id.* at 495.

36. *Id.* at 496.

37. *Id.* at 497.

38. *Id.* at 498.

39. *Id.*

40. *Id.*

41. *Id.*

42. Barry Meier, *Navajo Lawsuits Contend U.S. Government Failed the Tribe in Mining Royalty Deals*, N.Y. TIMES (July 18, 1999), <https://www.nytimes.com/1999/07/18/us/navajo-lawsuits-contend-us-government-failed-the-tribe-in-mining-royalty-deals.html>.

oppose laws that give the Secretary unfettered discretion on approval of tribal economic decisions.

In sum, though the legislative history is thin, the justification for the forty-five-day approval provision is fairly obvious in light of the larger context. In IGRA, Congress included several other time limits for action by federal decision-makers,<sup>43</sup> likely for similar reasons.

### B. Seminole Tribe v. Florida *and the Need for an Administrative Solution to an Unconstitutional Law*

The compact requirement itself was an innovation and was designed to address a sensitive political issue. When IGRA was enacted, it provided that a tribe could conduct Class I traditional gaming free of any outside regulation and could conduct Class II games, such as bingo and pull-tabs, subject to tribal and federal regulation. A tribe could offer full casino-style gaming, which IGRA designated as Class III gaming, however, only as long as it was located in a state that allowed at least some person or entity to engage in such gaming for some purpose, even if it was only a church or charitable organization.<sup>44</sup> This provision, at least in part, codified the legal theory accepted by the Supreme Court in *California v. Cabazon Band of Mission Indians*,<sup>45</sup> which held that a tribe had a sovereign right to offer its own regulated gaming in a state that regulated, but did not absolutely prohibit, gaming. States, however, had raised significant law enforcement concerns about Indian gaming; in particular, they asserted that Indian casinos might be infiltrated by organized crime.<sup>46</sup> Since any such activity on Indian lands would also necessarily occur within state lines, Congress was somewhat sympathetic to the states' legitimate law enforcement concerns. Congress addressed these concerns by prohibiting a tribe from en-

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43. Congress included a specific deadline of ninety days for the National Indian Gaming Commission (NIGC) Chairman's approval of tribal gaming ordinances, which includes a deemed approval provision, 25 U.S.C. § 2710(e) (2012), and 180 days for the NIGC Chairman's approval of Indian gaming management contracts, which lacks a deemed approval provision. 25 U.S.C. § 2711(d) (2012). Because of the hard deadline, tribal gaming ordinances tend to be approved within 90 days, but management contracts tend to take years, in part because the process is so complicated, requiring parties to amend their submissions multiple times before approval and each amendment is treated as restarting the 180-day clock. See generally Kevin K. Washburn, *The Mechanics of Indian Gaming Management Contract Approval*, 8 GAMING L. REV. 333 (2004).

44. 25 U.S.C. § 2710(d)(1)(B) (2012).

45. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

46. *Indian Gaming Regulatory Act: Hearing Before the Committee on Interior and Insular Affairs*, 100th Cong. 256 (1987) (statement of National Association of Attorneys General).

gaging in gaming unless it had first negotiated a compact with the state in which the tribe was located. The compact would give the state the opportunity to address legitimate state regulatory concerns by defining a clear regulatory role for the state in Indian gaming.<sup>47</sup>

Congress was concerned, however, that states might usurp tribal sovereignty.<sup>48</sup> The compact requirement was potentially subject to abuse because a state that wished to prevent the development of Indian gaming operations might simply refuse to negotiate a compact. Congress addressed this concern explicitly. To prevent the state from using the compact requirement to prevent Indian gaming from developing, Congress required states to negotiate in good faith with a tribe toward an agreed gaming compact.<sup>49</sup> Congress also explicitly identified the limited subjects that may be negotiated in a gaming compact.<sup>50</sup> If a state failed to negotiate in good faith toward a compact with a tribe, Congress authorized the tribe to sue the state in federal court.<sup>51</sup>

After IGRA's enactment in 1988, the scheme initially seemed to work. Within a year, Minnesota had negotiated and signed compacts with several tribes, and several other states had undertaken negotiations.<sup>52</sup> In 1990 and 1991, more than two dozen compacts between tribes and various states were signed and approved by the Secretary.<sup>53</sup> From 1990 to 1997, the Secretary approved more than 160 compacts.

Simultaneously, however, a problem was brewing in litigation between the Seminole Tribe and the State of Florida. Florida officials had fought Indian gaming since the 1970s<sup>54</sup> and were not in-

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47. S. REP. NO. 100-446, at 13 (1988), as reprinted in 1988 U.S.C.C.A.N. 3071, 1988 WL 169811 (“[a] State’s governmental interests with respect to Class III gaming on Indian lands include the interplay of such gaming with the State’s public policy, safety, law and other interests . . .”).

48. *Id.* at 6 (“Further, it is the Committee’s intention that to the extent tribal governments elect to relinquish rights in a tribal-State compact that they might have otherwise reserved, the relinquishment of such rights shall be specific to the tribe so making the election, and shall not be construed to extend to other tribes, or as a general abrogation of other reserved rights or of tribal sovereignty.”).

49. 25 U.S.C. § 2710(d)(7)(A) (2012) (creating a federal cause of action for a state’s failure to negotiate with a tribe or a state’s failure to negotiate in good faith).

50. See 25 U.S.C. §§ 2710(d)(3)(C)(i)–(vii) (2012).

51. 25 U.S.C. §§ 2710(d)(7)(A)(i)–(iii) (2012); *id.* §§ 2710(d)(7)(B)(i)–(ii).

52. Tribal-State Gaming Compacts Approval, 55 Fed. Reg. 12292, 12292 (Apr. 2, 1990).

53. *Indian Gaming Compacts*, DEP’T OF THE INTERIOR, <https://www.indianaffairs.gov/as-ia/oig/gaming-compacts> (last visited Oct. 12, 2018).

54. See *Seminole Tribe v. Butterworth*, 658 F.2d 310, 313–16 (5th Cir. 1981) (affirming a district court’s grant of relief to the tribe, concluding that the State of Florida did not pro-

clined to give up just because the Supreme Court and Congress had recognized an Indian tribe's right to conduct gaming. The State of Florida refused to negotiate with the Seminole Tribe as required by IGRA.

In September 1991, the Seminole Tribe sued the State of Florida in federal court—a right granted to the tribe under IGRA—for the state's failure to negotiate in good faith.<sup>55</sup> Florida responded that IGRA was unconstitutional because it violated the state's Eleventh Amendment sovereign immunity. The case ultimately reached the Supreme Court in 1995. When it was decided in 1996, the Court held that the Eleventh Amendment to the Constitution precluded Congress from subjecting a state to suit by a tribe. Accordingly, the Court held unconstitutional the provision of IGRA that allowed tribes to sue states for failing to negotiate in good faith toward a gaming compact.

*Seminole Tribe* wrecked the scheme devised by Congress to balance the regulatory interests of states against the right of tribes to engage in gaming. Following the decision, an Indian tribe still had the theoretical right to conduct gaming, but it nevertheless needed a tribal-state gaming compact to do so lawfully, and it suddenly had no leverage to force a state to come to the table to negotiate a gaming compact.

Having lost the “stick” of an IGRA-authorized lawsuit for failure to negotiate in good faith, tribes still needed some way to bring states to the negotiating table. Accordingly, tribes were forced more and more to offer “carrots” in the form of shares of gaming revenues.<sup>56</sup> For example, compacts entered between tribes and the State of Minnesota in 1990 and the State of Wisconsin in 1993 had no state revenue sharing provisions. In 1998 and 1999, Wisconsin demanded and received revenue sharing payments after its compacts expired.<sup>57</sup>

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hibit bingo games as against public policy and the state's civil statute regulating bingo could not be enforced on tribal sovereign land), *cert. denied*, 455 U.S. 1020 (1982).

55. *Seminole Tribe of v. Florida*, 517 U.S. 44, 51–52 (1996).

56. See Eric S. Lent, Note, *Are States Beating the House? The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 453, 455–56 (2003) (“Tribes now find themselves largely at the mercy of the states, which, for all practical purposes, can refuse to negotiate compacts or demand revenue sharing from tribes as a quid pro quo for the tribal-state compact necessary to operate Class III gaming activities.”).

57. *Id.* at 558; *cf.* Lower Sioux Indian Community Tribal-State Compact, 56 Fed. Reg. 192 (Oct. 3, 1991) (Minnesota's compacts did not expire and, accordingly, Minnesota's tribal state compacts still lack revenue-sharing provisions).

Although the offer to share significant gaming revenue brought states to the table, it created an entirely new issue.<sup>58</sup> To Congress, Indian gaming was intended to benefit tribes, not states; the compacting requirement was designed to ensure that parties addressed legitimate state regulatory issues related to gaming. To President Ronald Reagan, who signed IGRA into law, the purpose of IGRA was to help tribes become more self-sufficient and independent from the federal government.<sup>59</sup> President Ronald Reagan took office in 1981 and announced his administration's Indian policy in 1983.<sup>60</sup> One of President Reagan's central goals in Indian policy was to foster tribal self-sufficiency. It soon became apparent that gaming was the most effective economic engine to achieve that objective. As a result, Reagan's Department of the Interior officials were very supportive of tribes in developing Indian bingo operations. The Reagan Administration is credited with encouraging Indian gaming throughout the 1980s until its legality was firmly resolved in the U.S. Supreme Court's decision in *Cabazon Band*.<sup>61</sup>

Congress carefully designed the compact process to discourage any notion that states could take tribal gaming revenues. A range of provisions in IGRA makes plain that Congress intended gaming

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58. See Gatsby Contreras, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation?*, 5 J. GENDER RACE & JUST. 487, 495 (2002) (raising concern that some revenue-sharing provisions are possibly contrary to federal policy); see also Courtney J. A. DaCosta, *When "Turnabout" Is Not "Fair Play": Tribal Immunity Under the Indian Gaming Regulatory Act*, 97 GEO. L.J. 515, 543 (2009) ("Revenue-sharing arrangements have proven highly controversial . . ."); Henry Buffalo & Robert Miller, Commentary, *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 681, 689 (2004) ("[And irrespective of what the Ninth Circuit has said, I still believe that the law prohibits revenue sharing agreements.>").

59. 25 U.S.C. § 2702(1) (2012).

60. President Ronald Reagan, Statement on Indian Policy, (Jan. 24, 1983), <http://files.eric.ed.gov/fulltext/ED226884.pdf>.

61. See, e.g., Nicholas S. Goldin, Note, *Casting a New Light on Tribal Casino Gaming*, 84 CORNELL L. REV. 798, 812–13 (1999). When California state authorities instigated litigation challenging the right of a tribe to engage in gaming in *California v. Cabazon Band of Mission Indians*, the state eagerly sought the support of the federal Department of Justice in the litigation. Law enforcement officials at the Department of Justice, who had fought organized crime in the (non-Indian) gaming industry for decades, were very sympathetic to California's opposition to Indian gaming. State law enforcement officials assumed that President Reagan would be sympathetic, as well, since he was a former governor of California. When the case reached Solicitor General Charles Fried's office in 1987, however, Fried refused to intervene in the Supreme Court case. Fried later quipped that if the United States had formally asserted that Indian gaming was illegal, the first arrest would have been the Secretary of the Interior because Reagan's Interior Department and BIA were Indian gaming's biggest champions. Kevin K. Washburn, *Conflict and Culture: Federal Implementation of IGRA by the National Indian Gaming Commission, the Bureau of Indian Affairs, and the Department of Justice*, 42 ARIZ. ST. L.J. 303, 311–312 (2010) (recounting the story of why Solicitor General Charles Fried declined to file a brief in *Cabazon*).



to be an economic development vehicle only for tribes. These provisions gave life to the Reagan Administration's hope that gaming would be a path to tribal self-sufficiency. IGRA requires, for example, that tribes retain the "sole proprietary interest" in the gaming operation.<sup>62</sup> While a few provisions in IGRA address the use of tribal gaming revenues by states, they tend to explicitly narrow that use. For example, Congress authorized tribes to pay states to defray the legitimate costs of regulating Indian gaming under a compact.<sup>63</sup> Congress expressly disclaimed any notion that it was authorizing states to impose any "tax, fee, charge or other assessment" on Indian gaming revenues.<sup>64</sup> In IGRA, Congress clearly did not contemplate any general state revenue sharing. It assumed that a tribe could sue a state for failure to negotiate in good faith if a state made such demands.

From a federal Indian policy perspective, the substantive problem is that revenue sharing with states could undermine the promise of IGRA in furthering tribal economic development. Indian gaming might become more of a boon for state governments than for tribal governments.

Nevertheless, because of *Seminole Tribe*, revenue sharing provisions in compacts began to proliferate.<sup>65</sup> Just a few years earlier, states had opposed Indian gaming on the ground that tribes might be "shaken down" by organized crime. Suddenly, states also wanted to shake down tribes and take their revenues. It was a new and unexpected development that frustrated Indian tribes and caused discomfort for the Department of the Interior in its nominal role as federal trustee for tribes.<sup>66</sup>

*Seminole Tribe* placed the Department in a very difficult political position. The Department has a general federal trust responsibility to protect the interests of Indian tribes, and it was this trust responsibility that justified federal review of compacts between tribes and states.<sup>67</sup> If the Department approved a compact with state rev-

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62. 25 U.S.C. § 2710(b)(2)(A) (2012).

63. *Id.* § 2710(d)(3)(C)(iii).

64. *Id.* § 2710(d)(4).

65. Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. LEG. 39, 42 (2007) ("[I]n order to alleviate the negative impact of *Seminole Tribe* on Indian gaming[,] Indian tribes and the states began to negotiate broader revenue sharing agreements . . .").

66. See Steven Andrew Light et al., *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657, 659 (2004) (asserting that "revenue sharing is political coercion at tribes' expense").

67. See Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 253, 277 (2010) (noting that the role of the Secretary under the compact approval provisions in IGRA is one of "trustee").

enue sharing provisions, it would be complicit in undermining the basic purpose of IGRA and would be lending the Executive Branch's authority to the idea that state revenue sharing was legal. On the other hand, if the Department disapproved a tribal-state gaming compact because the compact (illegally) provided for state revenue sharing, there was a very real question about whether the tribe would be able to entice the state back to the table for further compact negotiations. Since a compact is required for Class III gaming, the risk was that the tribe would not be able to conduct Class III gaming. Such an outcome would have undermined IGRA and the policy goals of Congress and the Reagan Administration in supporting Indian gaming.

It was this conundrum that Secretary Bruce Babbitt faced when the New Mexico gaming compacts reached his desk in 1997.

### C. New Mexico Gaming Compact Controversy

By 1995, a year before the Court announced its ruling in *Seminole Tribe*, several tribes had signed compacts with the State of New Mexico in 1995.<sup>68</sup> These compacts included modest state revenue sharing provisions, allowing the state to take less than five percent of the tribe's gaming revenues in exchange for allowing tribes substantial exclusivity in offering gaming within the state.<sup>69</sup> In other words, the revenue sharing was a modest quid pro quo to the state for maintaining an effective ban on casino gaming by commercial vendors within the state, and the Department accepted it on that basis.<sup>70</sup>

After the Department approved the 1995 compacts, however, the New Mexico Supreme Court held that the New Mexico governor lacked authority to bind the state to those gaming compacts absent legislative approval.<sup>71</sup> After the state Supreme Court's decision, litigation determined that those compacts, though approved by the Department, had no force or effect because the Governor's signature was *ultra vires*.<sup>72</sup>

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68. Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1550 (1997).

69. See generally W. DALE MASON, INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS 70-145 (2000).

70. See, e.g., Letter from Ada E. Deer, Assistant Sec'y, U.S. Dep't of the Interior, to Governor Tony B. Vigil, Pueblo of Nambe 1 (Apr. 24, 1995) (approving a tribal state gaming compact).

71. State *ex rel.* Clark v. Johnson, 904 P.2d 11, 18 (N.M. 1995).

72. Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1559 (10th Cir. 1997).

The tribes in New Mexico found themselves re-negotiating compacts with the state legislature. Now, though, they faced a negotiating context in which *Seminole Tribe* had undercut the tribes' ability to sue states for failure to negotiate in good faith. In this new legal environment, tribes had dramatically different negotiation leverage.

Ultimately, twelve New Mexico tribes signed compacts with the state in 1997, but having lost their leverage in *Seminole Tribe*, the tribes agreed to pay up to up to sixteen percent of slot machine net win revenues to the state, as well as significant regulatory fees.<sup>73</sup>

At the Department, the sixteen percent revenue-sharing figure caused significant concern.<sup>74</sup> Sixteen percent of "net win" from slot machines is quite significant because net win can be likened to gross income in any ordinary commercial enterprise. It is a top-line number from which all of the ordinary business costs of the operation must be paid, such as payroll, advertising, debt repayment on construction loans, and all operating expenses, to reach the bottom line. In other words, the sixteen percent "off the top" might be far more than that which remains at the bottom line after payment of various costs. Giving such a large percentage of the gaming revenue to the state creates a substantial risk, at least for some tribes, that the state might earn more from Indian gaming than the tribe earns. It also means that the state revenue is guaranteed, while the tribe bears significant financial risk. The concern at Interior was that this type of outcome was difficult to square with the Congressional purposes behind authorizing Indian gaming and might well constitute an illegal tax or fee by the state.<sup>75</sup>

Though the tribes signed the compacts, they signed under protest and continued to argue that they signed under duress since *Seminole Tribe* had denied them the ability to force the state to negotiate in good faith. In other words, though the tribes signed the compacts, they presumably signed under protest because it appears

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73. Lent, *supra* note 56, at 459–60.

74. See Letter from Bruce Babbitt to Wendell Chino, *supra* note 17, at 1.

75. Congress enacted the Indian Gaming Regulatory Act on the hope that gaming would "promote tribal economic development [and] tribal self-sufficiency . . ." 25 U.S.C. § 2701(4) (2012); 25 U.S.C. § 2702(1) (2012). It created a federal regulatory regime specifically to protect the industry "as a means of generating tribal revenue." 25 U.S.C. § 2702(3). With one minor exception to allow a state government to recoup costs expended in regulating Indian gaming under a compact, Congress disclaimed any intention to let the compacting requirement "be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment . . ." 25 U.S.C. § 2710(d)(4) (2012).

that they were simultaneously lobbying Secretary Babbitt not to approve.<sup>76</sup>

The Secretary was in a difficult spot. On one hand, if the Secretary approved the compacts, he would vouch for the legality of the compacts and undermine the tribes' claim that the compacts were unfair and illegal; this would call into doubt whether the Secretary was meeting his trust responsibility to tribes under IGRA.

On the other hand, if the Secretary disapproved the compacts on the basis that they were unfair to the tribes, he would deprive them of the opportunity to engage in lawful Class III Indian gaming, essentially forcing the tribes to continue negotiating with the state even though the state was arguably negotiating in bad faith. Disapproval might punish tribes more than the state.

Ultimately, after much hand-wringing, the Secretary allowed the compact to go into effect by taking no action during the forty-five-day period. However, at the end of the forty-five-day period, Secretary Babbitt sent a short two-and-a-half page letter outlining his concerns about the compacts.

The Secretary's letter expressed both procedural and substantive concerns. He noted that the compacts were not the product of true bilateral negotiations and asserted that the revenue sharing provisions appeared to be more consistent with an inappropriate fee or tax assessment, rather than a "bargained-for payment for a valuable privilege."<sup>77</sup> After detailing problems with the provisions, the Secretary concluded the letter by expressing hope that the careful explanation would assist the parties in negotiations to resolve the Secretary's concerns.

For a time, it was unclear whether the Secretary had taken the proper path. The Secretary's action did not produce any sort of quick resolution. Litigation and lengthy negotiations between the tribes and the state ensued.<sup>78</sup> However, because the compacts had taken effect by virtue of the Secretary's no-action approval, the tribes legally could engage in gaming while they argued with the state about the legality of the revenue sharing provisions. The Secretary's creative action thus gave the tribes leverage and restored some of the balance lost after *Seminole Tribe*.

During the litigation, the tribes refused to pay the state revenue share and deposited the funds into escrow, where they accumulat-

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76. See generally Fletcher, *supra* note 65, at 61 (discussing Secretary Babbitt's letter).

77. See Letter from Bruce Babbitt to Wendell Chino, *supra* note 17, at 2.

78. Lent, *supra* note 56, at 459-61.

ed to tens of millions of dollars.<sup>79</sup> The parties eventually settled the litigation with the signing of new compacts. Eventually, most of the tribes signed new compacts in 2001 on substantially better revenue-sharing terms. The new compacts provided for revenue sharing of up to eight percent of net win, half of the amount demanded in the 1997 compacts.<sup>80</sup> The Department of the Interior affirmatively approved the new compacts in 2001.<sup>81</sup>

#### D. Deemed Approvals Since 1997

Since IGRA was enacted, the Department has reviewed compacts or compact amendments more than 780 times.<sup>82</sup> Since the 1997 deemed approval letter by Secretary Babbitt, the Department has approved more than 400 compacts. Of these approvals, the Department has allowed compacts to become approved by operation of law more than seventy-five times.<sup>83</sup> More than sixty of these no-action approvals have been accompanied by letters. In some ways, the deemed approval letter has become a fairly common practice within the Department. For comparison, during the same time period, the Department issued only ten disapprovals.

But while the number sixty suggests that deemed approval letters have become frequent, the facts are a more complicated. States tend to offer the same terms, or very similar terms, to various tribes. The number may overstate the frequency of deemed approval letters because states often sign the same or nearly identical compacts with numerous tribes. For example, within a couple of months of Secretary Babbitt's 1997 letter to the Mescalero Apache Tribe, Secretary Babbitt issued nine other letters related to virtually identical compacts between New Mexico and other tribes.

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79. *Id.* at 460.

80. *See, e.g.*, Letter from Neil McCaleb, Assistant Sec'y, U.S. Dep't of the Interior, Alvino Lucero, Governor, Isleta Pueblo 21 (Nov. 21, 2001).

81. *See id.* at 1.

82. *Indian Gaming Compacts*, DEP'T OF THE INTERIOR, <https://www.indianaffairs.gov/as-ia/oig/gaming-compacts> (last visited Oct. 12, 2018) (list of Approved Tribal-State Class III Gaming Compacts). The first Compact was approved in 1990 between the Fort Mojave Indian Tribe and the State of Nevada. Tribal-State Compacts Approval; Class III (casino) Gambling: Ft. Mojave Tribe—Nevada, 55 Fed. Reg. 12292 (Apr. 2, 1990).

83. Many of these instances involved virtually identical compacts. A state may present the same compact terms to multiple tribes within the state.

In total, deemed approval letters have been issued for approximately thirteen substantively different state compacts<sup>84</sup> regarding tribal-state compacts in only eleven states: California, Iowa, Massachusetts, Michigan, Nevada, New Mexico, New York, Oklahoma, South Dakota, Washington, and Wisconsin.<sup>85</sup>

Deemed approval letters have been issued under every presidential administration since 1997. For example, Secretary Gale Norton, a member of President George W. Bush's cabinet, used a deemed approval letter in a no-action approval of a gaming compact between the Seneca Nation and the State of New York in 2002.<sup>86</sup> Though she purported to use the no-action approval approach "reluctantly," she wrote a detailed eight-page letter to identify a variety of concerns and to speak more generally about Indian gaming policy, concluding that "policy considerations . . . counsel against an affirmative approval."<sup>87</sup> Secretary Norton's primary concern was that the compact gave the Seneca Nation a region of geographic exclusivity at the expense of two other tribes.<sup>88</sup> Curiously, she explicitly found that the provision did not constitute a legal violation of the federal trust responsibility to Indian tribes, but she raised a policy concern about the potential precedent the compact might set, saying, "I am still troubled that parties in future compacts may pit tribe against tribe."<sup>89</sup> She also expressed concerns about so-called "off-reservation gaming," concluding that "elements of this Compact may be used by future parties to proliferate off-reservation gaming development on lands . . . selected solely based on economic potential, wholly devoid of any other legitimate [tribal] connection."<sup>90</sup>

Deemed approval letters were also issued in the Obama administration<sup>91</sup> and the Trump administration.<sup>92</sup>

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84. These include: California in 2012, Iowa in 1992, Massachusetts in 2014, Michigan in 2008, Michigan in 1999, Nevada in 2004, New Mexico in 2015, New Mexico in 1997, New York in 2002, Oklahoma in 2004, South Dakota in 1991, Washington in 1993, Wisconsin in 2003. See *Indian Gaming Compacts*, DEP'T OF THE INTERIOR, <https://www.indianaffairs.gov/asia/oig/gaming-compacts> (last visited Oct. 12, 2018).

85. *Id.*

86. Letter from Gale Norton, Sec'y of the Interior, to Cyrus Schindler, President, Seneca Nation of Indians 1 (Nov. 12, 2002).

87. *Id.* at 7.

88. *Id.* at 4.

89. *Id.* at 5.

90. *Id.* at 2.

91. See e.g., Letter from Larry Echo Hawk, Assistant Sec'y for Indian Affairs, U.S. Dep't of the Interior, to Sherry Treppa Bridges, Chairperson, Habematolel Pomo of Upper Lake (Aug. 31, 2011); Letter from Kevin K. Washburn, Assistant Sec'y for Indian Affairs, U.S. Dep't of the Interior, to Virgil Siow, Governor, Pueblo of Laguna (Oct. 16, 2015); Letter

The deemed approval letters have raised a variety of concerns, but the Department's concern that appears most often in the letters relates to revenue sharing with states. Concerns about revenue sharing appear in roughly fifty-eight of the deemed approval letters.<sup>93</sup> The letters reflect the general concern that state revenue sharing conflicts with federal policy in favor of gaming being a means to tribal economic development and self-sufficiency<sup>94</sup> and requiring that "the Indian tribe is the primary beneficiary of the gaming operation."<sup>95</sup> In some instances, of course, a revenue share has been so high that it resulted in a disapproval.<sup>96</sup>

The second most common concern in the letters relates to efforts to address matters in a compact that are not germane to gaming,<sup>97</sup> a concern raised in forty-three of the letters. IGRA generally authorizes tribes and states to include only those matters in compacts that deal directly or at least indirectly with gaming licensure and regulation.<sup>98</sup> The concern here is that states may be using the tribal state gaming compact requirement as a lever to require tribes to negotiate about matters that are not directly related to Class III gaming, such as water rights, hunting rights, fishing rights, other treaty rights, or even Class II gaming.<sup>99</sup> Such provisions are outside the limited scope of that which Congress intended states and tribes to negotiate in Indian gaming compacts.

Another common concern raised in some letters are compact provisions related to so-called "free play" in connection with revenue sharing. This issue involves the accounting treatment of promotional "free play" that an Indian gaming casino provides to consumers to encourage them to visit the casino. The question is whether such credits provided by the casino constitute revenue to

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from Lawrence S. Roberts, Assistant Sec'y for Indian Affairs, U.S. Dep't of the Interior, to Robert J. Welch, Jr., Chairman of the Viejas (Baron Long) Group, Capitan Grande Band of Mission Indians of the Viejas Reservation (Oct. 21, 2016).

92. Letter from Gavin Clarkson to Joseph Talachy, *supra* note 22.

93. See, e.g., Letter from Kevin K. Washburn, Assistant Sec'y for Indian Affairs, Dep't of the Interior, to Hon. Virgil Siow, Governor of the Pueblo of Laguna (Oct. 16, 2018), <https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-033867.pdf>.

94. See 25 U.S.C. §§ 2701(4) (2012); *id.* § 2702(1).

95. *Id.* § 2702(2).

96. See Letter from Kevin K. Washburn, Assistant Sec'y for Indian Affairs, Dep't of the Interior, to Hon. Deval Patrick, Governor of the Commonwealth of Massachusetts (Oct. 12, 2012), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/webteam/pdf/idc1-028222.pdf>.

97. See Kevin K. Washburn, *Recurring Issues in Gaming Compact Approval*, 20 GAMING L. REV. & ECON. 388, 391–93 (2016).

98. See 25 U.S.C. §§ 2710(d)(3)(C)(i)–(vii) (2012).

99. See Washburn, *supra* note 97.

the tribe when the credit is used and, thus, whether it should be counted as gaming revenues for purposes of state revenue-sharing payments. To tribes, free play reflects a marketing cost, not a gain. Because tribes presumably use past gaming revenues to provide free play, tribes assert that they have already made revenue-sharing payments to the state on those revenues. The issue has come up, now and then, in disputes in several states.<sup>100</sup> In a 2015 deemed approval letter, the Department of the Interior noted that New Mexico's demand was inconsistent with Generally Accepted Accounting Principles and industry standards, concluding that revenue payments on free play would be an illegal state tax on Indian gaming revenues.<sup>101</sup> A few other concerns have appeared in more than one letter.<sup>102</sup>

In sum, although Secretary Babbitt introduced the deemed approval letter in 1997 to address concerns primarily about revenue sharing with states, the Department has broadened the use of the letters over time to address a wider range of subjects.

## II. HOW SHOULD LAW AND THE COURTS TREAT NO-ACTION APPROVALS AND DEEMED APPROVAL LETTERS UNDER IGRA?

Since the Department has, over time, often used no-action approvals and has broadened use of the deemed approval letter, it is inevitable that courts will eventually directly confront the legitimacy of these types of outcomes. When these issues reach the courts, how will they be decided under federal administrative law? How should courts view such behavior? What is the legal effect of a no-action approval or a deemed approval letter? Are no-action ap-

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100. See *Sault Ste. Marie Tribe of Chippewa Indians v. Granholm*, 475 F.3d 805 (6th Cir. 2007) (discussing how the issue arose in Michigan); see also Ryan Burns, *Revenue Sharing and Free Play*, INDIAN GAMING MAGAZINE, Apr. 2010, at 56, [http://www.indiangaming.com/istore/Apr10\\_Burns.pdf](http://www.indiangaming.com/istore/Apr10_Burns.pdf) (citing the issue as arising in Connecticut, Oklahoma and New Mexico).

101. Letter from Kevin K. Washburn, Assistant Sec'y for Indian Affairs, U.S. Dep't of the Interior, to Hon. Danny H. Breuninger Jr., Mescalero Apache Tribe (June 9, 2015). In 2017, the Department, then under new management, reaffirmed its position. Letter from Gavin Clarkson to Joseph Talachy, *supra* note 22 ("Our position remains the same. Free play and point play must be treated according to industry standards and Generally Accepted Accounting Principles (GAAP) by excluding both from the definition of 'net win,' which forms the basis for revenue sharing calculations.").

102. Examples include Class II gaming regulations, impermissible regulations outside of the gaming context, ongoing related litigation, land use concerns, criminal jurisdiction issues, and the expiration of the forty-five-day decision period. See *Indian Gaming Compacts*, DEP'T OF THE INTERIOR, <https://www.indianaffairs.gov/as-ia/oig/gaming-compacts> (last visited Oct. 12, 2018), for such letters.



provals reviewable as agency action under the Administrative Procedure Act? If such behavior is “action,” is it “final?” What kind of review is appropriate? Are deemed approval letters entitled to any deference or respect, and, if so, to what extent?

This Part will analyze the uncertain application of the APA to no-action approvals and deemed approval letters. It will also describe and critique the existing cases that have dealt with no-action approvals and the one case that discussed in dicta a deemed approval letter. Finally, it will recommend an approach to review of the question.

#### *A. How Should the APA Apply to a No-Action Approval?*

As noted above, no-action approvals are enigmatic. This is in part because it is not certain how or whether judicial review is available. An ordinary compact approval would be categorized according to administrative law within the species of agency action known as “informal adjudication.” Under principles of federal administrative law, of course, an agency action is generally subject to judicial review in the courts, at least as long as it is final for the agency.<sup>103</sup> Ordinarily, a compact approval or disapproval by the Secretary would be a final agency action that could be reviewed by a federal court under the APA in a case properly filed by any party with standing.

In reviewing such an approval or disapproval, the court ordinarily would examine the administrative record developed by the agency, including any submissions by the parties, and examine the reasoned decision of the agency to determine, for example, whether the agency acted arbitrarily, capriciously, or otherwise not in accordance with law.<sup>104</sup> It is not uncommon, after the Department has received a compact to review and while its decision is pending, for the Department to ask for more information, inviting the parties to brief matters for which the Department has concerns. For example, the Department will frequently ask for a justification for any revenue sharing in the compact.<sup>105</sup>

In other words, a small administrative record is often developed in the compact approval process. In the ordinary case of an affirm-

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103. See Administrative Procedure Act, 5 U.S.C. §§ 702 & 704 (2012).

104. See Administrative Procedure Act, 5 U.S.C. § 706 (2012).

105. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-355, INDIAN GAMING: REGULATION AND OVERSIGHT BY THE FEDERAL GOVERNMENT, STATES, AND TRIBES 17–19 (2015).

ative approval or disapproval, it is relatively routine work for a court to examine the administrative record, review the statute and the regulations, and review the stated basis for the Secretary's decision.<sup>106</sup> In such a context, the court can analyze, for example, whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in light of the administrative record that had been developed and the reasoning offered by the Department.<sup>107</sup>

Judicial review of agency action usually involves a review of the justification or reasoning for the action. Such actions are frequently called "record review" cases because the court is limited to reviewing the administrative record before the agency.<sup>108</sup> The court will examine the entire administrative record and analyze whether the agency relied on the correct law, whether it applied the correct legal factors, and whether it properly weighed the various considerations in reaching a decision.<sup>109</sup>

In such a case, the agency's reasoning is exceedingly important to the court's review. It is black letter law that, at least under the broadest form of review, a court may not substitute its own views for the views of the expert agency charged by Congress with making the decision.<sup>110</sup> Indeed, in contrast to a district court decision, which an appellate court can often affirm even if it reached the right result for the wrong reasons, an appellate court must ordinarily remand a decision to an agency under such circumstances.<sup>111</sup>

Because the reasoning underlying agency action is crucially important for judicial review, it is not obvious how courts should proceed in the face of a no-action approval. But the routine administrative law approach to judicial review does not fit well in the context of a no-action approval, because the agency "action" to be reviewed is really no action at all. A no-action approval is, by definition, not an action by the agency; it is inaction. A compact that is approved by the agency's inaction within forty-five days becomes effective not because of any formal action by the agency, but be-

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106. 25 C.F.R. §§ 293.1–293.16 (2009).

107. See 5 U.S.C. § 706 (2012).

108. See *Kappos v. Hyatt*, 566 U.S. 431, 438 (2012) ("Under the APA, judicial review of an agency decision is typically limited to the administrative record.").

109. See generally *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (discussing judicial review of agency action).

110. See, e.g., *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983).

111. *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007).

cause Congress so provided.<sup>112</sup> How should judicial review proceed under such circumstances?

A no-action approval thus presents a doctrinal puzzle for purposes of judicial review, in part because the APA draws a distinction between agency action and agency inaction. Thoughtful scholars have made a compelling case that the APA's distinction between action and inaction is superficial, artificial, simplistic, subject to manipulation, unduly confusing, and ultimately meaningless.<sup>113</sup> Inaction is enigmatic in many instances because of the questions inherent in determining whether it is reviewable. For example, is the inaction "final" for purpose of the APA?<sup>114</sup> Does it represent action "unlawfully withheld" or "unreasonably delayed?"<sup>115</sup> When does inaction constitute an abuse of discretion?<sup>116</sup>

In the case of compact approval under IGRA, the statute itself provides conflicting implications. It contains language reflecting agency discretion in some places and language suggesting no discretion in others. For example, Congress authorized the Secretary to approve gaming compacts. Congress further provided that "[t]he Secretary may disapprove a [gaming compact] only if such compact violates - (i) any provision of this chapter, (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." Finally, "[i]f the Secretary does not approve or disapprove a [gaming compact] before the date that is forty-five days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter."<sup>117</sup>

These provisions put to rest some of the difficult questions that ordinarily come up in cases involving inaction. For example, whether a deemed approval constitutes action or inaction, that decision is effectively "final" after forty-five days. No action would presumably not constitute action "unlawfully withheld" because the

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112. The provision states: "If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter." 25 U.S.C. § 2710(d)(8)(C) (2012).

113. See, e.g., Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENV'T'L L.J. 461 (2008).

114. Administrative Procedure Act, 5 U.S.C. § 704 (2012).

115. Administrative Procedure Act, 5 U.S.C. § 706(1) (2012).

116. 5 U.S.C. § 706(2)(a) (2012).

117. 25 U.S.C. § 2710(d)(8)(A)-(C) (2012).

terms of the statute indicate clearly that Congress anticipated no action by the Secretary at least in some cases. Moreover, it would be unlikely for delay to be “unreasonable” because delay produces an automatic approval. Indeed, the very purpose of the provision is to produce resolution of the question of approval, whether or not action has occurred.

However, these provisions raise different issues.

### 1. Agency Discretion and Resource Allocation

One question is whether the agency is really doing anything at all in a no-action approval. Although the distinction between action and inaction is often a false one, the agency may be making no substantive choice at all in some cases.

Perhaps the agency is overwhelmed with other pressing work and simply lacks the resources to address the compact before it. Moreover, perhaps it takes to heart the notion that a no-action approval means that a compact is approved only to the extent it does not violate IGRA. In such circumstances, the language of the statute would seem to be self-executing and would limit the harm of declining review, which is probably why Congress limited the effect of a no-action approval to lawful provisions.

In the case where the agency is not actually making any substantive choice, it is hard to argue that the agency is engaging in any action (or inaction) warranting review. In that instance, it is not the agency that issued the (no-action) approval; the approval was ordered by Congress, and it is essentially congressional action, not agency action, that gives the compact legal effect.

In other words, in this circumstance, the question is not whether there was action or inaction, but whether it was by the agency. In the absence of any agency action, a decision occurs by default, but the decision was directed by Congress, not the agency.

Congressional actions are judicially reviewable, of course, but only as to assertions that they are unconstitutional.<sup>118</sup> If such a case could be brought, it would be brought not under the APA and presumably not against the agency.

In light of the lack of mandatory words like “shall” and the seemingly permissive approach by Congress as to whether the Secretary must act at all, a court must ask if this decision is exempted

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118. See *Marbury v. Madison*, 5 U.S. 137 (1803).

from review because it is “committed to agency discretion by law?”<sup>119</sup> In such circumstances, it may be that Congress is leaving a resource allocation decision to the agency.

One scholar has made a compelling argument that the single most important factor in determining whether the courts will grant judicial review is the extent to which the decision involves allocation of agency resources.<sup>120</sup> Existing Supreme Court decisions on agency inaction, including *Heckler v. Chaney*,<sup>121</sup> *Norton v. Southern Utah Wilderness Alliance*,<sup>122</sup> and *Massachusetts v. EPA*,<sup>123</sup> are quite consistent with this view.

It would be easy to conclude that the relevant section of IGRA presents precisely such a question, with Congress essentially telling the agency to make an affirmative decision of approval or disapproval if it chooses to use its staff resources to do so but to decline to engage if resources are unavailable. Given that the agency has made more than 800 decisions since IGRA was enacted, the resource allocation question is certainly relevant. Thus, in the no-action approval context in which a party is seeking review, the best argument for the agency under the APA and Supreme Court precedent may well be that the lack of action represents a resource allocation question and the decision whether to act on a compact is committed to agency discretion by law.

That claim, however, might ring hollow in the context in which the Secretary sent a lengthy deemed approval letter on the day after the forty-fifth day. Thus, blaming the inaction on resource allocation may not be a complete solution.

## 2. Agency Discretion in Enforcement

Given that the statute effectively makes approval automatic, with or without action, and gives the Secretary the power and discretion to disapprove a compact only in certain circumstances, one could liken the power of disapproval to enforcement. Essentially, Congress has given the Department authority to block a compact to

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119. Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (2012).

120. Biber, *supra* note 113.

121. *Heckler v. Chaney*, 470 U.S. 821 (1985) (addressing the presumption of unreviewability of decisions by agency not to undertake enforcement action).

122. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (addressing agency’s alleged failure to manage off-road vehicle use).

123. *Massachusetts v. EPA*, 549 U.S. 497 (2007) (addressing agency’s failure to take regulatory action with regard to greenhouse gas emissions).

prevent it from becoming valid. In that respect, the compact review process is akin to an enforcement decision for the Secretary.

Viewed in this light, judicial review of inaction would be like judicial review of the failure to take enforcement action. Enforcement power is inherently executive in nature and, while the decision to exercise enforcement power is always subject to judicial review, the decision not to exercise enforcement power is almost never reviewable, in part for the resource allocation reasons identified above.<sup>124</sup>

In sum, whether viewed as a resource allocation question or an enforcement question, it seems quite unclear, and indeed doubtful, that the APA authorizes actions against the Secretary for a no-action or deemed approval.<sup>125</sup> However, the simple no-action approval authorized by IGRA has been the subject of litigation in a handful of cases.

### B. Courts Have Struggled with No-Action Approvals

Though not unheard of, the no-action approval is fairly uncommon in federal law. From the perspective of routine administrative law and judicial review, it has remained something of an enigma.

While dozens of federal statutes provide for an action to be “deemed approved” by law if a federal agency fails to act within a certain period of time, these provisions tend to exist in narrow categories, such as in federal monetary grant programs,<sup>126</sup> in federal regulatory regimes that require federal approval of state governmental implementation plans for federal programs,<sup>127</sup> and in a handful of other contexts.<sup>128</sup>

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124. Cf. *Heckler*, 470 U.S. 821.

125. To be clear, the analysis thus far has addressed the no-action approval in the absence of a deemed approval letter. That circumstance will be taken up below.

126. See, e.g., 34 U.S.C. § 10334 (2017) (application for grants to public entities to provide equipment and personnel training for the closed-circuit televising and video taping of the testimony of children in criminal proceedings for the violation of laws relating to the abuse of children deemed approved unless the agency official informs the applicant of reasons for disapproval).

127. See, e.g., 20 U.S.C. § 2342 (2012) (deemed approval of a state plan regarding adult career and technical education to which the federal Secretary of Education has not responded within 90 days); 42 U.S.C. § 300g-1(13)(g)(iii) (2012) (state multimedia program to mitigate radon levels in indoor air approved if not disapproved within 180 days). In the same general category, but much more specific, is the approval of a county ordinance that must be approved by a federal agency. 16 U.S.C. § 544e (2012) (county scenic area land use ordinance deemed approved if the Columbia River Gorge Commission fails to act within

The most common subject area for deemed approvals is in the area of Indian affairs, which has numerous statutory schemes in which approval has been deemed to have occurred unless a federal official, usually the Secretary, issues an affirmative disapproval.<sup>129</sup> The legal effect of no-action approvals is sometimes the subject of litigation brought by Indian tribes against the agency, but usually in contract cases involving money, not APA actions.<sup>130</sup>

Recall that in IGRA, a gaming compact for which the Secretary has not acted within forty-five days is “deemed approved,” but only to the extent that the compact is consistent with IGRA.<sup>131</sup> Similar limiting language is found in only one other statutory scheme, and it is also in the Indian affairs context. In the portion of the Indian Land Consolidation Act Amendments of 2000 that deal with Secretarial approval of a tribal probate code, Congress provided that a tribal probate code, submitted for the approval of the Secretary of the Interior and not approved or disapproved within 180 days, “shall be deemed to have been approved by the Secretary, but only to the extent that the tribal probate code is consistent with Federal law and promotes the policies set forth in section 102 of the Indian

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ninety days); 12 U.S.C. § 1467a(q)(2)(C) (2012) (approval of purchases of stocks by bank holding companies).

128. See, e.g., 33 U.S.C. § 1299 (2012) (where state has been delegated authority to run a federal grant program and a state has approved a grant application, the application will be deemed approved and funded if a federal official does not approve or disapprove the application within forty-five days). See also 33 U.S.C. § 908(i)(1) (2012) (regarding disability claims by longshoreman and harbor workers); 47 U.S.C. § 252 (2012) (state public utility commissions charged with reviewing competitive market agreements between telecommunications carriers and local telephone exchanges).

129. 23 U.S.C. § 207(j)(2)(B)(iii) (2012) (application to waive a regulation with respect to a tribal transportation self-governance compact or funding agreement deemed approved after 90 days if not approved or denied); 25 U.S.C. § 5123 (2012) (If a tribe uses a special Secretarial election to adopt a constitution and bylaws or to amend the same, they become effective when the Secretary provides approval. “If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary’s approval shall be considered as given.”); 25 U.S.C. § 2001(e)(2)(B) (2012) (in an application for certain types of grant or contract funding for BIA or non-BIA schools educating Indian children, if the Secretary fails to make a determination with respect to an application within 180 days, the application shall be deemed to have been approved); Indian Higher Education Programs Tribal Grant Authorization, 25 U.S.C. § 3304 (2012).

130. See, e.g., *Navajo Nation v. U.S. Dep’t of the Interior*, 852 F.3d 1124 (D.C. Cir. 2017) (holding that a ninety-day time limit on a federal response was not tolled during a partial government shutdown caused by a lapse in appropriations and thus that BIA’s letter partially declining a tribal funding request was late); *Yurok Tribe v. Dep’t of the Interior*, 785 F.3d 1405 (Fed. Cir. 2015) (holding that the BIA missed a ninety-day response deadline in the ISDA, triggering a “deemed approval,” but denying relief on another ground).

131. 25 U.S.C. § 2710(d)(8)(C) (2012).

Land Consolidation Act Amendments of 2000.”<sup>132</sup> This arcane provision has not been the subject of litigation.

To date, the highest courts to address the issue in the IGRA context have tended to find judicial review available but have not articulated compelling justifications. The first case to address the issue arose in the Seventh Circuit. In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*,<sup>133</sup> two tribes challenged a third tribe’s gaming compact with the State of Wisconsin, arguing that the compact was unlawful because it had an anti-competitive provision that harmed two other tribes who were not parties to the compact. The compact had been submitted to the Secretary for approval, but because the Secretary failed to act within forty-five days, the compact was deemed approved. The Secretary issued no letter.

Despite the fact that the compact had been approved by inaction, the two tribes that were not parties to the compact sued the Secretary. The Secretary, through the Department of Justice, defended the case.<sup>134</sup> In defending, the Secretary raised two arguments. First, she raised a standing issue, arguing that the Secretary’s inaction could not have harmed the plaintiffs because the Secretary’s inaction could approve the compact only to the extent it is consistent with the law. In other words, illegal provisions were not deemed approved.

The Seventh Circuit found this argument to be too clever. It held that the Secretary’s inaction “may have prevented the offending provisions from becoming effective in some academic sense” but that “is a far cry from an explicit rejection by the Secretary.”<sup>135</sup>

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132. 25 U.S.C. § 2205(b)(2)(B) (2012); *id.* § 2205(b)(2)(E)(ii) (emphasis added). The provision was added in 2000, several years after the enactment of IGRA. As in IGRA, the legislative history for the provision is thin, but a Senate Report on the legislation suggests that the Congressional concern was that BIA may lack the resources to accomplish the review within 180 days. S. REP. NO. 106-361, at 15 (2000) (“Secretarial Approval.—Subsection 206(b). Although existing law provides for Secretarial approval of tribal probate codes, this subsection establishes time-frames for Secretarial approval of proposed codes and amendments. The bill also provides that the codes and amendments become effective upon the expiration of these time-frames to the extent they are consistent with Federal law. This will allow the codes to become operational even if the BIA is unable to formally approve the codes.”).

133. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490 (7th Cir. 2005).

134. The Department of Justice’s defense of the Secretary under such circumstances is not always a foregone conclusion. *See Washburn*, *supra* note 61, at 311–12.

135. *Lac du Flambeau*, 422 F.3d at 501.



Therefore “the Secretary’s silence was the functional equivalent of an affirmative approval.”<sup>136</sup>

After reaching these difficult questions, however, and finding that the Secretary’s inaction was subject to judicial review, the Seventh Circuit avoided some of the harder questions by ruling for the Secretary on a second argument. The provision of IGRA that sets the approval/disapproval/no-action regime for compact review provides that the Secretary “may” disapprove the compact for certain reasons only.<sup>137</sup> Because IGRA says “may,” not “shall,” the Secretary argued that the decision to disapprove was committed to agency discretion by law.<sup>138</sup> The court ultimately did not pass judgment on this argument, but found that the plaintiff had forfeited the argument by failing to address it.<sup>139</sup> It thus declined to exercise judicial review on this basis. In sum, it avoided reaching the question of the ramifications of a deemed approval.

The Seventh Circuit’s approach is curious. One obvious way to interpret IGRA’s provisions on compact approval is to conclude that Congress gave the Secretary authority whether to regulate in any given case, either as the Secretary deems appropriate or as consistent with available staff resources. The Seventh Circuit suggests that Congress either cannot or did not give the Secretary that option. It is unclear from the Seventh Circuit’s decision whether Congress lacks the power to create a no-action option for the Secretary under these circumstances or it simply did not intend to do so. The Seventh Circuit’s ruling suggests that the Secretary has no choice but to make an affirmative decision as to each compact.<sup>140</sup>

The issue of review of a no-action approval next arose in a case in federal district court in Florida case called *PPI, Inc. v. Kempthorne*. In an unreported decision, the court found “clear and convincing evidence that Congress intended to preclude judicial review.”<sup>141</sup> It noted that in light of the forty-five-day deemed approval deadline, the “possibility of rewinding this process through APA review and sending the compact back to the Secretary for further consideration is inimical to the clearly expressed intent by Congress that the compact be deemed approved after forty-five

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136. *Id.*

137. 25 U.S.C. § 2710(d)(8)(B) (2012).

138. See Washburn, *supra* note 93, at 390.

139. *Id.*

140. Because this conclusion is so obviously contrary to Congressional intent, it is not very compelling.

141. *PPI, Inc. v. Kempthorne*, No. 4:08cv248-SPM, 2008 WL 2705431, at \*5 (N.D. Fla. July 8, 2008).

days.”<sup>142</sup> In short, the district court was more deferential than the Seventh Circuit to congressional intent to achieve quick resolution of compact review. It read the forty-five-day provision as a clear signal from Congress that no judicial review was appropriate in such circumstances.

The issue next arose in the federal courts in Washington, D.C. In *Amador County v. Kempthorne*, a county in California brought an APA “arbitrary and capricious” challenge to a no-action approval of a gaming compact between a tribe and the State of California.<sup>143</sup> The county argued that the compact was illegal because it allowed a tribe to conduct gaming on land within the county that was not qualified for gaming under IGRA.

Judge Richard W. Roberts of the United States District Court for the District of Columbia held that IGRA gives the Secretary “three options—to approve, disapprove or take no action—and the statute provides no clear standard by which the Secretary must decide his course of action.” Lacking a standard to guide judicial review, the judge held that the decision is committed to agency discretion by law and is, therefore, unreviewable under the APA.<sup>144</sup> Second, Judge Roberts highlighted the language in IGRA that a compact is approved by non-action “only to the extent the compact is consistent with [IGRA],” concluding therefore that the Secretary could never approve by inaction any illegal provision in a compact.<sup>145</sup> Because the inaction could therefore not produce illegality, there could be no injury from the failure to act. Judge Roberts ruled against the county.

On appeal, the District of Columbia Circuit reversed.<sup>146</sup> Beginning by citing the strong presumption that Congress intends review of agency action,<sup>147</sup> the court placed the burden on the agency to show that judicial review was precluded. It examined and rejected three arguments raised by the Secretary that no judicial review was available for a no-action approval.

First, the Secretary argued that Congress intended to preclude judicial review when it limited the scope of an approval of a compact by inaction; inaction results in approval, but only to the extent

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142. *Id.*

143. *Amador County v. Kempthorne*, 592 F. Supp. 2d 101 (D.D.C. 2009), *rev'd sub nom.*, *Amador County v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011).

144. *Amador County v. Kempthorne*, 592 F. Supp. 2d at 106.

145. *Id.* at 107 (citing 25 U.S.C. § 2710(d)(8)(C) (2012)).

146. *Amador County v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011).

147. *Id.* at 379 (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)).

the compact is consistent with IGRA. As to this argument, the D.C. Circuit echoed the Seventh Circuit in *Lac du Flambeau*. It explained that this provision does not set up any alternative mechanism to ensure compliance with the law because “someone—i.e. the courts—must decide whether those provisions are in fact lawful.”<sup>148</sup> Presumably because it wanted to force the Secretary to conduct this review in the first instance, the court thus rejected the notion that the limited scope of the approval created an implication of no judicial review.

Second, the court examined the Secretary’s argument that the agency had been delegated broad discretion under the statute when Congress provided that the Secretary “is authorized to” approve such compacts and “may” disapprove in certain circumstances. The Secretary argued that, by using “may” rather than “shall,” Congress intended that the decision whether to take any action falls entirely within the agency’s discretion.<sup>149</sup>

The court rejected the argument because, taken to its logical extreme, the argument meant that the Secretary could act contrary to fact. In other words, the court appears to have credited an argument by Amador County that the provision would allow the Secretary to turn a blind eye to obvious illegality and tacitly approve action that the Secretary knows is illegal.<sup>150</sup>

The court cited three other cases in which “may” was interpreted as “shall” and indicated that it would do the same. It further said that the use of the word “may” was actually intended to limit the circumstances when the Secretary could disapprove a compact to the circumstances indicated in the statutory provision. In this respect, the court interpreted the word “may” to mean “may only.” And it found the listing of circumstances in the statutory provision to constitute “the law to apply,” which could provide the needed standards to guide judicial review.<sup>151</sup>

In sum, as in the Seventh Circuit, the D.C. Circuit implicitly rejected the notion that Congress could give the Secretary the power not to regulate.

Third, the Secretary argued that the forty-five-day time limit was evidence that Congress intended to preclude judicial review, an argument that was convincing to the federal court in Florida in the unreported *PPI* decision. The D.C. Circuit simply rejected this ar-

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148. *Id.* at 380.

149. *Id.* at 381.

150. *Id.*

151. *Id.*

gument out of hand. It concluded that the caveat to no-action approvals (that such compacts were approved only to the extent consistent with law) was itself evidence “that Congress had no intention of trading compliance with IGRA’s requirements for efficiency in agency proceedings.”<sup>152</sup>

Finally, the Secretary also argued that only agency action, not inaction, is reviewable under the APA. Here, however, the court had already determined that “may” meant “shall,” so it made short work of the Secretary’s argument.

Federal administrative law offers a formal solution to the no action problem in a limited range of circumstances. The APA provides that agency action includes a “failure to act.”<sup>153</sup> While this provision provides a slender reed on which to hang judicial review, the law generally treats a failure to act as actionable only when a duty to act exists.<sup>154</sup> In IGRA, one might argue that Congress clearly did not impose a duty on the agency to decide. Thus, the APA was not intended to be used in circumstances such as a no-action compact approval. The court implicitly found otherwise when it said that “may” means “shall” and dismissed the notion that the agency had discretion.

Finding the action reviewable, the D.C. Circuit in *Salazar* then turned to the merits. Even still, the decision is equally unsatisfying. The relief sought by the plaintiff was not a remand for further explanation, but a reversal of the no-action approval and a legal ruling that the compact was illegal.<sup>155</sup> The court found the administrative and litigation record inadequate to make a decision and remanded to the district court for further action.<sup>156</sup> Ultimately, on remand, the district court found the approval lawful, primarily by deferring to other determinations by the agency related to the tribe at issue. The D.C. Circuit then affirmed the district court’s conclusion that the no-action compact approval was consistent with law.<sup>157</sup>

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152. *Id.*

153. 5 U.S.C. § 551(13) (2012).

154. *See generally* Biber, *supra* note 113.

155. Appellant Amador County, California’s Principal Brief at 50–53, *Amador County v. Salazar*, No. 10-5240 (D.C. Cir. Dec. 13, 2010).

156. *Amador County v. Salazar*, 640 F.3d 373, 383–84 (D.C. Cir. 2011). Ultimately, a different panel of the D.C. Circuit ruled for the Secretary on the merits in an unpublished disposition, but without disturbing the earlier decision. *See Amador County v. U.S. Dep’t of the Interior*, 707 Fed. App’x 720 (D.C. Cir. 2017) (mem.).

157. *Amador County v. U.S. Dep’t of the Interior*, 707 Fed. App’x 720 (D.C. Cir. 2017) (mem.) (*affirming sub nom.* *Amador County v. S.M.R. Jewell*, 170 F. Supp. 3d 135 (D.D.C. 2016)).

C. *Reflecting on the Circuit Courts' Approaches to  
No-Action Compact Approvals*

The decisions in *Lac du Flambeau* and *Salazar* are difficult to square with ordinary notions of APA judicial review. Viewed in context, the D.C. Circuit's effort in *Salazar* appears intended to engage in sufficient legal gymnastics to ensure that it could provide a forum for no-action approvals. Yet, nearly every aspect of its reasoning feels strained. One critical law review article characterized its reasoning as "too acrobatic to be particularly compelling" in finding "an implicit agency failure to decide not to disapprove."<sup>158</sup>

Since judicial review of agency action ordinarily requires careful scrutiny by the court as to why the agency proceeded as it did, ordinary judicial review does not appear to be possible in the context in which an agency has said nothing, and particularly when it clearly has authorization from Congress to proceed in this manner.

Judicial review in this context is particularly mystifying because an agency presumably acts as an "agent" of Congress. In IGRA, Congress envisioned the compact review scheme with three possible outcomes, approval, disapproval, or no-action approval. The first and second options would presumably have a reasoned decision, but the third option routinely would not. In the third situation, it is an action of Congress, not the agency, which causes the compact to go into effect. Since the no-action approval scenario was ordered by Congress, not the agency, it could be argued that the no-action approval effectively reflects Congressional approval, rather than agency approval. In a case in which Congress mandates an outcome without any agency action, there simply is no "agency," in either sense of the word. But, of course, the APA does not authorize general judicial review of actions by Congress. The natural reading of the provision enacted by Congress is that the agency may choose to regulate if it has the time and resources, but that Congress did not mandate action in every instance.

Since Congress appears to have drafted IGRA to ensure that compact approval occurs within forty-five days, even if the Secretary has not had a chance to review the compact, the D.C. Circuit's decision, as well as the Seventh Circuit's decision in *Lac du Flambeau*, seems contrary to the express intentions of Congress in IGRA. In both cases, the courts strained to find a basis for review against

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158. Bryan Clark & Amanda Leiter, *Regulatory Hide and Seek: What Agencies Can (and Can't) Do to Limit Judicial Review*, 52 B.C. L. REV. 1687, 1730 (2011).

fairly compelling arguments against such review. Moreover, neither case provided a merits review of agency inaction. Ultimately, neither decision is convincing.

A further difficulty is that calling an action reviewable does not answer the harder question of available relief. In IGRA, Congress clearly contemplated that no-action approvals would occur. Administrative law often tends to be more concerned with process than substance. On remand to the agency, in a case involving a no-action approval, the Secretary appears to have the authority take the same (non)action unless the court arrogated to itself the power to order the Secretary to act, despite the words in the statute. Indeed, it is not clear how the courts can legitimately police the agency when it is acting as Congress authorized.

In sum, circuit courts have not found a satisfying approach to the issue. The gestalt of the circuit court decisions is that courts are likely to find in favor of judicial review, whether or not there is content to review. The better argument appears to be that, whatever the merits of a no-action compact approval, review is not available when the agency took no action.

That said, as noted above, the third option of no-action approval has been joined by a fourth option in recent years, which might be characterized as the “no-action approval with formal comments from the agency.” While courts have struggled to find a compelling mode of judicial review for the no-action approval, the deemed approval letter presents the courts with different circumstances. Only on one occasion has a court had an opportunity to engage with a deemed approval letter and, as seen below, it was only in dicta.<sup>159</sup> Still, it is enlightening and therefore worth considering.

#### *D. Judge Lamberth and the First Deemed Approval Letter*

Secretary Babbitt’s own 1997 letter was the subject of criticism by a judge not long after it was issued. Based largely on the language in Secretary Babbitt’s original deemed approval letter, two New Mexico tribes asked the federal district court in Washington, D.C., for a declaratory judgment that the provisions requiring the tribes to share gaming revenues with the state were illegal. The tribes

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159. According to the GAO, “no court has issued a decision considering the extent to which a deemed approval letter is consistent with IGRA.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-355, INDIAN GAMING: REGULATION AND OVERSIGHT BY THE FEDERAL GOVERNMENT 20 n.38 (2015).

sought to strike the illegal provisions from the New Mexico compacts while nevertheless preserving the compacts themselves.

Though declining to grant relief himself, the colorful Judge Royce Lamberth characterized Secretary Babbitt's deemed approval letter as an "attempt to evade responsibility."<sup>160</sup> According to Judge Lamberth,

[t]he Secretary's decision makes plain that he considered the revenue sharing and regulatory fee provisions illegal, and yet he declined to disapprove the compacts. Instead, the Secretary approved the compacts and sought to evade responsibility by including a denunciation of the illegal provisions—a denunciation which he must have known would be unenforceable in court.<sup>161</sup>

These words were dicta in large part because Judge Lamberth himself dodged the substantive issue. The court ultimately held that the litigation could not proceed without an indispensable party, the state, and the state's immunity prevented it from being joined in the litigation.<sup>162</sup> Thus, he dismissed the action.

Judge Lamberth's views as to Secretary Babbitt's letter, though strongly presented, are not very compelling.

First, Judge Lamberth's words did not address the practical issue that the Secretary faced. The options faced by the Department and tribes to address unfair compact negotiation terms following Seminole Tribe were suddenly less obvious. An affirmative disapproval would address the problematic compact terms but possibly at great cost to a tribe and in a manner that would undermine Congress's purposes in enacting IGRA. If the Secretary disapproved the compact, the tribes presumably would have been unable to engage lawfully in Class III gaming for the lack of an approved gaming compact under IGRA. The Secretary generally lacks the authority to strike a particular provision that is problematic and approve the rest.<sup>163</sup> In other words, the Secretary generally lacks a "line-item ve-

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160. *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 56 (D.D.C. 1999).

161. *Id.* at 56–57.

162. *Id.* at 49.

163. The Secretary presumably has this power only if the parties have so indicated in the compact itself. *See, e.g.*, Letter from George T. Skibine, Acting Deputy Assistant Sec'y for Policy and Econ. Dev., U.S. Dep't of the Interior, to the Hon. LaRue Martin Parker, Chairman, Caddo Nation of Okla. (July 24, 2006) (on file with the *University of Michigan Journal of Law Reform*) (finding an illegal provision in the compact but noting that the compact provided that provisions found illegal by the Secretary were severable).

to” for problematic provisions in compacts. On the other hand, an affirmative approval would have the effect of allowing gaming, while simultaneously providing Departmental validation of unfair terms. In sum, either approval or disapproval likely would have placed the tribes in a worse position than a no-action approval. The Secretary—and presumably the tribes—were stuck between a rock and a hard place. They were placed in this awkward position not by their own action but by the Supreme Court’s change to Eleventh Amendment law after IGRA was enacted.

Judge Lamberth’s views may reflect his own frustration with the state of affairs post-*Seminole Tribe* more than his actual views. Indeed, he called on Congress to enact legislation to address the underlying problem created by the *Seminole Tribe* decision.<sup>164</sup>

Second, Judge Lamberth’s assumption that courts are powerless to address illegal provisions is curious.<sup>165</sup> A compact is simply a contract between sovereigns, with courts tending to apply principles of contract law in addressing them.<sup>166</sup> It is not at all clear that an illegal contract provision is enforceable in the courts. Though the subject of illegality in contracts is confronted much more often in first-year law school contract courses than in actual practice, it is a black letter principle of contracts law that a contract that is illegal or in violation of public policy may be unenforceable.<sup>167</sup>

While Judge Lamberth did not believe that he could reach the issue in the posture of the case before him,<sup>168</sup> a different case posture might have produced a different result. If, for example, a tribe stopped making revenue sharing payments that the Secretary had found illegal, it is likely that a state would sue, and a court would resolve the dispute. If the clause were illegal, the court would determine whether the contract or the provision is nevertheless enforceable. While it would be a risky, high stakes battle to wage, it is not certain that a tribe would lose a case in that posture.

In sum, while we can credit Judge Lamberth for speaking out and providing a view of a deemed approval letter, his views also do not provide a roadmap for how courts should address such letters.

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164. *Pueblo of Sandia*, 47 F. Supp. 2d at 57.

165. *Id.*

166. *See, e.g.*, *Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155, 1163 (9th Cir. 2015).

167. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961) (declining under federal law to enforce a contract that conflicted with a federal statute); *Schlessinger v. Valspar Corp.*, 686 F.3d 81, 85 (2d Cir. 2012) (“As a general rule, New York courts will not enforce illegal contracts.”).

168. *Pueblo of Sandia*, 47 F. Supp. 2d at 56.



E. *A Sensible Approach to Judicial Review When the Agency Has Provided Its Views*

Judge Lamberth's harsh criticism of a deemed approval letter may not be particularly convincing, but his critique of the Secretary's action feels more legitimate than the approaches taken by the Seventh Circuit in *Lac du Flambeau* or the D.C. Circuit in *Salazar*. This is because in *Pueblo of Sandia v. Babbitt*, unlike in the D.C. Circuit or the Seventh Circuit cases, the Secretary acted somewhat strategically.

To his credit, Judge Lamberth addressed a type of "action" by the Secretary and grappled with the Secretary's views. He certainly took the agency to task and leveled a reasonable critique, but he did so only after it had given substantive views. The circuit court decisions, on the other hand, strained mightily to hold the agency responsible when there is no clear evidence that the it had even thought about the question. This is illogical and inconsistent with the purpose of judicial review under the APA.

One problem with the circuit courts' approach is that judicial review is especially difficult when we do not know the reasons for the agency's action. How do we know if the agency acted arbitrarily or unreasonably if, for example, we do not know why the agency took a particular course of action? It seems far more feasible to accomplish the goals of judicial review when the views of the agency are available, and it also seems more legitimate to hold an agency accountable when it has acted affirmatively.

Thus, perhaps the line to be drawn is related to whether the agency provided reasoning with which to consider the basis for its action or inaction. Ordinarily, a no-action approval would not appear to reflect considered judgment or the agency's careful reasoning. However, a deemed approval letter gives a court a substantive position to review.

In some ways, a deemed approval letter reflects a partial ratification of the approval ordered in the statute. In sum, the Secretary has effectively adopted the approval with caveats. Courts ought to appreciate the Department's willingness to draft deemed approval letters to accompany no-action approvals because the existence of a letter solves the thorny administrative law problem in such cases by explaining why the agency proceeded as it did.<sup>169</sup> In other

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169. See generally *Hocor v. U.S. Dep't of Agriculture*, 83 F.3d 167 (7th Cir. 1996) (Posner, J.). Judge Posner, in a slightly different context dealing with so-called interpretive rules,

words, a letter provides a reasoned explanation for why the Department failed to act affirmatively and gives the court a reasoned decision to evaluate the legality of the compact in such circumstances. In sum, the deemed approval letter furnishes that which is lacking in the ordinary no-action approval scenario—agency reasoning. In that respect, a deemed approval letter functions much more as an affirmative agency decision.

The legislative record for IGRA, which is limited, suggests that Congress sought quick resolution and worried that typical agency bureaucratic processes around difficult political decisions would prevent timely resolution of compact validity. A no-action approval allows tribes and states to obtain quick resolution of the issue of compact approval and, presumably, get on with business. In the absence of a decision or other letter by the Secretary, the APA should not be perverted to provide judicial review of a non-action and, thus, potentially frustrate congressional intent.

When the Secretary issues a letter nearly simultaneously with the no-action approval, on the other hand, it demonstrates that the agency had the time and resources to make the decision, and it actually has engaged in reasoned decision making. The existence of the letter itself, in some ways, differentiates a compact that was actually “reviewed” by agency officials and an “unreviewed” compact. Where the agency has actually reviewed a compact and chosen to provide its views, it would not be inappropriate for the agency to be held accountable under the APA for its work. This is true in part because the Secretary’s letter creates some winners and losers.<sup>170</sup>

Finally, it is odd that an affirmative approval would be reviewable, but a no-action approval would be unreviewable. Courts are likely to be skeptical of agency behavior because the agency might be acting strategically, perhaps to avoid judicial review. The purpose of judicial review is, presumably in most cases, to prevent a government agency from causing harm for which it is unaccountable.

Strategic behavior to avoid judicial review may be in the eye of the beholder. In *Salazar*, the court seemed to be persuaded in part by the appellant’s claim that if the court followed the plain text of the statute and the Secretary could do nothing in the face of obvious illegality, the Secretary could be complicit in allowing an illegal

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suggests that courts should encourage agencies to give voice to their views rather than hide them from the public.

170. See discussion *infra* Part III.

compact to go into effect, evading an implicit responsibility in IGRA to enforce the law or, worse, perhaps even wrongfully shielding known illegality. My own long experience in government suggests that overworked government officials are rarely diabolical enough or well-organized enough to successfully engage in illegal conspiracies. The notion that an illegal compact could go into effect, however, is possible, of course, and that is the reason for deemed approval letters.

In sum, it may well be that judicial review under the APA is cognizable for deemed approval letters, and standing doctrine will provide reasonable limits on such cases.

Thus, a more sensible line to draw might be: A no-action approval is unreviewable unless the agency has issued a deemed approval letter to accompany its non-action, in which case the agency's views are reviewable.

#### F. *What Level of Deference, If Any, Should a Deemed Approval Letter Receive?*

Suggesting that deemed approval letters are important in judicial review raises the obvious question: What level of judicial deference, if any, should an agency deemed approval letter receive from the courts? As noted above, it may not be in an APA action in which a deemed approval letter will be reviewed. It is possible that such a letter will be reviewed, if at all, in the context of other litigation. The question is whether the letter is entitled to *Chevron* deference, so-called *Skidmore* respect, or no deference at all.<sup>171</sup>

In light of the fact that *Seminole Tribe* caused a significant disruption to IGRA with subtle, ripple effects through the entire statutory scheme, decision making in this area rests on ambiguities about how to apply the statutory scheme to changed circumstances. Given these ambiguities, the deemed approval letter reflects a pragmatic act by the Department to address changed circumstances.

The general argument for respect for formal decision letters from the Department is strong. First, Congress has identified clear goals to guide the agency's decision making.<sup>172</sup> Second, Congress clearly and specifically addressed matters of compact approval di-

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171. See generally *Christensen v. Harris County*, 529 U.S. 576 (2000) (comparing *Chevron* deference and *Skidmore* respect).

172. 25 U.S.C. § 2701(4) (2012) ("a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government").

rectly to the agency, a factor that many commentators believe to be crucial in deference calculus.<sup>173</sup> Third, the decisions involve delicate political matters of state-tribal relations and the federal trust relationship with Indian tribes, both of which are matters squarely within the Department's expertise<sup>174</sup> and Congress specifically referenced such expertise, in the most relevant provision of IGRA.<sup>175</sup> Fourth, the letters are usually signed at the highest levels within the agency, such as the Secretary, or the Assistant Secretary for Indian Affairs, both presidentially-appointed, Senate-confirmed officials. Fifth, the statute clearly assigned approval or disapproval to the agency, and though the D.C. Circuit did not agree in *Amador County*, appeared to give the Secretary discretion in plain language as to how to proceed, though it is cabined to a degree. In sum, agency compact approvals or disapprovals are likely to deserve deference.

A deemed approval letter, however, may not merit the same deference as a formal agency approval or disapproval. First, as noted above, while Congress delegated direct decision-making authority to the Department, it probably did not contemplate this innovative use of non-action. Moreover, in a deemed approval, approval occurs by default. In other words, it is really the statute drafted by Congress, not the agency, that is doing the decision-making work.

A deemed approval letter reflects the opinion of the agency in a circumstance when it has considered but presumably declined to use its formal decision-making authority. In that respect, a deemed approval letter might be considered as *dicta* in a judicial opinion. It reflects the expression of views on a matter that the agency has declined to decide formally. It is more akin to an advisory opinion by a thoughtful commentator with broad experience and expertise

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173. See, e.g., Thomas Merrill & Kristin Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001). The Supreme Court has tended to treat the formality of the agency decision-making process as crucial in determining whether *Chevron* deference should apply to agency decisions. See, e.g., *Christensen*, 529 U.S. 576 (contrasting an opinion letter with formal adjudication and notice-and-comment rulemaking). However, the Court has sometimes downplayed formality as a significant factor. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001) (noting that informal agency interpretations had received deference in the past).

174. See *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (citing such factors as "the interstitial nature of the legal question, 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" in support of *Chevron* deference).

175. 15 U.S.C. § 2710(d)(8)(B)(iii) (2012).

in the area, as reflected in the nearly 800 compact decision letters that the Department has made.<sup>176</sup>

To be sure, the Department might be an excellent source for guidance on IGRA interpretation. No institution has greater familiarity with the Indian gaming compact negotiation context or the political and economic consequences of its actions. In light of this expertise, it is reasonable to believe that its views will be thoughtful and persuasive. To the extent the Department has articulated federal Indian policy concerns about a provision, its views may not deserve robust *Chevron*-type deference but are likely to be entitled to that which is often characterized in administrative law as “*Skidmore* respect.”<sup>177</sup> In other words, its views should persuade a court to the extent that they are well-articulated and compelling.

Of course, to the extent that a deemed approval letter calls out an illegal provision in a compact, the court is competent to address those questions and arguably needs no guidance from an agency. If a compact goes into effect in the absence of formal action by the agency, the residual question is a legal one: Are any of the provisions of the compact inconsistent with IGRA?<sup>178</sup> Courts are quite capable of addressing straightforward questions of statutory interpretation. While it might provide the court some comfort to know the agency’s views, a court has no obligation to defer to the agency’s views.

Nevertheless, from an administrative law point of view, two of the important values that animate federal administrative law are reasoned decision making and transparency. Deemed approval letters serve both values. They explain why the Department decided to proceed as it did. Because understanding agency motivation is critically important in administrative law, one common outcome of judicial review of agency action in which the agency failed to provide an adequate explanation of the basis for its action is a remand to the agency for a more adequate explanation. In this respect, deemed approval letters further the ultimate conclusion of an action by providing that view. Thus, a deemed approval letter should be viewed as positive. It can aid a court in understanding the Executive Branch’s views about the underlying policy concerns that an-

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176. See *Indian Gaming Compacts*, U.S. DEP’T OF THE INTERIOR, <https://www.indianaffairs.gov/as-ia/oig/gaming-compacts> (last visited Oct. 12, 2018) (listing approximately 800 decisions).

177. For a discussion of the difference between *Chevron* and *Skidmore*, see generally *Christensen*, 529 U.S. 576.

178. 25 U.S.C. § 2710 (2012).

imate the law. Moreover, the information is objective and provided outside the context of any litigation.

### III. THE NORMATIVE QUESTION: ARE DEEMED APPROVAL LETTERS GOOD POLICY OR BAD?

Whether a deemed approval letter is subject to judicial review and whether the positions set out in such letters should be respected by a court are important but ultimately narrow questions. Since only one has ever been discussed at any length in a reported judicial decision, and only in dicta, their significance may not hinge on the ways in which they affect rights in litigation. Thus, the more important question is whether using deemed approval letters reflects good or bad federal policy. To assess this question, it is important to understand the broader context in which they are issued, the reasons that they are issued, and the practical ramifications of their use. Ultimately, a deemed approval letter appears to be better than no letter.

#### *A. The Fiscal and Political Contexts of Agency Decision Making in Indian Gaming*

As noted in the introduction, Indian gaming annually produces in excess of \$30 billion in revenue in Indian country. Given the importance of this revenue source to tribes and the moral burden caused by the failure of the United States to meet various responsibilities to tribal nations, disapproval of a compact is likely to be viewed as a bad option for the Secretary.

In light of the vast revenues involved, political considerations weigh heavily, and not just because money buys influence in Washington. The Department faces immense political pressure to not disapprove a compact. A compact is, by definition, an agreement by two sovereigns who have reached a meeting of the minds after engaging in a lengthy negotiation process and difficult compromises. A signed compact usually reflects the culmination of months or years of negotiation and significant legislative and executive processes within state and tribal sovereign governments. In most other circumstances, it is a happy occurrence for the federal government when a state and a tribe have reached agreement on a controversial matter.

A disapproval is likely to be a disappointment to both the state and the tribe and is likely to be an especially significant disappointment to a tribe. A tribe may have developed significant plans and investment around the expectation of an approved compact. The Department generally owes a trust responsibility to tribes, meaning that the Department has a general responsibility to look out for the best interests of the tribe. Department officials understand, better than almost anyone other than tribal leaders, the importance of strong tribal economic development. It is difficult to tell a tribe that no gaming development—no jobs, no revenues—is better than the deal that the tribe negotiated with the state. Disapproval is likely to have significant short-term negative effects for that tribe. Moreover, those short-term negative effects are likely to ripen into long-term negative effects if the state refuses to negotiate further. Following a disapproval, the Department cannot be sure that a state will return to the negotiating table with a tribe. The result is that a disapproval could prevent the tribe from ever engaging in Class III gaming despite the right recognized by Congress to do so. In other words, following a disapproval, a tribe may never have the opportunity to benefit from gaming revenues. From the tribe's perspective, it is often presumed paternalistic for the Department of the Interior to disapprove an agreement that the tribe has negotiated and believes is in its best interest.

Likewise, compact disapproval could deeply disappoint the state that has entered the compact, which may be expecting revenue sharing or other benefits through the compact.<sup>179</sup> In many states, a governor's or legislature's decision to engage with one or more tribes and to negotiate a compact is a significant political decision. To the state, it may be perceived as the height of arrogance for federal officials in Washington, D.C., to second guess the deal struck by the negotiating parties within the state.

Moreover, because of the amount of money involved, other powerful external political forces are often brought to bear to discourage the Department from issuing a disapproval. For example, gaming often brings developers from the private sector who themselves often enlist expensive lobbyists. The lobbyists, in turn, can

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179. For colorful accounts, see Sean P. Murphy, *In Casino Deal, Fed Felt the Heat from Mass.*, BOSTON GLOBE (Sept. 29, 2016), <https://www.bostonglobe.com/news/politics/2016/09/29/casino-deal-feds-felt-heat-from-mass/j5UIx7XrX0ie4y7GH2FP2K/story.html>; Tony Batt, *Mashpee Casino Sparked Obama Administration Infighting*, GAMBLING COMPLIANCE (Sept. 29, 2016), [https://gamblingcompliance.com/premiumcontent/news\\_analysis/mashpee-casino-sparked-obama-administration-infighting](https://gamblingcompliance.com/premiumcontent/news_analysis/mashpee-casino-sparked-obama-administration-infighting).

often engage members of Congress to reach out to the decision makers in the Department. In sum, for both fiscal and political reasons, the Department is loath to disapprove compacts.

For all these reasons, and in light of the Department's trust responsibility to tribes, the no-action approval and the deemed approval letter might be considered a thoughtful and nuanced response to a complicated problem.

### B. *How Does the Department of the Interior Use the Deemed Approval Letter Strategy?*

The ultimate purpose of the no-action approval accompanied by a deemed approval letter is to lower the stakes of decision making by allowing the Secretary to place legitimate concerns on the record while nevertheless allowing the parties to proceed with the gaming endeavor. Frankly, this can be called political expediency. While political expediency is not usually viewed as a positive good in the application of the law, it is clear that in this case the law failed. Congress sought to use a provision to protect tribal interests that was later declared unconstitutional. While one might blame Congress for this error, the Supreme Court changed the law on state constitutional immunity in *Seminole Tribe* after IGRA's enactment, using IGRA as the vehicle to reinterpret the Constitution. This result left tribes without protection that Congress clearly intended tribes to have.

While the use of deemed approval letters could possibly be abused, and the Department has occasionally found new uses for them, they are still relatively rare. Generally, deemed approval letters are used in at least three broad situations. First, the terms in a compact may be ambiguous. In that circumstance, the Department can express its views as to the lawful interpretation of the terms and express an expectation that the ambiguous terms will be applied in a lawful manner.<sup>180</sup>

Second, the Department may have real concerns about a particular term, but it may be unlikely that facts that make the term relevant will occur in the real world. For example, a compact may provide that a tribe provide the state a revenue share of twenty-five percent of net gaming revenue above a certain annual threshold,

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180. See, e.g., Letter from Kevin K. Washburn, Assistant Sec'y for Indian Affairs, U.S. Dep't of the Interior, to the Hon. Ty Vicenti, President, Jicarilla Apache Nation 3 (June 9, 2015), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-031301.pdf>.



such as \$1 billion dollars. If the gaming operation's annual revenues are currently below \$100 million and not expected to go so high, the Department might find that the term is unlikely to ever become operable.<sup>181</sup> It could be gratuitously harmful to disapprove a compact when the risk of actual harm is nonexistent.

Finally, the Department may issue a deemed approval if the compact is generally good for the tribe, and it contains only one or two serious issues of concern or a few minor issues. For example, despite the Department's concerns, a tribe's newly negotiated compact may objectively constitute a marked improvement across a wide range of subjects over the tribe's existing compact. In rare cases such as this, the Department may issue a deemed approval letter so as not to "let the perfect be the enemy of the good."<sup>182</sup> In some respects, the deemed approval letter is an expedient solution to a difficult problem, particularly when compacts give the Department significant concern, but do not present any actual risk to the tribe.

Such letters are also used to communicate general views about Indian gaming and to address various specific concerns. When the letters are circulated widely, they perform the role that any agency regulatory guidance might perform. They signal to the regulated industry what is and is not acceptable in gaming compact negotiations. This promotes adherence to the law. While adherence to IGRA was undermined by *Seminole Tribe's* evisceration of the provisions allowing tribes to sue states, the no-action approval and deemed approval letter can be used to reassert the purposes of IGRA and limit some of the problems spawned by revenue sharing.

An interesting question is whether the Secretary or other agency official will behave differently based on whether the decision will be subject to judicial review. Judicial review quite clearly has an impact on agency decision making. If an agency decision is ultimately subject to judicial review, a greater effort will be made to obtain review of agency lawyers and perhaps even Department of Justice lawyers to ensure that the final decision is defensible. However, in the run of cases, especially those with forty-five-day deadlines, strategic thinking in anticipation of litigation is usually

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181. See, e.g., Letter from Kevin K. Washburn, Assistant Sec'y for Indian Affairs, U.S. Dep't of the Interior, to the Hon. Russell Attebery, Chairman of the Karuk Tribe 3 (Nov. 12, 2014), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-028626.pdf>.

182. FRANCOIS MARIE AROUET (VOLTAIRE), *DICTIONNAIRE PHILOSOPHIQUE PORTATIF* (1764), reprinted in *CONCISE OXFORD DICTIONARY OF QUOTATIONS* 797 (Susan Ratcliffe ed., 6th ed. 2011).

somewhat limited. Moreover, considering the pace of civil litigation in the United States and the average tenure of agency political officials, it is doubtful that any agency official feels the breath of a federal judge breathing down her neck. The agency official is likely to act based much more on her view of the correct policy decision and in view of the parties before her. The official will usually be long gone before any judicial decision on that action is issued.

*C. Practical Ramifications of the  
Deemed Approval Provision and Letters*

The forty-five-day provision has been highly successful in producing resolution of decisions. While decisions sometimes languish at the Department of the Interior, and some decisions may still languish in other contexts, gaming compact decisions are given significant attention. Despite a small staff focused on these issues,<sup>183</sup> the staff has significant expertise, and a decision within the forty-five-day timeline is almost always possible. In the last twenty years, it has rarely been the case that the time runs simply because the relevant decision maker has not yet made up his mind. On the contrary, in most instances, a careful decision is made as to how to proceed. This is, in part, why the deemed approval letter is such a curious development. Today, when the options are discussed with the Interior decision maker, all four options are always on the table.

The deemed approval provision in IGRA has produced results. If there is any doubt that the decision-forcing mechanism has been successful in achieving quick resolution of decisions, compare another regime created by the same statute that lacks a decision-forcing mechanism: Section 20 of IGRA generally prohibits a tribe from engaging in Indian gaming on lands acquired by a tribe after the statute was enacted in 1988. The provision against gaming on “after-acquired” lands was intended generally to prevent expansion of gaming beyond existing Indian lands. To prevent the provision from producing harsh consequences, however, the law created several exceptions. One of the exceptions provides that a tribe can conduct gaming on newly-acquired lands if the Secretary obtains

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183. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-355, INDIAN GAMING: REGULATION AND OVERSIGHT BY THE FEDERAL GOVERNMENT, STATES, AND TRIBES 13, 13 n.29 (2015) (noting that the Office of Indian Gaming at Interior had seven staff, a budget of approximately \$1.1 million in fiscal year 2014, and “an average of eight staff since 1993”).

the concurrence of the state where the lands lie. The procedure, called a “two-part” determination, contains no time limit for the initial secretarial action, but gives the state’s governor twelve months, with the opportunity for a six-month extension, to decide whether to concur. These so-called “two-part determinations” are rare and must begin with the Secretary. Because there is no decision-forcing regime on the Secretary, a tribe’s request to the Department for a two-part determination routinely requires years.<sup>184</sup>

A deemed approval may also help the Secretary avoid certain negative legal ramifications of an approval. For example, an affirmative approval would likely imbue the decision with the imprimatur of agency expertise, which may well be entitled to deference. In other words, because an agency approval has the effect of approving the terms in a contract, those terms would be presumed lawful if approved by the expert agency assigned by Congress the task of interpreting and implementing IGRA. These are often circumstances in which the Department would prefer not to issue an approval. In contrast, a no-action approval would presumably be entitled to less deference and would involve lower stakes.

For the parties, a deemed approval letter probably has little significant impact. Given their interest in obtaining approval, it is doubtful that it causes significant reevaluation or renegotiation. However, it may well constitute a line in the sand for the Department that affects future negotiations. Moreover, it communicates a message to the industry more broadly and may place some side guards—or a ceiling—on the amount of revenue sharing in future compacts, providing notice, and preventing surprise disapprovals.

In that sense, the deemed approval letter should be applauded by anyone who seeks transparency in governmental decision making. While Congress did not require the Department to explain its view in the “deemed approval” context and likely did not contemplate a letter in these circumstances, the so-called fourth option is a useful way for the Department to meet its difficult responsibilities to tribes and the public under IGRA in implementing an imperfect statute. In sum, the deemed approval letter ought to be considered a positive development and a better alternative than a simple no-action approval without an explanation.

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184. See, e.g., Becky Kramer, *Spokane Tribe Breaks Ground on West Plains Casino, Plans for 2017 Opening*, SPOKESMAN-REVIEW (Nov. 9, 2016, 4:20 PM), <http://www.spokesman.com/stories/2016/nov/09/spokane-tribe-breaks-ground-on-west-plains-casino-/#/0> (“The Spokane Tribe first proposed the casino development in 2006, but waited nine years from the green-light from the U.S. Department of Interior to build the off-reservation casino.”).

#### D. *The Costs of the Approach*

Now that the practical benefits of the approach for the Secretary and the parties are clear, it is wise to consider the costs of such an approach. Political expedience is likely to have costs. The costs relate to uncertainty and possibly creating winners and losers.

##### 1. Uncertainty

Because the relevant provision of IGRA clearly says that a “compact is [deemed] approved [but] only to the extent it is consistent with law,” a no-action approval necessarily raises the question of how much of the compact is legal.<sup>185</sup> As result of the “only to the extent it is consistent with law” language, a no-action approval leaves potentially the entire compact “up for grabs” in a future legal action. Uncertainty around economic matters is generally not considered a salutary benefit. Indeed, between ordinary commercial actors, if for example the legality of payments of millions of dollars is at issue, we would expect there to be litigation.

Two answers present themselves. First, a disapproval is a high stakes outcome that the compacting parties may wish to avoid. Indeed, it may be a tragedy for a tribe and a major disappointment for a state. If a deemed approval letter allows the Department to approve most of the terms and allows the business relationship to move forward in a constructive manner, the parties may be happy to live with some uncertainty. Moreover, since Congress wrote the provision, Congress must have anticipated such uncertainty. Given the paucity of reported decisions on matters related to compact provisions identified as problematic in deemed approval letters, it is likely that the uncertainty has not created a significant problem.<sup>186</sup>

Second, a deemed approval letter from the Secretary could diminish the scope of uncertainty by narrowing the issues about which uncertainty remains. If the Secretary declines to approve or

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185. 25 U.S.C. § 2710(d)(8)(C).

186. To be sure, some compacts employ a compact dispute resolution process in which the parties have chosen an arbitration forum. Thus, looking at reported decisions may underestimate the existence of litigation. It may be that the issues are being litigated, just not in a forum in which they reach the federal case reporters. *See, e.g.*, PASCUA YAQUI TRIBE AND STATE OF ARIZONA GAMING COMPACT § 15(c) (2003), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-024640.pdf> (providing for arbitration of certain disputes between the Tribe and the State).

disapprove a compact but calls out certain provisions as problematic in a deemed approval letter, the letter may serve to preserve the legal issue for a potential showdown in future negotiations or litigation. The letter may also function, however, as a tacit or even explicit approval of the other provisions in the compact. In that respect, it may have the effect of narrowing any future claims of uncertainty about the compact. In sum, the deemed approval letter may lessen the uncertainty inherent in a no-action approval by narrowing the scope of that uncertainty. In that respect, the deemed approval letter is good for the parties and the courts.

## 2. Who Wins? Who Loses?

Another cost or potential disadvantage of deemed approval letters is that they create winners and losers. For this reason, deemed approval letters are not always applauded. In IGRA, Congress presumably presupposed an arms-length bargaining process between the tribe and the state and a negotiated solution reflected in the compact. Usually, the loser in a deemed approval letter is the state. Through a deemed approval letter, the Secretary usually suggests that the law forbids some of the terms of a compact. Thus, a natural objection by states is that the deemed approval essentially casts doubt on terms that the state negotiated, potentially rewriting the compact. Thus, states may object that the deemed approval letter is designed to improve the terms of the deal for the tribe after the fact and without any real accountability. This may even appear to be bias in the decision-making process at Interior.

The answer is easy. First, since the oversight role of the Department in the compact approval process is generally considered to be an exercise of the federal trust responsibility, the Department is almost always primarily concerned with protecting the interests of the tribe. The entire IGRA regulatory structure is designed to protect tribes, not states. Congress gave states the opportunity to address significant state regulatory concerns in compacts, but it feared state overreach in tribal negotiations.<sup>187</sup> Therefore, Congress gave the approval power to the Secretary. Another example of Congress's clear focus is the fact that IGRA imposes no duty on tribes to negotiate in good faith. It imposes this duty only on states.

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187. Cf. Kevin Gover & Tom Gede, *The States as Trespassers in a Federal-Tribal Relationship: A Historical Critique of Tribal-State Compacting Under IGRA*, 42 ARIZ. ST. L.J. 185, 190-91 (2010) (citing S. REP. NO. 100-446, at 13 (1988)).

In other words, the Department is carrying out the general role that Congress intended and using tools that Congress provided for the task.

#### CONCLUSION

The deemed approval letter is a curious development. At worst, this manner of decision making might be seen as an abdication of responsibility by the expert agency charged with making an affirmative decision, resulting in the postponement of an important decision and transfer of the decision from the expert agency to another forum.

When Congress created the deemed approval provision for any compact not addressed within forty-five days, however, it created a solution that has had significant pragmatic value. Indeed, because millions of dollars may hang in the balance for a tribe through development of a gaming operation and for a state through the potential revenue sharing, the deemed approval provision's facilitation of quick decisions is important to economic development.

In light of the lack of reported decisions dealing with deemed approval letters, it is clear that their practical value has been far more important than their value in litigation. At bottom, the deemed approval lowers the stakes of decision making for the Department because it allows the tribe to call out state overreaching without forcing tribes to pay the penalty of not being able to conduct gaming. For the Secretary, the "deemed approved" approach has been an expedient answer to the problems faced by the regulatory regime following *Seminole Tribe*.