No. 16-3015

In The
United States Court of Appeals
for the Tenth Circuit

STATE OF KANSAS, *et al.*,
Plaintiffs-Appellants,

v.

NATIONAL INDIAN GAMING COMMISSION, *et al.*,
Defendants-Appellees.

On Appeal from an Order of Dismissal Entered by the Honorable Daniel D. Crabtree, United States District Court for the District of Kansas, No. 15-CV-4857-DDC-KGS.

RESPONSE BRIEF OF THE QUAPAW TRIBAL APPELLEES

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August 1, 2016 ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the appellees, the Downstream Development Authority of the Quapaw Tribe of Oklahoma (O-Gah-Pah), the Quapaw Casino Authority of the Quapaw Tribe of Oklahoma (O-Gah-Pah), the Quapaw Tribal Development Corporation, T.C. Bear, John L. Berrey, Barbara Kyser Collier, Art Cousatte, Thomas Crawfish Mathews, Donna Mercer, George R. "Ranny" McWatters, Jr., Larry Ramsey, Tamara Smiley-Reeves, Rodney Spriggs, Trenton R. Stand, and Fran Wood, hereby make the following disclosures:

For purposes of this action, the following are the parent companies and publicly held corporations, along with their subsidiaries and affiliates, that own a ten percent (10%) or more interest in the disclosing parties, or that have a financial interest in the outcome of this litigation:

> All of the institutional appellees are governmental subdivisions of the Quapaw Tribe of Oklahoma, a federally recognized Indian tribe, and are wholly owned by the Quapaw Tribe. The individual appellees are tribal officers, employees, agency or department heads, and directors of enterprises of the Quapaw Tribe.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to 10th Cir. R. 28.2(C)(1), the Quapaw Tribal Appellees, have no prior or related appeals to disclose.

JURISDICTIONAL STATEMENT

As the District Court correctly recognized, the appellants failed to establish that federal courts have subject matter jurisdiction over their claims against the National Indian Gaming Commission (the "NIGC"), the named federal officers, and the tribal party defendants. In addition, the District Court properly recognized that the appellants' claims against the federal agencies and officers are barred by 25 U.S.C. § 2401(a).

ISSUES PRESENTED FOR REVIEW

The issues presented for review are:

1. Did the District Court err in holding that an advisory opinion by the NIGC is not a final agency action subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (the "APA"), and in dismissing the State of Kansas' challenges to the NIGC's advisory letter opinion for lack of subject matter jurisdiction?

STATEMENT OF THE CASE

This case arises from an ill-conceived effort by the State of Kansas to protect a planned state-owned casino from competition, which constitutes an unfounded intrusion into an Indian tribe's inherent and federally recognized rights to regulate its governmental activities on Indian lands. Under the Indian Gaming Regulatory Act of 1988 (the "IGRA"), tribes have exclusive jurisdiction to regulate class I and class II gaming on their lands. *See* 25 U.S.C. § 2710(a). Federal law further recognizes that states have no jurisdiction over class II gaming on Indian lands so long as they do not outright prohibit such gaming—which Kansas does not. The IGRA thus provides a regulatory role for

states *only* with respect to class III gaming, which a tribe may conduct only pursuant to a tribal-state gaming compact. *See id.* § 2710(d)(1). Only if a tribe obtains a compact does a state have any role in regulating gaming on Indian lands, and then only with respect to class III gaming. No such compact exists between the Tribe and Kansas.

Further, states cannot attempt to assert regulatory authority on Indian lands by seeking judicial review of voluntary agency actions in an attempt to stall economic activities by a tribe. Here, no actions have been taken by the NIGC with respect to the Quapaw Tribe's trust land in Cherokee County, Kansas, that are subject to judicial review. The IGRA specifies precisely when a federal action may be challenged by a third party, none of which are at issue here. The State and Cherokee County (the "State parties") have brought claims—which if allowed to continue—would upend the legal regime surrounding Indian gaming.

Background

In 2012, the Secretary of the Interior of the United States took land into trust within the Quapaw Tribe's 1833 reservation along the southern Kansas border. (App. at 571.) This trust land, situated adjacent to the Tribe's existing Downstream Casino Resort, contains parking lots and other Tribal governmental facilities and infrastructure.[1] (App. at 569.) Shortly thereafter, various state and local officers—including Governor Brownback and officials in Cherokee County—began encouraging the Tribe to pursue a

[1] The Quapaw Tribe's uses of the Cherokee County tract have not materially changed since the Tribe resort opened in 2008. (App. at 569.) The Tribe is not conducting class II gaming on the trust land. (App. at 317.)

compact in order for it to be in a position to develop a class III gaming facility on the trust land at some future date.[2] (App. at 284 & 316.) As a condition for the negotiations, the governor required the Tribe to secure an advisory opinion from the NIGC confirming that the land was eligible for gaming. (App. at 284-85 & 316-17.)

Complying with the governor's request, the Quapaw Tribe in May 2013 sought an advisory opinion from the NIGC addressing whether the Kansas trust land qualified for the so-called "last reservation exception" to the general prohibition in IGRA against gaming on trust land acquired after October 17, 1988. (App. at 571.) Subsequently, the Kansas Lottery Commission began attempting to develop a state-owned casino in the Southeastern Kansas Gaming Zone, which consists of Cherokee and Crawford Counties. (App. at 285.) Thereafter, with the guidance requested by the NIGC still in progress, Governor Brownback ended his participation in the previously cooperative compact negotiations with the Tribe. (App. at 285-86.)

On November 21, 2014, the Acting General Counsel of the NIGC issued an advisory opinion letter confirming that the Quapaw Tribe's trust land in Kansas was eligible for gaming pursuant to 25 U.S.C. § 2719(a)(2)(B). (App. at 573.) Shortly thereafter, the State and the County filed a lawsuit in the United States District Court for the District of Kansas challenging the NIGC's informal guidance letter. (App. at 573-74.) The State and the County also sought an injunction preventing the Tribe from

[2] The State and the County were interested in assisting the Tribe in obtaining a class III gaming compact that would provide for a revenue share for the County. (App. at 316.)

conducting gaming on the trust land, and named as party defendants three Tribal entities, as well as 18 individual Tribal officers, agency heads, and directors of enterprises—most of whom had no legal role or responsibility for gaming.[3] (App. at 115, 318, 321, 323 & 325.)

Decision of the District Court

Granting separate motions to dismiss filed by the federal and Tribal parties, the District Court dismissed all of the claims by Kansas and the County, including all of the claims against the 21 Quapaw Tribal parties. (App. at 603.) The District Court determined that the NIGC's advisory guidance "[did] not constitute a final decision" reviewable by federal courts. (App. at 586.) The court recognized that the IGRA "provides clear and unambiguous direction about which NIGC actions are final and thus subject to review under the [Administrative Procedure Act]," (App. at 582), and that it was not in a position to "[look] for ways to expand the universe of decisions that Congress saw fit to define as a final agency action," (App. at 585). Further, applying existing precedent, the court concluded that the Tribe's "request for a legal opinion applying the exception was no more than a voluntary request for guidance from the NIGC staff." (App. at 587.)

Concerning the claims against the Tribal parties, the District Court found no

[3] Cherokee County was at one point in 2013 and 2014 the potential location of the proposed state-owned casino. However, in June 2015 a Kansas state review board rejected proposals to locate a state casino in Cherokee County, and instead selected a location in Pittsburg, Kansas, in Crawford County. Subsequently, the Kansas Racing and Gaming Commission gave final approval for the casino to be located at the Crawford County site.

waiver of sovereign immunity exists to permit unconsented suits against the three governmental entities. (App. at 597.) The court also dismissed the claims against the individual Tribal officers pursuant to existing precedent recognizing that, as invoked by the State parties, the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), cannot be used to circumvent the enforcement mechanisms provided for in the IGRA. (App. at 600.) Additionally, the court concluded that the *Young* doctrine, which can be used only to obtain prospective relief to remedy ongoing violations of federal law, was inapplicable in this case. (App. at 602-03.)

The State parties appealed the Court's ruling dismissing the federal parties. (Dktg. Statement at 5 (Jan. 26, 2016).) However, the State and the County have elected not to pursue their appeal of the dismissal of their claims against the Tribal parties.[4]

SUMMARY OF THE ARGUMENT

It is fundamental that for the federal courts to intervene in the administrative process, an action must "mark the consummation of the agency's decisionmaking process" and it must also be one "by which rights or obligations" have been finally determined and from which "legal consequences will flow." The NIGC's non-binding guidance to the Quapaw Tribe satisfies neither of these basic requirements. The State parties' lawsuit thus represented an unwarranted effort to interfere with the basic legal rights and regulatory structures recognized for Indian gaming, and was intended to deter

[4] The State parties note in their opening brief the District Court's dismissal of their claims against the Tribal parties, and specifically acknowledge that they "d[o] not appeal that decision." Aplts.' Opening Br. at 11 n.6.

the Tribe from any future pursuit of gaming on its Kansas trust land.

The State parties' action on its face ignored the advisory nature—well-recognized in law—of the guidance provided by the NIGC to the Quapaw Tribe concerning the conduct of Indian gaming on its Kansas trust lands. In fact, the regulatory and administrative procedures setting forth the guidance process expressly make such agency opinions non-binding. Further, the NIGC's guidance letter did not confer any rights on the Tribe to conduct gaming on its trust lands. Those rights, in fact, are derived from a tribe's inherent sovereignty, as limited by Congress, and are immune from state challenges absent a class III gaming compact.

Similarly Kansas can point to no legal consequences flowing from the NIGC's guidance to the Quapaw Tribe. The advisory letter did not, as the State parties assert, compel Kansas to negotiate a class III compact with the Tribe. The Tribe's recent suit against the State alleging bad faith in the failed compact negotiations arose not from the NIGC's guidance, but from the governor's conduct. Nevertheless, Kansas was under an obligation to negotiate a compact with the Tribe in good faith notwithstanding any guidance the Tribe voluntarily obtained from the NIGC, and which the Tribe sought only at the request of the governor.

The State's and County's attempt to challenge informal guidance offered by the NIGC to an Indian tribe represents nothing more than an all-out effort to protect a planned state casino in the area from future competition—not a meritorious challenge to a legally final agency action. The District Court's dismissal of the State and County claims

correctly recognizes the limitations on judicial review of agency processes, as well as the legal and regulatory regime for Indian gaming. This Court should affirm.

STANDARDS OF REVIEW

The District Court's dismissal of the State parties' claims was for lack of subject matter jurisdiction, which is a matter of law, and which is subject to review *de novo*. *See Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 724 (10th Cir. 1996). Any review of the District Court's findings of jurisdictional facts, however, should be for clear error. *San Juan County v. United States*, 754 F.3d 787, 792 (10th Cir. 2014). Denial of a plaintiff's attempts to challenge agency action under the APA is also reviewed *de novo*. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1186 (10th Cir. 1999).

ARGUMENT & AUTHORITIES

I. ADVISORY GUIDANCE BY THE NIGC—PURELY OPTIONAL AND NON-BINDING—HAS NO LEGAL EFFECT ON A TRIBE'S RIGHT TO CONDUCT GAMING ON INDIAN LANDS

In order to obtain judicial review of a federal administrative agency's decisionmaking processes under the Administrative Procedure Act, it is well-established that a party must satisfy two threshold requirements. First, the decision at issue "must mark the consummation of the agency's decisionmaking process"—in other words, there must be a truly final and definitive action by the agency. *See Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 1168 (1997) (internal quotations omitted). Second, the agency action at issue "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* 520 U.S. at 178, 117 S. Ct. at 1168

(internal quotations omitted). The NIGC's voluntary practice of providing guidance to Indian tribes whose gaming it oversees does not, as a matter of law, reflect a final agency decision. In fact, such guidance is precisely what it is clearly described to be in the applicable regulations—advisory and non-binding.

A. Existing Law and the NIGC's Regulations Make Clear that the Guidance Provided to the Quapaw Tribe Was Voluntary and Optional

The practice of the NIGC's issuing guidance to Indian tribes concerning the eligibility of Indian lands for gaming began informally prior to the promulgation of procedures, and it continues to be a purely voluntary non-binding practice. Nothing in the IGRA obligates the NIGC or any other governmental agency to issue preliminary legal opinions as to whether existing Indian lands are eligible for gaming before gaming can occur on the lands. *See North County Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 747 (9th Cir. 2009). However, in the last 20 years, as Indian country developed more sophisticated gaming operations, and particularly as tribes sought financing that required legal enforceability opinions, including opinions concerning the eligibility of Indian lands for gaming, the NIGC began to receive an increasing number of requests for guidance about the agency's position on various matters.[5]

Eventually, when the NIGC promulgated new regulations in 2008, a procedure was included for tribes to obtain informal guidance concerning the eligibility of Indian lands for gaming. These procedures were included "in response to comments requesting

[5] *See* NIGC, *Helpful Hints for Submitting Requests for a Legal Opinion to the NIGC Office of Gen. Counsel*, (Dec. 11, 2013) (available at http://www.nigc.gov).

guidance on the process for seeking opinions under section 2719." *Gaming on Trust Lands Acquired After October 17, 1988*, 73 Fed. Reg. 29,354, 29,358 (May 20, 2008). Under the new regulations, such opinions were to remain advisory only, and further, the NIGC and the Department of the Interior were not obligated to issue such opinions.[6] *See* 25 C.F.R. § 292.3; *see also* 73 Fed. Reg. at 29,372.

The regulation applicable in this case, § 292.3(a), provides that

> "[i]f the newly acquired lands are already in trust and the request does not concern whether a specific area of land is a 'reservation,' the tribe *may* submit a request for an opinion to either the National Indian Gaming Commission or the Office of Indian Gaming."

25 C.F.R. § 292.3(a) (emphasis added). The regulations further make plain that only

> "[i]f the tribe seeks to game on newly acquired lands that require a land-into-trust application or the request concerns whether a specific area of land is a 'reservation,' the tribe must submit a request for an opinion to the Office of Indian Gaming."

25 C.F.R. § 292.3(b). The Quapaw Tribe's trust land at issue was conveyed into trust in 2012, and the request for the agency's guidance did not include any request for a determination of whether the lands are a part of a present-day reservation. Additionally, the request was to the NIGC, not the Office of Indian Gaming. Thus, provision (a) applied to the requests, and the request was, by the plain language of the regulation, voluntary.

Even requests for guidance under subsection (b) are voluntary. When read in

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[6] The *drafters* of the 2008 regulations intended to make clear that "the legal opinions are advisory in nature and thus do not legally bind the persons vested with the authority to make final agency decisions." *See* 73 Fed. Reg. at 29,372.

connection with subsection (a) and the purpose of this provision—to provide guidance on how to request an advisory opinion—it is clear that the word "must" guides a requestor to submit a request to the Office of Indian Gaming of Interior rather than to the NIGC. In other words, under the plain language of the regulation the term "must" applies to where a request must be directed, not whether a request is required to be made. The Department of the Interior interprets the regulations as not requiring the issuance of a land opinion, but rather as directing requestors where to apply if they choose to do so, and at least one court has upheld such interpretation.[7] *See Gila River Indian Cmty. v. United States*, 776 F. Supp. 2d 977, 991-92 (D. Ariz. 2011), *aff'd in part, rev'd in part & remanded*, 729 F.3d 1139 (9th Cir. 2013).

Indeed, Indian tribes have a good reason for requesting advisory opinions from the NIGC or the Office of Indian Gaming. For tribes considering investing substantial resources to develop property for gaming, it is prudent for them to know whether the government views the lands eligible for gaming. In fact, investors and financers routinely require such guidance from the agency, although with the understanding that it is non-binding. While a tribe has the right to proceed with gaming development without guidance from the NIGC, to do so adds significant risk, and is often not in the tribe's best interest.

The State parties contend that advisory guidance issued by the NIGC is

[7] The agency's interpretation that the statute is voluntary must be given deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45, 104 S. Ct. 2778, 2781-83 (1984).

mandatory, but this directly contradicts to the plain language of the regulations and existing law. The IGRA clearly does not require the issuance of an opinion from either the Secretary or the NIGC that land acquired after 1988 is eligible for gaming under § 2719. *See N. Cnty. Comm. Alliance, Inc.*, 573 F.3d at 747. While the IGRA intricately describes the requirements for gaming on Indian lands and the role of the federal government in enforcing those requirements, it contains no provision requiring a legal opinion be issued by the federal government before gaming can occur. *See id*.; *State of Ala. v. PCI Gaming Auth.*, 15 F. Supp. 3d 1161, 1188 n.28 (M.D. Ala. 2014).

If advisory guidance issued by the NIGC is subject to judicial review, there will be a strong deterrent to the agency's willingness to provide such guidance. Further, tribes will be forced to choose between fighting needless litigation or facing unintended risk and uncertainty in their economic investments. Such a predicament was not envisioned by the drafters of the 2008 regulations, which were intended merely to provide a process for tribes to seek advice concerning Indian gaming lands decisions.

B. An NIGC Advisory Opinion Has No Legal Impact on a Tribe's Right to Conduct Gaming on its Trust Lands

Neither do the State parties have any legal basis for their contention that the NIGC's guidance satisfies the *Bennett* test because it somehow confers on a tribe the right to begin gaming operations. That right exists not by virtue of informal agency guidance but from a tribe's sovereign right to regulate its lands, by being exempt from state laws, and by complying with the gaming limitations imposed by federal law. *See*

Steven A. Light & Kathryn R.L. Rand, *Indian Gaming & Tribal Sovereignty: The Casino Compromise* at 35-37 (2005) [hereinafter *Indian Gaming*].

The right of tribes to game on Indian lands is derived from Indian tribes' sovereign authority to regulate themselves and their members on lands within their Indian country jurisdiction, without interference from the states. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083 (1987) (noting absent congressional acts, states do not have authority to regulate gaming on Indian lands); *Bryan v. Itasca Cnty.*, 426 U.S. 373, 96 S. Ct. 2102 (1976) (recognizing states generally lack regulatory authority over Indian people on Indian lands). While courts have found that gaming on Indian lands is not within state jurisdiction, it nevertheless is subject to tribal and federal law. However, when tribes first started exercising their inherent right to game on their lands, there was few limitations under federal law. Tribal governments recognized gaming as an economic development opportunity to provide much-needed jobs and services to their members, so many tribes chose to embrace gaming rather than to prohibit it.[8] *See Indian Gaming* at 40.

As gaming became more common on Indian lands, Congress passed standards and limitations on gaming operations in Indian country under the IGRA. However, recognizing tribes' inherent authority to regulate themselves, including gaming activity

[8] It is worth noting that states share the same right as tribes to allow gaming within their jurisdictions to develop their economies and to provide services to their residents. Although some states permit gambling, and many states now have lotteries to provide supplemental funding to their governmental services, historically states chose to limit or prohibit gaming within their jurisdictions, allowing tribes to take advantage of new markets.

on lands under their jurisdiction, a careful balance was struck to ensure tribal sovereign rights were not unduly infringed upon. *See* 25 U.S.C. § 2701 (congressional findings concerning IGRA). The balance Congress struck under the IGRA is that a tribe can conduct class II gaming—such as bingo-based games—without state interference, while class III gaming may be conducted only pursuant to a tribal-state gaming compact.[9] The prohibition on class III gaming without a compact confers on states the limited authority to intervene only in class III gaming in tribal gaming operations on Indian lands—an authority the state did not have before the IGRA was passed. *See* 25 U.S.C. § 2710. Similarly, the IGRA required tribes to have their tribal gaming ordinances approved by the federal government before class II gaming can begin—a requirement that did not exist prior to passage of the IGRA. *See id.* These limitations are expressly incorporated into the IGRA, while agency Indian lands opinions are noticeably absent.

While adding limitations on tribal gaming in the IGRA, Congress also expressly recognized that Indian tribes hold the exclusive right to regulate gaming activity on their lands so long as the activity is not prohibited by federal law. *See* 25 U.S.C. § 2701(5). This is a right recognized by the IGRA, not conferred under any of its provisions. Because the IGRA does not require a tribe to obtain a gaming opinion on its lands before conducting gaming operations, tribes retain the inherent authority to game on their lands

[9] Of course, states still have authority to regulate gaming on non-Indian lands within state jurisdiction. If a tribe conducts gaming that is not on Indian lands, but rather on state lands, the state has many tools to enforce its laws, including the right to prosecute individuals and close quickly and permanently an illegal casino. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. ___, 134 S. Ct. 2024, 2035 (2014).

without one.[10] The State parties' argument that the NIGC's advisory opinion on Indian lands is a final determination from which legal consequences flow lacks a basis in well-established law.[11]

II. THE NIGC'S ADVISORY GAMING LANDS GUIDANCE DID NOT TRIGGER ANY LEGAL OBLIGATIONS ON THE STATE THAT WERE NOT ALREADY IN EXISTENCE UNDER PREVAILING LAW

The State parties similarly assert—again without any basis in law—that the NIGC's advisory opinion triggered a legal obligation by Kansas to engage in class III gaming compact negotiations. In fact, under the IGRA the State was required to negotiate with the Quapaw Tribe before any NIGC advisory opinion was issued. The obligation on the State to negotiate with the Tribe in good faith existed in June 2013, when the Tribe formally requested a compact. In fact, Governor Brownback asked the Tribe to seek an advisory opinion from the NIGC as to whether the lands were eligible for gaming in order to facilitate compact negotiations, and the Tribe complied. No legal consequences whatsoever flowed from the Tribe's seeking guidance from the NIGC that

[10] While a tribe has a legal right to game on its lands without an opinion from the federal government, doing so could, in some instances, create significant risks. If the gaming is occurring illegally, the federal government has the authority permanently to close the gaming facility, resulting in the loss of significant tribal resources and investments, in addition to imposing potential criminal and civil penalties. *See* 25 U.S.C. § 2706(a)(5) & 2713(b)(1).

[11] Further demonstrating that the NIGC's guidance opinion does not bestow a "legal right" on tribes, the federal government would not be prevented from prosecuting a tribe for unauthorized or illegal gaming operations, even after an NIGC opinion was issued. The regulations clearly state the opinions "are advisory in nature and thus do not legally bind the persons vested with the authority to make final agency decisions." 73 Fed. Reg. at 29,372. While the NIGC's advisory opinions minimize the risks of adverse legal actions, they do not prevent such actions.

did not already exist. Its request was part of ongoing and previously cooperative negotiations for a tribal-state gaming compact.

The State parties' legal positions in this matter derive from its broad sweeping—and incorrect—assertion that the NIGC's advisory opinion triggered the State's statutory obligation to negotiate with the Tribe regarding a class III gaming compact. Under § 2710, a state is required to negotiate a class III gaming compact in good faith upon a tribe's request for a compact. The only condition under IGRA triggering the state's good-faith negotiation obligation is that a tribe actually request the state to enter into compact negotiations, which the Quapaw Tribe did in June 2013. *See* 25 U.S.C. § 2710(d)(3)(A).

Some courts expressly have recognized a tribe's request as the only prerequisite to a state's negotiation obligations. *See Mashantucket Pequot Tribe v. Connecticut,* 913 F.2d 1024, 1032 (2d Cir. 1990). In *Mashantucket Pequot Tribe*, the court stated broadly that "the only condition precedent to negotiation specified by the IGRA is a request by a tribe to enter into negotiations." *Id*. While at least one court has held that there may be other prerequisites before a state is obligated to enter into good-faith negotiations, the State has not cited any court holding supporting its argument that an advisory opinion is a condition precedent. *See Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Engler*, 304 F.3d 616 (6th Cir. 2002) (holding the party must be a tribe, must have Indian land, and must be contemplating gaming). The State parties' argument that an NIGC advisory opinion triggers compact negotiations is without any basis in law.

The State parties also cannot establish that the lawsuit the Tribe filed later against the State for its refusal to enter into good-faith negotiations demonstrates that the advisory opinion had legal consequences.[12] The Tribe had good reason to wait until after the NIGC issued its advisory opinion to bring an action under IGRA asserting the State had not engaged in good-faith negotiations, but it was not a reason compelled by or derived from any controlling law. Indeed, at the time the NIGC's advisory opinion was issued it was still possible Governor Brownback might honor his commitment to negotiate a compact.

When the NIGC issued its advisory opinion, the Tribe, expecting Governor Brownback to honor his commitment, reached out to the State about resuming compact talks. However, rather than negotiate with the Tribe, Governor Brownback—now supporting a proposed state casino in southeastern Kansas—and the State filed this lawsuit. The Tribe—surprised that the NIGC's advisory opinion lead to a lawsuit from Governor Brownback rather than his cooperation in compact negotiations—filed suit against the State for its bad-faith actions. Had the Tribe known that Governor Brownback had no intention of entering into good-faith compact negotiations with the Tribe, it could have sued the State for failure to negotiate in good-faith long before the NIGC's advisory opinion was issued—and it would have had the legal right to do so.

[12] The State of Kansas states that the lawsuit was filed "just one month" after the District Court held the NIGC's opinion was immune from judicial review, which is misleading. The State is arguing that legal consequences flowed from the NIGC's advisory opinion, not the District Court's decision. The NIGC's advisory opinion was issued on November 14, 2014, and the lawsuit was brought over one year later.

Contrary to the argument made by the State and the County, the issuance of the NIGC's advisory opinion letter has had no legal impact on the failed negotiations, and, in particular, the State has not been forced to negotiate with the Tribe for a class III gaming compact. Even after the Tribe received an advisory opinion from the NIGC stating that gaming can be conducted on their lands in Kansas, the State continued to refuse to negotiate with the Tribe for a class III compact. When the Tribe filed a lawsuit in attempt to spur negotiations and get a seat at the bargaining table, the State refused to waive its sovereign immunity to the suit, and promptly obtained dismissal of the case. *See Quapaw Tribe of Indians v. Kansas*, Case No. 16-cv-2037-JWl-TJJ (D. Kan. Mar. 3, 2016) (Dkt. 16).

The State of Kansas was not legally compelled to negotiate, and still refuses to negotiate with the Tribe for a class III compact. The State's argument that a legal consequence of the NIGC advisory opinion was that it was forced to negotiate defies logic.

III. TREATING NIGC ADVISORY OPINIONS AS FINAL AGENCY ACTIONS WOULD DEFEAT THE LETTER AND INTENT OF THE IGRA

Through the IGRA, Congress established a careful balance of the federal, tribal, and state interests in regulating Indian gaming. *See* 25 U.S.C. §§ 2710 & 2714. A state's authority and right of action are extremely limited. As one court explained,

> "IGRA includes a number of express rights, and some of those go directly to states, but those that go to states come from tribal-state compacts . . . . These provisions of IGRA demonstrate that Congress carefully allocated regulatory and enforcement authority for tribal gaming among the federal government, the states,

> and the tribes. In short, IGRA explicitly gives states an enforcement role, but only through agreed-upon terms negotiated between the state and the tribe and embodied in the tribal-state compact . . . ."

PCI Gaming Authority, 15 F. Supp. 3d at 1188 n.28. In the IGRA, Congress meticulously set forth when lawsuits may be brought and who may bring them. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, S. Ct. 1114 (1996); *see also Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 647, 122 S. Ct. 1753, 1761 (2002).

The text in the IGRA specifies which actions of the NIGC are deemed to be final agency actions subject to appeal or to judicial review pursuant to the APA. *See* 25 U.S.C. § 2714. These final agency actions include only the NIGC's review of tribal gaming ordinances, management contracts, existing ordinances and contracts, and civil penalties. *See id.* (noting actions under §§ 2710, 2711, 2712, and 2713 are final agency action subject to judicial review). Notably excluded from this list are NIGC land opinions or any reference to § 2719.

Further, this Court has recognized that causes of actions pertaining to Indian gaming are limited to those specifically enumerated in the IGRA. *See Hartman v. Kickapoo Tribe Gaming Comm'n*, 176 F. Supp. 2d 1168, 1175 (D. Kan. 2001), *aff'd*, 319 F.3d 1230 (10th Cir. 2003); *State of Oklahoma v. Hobia*, 775 F.3d 1204, 1213 (10th Cir. 2014). There is no language in the IGRA that authorizes a state to bring an action challenging an advisory opinion of the NIGC. While states do have certain authority to bring an action under the IGRA, the act's language explicitly states that a class III

gaming compact is a required prerequisite. *See* 25 U.S.C. §§ 2710(d)(7)(A)(ii) & 2714.

Federal courts, including this Court, have overwhelmingly agreed, without exception, that states have no right to bring a claim under IGRA when no tribal-state compact is in place.[13] In *State of Florida v. Seminole Tribe of Florida*, the Eleventh Circuit recognized that giving state authority not expressed in the IGRA would "wreak havoc upon the existing remedial scheme of IGRA." *State of Florida*, 181 F.3d at 1249. This Court has explained that permitting suits not authorized in the IGRA would "rewrite Congress's handiwork" and "usurp[] Congress's current policy judgment." *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2039.

Unquestionably, permitting an implied right of action by the State of Kansas to challenge the NIGC's advisory opinion would disrupt the balance of authority in the IGRA. States would be granted authority to intervene in matters outside of their jurisdiction in order to stall and hinder economic development for Indian tribes. Indeed, that is precisely the result of the State's litigation in this case. The State is attempting to advance its own economic agenda by using the IGRA—an act intended to help tribal governments recover from historic economic disadvantages—and to obstruct the Tribe's

[13] *See State of Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1242 (11th Cir. 1999); *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 690 (1st Cir. 1994) ("[a]s a practical matter, then, a state ordinarily may regulate casino gambling on Indian lands only in pursuance of a consensual compact"); *United Keetoowah Band of Cherokee Indians v. Okla.*, 927 F.2d 1170, 1177 (10th Cir. 1991); *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709, 713 (10th Cir. 1989); *Neighbors of Casino San Pablo v. Salazar*, 773 F. Supp. 2d 141, 148 (D.D.C.), *aff'd*, 442 F. App'x 579 (D.C. Cir. 2011); *Wyandotte Nation v. Sebelius*, 337 F. Supp. 2d 1253, 1257 (D. Kan. 2004), *aff'd in part, vacated in part & remanded*, 443 F.3d 1247 (10th Cir. 2006); *Gaming Corp. v. Dorsey & Whitney*, 88 F. 3d 536, 545 (8th Cir. 1996).

sovereign right to engage in economic development through gaming.

A dismissal of this lawsuit would confirm that states cannot cross the jurisdictional limitations under prevailing law to interfere with Indian gaming. A different result would lead to more lawsuits by states against tribes, forcing tribes to expend resources defending endless gaming challenges, rather than providing for the economic welfare of their members and surrounding communities—a result that would disrupt the balance of interests incorporated into the IGRA and obstruct its stated purpose. *See* 25 U.S.C. § 2701(4).

CONCLUSION

For the foregoing reasons, the Quapaw Tribe requests that this Court to affirm the holding of the District Court dismissing this lawsuit by the State and the County.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 10th Cir. R. 28.2(C)(4), the Quapaw Tribal Appellees request an oral argument so as to be in a position to clarify directly any questions of the Court concerning the law and the record. This appeal presents a number of issues that are important in the area of Indian law and Indian gaming law, as well as to the interpretation and application of the IGRA. Oral argument could be beneficial to the Court, and could aid the Court in gaining a fuller understanding of these important matters.

Respectfully submitted,

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July 29, 2016

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 10th Cir. Form 6, the appellee certifies as follows:

Please complete one of the following sections:

Section 1: Word Count

As required by Fed. R. App. P. 28(a)(10), 28(b), and 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 5,546 words (maximum 7,000 words) in 13-point font (excluding certificates and statements regarding jurisdiction and oral argument).

Complete one of the following:

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My brief was prepared in a monospaced typeface and contains _____ lines of text.

I certify that the information on this form is true and correct to the best of my knowledge and belief after a reasonable inquiry.

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CERTIFICATE OF COUNSEL REQUIRED UNDER 10TH CIR. R. 31.3(B)

The appellees filing this brief are subdivisions of the Quapaw Tribe of Oklahoma, a federally recognized Indian tribal government, as well as 18 tribal officers, employees, agency or department heads, and directors of Quapaw Tribal enterprises. The Quapaw Tribal appellees are therefore exempt from 10th Cir. R. 31.3(A) by virtue of their being governmental entities and officers. *See* 10th Cir. R. 31.3(D).

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ECF PLEADING CERTIFICATION

Pursuant to Section II(I) of this Court's CM/ECF User's Manual, the appellees certify as follows:

(1) All privacy redactions required by Fed. R. App. P. 25(a)(5) or otherwise have been made. Specifically, no information appears in this filing that would require privacy redactions and as such, no such redactions appear.

(2) The hard copies of this filing that have been submitted to this Court in compliance with this Court's local rules and procedures are exact copies of the filing that has been submitted through ECF.

(3) The ECF submission of this filing was scanned for viruses with the most recent version of a commercial virus scanning program, "Sophos Endpoint Security and Control," version 9.7, with the latest detection data version 4.71G, and, according to the program, is free of viruses.

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CERTIFICATE PURSUANT TO RULE 25.6

Pursuant to Rule 25.6 of this Court's rules, counsel for the Quapaw Tribal Appellees hereby certifies as follows:

(1) Appellees attempted on July 29, 2016, to file the "Response Brief of the Quapaw Tribal Appellees" using the Court's Electronic Case Filing System, but were unable to do so due to a declared technical failure. Therefore, solely due to the technical failure, the filing could not be made on July 29, 2016.

(2) In compliance with Rule 25.6, this filing is being made on the next court day, August 1, 2016.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25 and 10th Cir. R. 25.3, 25.4, and 31.5, I hereby certify that on this the 1st day of August, 2016, seven (7) copies of the above and forgoing instrument, the "RESPONSE BRIEF OF THE QUAPAW TRIBAL APPELLEES," was delivered to an express service for delivery the next day to the Clerk of Court, and I also electronically transmitted a full, true, and correct copy to the Clerk of Court using the Electronic Case Filing System (the "ECF System") for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants (names only):

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I further hereby certify that on the same date, I served the same document by regular United States mail, with proper postage fully prepaid thereon, on the following, who are not registered participants in the ECF:

None

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