

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

**CHEYENNE ARAPAHO TRIBES)
OF OKLAHOMA)
100 Red Moon Circle)
Concho, OK 73022)**

Plaintiffs,)

v.)

Civil Action No.

**SALLY JEWELL)
Secretary)
United States Department of the Interior)
1849 C Street NW)
Washington, DC 20240)**

**KEVIN K. WASHBURN)
Assistant Secretary – Indian Affairs)
United States Department of the Interior)
1849 C Street NW)
Washington, DC 20240)**

Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. The Assistant Secretary for Indian Affairs (Assistant Secretary) of the United States Department of Interior (Department) has assumed without actually deciding that federally recognized Tribes may engage in online gaming, if such operations are otherwise consistent with the requirements of

the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*

2. However, on or about November 6, 2013, the Assistant Secretary acted a second time in purported disapproval of an agreement between the Cheyenne Arapaho Tribes (CNA) and State of Oklahoma intended to clarify that a Tribal State Gaming Compact (Compact) negotiated by and between the CNA and the State, and to permit the CNA to engage in online gaming operations serving individual players in international markets where online gaming is permitted. *First Amended Settlement Agreement Between the State of Oklahoma and the Cheyenne-Arapaho Tribes* (September 12, 2013).
3. The Assistant Secretary disapproved an agreed clarification between the CNA and the State this second time around on the ground it “introduces an inappropriate basis for revenue sharing in a Compact. The State cannot control, nor can it offer, exclusive access to a market of patrons located entirely outside the United States and its territories. As a result, the State’s concession [in exchange for revenue sharing] is illusory.” *Kevin K. Washburn, Assistant Secretary-Indian Affairs, to the Honorable Mary Fallin, Governor of Oklahoma* (November 6, 2013), p. 2.
4. The finding that “the State’s concession is illusory” is plainly mistaken: It is not State agreement to “control ... exclusive access to a market of patrons located outside the United States and its territories” that warrants a State

governmental interest in Tribal revenue. It is rather the State's limitations on non-Indian owned enterprises in Oklahoma that restrict access to players in these same international markets that warrant revenue sharing with the State.

5. The CNA have an enormous stake in offering online gaming to an international market as expressly agreed by State and Tribal parties: The Tribe has devoted precious and significant resources to development of the requisite and stringent infrastructure and technical requirements for a website compliant with Tribal, State and Federal law, and reasonably anticipated income from the operation sufficient both to repay the investment, and to become a significant new source of revenue for Tribal governance and other important purposes authorized by IGRA.
6. The CNA therefore seek declaratory and injunctive relief from final agency action on the part of the U.S. Department of Interior to prevent operation of the CNA's online gaming website directed to an exclusively international market.

II. JURISDICTION AND VENUE

7. The Court has jurisdiction of the controversy pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, 28 U.S.C. § 1331 and 28 U.S.C. § 1362.

8. Venue lies pursuant to 28 U.S.C. § 1391(e), in that a substantial part of the events giving rise to the claim occurred in this judicial district.

III. THE PARTIES

9. Plaintiff Cheyenne Arapaho Tribes of Oklahoma constitute a federally recognized Indian Tribe headquartered in Concho, Oklahoma. The CNA operate several Class III gaming operations on Tribal trust lands in Southwest Oklahoma pursuant to a State-Tribal Compact with the State of Oklahoma approved the U.S. Department of Interior. *70 Fed. Reg.* 18041 (April 8, 2005).
10. Defendant Sally Jewell is the Secretary of the U.S. Department of the Interior. She is named in her official capacity.
11. Defendant Kevin K. Washburn is the Assistant Secretary for Indian Affairs. He is named in his official capacity.

Upon information and belief, Plaintiff alleges the following:

IV. FACTS

A. INDIAN GAMING REGULATORY ACT (IGRA)

12. Congress enacted the Indian Gaming Regulatory Act of 1988 in order to provide “a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.” 25 U.S.C. § 2702.

13. IGRA serves to balance the sovereign interests of Tribal, State and Federal governments in the regulation of Indian gaming operations in the United States. Congress assigned each a role in regulating Tribal operations that varies with category of game involved: Class I games are subject almost exclusively to Tribal regulation; Class II games are subject to regulation by Tribal and Federal government; and the most sophisticated and potentially lucrative Class III games are subject to a regulatory scheme calling for involvement on the part of Tribal, State and Federal government.
14. A Tribe may offer Class III games only if (a) the Tribe or its potential operation is “located in a State that permits such gaming for any purpose by any person, organization or entity”, 25 U.S.C. § 2710 (d) (1) (B); (b) the governing body of the Tribe and the National Indian Gaming Commission – an agency within the U.S. Department of Interior – have given approval; and (c) the Tribe and State have negotiated for and agreed upon a “compact” that has been approved by the Secretary of the Interior.
15. IGRA designates the Secretary of the Interior “to approve any Tribal-State compact ...”, 25 U.S.C. § 2710 (d) (8) (A), and provides that the Secretary “may disapprove a compact ... only if such compact violates (I) any provision of [IGRA], (ii) any other provision of Federal law . . . , or (iii) the trust obligations of the United States to Indians.” *Id.*, § 2710 (d) (8) (B).

16. A Tribal–State compact may include a revenue sharing provision, if “ necessary to defray the [State’s] cost of regulating [Indian gaming] activity”, 25 U.S.C. § 2710 (d) (3) (C) ; and if the State bargains for a share of the gaming revenue in exchange for meaningful concessions to the Tribe.

**B. OKLAHOMA STATE-TRIBAL GAMING ACT
AND MODEL STATE TRIBAL GAMING COMPACT**

17. In 2004, the Oklahoma Legislature enacted the State-Tribal Gaming Act, 3A O.S. Supp. 2004, §§ 261-282. The Act’s provisions include a suggested “Model State Tribal Gaming Compact”, *id.*, § 281, for federally recognized Tribes seeking to conduct Class III gaming operations in Oklahoma.
18. Before enactment of the State-Tribal Gaming Act, Tribes in Oklahoma were restricted to Class II gaming operations, and to pari-mutuel betting in counties where voters had given approval pursuant to the Oklahoma Horse Racing Act of 1982.
19. The Model State Tribal Compact set forth by the State-Tribal Gaming Act authorizes Tribes to conduct Class III gaming operations as permitted by IGRA, and to use any resulting adjusted gross revenues for any or all of the purposes as also permitted by IGRA, which include funding tribal government operations or programs; providing for the general welfare of the tribe and its members; promoting tribal economic development; and funding operations of local government agencies.

20. The Model State Tribal Compact provides for operation of “covered games” – which may include use of any of the “Technical Aids” permitted under

IGRA – and defines these games as follows:

an electronic bonanza-style bingo game, an electronic amusement game, an electronic instant bingo game, nonhouse-banked card games; any other game, if the operation of such game by a tribe would require a compact and if such game has been: (i) approved by the Oklahoma Horse Racing Commission for use by an organizational licensee, (ii) approved by state legislation for use by any person or entity, or (iii) approved by amendment of the State-Tribal Gaming Act; and upon election by the tribe by written supplement to this Compact, any Class II game in use by the tribe, provided that no exclusivity payments shall be required for the operation of such Class II game
....

21. The Act also provides for certain geographic exclusivity to any Tribe engaging in Class III operations, limits the number of Class III machines at non-Indian owned race tracks to a maximum of 750 machines – Tribal operations were not so limited – and prohibits non-Indian enterprises from operating certain machines.
22. In exchange for these concessions from the State, and in recognition of the added burden on public resources imposed by Tribal gaming operations, the State-Tribal Gaming Act and its model Compact call for revenue sharing with the State on the following basis: annual payments in the amount of 4% of the first \$10 million in annual net revenue from prescribed electronic

- games; 5% of the next \$10 million; 6% of any subsequent amount; and a monthly 10% of net win deriving from “non-house-banked” card games.
23. The CNA and more than twenty other federally recognized Tribes in Oklahoma have negotiated for and entered State-Tribal Compacts on the basis of the “Model State Tribal Gaming Compact” set forth by the Oklahoma State-Tribal Gaming Act of 2004.
 24. The U.S. Department of the Interior approved the CNA State-Tribal Compact, notice of which was thereafter published in the Federal Register. *70 Fed. Reg.* 18041 (April 8, 2005).
 25. Until action taken by the Assistant Secretary in August 2013 purporting to disapprove the first agreement to clarify terms of the CNA State-Tribal Compact, the U.S. Department of Interior had never before acted to prevent a federally recognized Tribe in Oklahoma from operating of a particular game or games pursuant to the Oklahoma State-Tribal Gaming Act.

D. CNA DEVELOPMENT OF AN ONLINE GAMING WEBSITE, AND OBJECTION FROM THE STATE

26. The CNA operate several casinos on Tribal trust lands in Southwest Oklahoma. They have long desired to open additional operations near major population centers in other parts of the State, but been thwarted by land acquisition policies and other regulations that the U.S. Department of

Interior has applied in ways allowing a few large and powerful Tribes in the State to acquire dozens of casino sites – and to control two-thirds of the State’s 3.8 billion dollar Indian gaming market – while limiting the scope of other Tribal operations by arbitrarily applied laws and regulations pursuant to the National Environmental Policy Act (“NEPA”) and IGRA.

27. Having little prospect of additional “brick and mortar” gaming operations in the State to fund programs vital to the Tribe and its people in light of regulatory obstacles, and having informal assurance of eventual approval from dependable sources in the federal government, the CNA began a long and costly effort to develop an online poker website as an added source of sorely needed revenue.
28. The effort culminated in an online website called *pokertribes.com*, which was carefully developed in keeping with stringent infrastructure, technical and other requirements ensuring operations in compliance with Tribal, State, and Federal law.
29. In or about June 2012 the CNA began offering *pokertribes.com* to qualified individual players on a “free play” basis without geographic restriction.
30. The State objected to operation of the website on the ground that online gaming directed to State and national markets – which is not otherwise permitted in Oklahoma – represented a “material violation” of the CNA

State-Tribal Compact.

**E. SETTLEMENT AGREEMENT CLARIFYING
TERMS OF CNA TRIBAL- STATE COMPACT**

31. The CNA did not and does agree with the State’s objections to operating *pokertribes.com* and similar online gaming websites on Tribal trust lands in Oklahoma directed to individual players within the United States and its territories. They nonetheless entered negotiations with the State directed to resolution of the controversy on a mutually agreeable basis pursuant to the dispute resolution provision of the Tribal-State Compact.
32. The negotiations culminated in an agreement to resolve the controversy which the parties styled *Settlement Agreement Between the State of Oklahoma and the Cheyenne–Arapaho Tribes (“Settlement Agreement”)* (April 5, 2013).
33. The *Settlement Agreement* included “Stipulations” to the effect:
 1. ... that any gaming by the Tribes, in all physical and electronic forms, is covered conduct under the State Tribal Gaming Compact.
 2. ... that gaming by the Tribes, regardless of the location of any portion of a gaming transaction, is covered conduct under the State Tribal Gaming Compact.
 3. ... that all forms of internet and/or electronic gaming by individual players, who are not physically present at all times in a facility located entirely on Indian lands as defined by IGRA, is covered conduct under the State Tribal Gaming Compact, but is not permissible and is prohibited if the individual player(s) are

located or reside within the boundary of the United States and its territories during any portion of a gaming transaction.

4. ... That all forms of internet and/or electronic gaming by individual players, who are not physically present at all times in a facility located on Indian lands as defined by IGRA, is covered conduct under the State Tribal Gaming Compact, and is permissible if the individual player is located or resides outside the boundary of the United States or its territories during the entirety of a gaming transaction pursuant to the attached technical standards of play.... *Id.* at

34. Attached to the *Settlement Agreement* were detailed and rigorous technical standards of participation required and approved by the CNA Gaming Commission.

35. Developed by a testing laboratory certified by the Oklahoma State Racing Commission pursuant to the Tribal-State Compact, these *Technical Standards for Internet Gaming Systems Utilized in International (Non USA) Markets Where Internet Gaming is Not Illegal* (April 3, 2013) (“*Technical Standards*”) were designed to “address the compliance requirements for Internet Gaming Systems pursuant to the Tribal-State Compact. Such systems permit ... gaming/gambling activities via the internet from designated geographically permitted locations, or more specifically, international locations where law and regulations permit and regulate Internet Gaming.” *Id.* at 2.

36. The *Technical Standards* set forth numerous requirements and safeguards

ensuring compliance with the laws of the country where any online gaming transaction takes place, including requirements with respect to “Account Funding” that individual players

... wishing to conduct a financial transaction must have an established account; the creation of such account must require a valid government-issued form of identification. Financial transactions must be conducted by a means conforming with applicable laws.

Id. at 11.

37. The *Technical Standards* set forth the following requirements with respect to “Verification” of eligibility to play:
- a) Players must hold a valid account before commencement of gaming.
 - b) The IGS [Internet Gaming System] must reasonably identify the location, age, and identity of a player before allowing them to bet.
 - c) The IGS must have the reasonable capability to deny access to under-aged persons.
 - d) The IGS must have the reasonable capability to deny access to persons outside of the permissible geographic location.
 - e) Player access to an IGS must involve at least a User ID and Password.
 - f) Initial passwords are set by the player; however, any subsequent password resets must be issued in a secure manner.

Ibid.

38. The *Settlement Agreement* between the parties of April 5, 2013, also provided that “any other federally recognized tribe with a valid State-Tribal Gaming Compact with the State”, would have the same opportunity to engage in online gaming operations directed to an international market, but

“only upon entering into a [similar] Settlement Agreement with the State.”

Id.

39. As for revenue sharing between the Tribal and State parties, the *Settlement Agreement* provided for payment of twenty percent to the State “of all gaming revenues generated by all forms of internet and/or electronic gaming ...” *Id.*

F. PURPORTED DISAPPROVAL OF SETTLEMENT AGREEMENT ON BASIS OF REVENUE TO STATE

40. The CNA and the State both regarded the *Settlement Agreement* as a clarification of the CNA Tribal–State Compact, rather than a substantive change requiring approval of the Secretary of Interior pursuant to IGRA, 25 U.S.C. § 2710 (d) (8) (A).
41. The CNA nonetheless forwarded the *Settlement Agreement* to the Department of the Interior’s Office of Indian Gaming, as a matter of courtesy, and in recognition of the Department of the Interior’s broad general interest in Tribal gaming operations throughout the country.
42. On or about August 1, 2013 the Assistant Secretary for Indian Affairs wrote the parties to inform them that the Department of the Interior was not “reach[ing] the issue of whether internet gaming as contemplated in the Agreement was lawful,” but that he was nonetheless indicating disapproval on behalf of the Department based on the revenue sharing term of the

Settlement Agreement calling for twenty percent of any online revenue to go to the State. *Kevin K. Washburn to Honorable Janice Prairie Chief Boswell* (August 1, 2013).

43. The Assistant Secretary indicated, first, that “the State has not offered a meaningful concession” sufficient to justify a share in any revenue generated in online operations:

[E]ven if such [online] gaming is lawful, the Agreement does not expand the scope of gaming authorized under the existing Compact. Rather, it provides a different method of delivering types of games already permitted under the Compact. We recently determined that authority to operate wireless gaming was not a concession because it was simply an extension of the Class III gaming authorized by the proposed compact....

Id., p. 4.

44. Second, the Assistant Secretary indicated that, “[e]ven if a different method of delivering types of games under an existing Compact were a meaningful concession, the Tribes have not demonstrated that this concession would provide substantial economic benefits to the Tribes in a manner justifying the revenue sharing required.” *Ibid.*

**G. SETTLEMENT AGREEMENT MODIFIED TO
PROVIDE REVENUE SHARING ON THE SAME BASIS
PRESCRIBED BY STATE-TRIBAL COMPACT**

45. CNA and State officials believed the Assistant Secretary to be without authority to disapprove the *Settlement Agreement*, but nonetheless renewed

discussions towards addressing the objections in order to enable CNA online gaming operations to commence promptly without the specter of possible litigation with the Department of the Interior.

46. On September 12, 2013, the parties entered a *First Amended Settlement Agreement Between the State of Oklahoma* (“*First Amended Settlement Agreement*”).
47. The *First Amended Settlement Agreement* included reference to the Assistant Secretary’s purported disapproval of the original *Settlement Agreement* between the parties, “based in part on the gaming revenues due the State exceeding those rates reflected in the Compact.” *Id.* at 1.
48. The CNA therefore “agree[d] [that] all payments [deriving from online gaming operations] shall be made in accordance with [existing] *State Tribal Gaming Compact* provisions” *Id.* at 2.
49. Terms relating to online gaming operations directed to an international market were otherwise virtually identical to those set forth in the original *Settlement Agreement* between the parties. *Ibid.*
50. The CNA and the State both regarded this *First Amended Settlement Agreement* as a clarification of the CNA Tribal–State Compact, rather than a substantive change requiring approval of the Secretary of Interior pursuant to IGRA, 25 U.S.C. § 2710 (d) (8) (A).

51. The CNA nonetheless forwarded the *First Amended Settlement Agreement* to the Department of the Interior's Office of Indian Gaming, again as a matter of courtesy, and in continued recognition of the Department's broad general interest in Tribal gaming operations throughout the country.
52. The CNA also forwarded a comprehensive market study of the world-wide online gaming market, and potential revenue to the Tribes deriving from an online gaming website directed to an international market to which the CNA would have access to the exclusion of non-Indian enterprises in Oklahoma: The study projected some 132 million dollars in gross annual revenue to the Tribes by the year 2018 if by then the CNA website attracted just 2% of the market worldwide.

F. PURPORTED DISAPPROVAL OF *FIRST SETTLEMENT AGREEMENT* ON A DIFFERENT GROUND

53. On or about November 6, 2013, the Assistant Secretary wrote the parties indicating a purported disapproval of the *First Amended Settlement Agreement* on behalf of the Department of the Interior. *Kevin K. Washburn to the Honorable Janice Prairie-Chief Boswell* (November 6, 2013).
54. The Assistant Secretary failed to mention that the *First Amended Settlement Agreement* made the State's share of any online gaming revenue consistent with the revenue sharing provision of the CNA State-Tribal Compact approved by the Department.

55. The Assistant Secretary also invoked a different ground for purported disapproval of this second effort by Tribal and State parties to enable the CNA to offer online gaming to an exclusively international market where such gaming is permissible:

The Department is committed to adhering to IGRA’s statutory restrictions on tribal-state gaming compacts. IGRA prohibits the imposition of a tax, fee, charge or other assessment on Indian gaming except to defray the state’s costs of regulating Class III gaming activities. 25 U.S.C. § 2710 (d) (4). To determine whether a state may collect revenues from Indian gaming, we ordinarily consider whether the state has offered “meaningful concessions” to the tribe. For purposes of this decision, we assume, without deciding, that the Tribes may operate internet gaming, and may include that gaming within the scope of a Compact, to the extent that internet gaming may be permitted by IGRA. Here, the proposed expansion of the Compact’s definition of covered games to include persons located outside the United States and its territories introduces an inappropriate basis for revenue sharing in a Compact. The State cannot control, nor can it offer, exclusive access to a market of patrons located exclusively outside the United States and its territories. As a result, the State’s concession is illusory. Therefore, the revenue sharing requirement for the proposed internet gaming activities amounts to an impermissible tax in violation of IGRA. *See* 25 U.S.C. § 2710 (d) (4). Based upon this determination, the Agreement is disapproved.

Id. at 2.

56. The State of Oklahoma has since reiterated that “the State Tribal Gaming Act of 2004 prescribing the terms of the Class III Compact (Compact) between the Tribes and the State fully authorizes the Amended Settlement and igaming directed to an international market contemplated by the parties,” *Steven K. Mullins, General Counsel to Office of Governor Mary*

Fallin, to Governor Janice Prairie-Chief Boswell (December 9, 2013), p. 3,

and among the reasons stated the following:

1. The Compact recognized and authorized characteristics of the “covered games”, which included the use of Technological Aids pursuant to IGRA;
2. The Compact exclusivity fee was justified and not illusory because of the exclusivity it provided to Tribes located within the State as opposed to third parties also located within the State; and
3. The Compact exclusivity fee also applies to the operation of internet gaming websites, thereby upholding the original bargained for benefit to the Tribes.

Id., pp. 1-2.

V. CLAIM

57. The allegations set forth in paragraphs 1 through 54 are incorporated herein by reference.
58. The Assistant Secretary’s purported disapproval of the parties *First Amended Settlement Agreement* permitting the Cheyenne Arapaho Tribes to engage in online gaming directed to individual players in an international market was arbitrary and capricious, an abuse of discretion and otherwise in violation of law.

VI. PRAYER FOR RELIEF

WHEREFORE, the Cheyenne Arapaho Tribes of Oklahoma respectfully request that this Court:

- A. Declare, adjudge and decree that any final agency action taken by the U.S. Department of the Interior to interfere with or obstruct operation of *pokertribes.com* and any similar online CNA website offered to qualified players outside the United States and its territories would be and is arbitrary and capricious, an abuse of discretion and otherwise in violation of law;
- B. Enjoin the U.S. Department of the Interior against taken to interfere with or obstruction of *pokertribes.com* and any similar online CNA website offered to qualified players outside the United States and its territories;
- C. Grant Plaintiff an award of attorney fees and costs; and
- D. Grant such additional relief as the Court may deem just and proper.

Respectfully submitted this ____ day of December, 2013,

/s/ Richard J. Grellner
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