

STATE OF FLORIDA  
DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION  
DIVISION OF PARI-MUTUEL WAGERING

CASE NO. 2021-043451

DEBARY REAL ESTATE HOLDINGS, LLC,

Petitioner,

v.

DEPARTMENT OF BUSINESS AND  
PROFESSIONAL REGULATION,  
DIVISION OF PARI-MUTUEL WAGERING

Respondent.

**MOTION TO DISMISS PROCEEDING FOR REVOCATION OF PERMIT  
OR, ALTERNATIVELY,  
MOTION TO STAY OR ABATE INFORMAL HEARING**

The petitioner, Debary Real Estate Holdings, LLC (“Debary”), moves to dismiss this proceeding seeking the revocation of PMW Permit #543 held by Debary because the respondent, State of Florida, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the “Division”), lacks the statutory authority to revoke PMW Permit #543 inasmuch as the Federal government’s prior approval of that certain gaming compact between the State of Florida and the Seminole Tribe of Florida executed by Governor DeSantis and the Tribe on April 23, 2021 and later amended on May 17, 2021 (the “Gaming Compact”) was invalidated and voided by the United States District Court for the District of Columbia in *West Flagler Associates et al. v. Deb Haaland, Secretary, U.S. Department of the Interior, et al.*, Case No. 21-cv-2192 (DLF) or, alternatively, Debary moves to stay or abate this proceeding until such time as the validity of the Gaming Compact is fully and finally confirmed; and in support hereof states:

1. The Division is the executive branch administrative agency that regulates pari-

mutuel wagering activities in Florida pursuant to the provisions of Chapter 550, Fla. Stat.

Among the historical functions of the Division under various provisions of Chapter 550 are the evaluation (for approval or denial) of applications for the issuance of pari-mutuel permits and the enforcement the disciplinary provisions of Chapter 550 against its permittees and licensees.

2. On October 7, 2008, the Division issued to Debary a pari-mutuel wagering permit, which permit is designated in the Division's records as PMW Permit #543, and which permit authorizes Debary to conduct pari-mutuel wagering on quarter horse races and to conduct other authorized pari-mutuel wagering activities at a specific location within the municipality of Debary in Volusia County, Florida. Hereafter, Debary's pari-mutuel permit shall be referred to as the "Permit". The permit was issued under former §550.334 (repealed in 2010) which, in 2008, contained the requirements for the issuance of pari-mutuel permits for quarter horse racing. See *Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering*, 53 So.3d 1158 (Fla. 1st DCA 2011). Prior to the Division's initiation of the administrative process to revoke the Permit more particularly described below, Debary has not previously been cited by the Division for the violation of the any provision of Chapter 550 and no discipline has ever previously been imposed or threatened by the Division against Debary or the Permit for any reason.

4. During Special Session A of the 2021 Florida Legislative Session, which special session began on May 17, 2021 and ended on May 19, 2021, the legislature enacted several separate yet inter-related legislative enactments concerning gambling activities, with the effectiveness of all of such enactments specifically made contingent upon the approval and validity of the Gaming Compact that is the specific subject matter of one of those inter-related enactments, CS for SB 2-A, which bill was later codified as Chapter 2021-269, Laws of Florida.

5. Through the enactment of the aforesaid CS for SB 2-A, the legislature approved

the participation of the State of Florida in the Gaming Compact that the Governor and the Tribe had previously executed. In apparent recognition that Federal law requires the Secretary of the US Department of the Interior to approve all tribal compacts as a prerequisite to the Gaming Compact's effectiveness, the legislature made the effective date of CS for SB 2-A contingent upon the happening of future acts and circumstances described in ¶7 of CS for SB 2-A as follows:

Except as otherwise expressly provided in this act and except for this section, which shall take effect upon this act becoming a law, **this act shall take effect only if the Gaming Compact between the Seminole Tribe of Florida and the State of Florida executed by the Governor and the Seminole Tribe of Florida on April 23, 2021, as amended on May 17, 2021, under the Indian Gaming Regulatory Act of 1988, is approved or deemed approved and not voided by the United States Department of the Interior, and shall take effect on the date that notice of the effective date of the compact is published in the Federal Register.**

6. Another of the bills, CS for SB 8-A, later codified as Chapter 2021-271, amended the provisions of §550.054 to require the Division to revoke the permits of permitholders (except for permits issued under §550.3445) that did not hold an operating license to conduct pari-mutuel wagering during fiscal year 2020-2021. Debarry did not hold an operating license during fiscal year 2020-2021. The Division's authority to revoke those pari-mutuel permits that meet the statutory criterion for revocation is set forth in newly created §550.054(9)(c) and newly created §550.054(15)(a), both found in ¶7 of CS for SB 8-A and which provide as follows (hereafter the "2021 Revocation Amendments"):

**(9)(c) The division shall revoke the permit of any permitholder, other than a permitholder issued a permit pursuant to s. 550.3345, who did not hold an operating license for the conduct of pari-mutuel wagering for fiscal year 2020-2021. A permit revoked under this paragraph is void and may not be reissued.**

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**(15)(a) Notwithstanding any other provision of law, a permit for the conduct of pari-mutuel wagering and associated cardroom or slot machine licenses may only be held by a permitholder who held an operating license for the conduct of pari-mutuel wagering for fiscal year 2020-2021 or who holds a permit issued pursuant to s. 550.3345.**

7. Through the inclusion of §42 of CS for SB 8-A, the legislature made the effective date of the provisions of CS for SB 8-A, including the 2021 Revocation Amendments to §550.054 referenced in the preceding paragraph, expressly contingent upon the Gaming Compact described in CS for SB 2-A being approved and not voided by the Secretary of the Interior as provided in the effective date provision (§7) of CS for SB 2-A:

Except as otherwise expressly provided in this act, **this act shall take effect on the same date that SB 2A or similar legislation takes effect**, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

8. To the best of Debary's knowledge and belief, the Gaming Compact was approved on August 5, 2021 by default after the Secretary of the Interior took no action within 45 days after the Secretary's receipt of the Gaming Compact and that on August 11, 2021, Notice of Approval was published in Federal Register.

9. On or about October 1, 2021, the Division initiated the administrative process of revoking the Permit by sending to Debary a document entitled Notice of Intent to Revoke Permit, a copy of which notice is attached hereto as Exhibit 1 (the "Initial Notice"). As the Division's authority for initiating the revocation proceeding, the Initial Notice specifically relies upon the 2021 Revocation Amendments.

10. On November 8, 2021, the Division amended the Initial Notice with a document entitled Amended Notice of Intent to Revoke Permit, a copy of which is attached as Exhibit 2 (the "Amended Notice"). As the Division's authority for initiating the revocation proceeding, the Amended Notice also relies upon the 2021 Revocation Amendments.

11. On or about November 22, 2021, which was a date several days before expiration of the 21 day period in which Debary's response to the Amended Notice was due, a decision was rendered by the United States District Court for the District of Columbia in Case No. 21-cv-2192 (DLF), which action is styled *West Flagler Associates et al. v. Deb Haaland, Secretary, U.S.*

*Department of the Interior, et al.* and which decision has the effect of vacating and voiding the Department of the Interior’s prior approval of the Gaming Compact which is directly referenced to in ¶7 of CS for SB 2-A and indirectly referenced in ¶42 of CS for SB 8-A. A copy of the foregoing described opinion is attached hereto as Exhibit 3 (hereafter the “Federal Court Decision”). The Federal Court Decision notes at page 14 that the State of Florida had participated in that proceeding and had “defended” the Gaming Compact “on the merits”.

12. With regard to the impact of the Federal Court Decision on the Gaming Compact, the Court ruled at Pages 23 and 24 of Exhibit 3 attached as follows:

“The last issue in this case is the plaintiffs’ remedy. The issue is governed by of the APA, which directs courts to “hold unlawful and set aside agency action” that is “not in accordance with law.” 5 U.S.C. 706(2)(A). **The “agency action” under review is the Secretary’s default approval of the Compact.** See Compl.1 (West Flagler). *Amador County* [*Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011)] confirms that vacating the Secretary’s approval is appropriate. See 640 F.3d at 378 (explaining that, if a plaintiff successfully challenges a default approval, “**the Secretary would have to reject the compact**”). And because the Tribe may offer online gaming “only with secretarial approval of the compact,” *id.*; see also 25 U.S.C. 2710(d)(1)(C), **vacating the Secretary’s approval will fully redress the West Flagler plaintiffs’ injury. For those reasons, the Court concludes that the appropriate remedy is to set aside the Secretary’s default approval of the Compact.**”

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**“In the Court’s understanding, the practical effect of this remedy is to reinstate the Tribe’s prior gaming compact, which took effect in 2010, see Indian Gaming, 75 Fed. Reg. 38,833 (July 6, 2010), and which may remain in effect until 2030, see Compl. Ex. D. (Prior Compact) XVI(B), Dkt. 1-4 (West Flagler). See Fl. Stat. 285.710(3)(b). In that respect, this decision restores the legal status of class III gaming in Florida to where it was on August 4, 2021—one day before the Secretary approved the new compact by inaction.”**

13. Based upon Debary’s best information and belief (based primarily on newspaper accounts and trade publications), the Federal Court Decision has been appealed to the District of Columbia Court of Appeals by the Seminole Tribe and the US Department of the Interior and that the Seminole Tribe had requested that the effectiveness of the Federal Court Decision be stayed pending appeal, which request for a stay was denied first by the District Court and then

later by the DC Circuit. Because both requests for a stay were denied, the Federal Court Decision is and remains in full force and effect.

14. On or about November 28, 2021, Debary filed its response to the Amended Notice by petitioning for a formal administrative hearing, a copy of which petition is attached as Exhibit 4. As a review of the Petition will show, Debary, referring to the Federal Court Decision, questioned the Division's reliance on the 2021 Revocation Amendments as the basis for revoking the Permit inasmuch as the Federal Court Decision had vacated and voided the required Federal approval of the Gaming Compact. Debary also reserved certain rights to assert the unconstitutionality of the 2021 Revocation Amendments at the administrative hearing by making a record for later review by a District Court of Appeal.

15. Counsel for Debary was orally informed in December, 2021 that the request for a formal hearing had been denied and that an informal hearing would be scheduled for some time in early February, 2022. On January 24, 2022, a hearing date of February 9, 2022 was confirmed by a Notice of Informal Hearing provided by the Division to Debary's counsel by email.

16. Implicit in scheduling an informal hearing for February 9, 2022 is that the Division believes that the effectiveness of the 2021 Revocation Amendments somehow survived the judicial vacation of the Federal approval of the Gaming Compact, which approval is the predicate upon which the effectiveness of the 2021 Revocation Amendments is conditioned by §42 of CS for SB 8-A. This is so because without the 2021 Revocation Amendments being in effect, there is no other statutory provision within Chapter 550 or elsewhere which authorize the Division to revoke the Permit simply because Debary did not hold a pari-mutuel operating license during fiscal year 2020-2021—which lack of an operating license for fiscal year 2020-2021 was only the ground for permit revocation stated, referred to and relied upon within the Amended Notice. See *McCarthy v. Dep't of Ins. and Treasurer*, 479 So.2d 135, 137 (Fla. 2d

DCA 1985) (a licensee can only be prosecuted for the violation or violations cited in the administrative complaint).

17. Administrative agencies, such as the Division, being creatures of statute, have only such power as the statutes confer, with all reasonable doubt about the lawful existence of a particular power being exercised by an administrative agency resolved against its exercise.

*Gulfstream Park Racing Association, Inc. v. Department of Business Regulation*, 443 So.2d 113 (Fla. 3d DCA 1983), approved in *Gulfstream Park Racing Ass'n, Inc. v. Department of Business Regulation*, 441 So.2d 627 (Fla. 1983).

18. As indicated above, both the US District Court and the DC Court of Appeals have denied the request of the Seminole Tribe to stay the effectiveness of the Federal Court Decision. As a result of the Federal Court Decision not being stayed, the Federal Court Decision vacating and voiding the Secretary of the Interior's approval of the Gaming Compact is and remains the binding and controlling law regarding the validity of the Gaming Compact unless and until the Federal Court Decision is reversed or otherwise superseded by the decision of a court of superior authority.

19. Without question, the sole source of the Division's statutory authority to revoke the Permit arises from the 2021 Revocation Amendments, the effective of which the legislature specifically made contingent on the effectiveness of the Gaming Compact. Inasmuch as the legal effect of the Federal Court Decision was to vacate and void the prior approval of the Gaming Compact by the Secretary of the US Department of the Interior, the contingency set forth in CS for SB 2-A governing the effectiveness of that bill ultimately has failed—which in turn has caused the contingency set forth in CS for SB 8-A regarding the effectiveness of that bill, including the 2021 Revocation Amendments, to ultimately fail.

20. Because the contingency governing the effectiveness of the provisions of CS for SB 8-A has failed, the 2021 Revocation Amendment are not in effect. Furthermore, because there is no other statutory provision within Chapter 550 or elsewhere that authorizes the Division to revoke the Permit because Debary did not hold a pari-mutuel operating license during fiscal year 2020-2021, the Division does not have the statutory authority to revoke the Permit for that reason. *Gulfstream Park Racing Association, Inc. v. Department of Business Regulation, supra*. Accordingly, because the Division lacks of authority to maintain this permit revocation proceeding, this proceeding must be dismissed.

21. Alternatively, Debary requests that the Division stay and/or abate the informal hearing apparently scheduled for February 9, 2022 until such time as all appeals of the Federal Court Decision have been exhausted and the validity of the Gaming Compact is fully and finally resolved one way or the other. Of course, if, in the final resolution, the Gaming Compact is not approved, then the Division must dismiss this proceeding with prejudice.

WHEREFORE, Debary respectfully requests the entry of an order consistent with the relief requested in this motion.

Dated this 24th day of January, 2022.

**S/DAVID S. ROMANIK**

David S. Romanik FBN 212199  
David S. Romanik, P.A.  
Counsel for the Petitioner/Debary  
2355 SE 5<sup>th</sup> St.  
Ocala, FL 34471  
954-610-4441  
[davidromanik@mac.com](mailto:davidromanik@mac.com)



**CERTIFICATE OF SERVICE**

I hereby certify that on this 24<sup>th</sup> day of January, 2022, a true copy of the foregoing petition was sent by electronic mail to the following personnel of the respondent, the Division of Pari-Mutuel Wagering:

Marc D. Taupier  
Chief Attorney, Division of Pari-Mutuel Wagering  
[marc.taupier@myfloridalicense.com](mailto:marc.taupier@myfloridalicense.com)

Ronda Bryan  
Clerk, Department of Business and Professional Regulation  
[ronda.bryan@myfloridalicense.com](mailto:ronda.bryan@myfloridalicense.com)

Bryan Barber  
Clerk, Division of Pari-Mutuel Wagering  
[bryan.barber@myfloridlicense.com](mailto:bryan.barber@myfloridlicense.com)

**S/DAVID S. ROMANIK**

# **EXHIBIT 1**

Julie I. Brown, Secretary

Ron DeSantis, Governor

October 1, 2021

Debary Real Estate Holdings, LLC  
444 Seabreeze Boulevard, Ste. 1000  
Daytona Beach, Florida 32118

NOTICE OF INTENT TO REVOKE PERMIT

To Whom It May Concern:

This Notice of Intent to Revoke Permit (“Notice”) serves to inform you that the Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (“Division”) intends to revoke the permit issued to Debary Real Estate Holdings, LLC (“Debary Real Estate Holdings”) for the following reason:

1. Debary Real Estate Holdings is the holder of pari-mutuel permit number 543, (Permit 543) issued pursuant to section 550.054, Florida Statutes.
2. Debary Real Estate Holdings did not hold an operating license for the conduct of pari-mutuel wagering for Permit 543 for fiscal year 2020-2021.
3. During the 2021 Florida Legislative Special Session, chapter 550, Florida Statutes was amended. *See* ch. 2021-271, §7, at page 9, Laws of Fla.
4. Section 550.054(9)(c), Florida Statutes, now reads, “[t]he division shall revoke the permit of any permitholder, other than a permitholder issued a permit pursuant to s. 550.3345, who did not hold an operating license for the conduct of pari-mutuel wagering for fiscal year 2020-2021. A permit revoked under this paragraph is void and may not be reissued.”

Based on the foregoing, the Division finds that:

1. The plain language of section 550.054(9)(c), Florida Statutes, expressly requires the Division to revoke the permits of permitholders, other than permitholders issued a permit pursuant to section, 550.3345, Florida Statutes, who did not hold an operating license for the conduct of pari-mutuel wagering for fiscal year 2020-2021.
2. Debary Real Estate Holdings was issued a permit pursuant to section 550.054, Florida Statutes.
3. Debary Real Estate Holdings did not hold an operating license for the conduct of pari-mutuel wagering for fiscal year 2020-2021.

Therefore, the Division intends to **REVOKE** Permit 543 issued to Debary Real Estate Holdings.

Pursuant to section 120.57, Florida Statutes, you may request a hearing to challenge the Division's decision within twenty-one (21) days of receipt of this Notice, as provided for in rule 28-106, Florida Administrative Code, and the attached Notice of Rights.

If you do not request a hearing within twenty-one (21) days of your receipt of this Notice, this Notice will become the Agency's Final Order. If this Notice becomes a Final Order, you will have 30 days to file for an appeal pursuant to section 120.68, Florida Statutes. The Final Order will become effective, and Permit 543 will be revoked, on the date the Final Order is filed with the Agency Clerk.

Sincerely,



Louis Trombetta, Director  
Division of Pari-Mutuel Wagering

Attachment: Notice of Rights

Case No.: 2021-043451

CERTIFICATE OF SERVICE

I hereby certify this 7 day of October, 2021, that true copies of the foregoing "Notice of Intent to Revoke Permit" have been served via Certified Mail upon:

**Debary Real Estate Holdings, LLC**  
444 Seabreeze Boulevard, Ste. 1000  
Daytona Beach, Florida 32118

**Frank B. Sanderlin, Registered Agent**  
444 Seabreeze Boulevard, Ste. 1000  
Daytona Beach, Florida 32118



AGENCY CLERK'S OFFICE  
Department of Business and Professional Regulation

## NOTICE OF RIGHTS

This is an action that may affect your substantial interests. Mediation of this administrative dispute is not available. However, pursuant to chapter 120, Florida Statutes, you may request a hearing on this matter, provided a written request is filed with the agency. The request must comply with the requirements of rules 28-106.111 and 28-106.201 or 28-106.301, Florida Administrative Code. The written request must be received by the Division within 21 days of your receipt of this notice.

If the Division determines there are disputed issues of material fact, the case will be forwarded to the Division of Administrative Hearings for a formal hearing. If there are no disputed issues of material fact, the Division will schedule an informal hearing. You will be notified of the date, time and place of the hearing. In either case, you have the burden of establishing entitlement to the permit.

In a formal hearing, you have the right to appear in person on your own behalf, to be represented by an attorney, to bring witnesses and present evidence, to cross-examine any witnesses produced against you by the State, and to have subpoenas issued on your behalf.

In an informal hearing, you have the right to appear in person on your own behalf, to be represented by an attorney, and to submit whatever information you desire to show entitlement to the permit.

If a written request for a hearing is not received within 21 days of your receipt of this notice, the foregoing Notice of Intent to Revoke Permit will become a Final Order.

Practice in all of the above proceedings are governed by chapter 120, Florida Statutes, and rule 28-106, Florida Administrative Code.

# **EXHIBIT 2**

Julie I. Brown, Secretary

Ron DeSantis, Governor

November 8, 2021

Debary Real Estate Holdings, LLC  
444 Seabreeze Boulevard, Ste. 1000  
Daytona Beach, Florida 32118

**AMENDED NOTICE OF INTENT TO REVOKE PERMIT**

To Whom It May Concern:

This Amended Notice of Intent to Revoke Permit ("Notice") serves to inform you that the Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Division") intends to revoke the permit issued to Debary Real Estate Holdings, LLC ("Debary Real Estate Holdings") for the following reason:

1. Debary Real Estate Holdings is the holder of pari-mutuel permit number 543 (Permit 543).
2. Permit 543 was not issued pursuant to section 550.3345, Florida Statutes.
3. Permit 543 was issued pursuant to section 550.334, Florida Statutes.
4. Debary Real Estate Holdings did not hold an operating license for the conduct of pari-mutuel wagering for Permit 543 for fiscal year 2020-2021.
5. During the 2021 Florida Legislative Special Session, chapter 550, Florida Statutes was amended. *See* ch. 2021-271, §7, at page 9, Laws of Fla.
6. Section 550.054(9)(c), Florida Statutes, now reads, "[t]he division shall revoke the permit of any permitholder, other than a permitholder issued a permit pursuant to s. 550.3345, who did not hold an operating license for the conduct of pari-mutuel wagering for fiscal year 2020-2021. A permit revoked under this paragraph is void and may not be reissued."

Based on the foregoing, the Division finds that:

1. The plain language of section 550.054(9)(c), Florida Statutes, expressly requires the Division to revoke the permits of permitholders, other than permitholders issued a permit pursuant to section 550.3345, Florida Statutes, who did not hold an operating license for the conduct of pari-mutuel wagering for fiscal year 2020-2021.
2. Debary Real Estate Holdings was issued a permit pursuant to section 550.334, Florida Statutes.

3. Debary Real Estate Holdings did not hold an operating license for the conduct of pari-mutuel wagering for fiscal year 2020-2021.

Therefore, the Division intends to **REVOKE** Permit 543 issued to Debary Real Estate Holdings.

Pursuant to section 120.57, Florida Statutes, you may request a hearing to challenge the Division's decision within twenty-one (21) days of receipt of this Notice, as provided for in rule 28-106, Florida Administrative Code, and the attached Notice of Rights.

If you do not request a hearing within twenty-one (21) days of your receipt of this Notice, this Notice will become the Agency's Final Order. If this Notice becomes a Final Order, you will have 30 days to file for an appeal pursuant to section 120.68, Florida Statutes. The Final Order will become effective, and Permit 543 will be revoked, on the date the Final Order is filed with the Agency Clerk.

Sincerely,

  
\_\_\_\_\_  
Louis Trombetta, Director  
Division of Pari-Mutuel Wagering

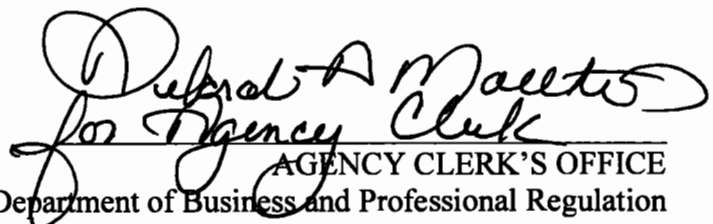
Attachment: Notice of Rights

CERTIFICATE OF SERVICE

I hereby certify this 9 day of November 2021, that true copies of the foregoing "Notice of Intent to Revoke Permit" have been served via Certified Mail upon:

**Debary Real Estate Holdings, LLC**  
444 Seabreeze Boulevard, Ste. 1000  
Daytona Beach, Florida 32118

**Frank B. Sanderlin, Registered Agent**  
444 Seabreeze Boulevard, Ste. 1000  
Daytona Beach, Florida 32118

  
\_\_\_\_\_  
AGENCY CLERK'S OFFICE  
Department of Business and Professional Regulation



## NOTICE OF RIGHTS

This is an action that may affect your substantial interests. Mediation of this administrative dispute is not available. However, pursuant to chapter 120, Florida Statutes, you may request a hearing on this matter, provided a written request is filed with the agency. The request must comply with the requirements of rules 28-106.111 and 28-106.201 or 28-106.301, Florida Administrative Code. The written request must be received by the Division within 21 days of your receipt of this notice.

If the Division determines there are disputed issues of material fact, the case will be forwarded to the Division of Administrative Hearings for a formal hearing. If there are no disputed issues of material fact, the Division will schedule an informal hearing. You will be notified of the date, time and place of the hearing. In either case, you have the burden of establishing entitlement to the permit.

In a formal hearing, you have the right to appear in person on your own behalf, to be represented by an attorney, to bring witnesses and present evidence, to cross-examine any witnesses produced against you by the State, and to have subpoenas issued on your behalf.

In an informal hearing, you have the right to appear in person on your own behalf, to be represented by an attorney, and to submit whatever information you desire to show entitlement to the permit.

If a written request for a hearing is not received within 21 days of your receipt of this notice, the foregoing Notice of Intent to Revoke Permit will become a Final Order.

Practice in all of the above proceedings are governed by chapter 120, Florida Statutes, and rule 28-106, Florida Administrative Code.

# **EXHIBIT 3**

**JFUNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

WEST FLAGLER ASSOCIATES *et al.*,

*Plaintiffs,*

v.

DEB HAALAND,  
Secretary, U.S. Department of the Interior,  
*et al.*,

*Defendants.*

No. 21-cv-2192 (DLF)

MONTERRA MF, LLC *et al.*,

*Plaintiffs,*

v.

DEB HAALAND,  
Secretary, U.S. Department of the Interior,  
*et al.*,

*Defendants.*

No. 21-cv-2513 (DLF)

**MEMORANDUM OPINION**

In August 2021, the Secretary of the Interior approved a gaming compact between the State of Florida and the Seminole Tribe of Florida. The Compact authorizes the Tribe to offer online sports betting throughout the State, including to bettors located off tribal lands. In these related cases, the plaintiffs argue that the Compact violates the Indian Gaming Regulatory Act, the Unlawful Internet Gambling Enforcement Act, the Wire Act, and the Equal Protection Clause. They accordingly ask this Court to “set aside” the Secretary’s approval of the Compact pursuant to the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

Before the Court are the plaintiffs' Motions for Summary Judgment in both the *West Flagler* case and the *Monterra* case, Dkt. 19 (*West Flagler*), Dkt. 37 (*Monterra*); the Tribe's respective Motions to Intervene, Dkt. 13 (*West Flagler*), Dkt. 31 (*Monterra*); and the Secretary's respective Motions to Dismiss, Dkt. 25 (*West Flagler*), Dkt. 35 (*Monterra*).<sup>1</sup> For the reasons that follow, the Court will hold that the Compact violates IGRA and grant the *West Flagler* plaintiffs' motion for summary judgment. Additionally, the Court will deny the *Monterra* plaintiffs' motion as moot, deny the Tribe's motions, and deny the Secretary's motions.

## I. BACKGROUND

### A. Statutory Background

The Indian Gaming Regulation Act (IGRA) “creates a framework for regulating gaming activity on Indian lands.” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014). To that end, the Act divides gaming activities into three classes. *See* 25 U.S.C §§ 2710(a), 2710(d)(1). Class III gaming, the kind involved here, includes both casino games and sports betting. *See id.* §§ 2703(6)–(8); 25 C.F.R. § 502.4(c). To host class III gaming “on Indian lands,” a tribe must “enter[] into” a compact with the state in which its lands are located. 25 U.S.C. § 2710(d)(1)(C). These compacts “prescribe[] rules for operating gaming, allocate[] law enforcement authority between the tribe and State, and provide[] remedies for breach of the agreement’s terms.” *Bay Mills*, 572 U.S. at 785 (citation omitted). As relevant here, a compact may take effect only after the Secretary of the Interior has both approved its terms and noticed its approval in the Federal Register. *See* 25 U.S.C § 2710(d)(3)(B).

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<sup>1</sup> The Court resolves these cases together because they challenge the same gaming compact, raise overlapping questions of law, and seek overlapping forms of relief. For clarity, the Court will use parentheticals to identify the case name with which each filing is associated.

IGRA closely regulates the Secretary’s review of gaming compacts. To start, it provides that the Secretary may disapprove a compact “only if [it] violates” another provision of IGRA, “any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands,” or “the trust obligations of the United States to Indians.” *Id.* § 2710(d)(8)(B). IGRA also provides that the Secretary must either approve or disapprove each compact within 45 days of receiving it. *See id.* § 2710(d)(8)(C). Otherwise, the compact shall “be considered to have been approved by the Secretary, but only to the extent the compact is consistent with” IGRA. *Id.* The D.C. Circuit has squarely held, first, that these default approvals are “reviewable” in federal court and, second, that the Secretary “must . . . disapprove” unlawful compacts. *Amador Cty. v. Salazar*, 640 F.3d 373, 381–83 (D.C. Cir. 2011).

## **B. Factual Background**

This case concerns a class III gaming compact between the State of Florida and the Seminole Tribe of Florida. *See* Compl. Ex. A (Compact), Dkt. 1-1 (*West Flagler*). Before the Compact took effect, Florida law prohibited wagering on “any trial or contest of skill, speed[,] power or endurance.” *See* Fl. Stat. § 849.14 (2020). Although that prohibition contained a narrow exception for horse racing, dog racing, and jai alai, *see id.* § 550.155(1), it barred betting on all major sports, including football, baseball, and basketball, *see id.* § 849.14; *see also* State of Fl. Amicus Br. at 1, 8, Dkt. 28 (*West Flagler*). The Florida Constitution also limited the conditions in which the State could expand sports betting going forward. *See* Fl. Const. art. X, § 30(a). Specifically, it provided that the State could only expand such betting through a “citizens’ initiative,” *id.* §§ 30(a)–(b), with the caveat that “nothing herein . . . limit[s] the ability of the state or Native American tribes to negotiate gaming compacts” under IGRA, *id.* § 30(c).

The compact in this case expanded the Tribe’s ability to host sports betting throughout the State. In relevant part, the Compact defines “sports betting” to mean “wagering on any past or future professional sport or athletic event, competition or contest,” Compact § III(CC); classifies “sports betting” as a “covered game,” *id.* § III(F); and authorizes the Tribe “to operate Covered Games on its Indian lands, as defined in [IGRA],” *id.* § IV(A). The Compact also provides that all in-state wagers on sporting events “shall be deemed . . . to be exclusively conducted by the Tribe at its Facilities where the sports book(s) . . . are located,” even those that are made “using an electronic device” “by a Patron physically located in the State but not on Indian lands.” *Id.* § III(CC)(2); *see also id.* § IV(A) (providing that “wagers on Sports Betting . . . shall be deemed to take place exclusively where received”). In this manner, the Compact authorizes online sports betting throughout the State. And because the State has not entered a similar agreement with any other entity, the Compact grants the Tribe a monopoly over both all online betting and all wagers on major sporting events. *See* Tribe’s Mot. to Intervene at 1–3, Dkt. 13 (*West Flagler*).

On June 21, 2021, the Secretary of the Interior received a copy of the Compact. *See* Compl. Ex. F (Approval Letter) at 1, Dkt. 1-6 (*West Flagler*). Because the Secretary took no action on it within forty-five days, *see id.*, she approved the Compact by default on August 5, *see* 25 U.S.C § 2710(d)(8)(C). The next day, the Secretary explained her no-action decision in a letter to the Tribe. *See generally* Approval Letter. The letter reasoned that IGRA allows the Tribe to offer online sports betting to persons who are not physically located on its tribal lands. *Id.* at 6–8. To support that conclusion, the letter noted that IGRA allows states and tribes to negotiate the “allocation of criminal and civil jurisdiction,” 25 U.S.C. § 2710(d)(3)(c)(i)-(ii), emphasized that Florida consented to the Compact, and argued that “IGRA should not be an

impediment to tribes that seek to modernize their gaming offerings.” *Id.* at 7. At the same time, the letter insisted that Florida residents could not place sports bets while “physically located on *another Tribe’s* Indian lands.” *Id.* at 8 & n.14 (emphasis added). To do so, it reasoned, would violate IGRA’s instruction that gaming is “lawful on Indian lands” only if such gaming is authorized by the “Indian tribe having jurisdiction over such lands.” *Id.* (quoting 25 U.S.C. § 2710(d)(1)(A)(i)).

On August 11, the Secretary published notice of the Compact in the Federal Register. *See* Indian Gaming; Approval by Operation of Law of Tribal-State Class III Gaming Compact, 86 Fed. Reg. 44,037 (Aug. 11, 2021). At that point, the Compact took effect and acquired the force of law. *See* 25 U.S.C. § 2710(d)(3)(B). Pursuant to that Compact, as well as a Florida statute that implements its terms, *see* Fl. Stat. § 285.710(13)(b), online sports betting is now available in Florida. Although the Tribe initially represented that it would not offer such betting until November 15, *see* Pls.’ Mot. for Summ. J. Ex. C (Savin Decl.) ¶ 23, Dkt. 19-3 (*West Flagler*), it in fact launched online betting on November 1, *see* Pls.’ Notice of Material Factual Development at 1 & Ex. A, Dkt. 39 (*West Flagler*).

### **C. Procedural History**

On August 16, plaintiffs West Flagler Associates and Bonita-Fort Myers Corporation brought a civil action to challenge the Secretary’s approval of the Compact. *See* West Flagler Compl. Both entities own brick-and-mortar casinos in Florida. *See* Savin Decl. ¶¶ 3, 15. To establish Article III standing, they allege that the Compact’s allowance for online betting will divert business from their facilities. *See id.* ¶¶ 25–29. On the merits, they argue that the Compact’s authorization of online betting violates IGRA, the Unlawful Internet Gambling Enforcement Act (UIGEA), the Wire Act, and the Equal Protection Clause. *See* Compl. ¶¶ 124–

28; Pls.’ Mot. for Summ. J. at 18–38, Dkt. 19 (*West Flagler*). Of these, their leading argument is that the Compact violates IGRA because it authorizes class III gambling outside of “Indian lands.” Pls.’ Mot. for Summ. J. at 18 (quoting 25 U.S.C. § 2710(d)(8)(A)).

On September 17, the Tribe moved to intervene for the limited purpose of filing a motion to dismiss. *See* Tribe’s Mot. to Intervene, Dkt. 13 (*West Flagler*). The Tribe argues that it may intervene as of right because it has an economic interest in the Compact and because the Secretary will not adequately protect that interest. *See id.* at 9–13; *see also* Fed. R. Civ. P. 24(a). The Tribe further argues that it is an indispensable party to this litigation, *see* Fed. R. Civ. P. 19, but that its sovereign immunity prevents its joinder. *See* Tribe’s Proposed Mot. to Dismiss at 4–11, Dkt. 13-4 (*West Flagler*). Finally, the Tribe argues that filing its motion to intervene did not waive its sovereign immunity. *See id.* at 5–6. To the contrary, it argues that “limited intervention [is] an appropriate mechanism through which parties may file motions to dismiss under Rule 19 . . . based on sovereign immunity.” Tribe’s Mot. to Intervene at 5. *See also* Tribe’s Mot. to Intervene, Dkt. 31, and Proposed Mot. to Dismiss, Dkt. 31-4 (raising the same argument in the *Monterra* litigation).

On September 27, *Monterra* MF and its co-plaintiffs filed a separate challenge to the Secretary’s approval. *See* Compl., Dkt. 1 (*Monterra*). All but one of these co-plaintiffs live, work, or own property near Florida casinos. *See id.* ¶¶ 22–29. The remaining plaintiff, No Casinos, is a nonprofit organization that opposes the expansion of gambling in Florida. *See id.* ¶ 30. To establish Article III standing, these plaintiffs allege that the expansion of gambling in Florida will increase neighborhood traffic, increase criminal activity, and reduce their property values. *See* Pls.’ Mem. in Supp. of Mot. for Summ. J. at 12, Dkt. 37-4 (*Monterra*). On the merits, they join the *West Flagler* plaintiffs in arguing that the Compact’s online gambling rules



violate IGRA, UIGEA, and the Wire Act. *See id.* at 15–23. They also argue that the Compact’s expansion of in-person gambling violates both the Florida Constitution and a separate provision of IGRA, which conditions the lawfulness of class III gaming on whether the state “permits such gaming for any purpose by any person, organization, or entity,” 25 U.S.C. § 2710(d)(1)(B). *See id.* at 23–28.

The *West Flagler* plaintiffs moved for summary judgment on September 21. Dkt. 19 (*West Flagler*). The *Monterra* plaintiffs followed suit on October 15. Dkt. 35 (*Monterra*). The Secretary then moved to dismiss both plaintiffs’ cases for lack of standing. *See* Gov’t’s Mot. to Dismiss at 8–17, Dkt. 25 (*West Flagler*); Gov’t’s Mot. to Dismiss at 8–15, Dkt. 35 (*Monterra*). The Secretary also argued that the plaintiffs failed to state a claim under IGRA, that IGRA does not require her to consider questions of state law, and that *West Flagler*’s constitutional argument fails. *See* Gov’t’s Mot. at 17–31 (*West Flagler*); Gov’t’s Mot. at 15–19 (*Monterra*). The Secretary did not, however, address whether the online gaming contemplated by the Compact occurs on or off “Indian lands,” 25 U.S.C. § 2710(d)(8)(A).

On November 5, the Court held a hearing on the above motions.<sup>2</sup> The cases are now ripe for review.

## II. LEGAL STANDARD

A court grants summary judgment if the moving party “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A

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<sup>2</sup> At the hearing, government counsel was unable to take a position on the location of online gaming under the Compact. *See* Rough Hr’g Tr. at 51–53. The Court thus directed counsel to file a supplemental brief on the merits on or before November 9. *See* Min. Order of Nov. 5, 2021. Counsel has since done so. *See* Dkt. 40–41 (*West Flagler*); Dkt. 52–53 (*Monterra*).

“material” fact is one with potential to change the substantive outcome of the litigation. *See Liberty Lobby*, 477 U.S. at 248; *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). A dispute is “genuine” if a reasonable jury could determine that the evidence warrants a verdict for the nonmoving party. *See Liberty Lobby*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895.

In an Administrative Procedure Act case, summary judgment “serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review.” *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006). The Court will “hold unlawful and set aside” agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” *id.* § 706(2)(C), or “unsupported by substantial evidence,” *id.* § 706(2)(E).

### III. ANALYSIS

#### A. West Flagler Has Article III Standing

Before reaching the merits of either action, this Court must first determine whether at least one plaintiff has Article III standing. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998). To establish standing, a plaintiff must demonstrate that he has suffered an “injury in fact” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). The plaintiff must also establish that there is “a causal connection between the injury and the conduct complained of” and that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* at 560–61 (internal quotation marks and citation omitted). Each of these elements “must be supported in the same way as any other matter on which the plaintiff bears the burden of proof.” *Id.* at 561. As such, at the

summary judgment stage, a plaintiff “can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true.” *Id.* (internal quotation marks and citation omitted).

Under the “basic law of economics,” *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (citation omitted), an “actual or imminent increase in competition” establishes an injury in fact, *Am. Inst. of Certified Pub. Accts. v. IRS*, 804 F.3d 1193, 1197 (D.C. Cir. 2015). Litigants accordingly suffer an injury “when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them.” *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (internal quotation marks and citation omitted). Because “a loss of even a small amount of money is ordinarily an injury,” *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017), any increase in competition suffices to establish Article III standing, *see Ipsen Biopharmaceuticals, Inc. v. Becerra*, 2021 WL 4399531, at \*8 (D.D.C. Sept. 24, 2021) (citation omitted).

Here, West Flagler alleges that the Compact “will divert business that would have been spent at [its facilities] and cause it to be spent on online sports gaming offered by the Tribe.” Savin Decl. ¶ 25. In its view, this diversion will occur because some customers “will prefer the ease of online gaming” to gaming in-person at West Flagler’s casino. *Id.* That prediction is reasonable and hardly “speculative.” *Lujan*, 504 U.S. at 561. Indeed, West Flagler surveyed its patrons to prove that very point. *See* West Flagler Mot. for Summ. J. Ex. D (Chavez Decl.), Dkt. 19-4. The survey found that between ten and fifteen percent of those patrons would “wager online and shift a non-zero amount of their current gambling spending away from” games West Flagler currently offers. *Id.* at 10. The survey further explained that the above percentage rests on “conservative” assumptions and “likely understates the full universe of individuals whose

behavior would change.” *Id.* at 11. Without discussing those assumptions in detail, the Court reads the survey to show a substantial probability that authorizing online gambling has caused West Flagler some competitive injury.

The Secretary’s objections to standing do not persuade.

First, West Flagler’s survey supports its bottom-line conclusion. Although the Secretary challenges the survey’s methodology, *see* Gov’t’s Mot. at 10–15 (*West Flagler*), West Flagler retained an expert to both design the survey’s approach and defend it in exacting detail, *see* Chavez Decl. at 3–7. Many of the Secretary’s objections to that approach lack any merit.<sup>3</sup> And even if they had merit, each of them concerns only to the “magnitude” of West Flagler’s competitive injury, “which has no bearing on whether it [] established Article III standing.” *Ipsen Biopharmaceuticals*, 2021 WL 4399531, at \*8 (citing *Czyzewski*, 137 S. Ct. at 983). In other words, even if the survey sampled an unrepresentative segment of the casino’s patrons, *see* Gov’t’s Mot. to Dismiss at 11 n.6, it still shows that at least one of those patrons will divert some of his gambling spend to online sports betting. That “loss of even a small amount of money” is enough for competitive standing. *Czyzewski*, 137 S. Ct. at 983.

Second, West Flagler’s injury does not “depend[] on [its] own business decisions.” *See* Gov’t’s Mot. to Dismiss at 15. It is true that West Flagler could offer sports betting in its casino by partnering with the Tribe. *See id.* But West Flagler has shown a substantial probability that this partnership would leave it less profitable than it was before. *See* Savin Decl. ¶¶ 34–38.

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<sup>3</sup> For instance, the Secretary challenges the inference, from a respondent’s answer that he would “open an online sports wagering account,” Chavez Decl. at 9, that he would “*actually* place bets online,” Gov’t’s Mot. at 13 (emphasis in original). But placing bets online is the obvious purpose of opening an online betting account. And nothing in the requirement of an “imminent” injury, as described in *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), requires ignoring this common-sense connection.

Under the partnership, the Tribe would place sports-betting kiosks in West Flagler’s casino and receive up to 40% of the revenue that the kiosks generate. *See Compact* § III(CC)(3)–(4); Savin Decl. ¶ 36. That arrangement would both require substantial upfront investments and substantially decrease the average, long-term yield from the games West Flagler offers. *See Savin Decl.* ¶¶ 34, 36–37. For those reasons, forcing West Flagler to choose between entering the partnership and losing further competitive ground is itself an injury. That injury is amplified by the Secretary’s earlier suggestion that this kind of partnership may independently violate IGRA.<sup>4</sup> *See Approval Letter* at 11–12. And in any event, even if West Flagler could offer in-person sports betting on the same terms as the Tribe, its inability to host *online* sports betting would still create a competitive injury. *See supra*.

For the reasons above, the Court finds that West Flagler has adequately established a competitive injury. It also finds that this injury was both caused by the conduct challenged in this action and redressable by a favorable decision on the merits. *See Lujan*, 504 U.S. at 560–61. On that first point, there is a “causal connection” between West Flagler’s injury and the Secretary’s approval of the gaming Compact, *id.*, without which the Tribe could not offer online sports betting, 25 U.S.C. § 2710(d)(1)(C). And on the second, setting aside the Secretary’s approval would prevent the Tribe from offering such betting, at least under the current Compact. Because that result would fully redress West Flagler’s injury, West Flagler has Article III standing. *See Lujan*, 504 U.S. at 560–61.

This Court need not address whether the other plaintiffs in these actions have standing.

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<sup>4</sup> The Secretary suggested that this kind of partnership may violate 25 U.S.C. § 2710(b)(2)(A) by giving non-Indian entities a proprietary interest in Indian gaming. *See Approval Letter* at 11–12. The Secretary never addresses the tension between encouraging West Flagler to enter such a partnership in this litigation and advising that such partnerships are unlawful elsewhere.

As a general matter, “the presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement.” *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006). Although the *West Flagler* and *Monterra* suits raise different claims, they seek the same relief—principally, the vacatur of the Secretary’s default approval. *See* Compl. at 42 (*West Flagler*); Compl. at 37, Dkt. 1 (*Monterra*). And because the Court will grant that relief in the *West Flagler* action, it has no occasion to consider the separate arguments in the *Monterra* filing, let alone whether the *Monterra* plaintiffs independently have Article III standing. *See Louie v. Dickson*, 964 F.3d 50, 55 (D.C. Cir. 2020) (noting that a case is moot when a court “cannot grant any relief beyond that already afforded”).

**B. The Tribe Is Not an Indispensable Party**

Next, the Court must resolve the Tribe’s motion to intervene, *see* Dkt. 13, and motion to dismiss, *see* Dkt. 13-4. As both parties acknowledge, federal courts disagree on whether a sovereign may intervene in an action while preserving its sovereign immunity. *Compare, e.g., Cnty. Sec. Agency v. Ohio Dep’t of Com.*, 296 F.3d 477, 483 (6th Cir. 2002) (holding that “a motion to intervene is fundamentally incompatible with an objection to personal jurisdiction”), *with MGM Glob. Resorts Dev., LLC v. DOI*, 2020 WL 5545496, at \*5–6 (D.D.C. Sept. 16, 2020) (declining to adopt an “‘all or nothing’ approach to intervention”). At the same time, controlling precedent makes clear that courts may address whether a person is required in or indispensable to an action *sua sponte*. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 861 (2008) (“A court with proper jurisdiction may also consider *sua sponte* the absence of a required person and dismiss for failure to join.”); *see also Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 772 n.6 (D.C. Cir. 1986) (finding an “independent duty to raise” an “indispensable party claim” based on tribal immunity). In this case, the Tribe moves to intervene solely to argue

for dismissal on the ground that it is a required and indispensable party. Accordingly, to conserve judicial resources, the Court will exercise its discretion to decide whether the Tribe is a required and indispensable party before resolving its motion to intervene.

The Federal Rules of Civil Procedure require joining each person that has “an interest relating to the subject of the action” if that person is subject to suit and if “disposing of the action in [his] absence” might “impede the person’s ability to protect the interest.” Fed. R. Civ. P. 19(a)(1)(B)(i). The Tribe is a “required party,” in this respect, because it “has an interest in the validity of [its] compact . . . , and [its] interest would be directly affected by the relief that [West Flagler] seeks.” *Kickapoo Tribe of Indians of Kickapoo Rsrv. in Kansas v. Babbitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995). The Federal Rules further provide that, if a required party “cannot be joined,” the court must “determine whether, in equity and good conscience, the action . . . should be dismissed.” Fed. R. Civ. P. 19(b). In this case, the Tribe cannot be joined because it “enjoys sovereign immunity.” *Kickapoo Tribe*, 43 F.3d at 1495; *see Bay Mills Indian Cmty.*, 572 U.S. at 788 (noting that tribes possess “common-law immunity from suit traditionally enjoyed by sovereign powers” (citation omitted)). Accordingly, to determine whether this action “should be dismissed,” the Court must determine whether “equity and good conscience” permit the action to proceed in the Tribe’s absence. Fed. R. Civ. P. 19(b).

Federal Rule 19(b) lists four factors that bear on whether a party is indispensable. *See* Fed. R. Civ. P. 19(b). They are, first, “the extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties;” second, “the extent to which any prejudice could be lessened or avoided;” third, “whether a judgment rendered in the person’s absence would be adequate;” and fourth, “whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.” *Id.* Although the Federal Rules present these

factors as non-exclusive, the D.C. Circuit has held that “there is very little room for balancing of other factors” where a necessary party is immune from suit. *Kickapoo Tribe*, 43 F.3d at 1496.

Beginning with the first factor, resolving this case in the present posture would not prejudice the Tribe. *See* Fed. R. Civ. P. 19(b)(1)–(2). Although the Tribe argues that this case implicates its sovereign immunity, *see* Proposed Mot. to Dismiss at 8–9, the Tribe is not a party to this case, and the plaintiffs make no attempt to bind either the Tribe or its agents. *See Wuterich v. Murtha*, 562 F.3d 375, 386 (D.C. Cir. 2009) (“[S]overeign immunity is an immunity from suit.”); *see also Mowrer v. DOT*, 14 F.4th 723, 741–43 (D.C. Cir. 2021) (Katsas, J., concurring) (explaining that sovereign immunity is “effectively a rule of personal jurisdiction”). Further, unlike in *Republic of Philippines v. Pimentel*, this case does not resolve the ownership of any asset to which the Tribe has a “nonfrivolous, substantive claim,” which would indirectly violate the Tribe’s immunity. 553 U.S. at 868–69. Instead, the plaintiffs challenge a decision that IGRA commits to the Secretary and for which that statute provides “law to apply” in federal court, *Amador Cty.*, 640 F.3d at 381 (citing 25 U.S.C. § 2710(d)(8)(C)). In these circumstances, holding that the *federal* government erred in applying *federal* law would fully respect the Tribe’s sovereign immunity.

Moreover, although the Tribe has a financial interest in the Compact, it is unclear how proceeding in its absence would harm that interest. The first factor in Rule 19(b) asks whether a party suffers prejudice from the fact that an adverse decision is “rendered in [its] absence,” not simply from the fact that a decision is adverse. Fed. R. Civ. P. 19(b)(1); *see also* Fed. R. Civ. P. 19(a)(1)(B)(i) (similarly asking whether “a person’s absence may . . . impair or impede [his] ability to protect [an] interest”). Here, the Tribe’s absence is not prejudicial because both the Secretary and the State of Florida have defended the Compact on its merits. *See* Gov’t’s Mot. to



Dismiss at 17–31; Fl. Amicus Br., Dkt. 28; Gov’t’s Suppl. Memo, Dkt. 41 (all *West Flagler*).

The Secretary and the State share the Tribe’s position on the key issue in this case—*i.e.*, that the Compact is consistent with IGRA. The Tribe never identifies how its litigation interests differ from those of the other sovereigns. *See* Tribe’s Reply in Supp. of Mot. to Intervene at 11–13, Dkt. 24 (*West Flagler*). And although the Tribe asks this Court to simply assume that their interests conflict, *see id.* at 11, its request is inconsistent with applying Rule 19(b) based on “practical considerations in the context of particular litigation,” as controlling precedent requires, *Kickapoo Tribe*, 43 F.3d at 1495 (citation omitted). In these circumstances, where there is “no conflict . . . between the Secretary’s interest and the interest of the nonparty Tribe[],” the D.C. Circuit has held that the Secretary may “adequately represent” the Tribe’s interests.<sup>5</sup> *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996); *see also Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001) (finding that the potential prejudice to a tribe’s interest was reduced by “the presence of the Secretary as a party defendant” with “virtually identical” interests). The Court thus finds that the first Rule 19(b) factor favors permitting this litigation to proceed.

The second Rule 19(b) factor does not alter this analysis. Having found that the extent of any prejudice to the Tribe does not warrant dismissal, it makes little sense to ask whether “protective provisions in [this Court’s] judgment” or “shaping [its] relief” would lessen that

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<sup>5</sup> The Tribe cites *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312 (D.C. Cir. 2015), to argue that courts “look skeptically on government entities serving as adequate advocates for private parties.” *Id.* at 321; *see* Tribe’s Proposed Mot. to Dismiss at 3–4. But *Crossroads* noted that skepticism in explaining why an absent party could intervene under Federal Rule of Civil Procedure 24(a), which is allowed more liberally than dismissal under Rule 19(b). *See id.* (noting that the adequacy requirement in Rule 24(a) is “not onerous” and that movants “ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation”).

prejudice. Fed. R. Civ. P. 19(b)(2). The ability to minimize prejudice, in other words, bears on indispensability only when there is prejudice to be minimized.

Moreover, because the Court can issue an “adequate” judgment in the Tribe’s absence, the third Rule 19(b) factor also favors allowing this action to proceed. Fed. R. Civ. P. 19(b)(3). As used in this context, “adequacy refers to the public stake in settling disputes by wholes, whenever possible.” *Pimentel*, 553 U.S. at 870 (quoting *Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 111 (1968)). The adequacy requirement thus furthers the “social interest in the efficient administration of justice and the avoidance of multiple litigation.” *Id.* (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 738 (1977)). Here, the *West Flagler* plaintiffs challenge an action by the Secretary and obtaining relief against the Secretary would fully redress their injury. Those plaintiffs have indicated no interest in suing the Tribe, and the Tribe’s sovereign immunity would block most efforts to that effect, *see Bay Mills*, 572 U.S. at 788–89. Accordingly, there is no possibility that the failure to join the Tribe would produce “multiple litigation.” *Pimentel*, 553 U.S. at 870 (citation omitted).

Finally, because the plaintiffs would have no “adequate remedy if the action were dismissed for nonjoinder,” the fourth Rule 19(b) factor also favors proceeding. Fed. R. Civ. P. 19(b)(4). Dismissing this suit would not allow the plaintiffs to proceed in an alternate forum, for example, after curing a defect in personal jurisdiction. To the contrary, holding that the Tribe is indispensable in this case, where the Tribe has made no particularized showing of prejudice, would require treating tribes as indispensable in *every* case that challenges the Secretary’s approval of a gaming compact. And under that rule, those approvals will *never* be subject to judicial review because the nonjoinder of a tribe will *always* require dismissal. The D.C. Circuit,

which reached the merits in another compact-approval case, has not adopted that extreme and unworkable conclusion. *See Amador Cty.*, 640 F.3d at 378–84.

The Tribe’s remaining arguments, both of which rely on unpublished and out-of-circuit decisions, do not persuade. To start, the Tribe invokes *Friends of Amador County v. Salazar*, 554 F. App’x 562 (9th Cir. 2014), which held that the Secretary could not adequately represent a tribe’s interest in a challenge to an IGRA gaming compact, *see id.* at 564–66. But there, the government’s responses at a status conference “caused the district court to suspect” that the government would litigate the case in line with “its national Indian policy, even if contrary to the Tribe’s interests.” *Id.* at 564. Consistent with that suspicion, the government later failed to “appear at oral argument or file any brief in the appeal.” *Id.* There is no similar evidence of “divergent interests” in this case. *Id.* The Tribe also cites a decision from the Northern District of Florida, which found that a tribe was indispensable to an IGRA compact-approval case while taking no position on whether the tribe’s interests diverged from the Secretary’s. *See PPI, Inc. v. Kempthorne*, No. 4:08-cv-248, 2008 WL 2705431 (N.D. Fl. 2008). But that decision erred in holding that the judicial review of a no-action approval would violate the tribe’s “sovereign right not to have its legal duties judicially determined without consent,” *id.* at \*4, and also failed to address most of the considerations discussed above. Accordingly, the Court will not follow the decision here.

For the reasons above, the Court finds that “equity and good conscience” permit this action to continue in the Tribe’s absence. Fed. R. Civ. P. 19(b). This conclusion resolves the Tribe’s motion to intervene. Because the Tribe moved to intervene solely to move for dismissal, because the Tribe seeks dismissal on the sole ground that it is indispensable, and because the Tribe is not indispensable, the Tribe’s motion for limited intervention is denied as moot.

**C. The Compact violates IGRA by authorizing gaming off Indian lands**

On the merits, it is well-settled that IGRA authorizes sports betting only on Indian lands. This requirement stems from IGRA § 2710(d)(8)(A), which authorizes the Secretary to approve compacts “governing gaming on Indian lands.” 25 U.S.C. § 2710(d)(8)(A). It is repeated in IGRA § 2710(d)(1), which lists the conditions under which “[c]lass III gaming activities shall be lawful on Indian lands.” *Id.* § 2710(d)(1). Altogether, over a dozen provisions in IGRA regulate gaming on “Indian lands,”<sup>6</sup> and none regulate gaming in another location. Indeed, if there were any doubt on the issue, the Supreme Court has emphasized that “[e]verything—literally everything—in IGRA affords tools . . . to regulate gaming on Indian lands, and nowhere else.” *Bay Mills*, 572 U.S. at 795.

It is equally clear that the Secretary must reject compacts that violate IGRA’s terms. The D.C. Circuit addressed this very issue in *Amador County v. Salazar*, which held that IGRA imposes “an obligation on the Secretary to affirmatively disapprove any compact” that is inconsistent with its terms, 640 F.3d at 382. The Circuit drew this obligation from IGRA § 2710(d)(8)(C), which provides that secretarial inaction may approve a compact “only to the extent the compact is consistent with” the Act, 25 U.S.C. § 2710(d)(8)(C). *See Amador County*, 640 F.3d at 381–82. And in explaining the obligation, the court held that the above provision creates “law to apply” for the review of secretarial inaction and emphasized that the Secretary “may not allow a compact that violates [the provision’s] caveat to go into effect.” *Id.* at 381. Because *Amador County* controls here, and because IRGA authorizes gaming only on Indian lands, it follows that the Secretary must reject any gaming compact that authorizes gaming at any

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<sup>6</sup> These provisions include 25 U.S.C. § 2710(a)(1), (a)(2), (b)(1), (b)(2), (b)(4), (d)(1), (d)(2)(A), (d)(2)(C), (d)(3)(A), (d)(5), (d)(7)(A)(ii), (d)(8)(A).

other location.

The instant Compact attempts to authorize sports betting both on and off Indian lands. In its own words, the Compact authorizes such betting by patrons who are “physically located in the State [of Florida] but *not on [the Tribe’s] Indian Lands.*” Compact § III(CC)(2) (emphasis added). That italicized phrase is no slip of the tongue, but instead describes the basic consequence of authorizing online betting throughout the State. Most locations in Florida are not Indian lands, which IGRA defines to mean lands “within the limits of any Indian reservation,” “held in trust by the United States for the benefit of any Indian tribe,” or “over which an Indian tribe exercises governmental power,” 25 U.S.C. § 2703(4). And although the Compact “deem[s]” all sports betting to occur at the location of the Tribe’s “sports book(s)” and supporting servers, *see* Compact § III(CC)(2), this Court cannot accept that fiction. When a federal statute authorizes an activity only at specific locations, parties may not evade that limitation by “deeming” their activity to occur where it, as a factual matter, does not. *See CSX Transp., Inc. v. Ala. Dep’t of Revenue*, 562 U.S. 277, 291 (2011) (“[A] statute should be interpreted so as not to render one part inoperative.”). Accordingly, because the Compact allows patrons to wager throughout Florida, including at locations that are not Indian lands, the Compact violates IGRA’s “Indian lands” requirement.

The Supreme Court’s decision in *Michigan v. Bay Mills Indian Community* confirms that conclusion. In that case, the State of Michigan sought to enjoin class III gaming at a casino that was operated by an Indian tribe but located outside Indian lands. *Bay Mills*, 572 U.S. at 791–93. To do so, it invoked a provision of IGRA that abrogates sovereign immunity for “gaming activity located on Indian lands,” 25 U.S.C. § 2710(d)(7)(A)(ii), under the theory that the casino was “authorized, licensed, and operated” from the tribe’s reservation, *Bay Mills*, 572 U.S. at 792.

The Court held that the provision did not apply. The Court explained that the phrase “gaming activity” in IGRA describes “the stuff involved in playing class III games,” not the administrative actions that support them. *Id.* And because the casino’s gaming activity occurred *off* Indian lands, the Court held that IGRA’s abrogation of immunity for gaming *on* Indian lands did not apply. *Id.* at 791–792. This same reasoning dooms the instant Compact, which rests on the theory that online betting occurs not where patrons actually play class III games, but instead at the location of the Tribe’s sportsbook and servers. Because the Compact authorizes patrons to wager *off* Indian lands, and because those bets clearly qualify as “gaming,” 25 U.S.C. § 2710(d)(8)(A), *Bay Mills* makes clear that the instant Compact authorizes gaming *off* Indian lands.

The Secretary’s Approval Letter, as submitted to the Tribe on August 6, 2021, lacks a plausible defense of the Compact’s scope. First, the letter notes that IGRA allows gaming compacts to govern the “application” of state and tribal laws that are relevant to class III gaming and the “allocation of criminal and civil jurisdiction” between states and tribes with respect to enforcing those laws, 25 U.S.C. § 2710(d)(3)(c)(i)-(ii). *See* Approval Letter at 7. But those provisions, which concern states and tribes’ regulatory responsibilities, say nothing about whether gaming activity occurs on “Indian lands,” 25 U.S.C. § 2710(d)(8)(A). Second, the Approval Letter notes that “[m]ultiple states have enacted laws that deem a bet to have occurred at the location of the [hosting] servers” and argues that the “Compact reflects this modern understanding of how to regulate online gaming.” Approval Letter at 8. But regardless of what states have done in their own jurisdictions, changes in state law do not affect the federal-law issues in this case. Finally, the Approval Letter argues that online sports betting has practical benefits. *See id.* at 8–9. But “[s]uch policy arguments, though proper for legislative

consideration, are irrelevant” here. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978).<sup>7</sup>

The Secretary’s lead argument in this litigation fares no better. That argument insists that the Compact authorizes only the online gaming activities that occur on Indian lands, including the receipt of online sports bets that are placed elsewhere. *See* Gov’t’s Supplementary Mem. at 9, Dkt. 41 (*West Flagler*). The Secretary further argues that a Florida statute permits the remaining gaming activities, which include placing those bets in the first instance. *See id.* at 9–10 (citing Fl. Stat. § 285.710(13)(b)). Finally, the Secretary argues that the sole purpose of the Compact’s “deeming” language is to divide regulatory responsibilities between the State and the Tribe. *See id.* at 12. For these reasons, the Secretary argues that all sports betting in Florida, including both placing bets and processing them, is lawful where it occurs.

The principal problem with the above argument is that it is incompatible with the Compact’s text. The interpretation of tribal-state gaming compacts is a question of federal law. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1075–82 (9th Cir. 2010) (reviewing the interpretation of a compact *de novo*). And contrary to the Secretary’s position, the plain text of the Compact affirmatively authorizes sports betting both on and off Indian lands. This authorization appears in Section IV(A) of the Compact, which provides the Tribe “is authorized to operate Covered Games on its Indian lands,” Compact § IV(A)—a category that includes sports betting, *see id.* § III(F)(5). Section IV(A) then provides, in its very next sentence, that sports wagers “made by players physically located within the State . . . shall be deemed to take place . . . on Indian Lands” at the “location of the servers or

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<sup>7</sup> The Approval Letter also argues that patrons may not wager online while “physically located on another Tribe’s Indian lands,” Approval Letter at 8 & n.14, on the theory that IGRA allows gaming “on Indian lands” only if that gaming is authorized by the “Indian tribe having jurisdiction over such lands,” *id.* (quoting 25 U.S.C. § 2710(d)(1)(A)(i)). That argument concedes that online betting occurs at the bettor’s location.

other devices used to conduct such wagering activity.” *Id.* § IV(A). By simultaneously authorizing sports betting on Indian lands and deeming gaming across Florida to occur on those same lands, Section IV(A) purports to authorize sports betting throughout the State.

Other provisions in the Compact make clear that the “deemed” clause in Section IV(A) plays an authorizing, rather than regulatory role. *See* Gov’t’s Suppl. Mem. at 4. The title of Section IV, “Authorization and Location of Covered Games,” suggests that the location of gaming is relevant to its authorization. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998). Other provisions of the Compact carefully divide regulatory responsibilities between the Tribe and the State. These responsibilities include promulgating rules on who can participate in sports betting, *see id.* § V(A)(2)(e)–(f), the determination of odds “at which wagers may be placed,” *id.* § V(A)(2)(d), the reporting of abnormal betting activity, *see id.* § V(A)(2)(j), and the prevention of compulsive gambling, *see id.* § V(D). They also include the resolution of patron disputes, *see id.* § VI, the enforcement of the Compact’s provisions, *see id.* § VII, and the regular auditing of gaming activities, *see id.* § VIII. Because the Compact allocates these responsibilities in such fine detail, the Court will not ascribe that same function to the Compact’s “deemed” clause, which would render that clause superfluous, *see Corley v. United States*, 556 U.S. 303, 314 (2009).

The final problem with the Secretary’s argument is that, although it attempts to read the Compact *in pari materia* with Florida law, its account of that law is inconsistent with the Florida Constitution. Article X, Section 30 of that Constitution provides that the State may expand sports betting only through a citizen’s initiative or an IGRA gaming compact. *See* Fl. Const. art. X, §§ 30(a)–(c). And because no citizens’ initiative has approved online sports betting, such betting can be lawful in Florida only if it is authorized by a gaming compact. *See id.* Against this



backdrop, it makes little sense to argue that the Florida Legislature authorized sports betting independently of the instant Compact. *See* Gov’t’s Suppl. Mem. at 4. To the contrary, the better explanation of the Legislature’s conduct is that it intended to remove any state-law barriers to the gaming it understood the Compact to authorize. *See* Fl. Stat. § 285.710(13)(b) (providing that games “conducted pursuant to” the Compact “do not violate the laws of this state”). It is important to be clear: this Court is not issuing a final decision on any question of Florida constitutional law. Nonetheless, to the degree that the Secretary invokes Florida law to explain the Compact’s terms, her argument misses the mark.

For the reasons above, the Court concludes that the Compact authorizes gaming both on and off Indian lands. The Compact accordingly violates IGRA’s “Indian lands” requirement, which means that the Secretary had an affirmative duty to reject it. This disposition warrants granting the *West Flagler* plaintiffs’ motion for summary judgment and eliminates any need to address their other arguments on the merits.

#### **D. The Appropriate Remedy Is to Vacate the Compact**

The last issue in this case is the plaintiffs’ remedy. The issue is governed by § 706 of the APA, which directs courts to “hold unlawful and set aside agency action” that is “not in accordance with law.” 5 U.S.C. § 706(2)(A). The “agency action” under review is the Secretary’s default approval of the Compact. *See* Compl. ¶ 1 (*West Flagler*). *Amador County* confirms that vacating the Secretary’s approval is appropriate. *See* 640 F.3d at 378 (explaining that, if a plaintiff successfully challenges a default approval, “the Secretary would have to reject the compact”). And because the Tribe may offer online gaming “only with secretarial approval of the compact,” *id.*; *see also* 25 U.S.C. § 2710(d)(1)(C), vacating the Secretary’s approval will fully redress the *West Flagler* plaintiffs’ injury. For those reasons, the Court concludes that the

appropriate remedy is to set aside the Secretary’s default approval of the Compact.<sup>8</sup>

The remedy also resolves the *Monterra* action. It is true that the *Monterra* plaintiffs have challenged the Compact under a broader legal theory than is addressed in this opinion. *See* Mem. in Supp. at 23–28 (*Monterra*). But those plaintiffs seek the same relief that this opinion provides. *See* Compl. ¶ 139 (*Monterra*) (requesting an “order setting aside defendants’ unlawful approval of the 2021 Compact”). And because vacating the Compact fully redresses the injuries that those plaintiffs allege, their request for summary judgment on other grounds is dismissed as moot. *See Dickson*, 964 F.3d at 55.

\* \* \*

In the Court’s understanding, the practical effect of this remedy is to reinstate the Tribe’s prior gaming compact, which took effect in 2010, *see* Indian Gaming, 75 Fed. Reg. 38,833 (July 6, 2010), and which may remain in effect until 2030, *see* Compl. Ex. D. (Prior Compact) § XVI(B), Dkt. 1-4 (*West Flagler*). *See* Fl. Stat. § 285.710(3)(b). In that respect, this decision restores the legal status of class III gaming in Florida to where it was on August 4, 2021—one day before the Secretary approved the new compact by inaction. Because the more recent Compact is no longer in effect, continuing to offer online sports betting would violate federal law. *See* 25 U.S.C. § 2710(d)(1)(C) (providing that “[c]lass III gaming activities shall be lawful on Indian lands only if . . . [they are] conducted in conformance with a Tribal-State compact . . . that is in effect”).

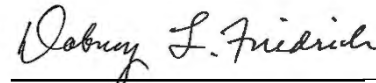
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<sup>8</sup> At oral argument, the *West Flagler* plaintiffs suggested that the Court could set aside the compact only to the extent that it conflicts with IGRA. But the Secretary forfeited any request for severance by omitting it from its motions to dismiss, its corresponding replies, and its supplemental briefs. In any event, the Court reads *Amador County*, which identifies the appropriate relief in this case as ordering the Secretary “to reject the compact,” as foreclosing line-by-line review of the Compact’s terms. *See* 640 F.3d at 378.

This decision does not foreclose other avenues for authorizing online sports betting in Florida. The State and the Tribe may agree to a new compact, with the Secretary's approval, that allows online gaming solely on Indian lands. Alternatively, Florida citizens may authorize such betting across their State through a citizens' initiative. *See* Fl. Const. art. X, §§ 30(c). What the Secretary may not do, however, is approve future compacts that authorize conduct outside IGRA's scope. And IGRA, as the Supreme Court explained in *Bay Mills*, authorizes gaming "on Indian lands, and nowhere else." 572 U.S. at 795.

### CONCLUSION

For the foregoing reasons, the *West Flagler* plaintiffs' Motion for Summary Judgment is granted, the *Monterra* plaintiffs' Motion for Summary Judgment is denied as moot, the Tribes' Motions to Intervene are denied, and the Secretary's Motions to Dismiss are denied. A separate order consistent with this decision accompanies this memorandum opinion.

  
DABNEY L. FRIEDRICH  
United States District Judge

November 22, 2021

# **EXHIBIT 4**

STATE OF FLORIDA  
DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION  
DIVISION OF PARI-MUTUEL WAGERING

CASE NO. 2021-043451

DEBARY REAL ESTATE HOLDINGS, LLC,

Petitioner,

v.

DEPARTMENT OF BUSINESS AND  
PROFESSIONAL REGULATION,  
DIVISION OF PARI-MUTUEL WAGERING

Respondent.

**PETITION FOR FORMAL ADMINISTRATIVE HEARING INVOLVING DISPUTED  
ISSUES OF MATERIAL FACT**

Pursuant to §§120.569 and 120.57(1), Fla. Stat. (2021) and Rule 28-106.201, F.A.C., the petitioner, DEBARY REAL ESTATE HOLDINGS, LLC, files herewith its petition seeking a formal administrative hearing involving disputed issues of material fact challenging the factual and legal basis for the Amended Notice of Intent to Revoke Permit served on the petitioner on November 12, 2021, a copy of which is attached as Exhibit 1 hereto (the “Notice”); and in support hereof states as follows:

**PARTIES**

1. The petitioner is the holder of Pari-Mutuel Permit No. 543 (the “Permit”) previously issued to the petitioner by the respondent, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING (hereinafter the “Division”). It is the Permit that is the pari-mutuel permit that the Division seeks to revoke in the Notice. For the purposes of this proceeding, the petitioner’s address, telephone number and email address shall be the same as the petitioner’s counsel.

2. The affected agency is the Division which maintains its office in Tallahassee, Florida. The Division is the administrative agency that regulates the conduct of horse racing and other pari-mutuel wagering activities at Florida's pari-mutuel facilities. The Division is the agency that issued the Notice to the petitioner. The Division has previously assigned the file or case number set forth above to this proceeding.

### OPERATIVE FACTS

3. On or about November 8, 2021, the Division issued the Notice (Exhibit 1 attached) evidencing its intent to revoke the Permit under certain amendments to §550.054 enacted by the legislature during a special session of the legislature held in May, 2021, which amendments that the Division apparently believes are currently in effect (the "2021 Amendments"). The Notice was served on the petitioner by certified mail on November 12, 2021.

4. In CS for SB 8A, the effective date of the amendment to §550.054 that the Division has relied upon in sending the Notice, as set forth in §42 thereof, provides:

Except as otherwise expressly provided in this act, **this act shall take effect on the same date that SB 2A or similar legislation takes effect**, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

5. In CS for SB 2A, the effective date of that enactment, which is referred to in ¶ 7 of CS for SB 8-A, provides:

Except as otherwise expressly provided in this act and except for this section, which shall take effect upon this act becoming a law, this act shall take effect only if the Gaming Compact between the Seminole Tribe of Florida and the State of Florida executed by the Governor and the Seminole Tribe of Florida on April 23, 2021, as amended on May 17, 2021, under the Indian Gaming Regulatory Act of 1988, **is approved or deemed approved and not voided by the United States Department of the Interior, and shall take effect on the date that notice of the effective date of the compact is published in the Federal Register.**

6. On or about November 22, 2021, a decision was issued by the United States

District Court for the District of Columbia in Case No. 21-cv-2192 (DLF), which action is styled West Flagler Associates et al. v. Deb Haaland, Secretary, U.S. Department of the Interior, et al. and which decision appears to have the effect of vacating the Department of the Interior’s approval of the “Gaming Compact” directly referenced to CS for SB 2A and indirectly referenced in CS for SB 8A, thereby calling into question whether the 2021 Amendments are currently in full force and effect, thereby making said amendments binding on the parties to this proceeding. (Hereafter, the November 22, 2021 decision of the United States District Court for the District of Columbia in Case No. 21-cv-2192 (DLF) shall be referred to as the “Federal Court Decision.”)

7. That the Permit held by the petitioner was issued under the provisions of §550.334, not under the provisions of §550.054.

8. The Notice did not provide any indication that the petitioner will receive compensation from the Division or the State on account of the forced taking of its property.

9. Because the class of permits to which the revocation provisions of CS for SB 8A appears to apply will be a closed class on whatever date CS for SB 8A becomes or became effective, CS for SB 8A is a unconstitutional and unenforceable special law enacted without compliance with requirements for the proper adoption of special laws as set forth in Article III, §10 of the Florida Constitution.

### **THE PETITIONER’S STANDING**

10. As the holder of the pari-mutuel permit subject to a notice of intent to revoke that specific permit, the petitioner has standing to initiate this proceeding to challenge such revocation.

### **STATEMENT OF DISPUTED ISSUE OF MATERIAL FACT**

11. On account of the Federal Court Decision, the petitioner disputes, as a matter of fact or as a matter of ultimate fact, that the 2021 Amendments are currently in full force and

effect; and, accordingly, if the 2021 Amendments are not currently being in effect, whether, as a matter of fact or as a matter of ultimate fact, the Division currently possesses the statutory authority to revoke the Permit.

12. Because it is readily apparent from the literal text of the 2021 Amendments that those amendments do not apply to pari-mutuel permits other than to permits issued under the provisions of §550.054, any interpretation of the 2021 Amendments applying those provisions to permits other than permits issued under §550.054 (such as the Permit) is an unadopted rule which, as provided in §120.57(1)(e), cannot be relied upon as the basis for final agency action.

13. Because this petition raises both disputed issues of material fact and disputed mixed issues of law and fact, the petitioner is entitled to an evidentiary hearing before an Administrative Law Judge appointed by the Division of Administrative Hearings (“DOAH”) pursuant to §§120.569 and 120.57(1).

**RESERVATION OF RIGHTS TO CHALLENGE THE FACIAL AND AS APPLIED  
CONSTITUTIONALITY OF THE 2021 AMENDMENT**

14. It is the petitioner’s belief that the 2021 Amendments, to the extent that they authorize the taking of the petitioner’s valuable property rights without notice, without compensation and in an arbitrary, capricious and hypocritical manner, is an unconstitutional and unenforceable enactment of the Florida legislature in that those amendments: (a) violate the petitioner’s constitutional rights, under both the Florida and Federal constitutions, to due process of law, to equal protection under the law, to just compensation for the unauthorized taking of the plaintiff’s property; (b) violate of the provisions of Article III, §10 of the Florida Constitution prohibiting special laws; and (c) possibly violate other, yet to be identified constitutional provisions. Because the resolution of issues of statute constitutionality are generally beyond the jurisdiction of administrative agencies including DOAH, the Florida Supreme Court in *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Imp. Trust Fund*, 427 So.2d



153 (Fla. 1982), explained the alternative methods by which a participant in an administrative proceeding can properly assert a constitutional challenge to the statute upon which the administrative proceeding is based. Per *Key Haven*, one of the options available to such a petitioner is to raise the constitutional issue in the petition initiating the administrative proceeding, then to create a reviewable record in that proceeding and then to ask the District Court to review the constitutional issue as part of any judicial review under §120.68. The petitioner reserves the right to develop a record in this proceeding that addresses the petitioner's claims that the 2021 Amendments are unconstitutional and are therefore unenforceable enactments of the legislature. Another option per *Key Haven* is the filing of a declaratory action in a trial court (which is presently under consideration by the petitioner). Should a trial court action be initiated, then the petitioner reserves the right to seek a stay of these proceedings until the conclusion of the constitutional challenge as authorized in the decisions in *Key Haven*, *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So.2d 695 (Fla. 1978) and *E.T. Legg and Co. v. Franza*, 383 So.2d 962 (Fla. 4th DCA 1980).

#### **PRAYER FOR RELIEF**

WHEREFORE, the petitioner prays for that the Division refer this matter to the Division of Administrative Hearings to conduct a formal evidentiary hearing pursuant to §§120.569 and 120.57(1) and that a recommended order and a final order be entered rejecting the Division's intended revocation of the Permit for the reasons herein stated.

**S/DAVID S. ROMANIK**

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David S. Romanik, P.A.  
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Ocala, Fl 34471  
954-610-4441  
[davidromanik@mac.com](mailto:davidromanik@mac.com)

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of November, 2021, a true copy of the foregoing petition was sent by electronic mail to the following personnel of the respondent, the Division of Pari-Mutuel Wagering:

Louis Trombetta  
Director, Division of Pari-Mutuel Wagering  
[louis.trombetta@myfloridalicense.com](mailto:louis.trombetta@myfloridalicense.com)

Ronda Bryan  
Clerk, Department of Business and Professional Regulation  
[ronda.bryan@myfloridalicense.com](mailto:ronda.bryan@myfloridalicense.com)

Bryan Barber  
Clerk, Division of Pari-Mutuel Wagering  
[bryan.barber@myfloridlicense.com](mailto:bryan.barber@myfloridlicense.com)

Elizabeth Stinson  
Staff Counsel, Division of Pari-Mutuel Wagering  
[elizabeth.stinson@myfloridalicense.com](mailto:elizabeth.stinson@myfloridalicense.com)

**S/DAVID S. ROMANIK**

# **EXHIBIT 1**

Julie I. Brown, Secretary

Ron DeSantis, Governor

November 8, 2021

Debary Real Estate Holdings, LLC  
444 Seabreeze Boulevard, Ste. 1000  
Daytona Beach, Florida 32118

**AMENDED NOTICE OF INTENT TO REVOKE PERMIT**

To Whom It May Concern:

This Amended Notice of Intent to Revoke Permit ("Notice") serves to inform you that the Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Division") intends to revoke the permit issued to Debary Real Estate Holdings, LLC ("Debary Real Estate Holdings") for the following reason:

1. Debary Real Estate Holdings is the holder of pari-mutuel permit number 543 (Permit 543).
2. Permit 543 was not issued pursuant to section 550.3345, Florida Statutes.
3. Permit 543 was issued pursuant to section 550.334, Florida Statutes.
4. Debary Real Estate Holdings did not hold an operating license for the conduct of pari-mutuel wagering for Permit 543 for fiscal year 2020-2021.
5. During the 2021 Florida Legislative Special Session, chapter 550, Florida Statutes was amended. *See* ch. 2021-271, §7, at page 9, Laws of Fla.
6. Section 550.054(9)(c), Florida Statutes, now reads, "[t]he division shall revoke the permit of any permitholder, other than a permitholder issued a permit pursuant to s. 550.3345, who did not hold an operating license for the conduct of pari-mutuel wagering for fiscal year 2020-2021. A permit revoked under this paragraph is void and may not be reissued."

Based on the foregoing, the Division finds that:

1. The plain language of section 550.054(9)(c), Florida Statutes, expressly requires the Division to revoke the permits of permitholders, other than permitholders issued a permit pursuant to section 550.3345, Florida Statutes, who did not hold an operating license for the conduct of pari-mutuel wagering for fiscal year 2020-2021.
2. Debary Real Estate Holdings was issued a permit pursuant to section 550.334, Florida Statutes.

3. Debary Real Estate Holdings did not hold an operating license for the conduct of pari-mutuel wagering for fiscal year 2020-2021.

Therefore, the Division intends to **REVOKE** Permit 543 issued to Debary Real Estate Holdings.

Pursuant to section 120.57, Florida Statutes, you may request a hearing to challenge the Division's decision within twenty-one (21) days of receipt of this Notice, as provided for in rule 28-106, Florida Administrative Code, and the attached Notice of Rights.

If you do not request a hearing within twenty-one (21) days of your receipt of this Notice, this Notice will become the Agency's Final Order. If this Notice becomes a Final Order, you will have 30 days to file for an appeal pursuant to section 120.68, Florida Statutes. The Final Order will become effective, and Permit 543 will be revoked, on the date the Final Order is filed with the Agency Clerk.

Sincerely,

  
\_\_\_\_\_  
Louis Trombetta, Director  
Division of Pari-Mutuel Wagering

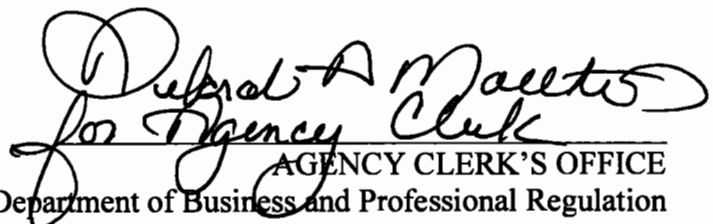
Attachment: Notice of Rights

CERTIFICATE OF SERVICE

I hereby certify this 9 day of November 2021, that true copies of the foregoing "Notice of Intent to Revoke Permit" have been served via Certified Mail upon:

**Debary Real Estate Holdings, LLC**  
444 Seabreeze Boulevard, Ste. 1000  
Daytona Beach, Florida 32118

**Frank B. Sanderlin, Registered Agent**  
444 Seabreeze Boulevard, Ste. 1000  
Daytona Beach, Florida 32118

  
\_\_\_\_\_  
AGENCY CLERK'S OFFICE  
Department of Business and Professional Regulation

## NOTICE OF RIGHTS

This is an action that may affect your substantial interests. Mediation of this administrative dispute is not available. However, pursuant to chapter 120, Florida Statutes, you may request a hearing on this matter, provided a written request is filed with the agency. The request must comply with the requirements of rules 28-106.111 and 28-106.201 or 28-106.301, Florida Administrative Code. The written request must be received by the Division within 21 days of your receipt of this notice.

If the Division determines there are disputed issues of material fact, the case will be forwarded to the Division of Administrative Hearings for a formal hearing. If there are no disputed issues of material fact, the Division will schedule an informal hearing. You will be notified of the date, time and place of the hearing. In either case, you have the burden of establishing entitlement to the permit.

In a formal hearing, you have the right to appear in person on your own behalf, to be represented by an attorney, to bring witnesses and present evidence, to cross-examine any witnesses produced against you by the State, and to have subpoenas issued on your behalf.

In an informal hearing, you have the right to appear in person on your own behalf, to be represented by an attorney, and to submit whatever information you desire to show entitlement to the permit.

If a written request for a hearing is not received within 21 days of your receipt of this notice, the foregoing Notice of Intent to Revoke Permit will become a Final Order.

Practice in all of the above proceedings are governed by chapter 120, Florida Statutes, and rule 28-106, Florida Administrative Code.