The Honorable David Bernhardt
Secretary of the Interior
U.S. Department of the Interior
1849 C St., NW
Washington, D.C. 20240

Re: Response to Opinion from Oklahoma Attorney General Michael Hunter

As elected leaders of the Comanche Nation and the Otoe–Missouria Tribe of Indians (collectively, "the Tribes"), we write to you in response to Oklahoma Attorney General Opinion 2020-8 ("AG Opinion"), in which Oklahoma Attorney General Michael Hunter requests that the U.S. Department of the Interior ("Department") disapprove the Tribal–State Compacts lawfully entered into between the State of Oklahoma and the Tribes (the "Compacts"). As explained herein, the Compacts are clearly legal under both the Indian Gaming Regulatory Act ("IGRA") and Oklahoma law, and they should be approved accordingly.

I. Background

Although the AG Opinion captures some of the relevant timeline, it omits key elements of the background necessary to understand the legal issues presented. This background section provides additional pertinent details.

A. The Indian Gaming Regulatory Act

Congress enacted IGRA in 1988, shortly following the U.S. Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), where the Court held that the State of California lacked jurisdiction to regulate on-reservation gaming activity. The Department is well-versed with IGRA, and its full history and structure need not be elaborated herein. However, certain provisions governing tribal–state gaming compacts do require particular attention.

IGRA permits tribes to engage in class III gaming only upon certain conditions, including the condition that such gaming be "conducted in conformance with a Tribal–State compact entered into by the Indian tribe and the State . . . ." 25 U.S.C. § 2710(d)(1)(C). The compact may include provisions relating to, *inter alia*, the applicability of certain state or tribal laws, the assessment of fees necessary to defray state regulatory costs, standards for the operation of gaming activities, and "any other subjects that are directly related to the operation of gaming activities." § 2710(d)(3)(C)(i)–(vii).

Upon submission, the Department has 45 days to approve or disapprove a compact. If no action is taken within those 45 days, "the compact shall be deemed approved by the Secretary, but only to the extent the compact is consistent with [IGRA]." § 2710(d)(8)(C).

B. The State–Tribal Gaming Act

In 2004, the Oklahoma legislature (through a state ballot question) enacted the State-Tribal Gaming Act, 3A O.S. §§ 261 *et seq.* This legislation offered a "Model Tribal Gaming Compact" ("Model Compact") to every federally recognized tribe in the State. § 281. Though embodied in legislation, the offer was made "through the concurrence of the Governor after considering the executive prerogatives of that office and the power to negotiate the terms of a compact between the state and a tribe." § 280.

The Model Compact authorizes compacting tribes to offer "covered games," and defines that term as:

> 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.

Model Compact, Part 3(5).

Importantly, although most Oklahoma tribes have adopted the Model Compact, there is no requirement under state or federal law that compacts in Oklahoma be one-size-fits-all.

C. Recent compact litigation

The Compacts now at issue came about in the wake of a larger dispute as to whether the Tribes' previous Model Compacts—entered into pursuant to the State-Tribal Gaming Act—expired at the end of the 2019. As the Department may be aware, the previous compacts provided for a term ending on January 1, 2020; however, there was a clause specifying that they "shall automatically renew" under certain conditions.

The Tribes—and several other tribes in the State—were part of a suit brought in the U.S. District Court for the Western District of Oklahoma seeking a declaratory judgment that the Model Compacts did in fact automatically renew. The dispute was ordered to mediation by the Court. The proceedings in mediation were (and remain) confidential, but the important point for the purposes of this memorandum is that the Tribes resolved their dispute through a good-faith negotiation with the State, having entered into the Compacts now before the Department.

D. The Compacts

On April 21, 2020,[1] the Tribes and Governor J. Kevin Stitt signed and executed the Compacts and submitted the Compacts to the Office of Indian Gaming. In doing so, the parties put an end to the long-running dispute, settled the pending litigation, and reached an agreement that would benefit the Tribes, the State, and the local communities.

The Compacts reflect significant modernization in tribal gaming in Oklahoma. They fundamentally reform the valuation of "substantial exclusivity" for the purposes of revenue sharing. To that end, they recognize that the value of substantial exclusivity has a significant geographic component. The Tribes will each pay 4.5% of adjusted net win from class III gaming to the State (less than their existing compacts) on their current facilities, but agree to pay higher amounts if and when new casinos in more geographically desirable locations are approved. The Tribes agree to maintain at least 45% of their gaming revenues from class III gaming, a ratio that will be raised to 50% if the new sites are approved.[2] Part 3.D.

The Compacts also discuss expanded forms of class III gaming beyond what most Oklahoma tribes currently operate. The Compacts at Part 2.A.7 define the term "Covered Game" as follows:

> "*Covered Game*" or any derivative thereof means all Gaming Machines, House-banked Card Games, Nonhouse-Banked Card Games, House-banked Table Games, Nonhouse-banked Table Games, and Event Wagering, which are conducted in accordance with the Standards, as applicable, if the operation of such game by the Tribe would require a Compact and if such game has been approved by the SCA [State Compliance Agency]. Class II gaming, as defined by IGRA, is expressly excluded from this definition.

Part 2.A.7 (emphasis added)

The Compacts thus explicitly address House-banked Card and Table Games—matters that have not previously been expressly discussed. Also, Part 2.A.13 of the Compacts discusses event wagering, e.g., sportsbooks. That section begins with a definition of "Event Wagering," which provides:

> "*Event Wagering*" means the placing of a wager on the outcome of a Sport event, including E-Sports, or any other events, to the extent such wagers are authorized by law, subject to the following terms and conditions. . . .

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[1] The Compacts were actually signed privately by each party on Saturday, April 18; however, the signing ceremony and submission to the Office of Indian Gaming did not take place until the following Tuesday.

[2] To be clear, although the Tribes must certify a certain percentage of revenue coming from class III gaming, the Compacts in no way limit the Tribes' ability to engage in *class II* gaming. By way of comparison, whereas compacts in the State of Arizona provide that tribes generally cannot have more than forty (40) class II machines, the Comanche Nation and the Otoe-Missouria Tribe may operate as many class II machines as they wish, so long as over 45% of revenue is derived from class III gaming.

Part 2.A.13 (emphasis added). Numerous subsections follow in which the Compact lays out various "terms and conditions" governing the conduct of Event Wagering. For example, the Tribes can each offer Event Wagering at two locations; such wagering cannot include Oklahoma intercollegiate events; and wagers may be accepted either over-the-counter or on a mobile device, but in no event from any further than 1,000 feet of the physical facility. The State may conduct Event Wagering at five locations, but only in accordance with the same terms and conditions applicable to the Tribes. *See id.* at Part 2.A.13(a)–(g). Of course, these subsections all relate back to the definition of "Event Wagering," i.e., the terms and conditions come into effect only "to the extent such wagers are authorized by law."

E. The AG Opinion

Shortly after the Compacts were signed and submitted to the Office of Indian Gaming, the Attorney General publicly challenged their legality, stating: "The governor has the authority to negotiate compacts with the tribes on behalf of the state. However, only gaming activities authority by the [State-Tribal Gaming Act] may be the subject of a tribal gaming compact. Sports betting is not a prescribed 'covered game' under the act."[3]

Two weeks later, the Attorney General issued the AG Opinion, again dialing in on the Event Wagering provisions of the Compacts. The general focus of the AG Opinion was whether the Governor had authority to enter into the Compacts given their discussion of such new forms of gaming activity. The Attorney General concluded that the Governor lacks such authority, relying on the premise (which, as explained below, we submit is false) that the Compacts "authorize gaming activity prohibited by state law."

Around the same time as the AG Opinion, letters were also sent to the Department from the Chickasaw Nation, the Quapaw Nation, and the Wichita & Affiliated Tribes requesting that the Department disapprove the Compacts.[4] We intend to address the concerns of these tribes in a separate memorandum, as they involve different legal issues—primarily the Compacts' section regarding a concurrence from the Governor that lands be taken into trust for the purposes of gaming under Section 20 of IGRA.

With all due respect to the Attorney General, we fundamentally disagree with his analysis. We have thus prepared this memorandum explaining the legality of the challenged compact provisions in the AG's Opinion and letter.

II. Analysis

Essentially, as this memorandum explains, there is nothing wrong with the Event Wagering or House-banked Card or Table Games provisions of the Compacts. To the extent the Attorney General challenges the Event Wagering, Gaming Machine and house-banked game provisions, his Opinion relies entirely on a false premise—that the Compacts in and of themselves will authorize event wagering and house-banked gaming and certain Gaming Machines in the State of Oklahoma.

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[3] https://www.tulsaworld.com/news/local/government-and-politics/oklahoma-ag-mike-hunter-says-gov-stitts-new-tribal-gaming-compacts-not-authorized-by-state/article_1e9bd0d3-3d50-50c0-8233-a3d924f01f44.html

[4] The Chickasaw Nation, the Quapaw Nation, and the Wichita and Affiliated Tribes remain parties in the lawsuit discussed in Part I.C herein.

That is not what the Compacts do. The definition of "Covered Game" only includes games that are approved by the State Compliance Agency. The State Compliance Agency does not have the power to approve games that are unlawful. Further, the Compacts' definition of event wagering further states that such gaming must be authorized by law, i.e., state law. It was fully within the Governor's authority to enter into such Compacts. These provisions reflect common practice in the tribal–state compacting process. The Compacts are fully consistent with IGRA and Oklahoma law, and the Department should approve the Compacts accordingly.

A. The Governor has authority to enter into Compacts on behalf of the State.

The Tribes agree with much of Part II.A of the AG Opinion insofar as that section recognizes the Governor's authority to negotiate and enter into compacts with tribes on behalf of the State.

However, the Tribes strongly disagree with the Attorney General's apparent position that the Governor's authority has no grounding in the State Constitution. To be sure, while the Oklahoma Constitution vests the Governor with explicit authority to conduct "all intercourse and business of the State with other states and with the United States," there is no specific reference to such authority vis-à-vis Indian tribes. *See* Okla. Const. Art. VI, § 8. Nonetheless, contrary to the Attorney General's position, the Oklahoma Supreme Court has relied on that constitutional provision as a basis to hold that the Governor "has been and continues to be the party responsible for negotiating compacts with the sovereign nations of this state." *See Sheffer v. Buffalo Run Casino*, 315 P.3d 359, 364 & n.18 (Okla. 2013) (citing Article VI, § 8 of the Oklahoma Constitution).

In any event, regardless of state constitutional law, even the Attorney General admits that the Governor has a *statutory* authority to negotiate and enter into compacts with Indian tribes. Indeed, by Oklahoma statute, "[t]he Governor is authorized to negotiate and enter into cooperative agreements on behalf of this state with federally recognized Indian tribal governments within this state to address issues of mutual interest." 74 O.S. § 1221(C)(1). Furthermore, as the Attorney General also agrees, any "requirement that individual agreements or compacts negotiated by the Governor on behalf of the State with other sovereigns, such as Indian tribes, be approved by the Legislature would violate the principles of separation of powers." *See* AG Op. at 4 (citating omitted).

Where the Tribes fundamentally disagree with the AG Opinion is with regard to the implication that the Compacts "conflict with[] the laws duly enacted by the legislative branch." *See* AG Op. at 4. To the contrary, as explained below, the Compacts are entirely consistent with state and federal law.

B. Compacts under IGRA can, and often do, address forms of gaming that are not currently allowed under State law.

In entering into the Compacts, the Tribes and the State took initiative to conditionally address games that may not be currently authorized by law, but may be authorized in the future. While it is true that Oklahoma legislation does not explicitly authorize event wagering, house-banked games and certain gaming machines, nothing in IGRA prohibits an Indian tribe and a State

from establishing guidelines as to how certain gaming activities might be conducted in the future, even when those activities are not currently addressed under State statutes.

Indeed, it is not uncommon for a tribal–state compact to address forms of gaming that the state legislature has yet to explicitly authorize, and such compacts are routinely approved. The following are just a few examples:

- The State of Arizona entered into compacts with numerous tribes in 2002–2003 in which the compacts address Internet gaming, a form of gaming that had yet to be permitted under state law. The compacts state: "The Tribe shall not be permitted to conduct gaming on the Internet unless Persons other than Indian tribes within the State or the State are authorized by State law to conduct gaming on the Internet." *See, e.g.*, Compact between the State of Arizona and the Havasupai Indian Tribe, § 3(y) (2002) (emphasis added).

- In 2003, the State of California entered into a compact with the Iipay Nation of Santa Ysabel addressing Internet gaming in somewhat similar terms, providing that the tribe "will not offer [certain lottery games] through use of the Internet unless others in the state are permitted to do so under state and federal law." Compact between the State of California and the Iipay Nation of Santa Ysabel, § 4.1(c) (2003).

- In 2013, the State of Massachusetts entered into a compact with the Mashpee Wampanoag Tribe, which also addressed Internet gaming, but in much more detail. That compact stated in relevant part:

> 4.3.2. The Tribe will not offer any form of Internet Gaming regulated by the Commonwealth unless Internet Gaming is authorized under Commonwealth and federal law, and provided that in such case:
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> (a) If Internet Gaming is authorized by the Commonwealth, and only the Massachusetts State Lottery or any other governmental agency of the Commonwealth is permitted to conduct Internet Gaming, the parties recognize and agree that: (i) the Tribe is permitted under IGRA to conduct Internet Gaming pursuant to a tribal state compact; (ii) the parties will negotiate in good faith for a tribal state compact, or amendment to this Compact, to implement the Tribe's conduct of Internet Gaming; and (iii) the Tribe may conduct Internet Gaming only in accordance with such compact or amendment.
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> (b) If Internet Gaming is authorized by the Commonwealth and permitted to be conducted by any Category 1 Licensee or other commercial entity licensed by the Commonwealth, the Tribe may conduct Internet Gaming in the same manner and to the same extent that Internet Gaming is permitted to be conducted in the Commonwealth by any Category 1 Licensee or other licensed

> commercial entity, provided the Tribe first complies with subpart 4.4 of this Compact.

All three of these compacts were approved by the Department, and in none of the approvals did the Department find the Internet gaming provisions to be problematic, much less a basis for disapproval.

The fact that these examples involve Internet gaming (as opposed to event wagering) is immaterial. Nor is it material that these examples are framed in the negative tense—i.e., that the activity is prohibited "unless" certain preconditions occur. After all, once those preconditions occur, the path would be clear for those tribes to engage in Internet gaming activity. The relevant point is that they clearly prove that compacts can address a form of gaming that is not *currently* authorized under state law but which *might* be authorized in the future. And as particularly demonstrated by the Mashpee Wampanoag Compact, such prospective gaming activity can be addressed in detail, even if it is dependent on future legislation.

Of course, in submitting this memorandum, we do not concede that event wagering, house-banked games or certain gaming machines are currently unlawful in the State of Oklahoma.[5] But ultimately, even if there is a debate among the executive and legislative branches of Oklahoma government as to whether event wagering is legal, that is an internal state-law matter, and should not prevent the Department from approving the Compacts. Indeed, the Department has made it clear that an intrastate dispute over the legality of certain games is no reason for disapproval. Take for example the 2003 amendments to the compact between the Sokaogon Chippewa Community and the State of Wisconsin. Those amendments authorized additional forms of class III gaming, including electronic keno, roulette, craps, and poker. At the time the amendments were submitted to the Department, there was an ongoing dispute as to whether such games can be lawfully compacted for. *See* Letter from Acting Assistant Secretary A. Martin to Chairwoman S. Rachal (Aug. 13, 2003); *see also Dairyland Greyhound Park v. Doyle*, 295 Wis. 2d 1 (2006). Instead of trying to resolve the intrastate dispute, the Department determined that the best course of action was to allow the amendments to take effect. *Id.*

These examples all reflect a commonsense legal principle: it is entirely appropriate for a compact to include provisions regarding forms of gaming that are not *yet* legal (but may be in the future) or that are the subject of ongoing internal state-based debate over their legality.

C. The Compacts are entirely consistent with state law.

As stated above, there is nothing inappropriate about a compact that addresses new forms of gaming, and there is a deeply rooted historical practice in doing so. With these precedents, the Department should not hesitate to approve the Compacts.

As to the Event Wagering provision, it clearly states that the Tribes can conduct Event Wagering only "to the extent such wagers are authorized by law." Hence, if it turns out that such wagers are *not* authorized by law, then the Tribes cannot conduct such Event Wagering. It is that

[5] Indeed, in his memorandum recently submitted to the Department, the Governor has set forth cogent reasons as to why such gaming can be offered under existing state law.

simple. And the detailed framework for Event Wagering does not change the analysis, as all of the provisions ultimately rely on the criterion that such wagers be authorized by law.

Furthermore, although the AG Opinion only references house-banked card and table games in a single footnote, *see* AG Op. at 5 n.5, it is worth noting that similar analysis applies to those games as well.[6] House-banked card and table games (like Event Wagering) are part of the broader definition of "Covered Games" That definition provides:

> "*Covered Game*" or any derivative thereof means all Gaming Machines, House-banked Card Games, Nonhouse-banked Card Games, House-banked Table Games, Nonhouse-banked Table Games, and Event Wagering, which are conducted in accordance with the Standards, as applicable, if the operation of such game by the Tribe would require a Compact and if such game has been approved by the SCA. Class II gaming, as defined by IGRA, is expressly excluded from this definition.

Part 2.A.7. As clearly stated, a Class III game is only a "Covered Game" "if such game has been approved by the SCA" (i.e., the State of Oklahoma Office of Enterprise and Management Services). The SCA does not have authority to approve unlawful games. Indeed both federal law and Oklahoma law impose a legal presumption that the SCA will not approve games that are unlawful under the Oklahoma law. *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 758 (2005) (government officials must be presumed to act lawfully) (citing *President, Directors & Co. of Bank v. Dandridge*, 25 U.S. 64, 69-70(1827); *Habeas Corpus of Langley v. Travers*, 325 P.2d 1094, 1116 (OK 1958) ("It has been held repeatedly that there is a presumption that [public] officers will act lawfully") (Nix, J. dissenting). Such legal presumption also binds the Department. Accordingly, the Department must presume that the SCA will only approve games that are lawful in the State.

Additionally, the Compact's definition of "Covered Game" is substantively the same as the Model Compact definition, which was approved by the Department. Specifically, the Model Compact broadly includes *all* games which may be later authorized by Oklahoma Law.[7] Thus under the Model Compact, "Covered Game" could be interpreted to include house banked card games and event wagering. Here, the Compacts' express reference to a game is not different than the Department-approved Model Compact definition which included *any* game. Furthermore, like the Model Compact, the Compacts require any "Covered Game" to be approved by Oklahoma Law.[8]

Ultimately, the Compacts merely address new forms of gaming that were not part of the prior compacts and that would be innovative in the state—a practice that the Department has long

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[6] Of course, the Tribes do not concede that such gaming would currently be illegal. But even if there are debates regarding their legality, such debate does not prevent approval of the Compacts.

[7] Model Compact, Part 3(5) (defining "Covered Game" in part to include "*any other game*, if the operation of such game by a tribe would require a compact and if such game has been. . . [approved by the Oklahoma Horse Racing Commission, state legislation, or amendment to the State Tribal Gaming Act]").

[8] Compacts, 2.A.7 (requiring "Covered Game" to be authorized by Oklahoma law since SCA must approve the game and SCA may only approve games authorized by Oklahoma law).

approved. There is no irreconcilable conflict between the Compacts and state law, as the Compacts clearly incorporate state law to the extent it is applicable. The Department should thus approve the Compacts.

D. The Compacts are the product of a good faith settlement of ongoing litigation, and thus present unique circumstances in favor of approval.

As the Department is aware, these Compacts were entered into as the result of a good faith negotiated settlement between the Tribes and the State to resolve their dispute in ongoing litigation over whether the existing compacts automatically renewed. Because these Compacts embody the settlement of contentious federal court litigation, there are unique circumstances justifying their approval.

The ongoing litigation has caused substantial disruption to the Oklahoma Indian gaming industry, and there is no clear end in sight. Summary judgment proceedings are poised to begin, but there is certainly no guarantee that adjudication of the cross-motions for summary judgment will put an end to the case. Indeed, the far more likely scenario is years of appeals, cross-appeals, remands, further appeals, with all types of prolonged motion practice along the way. Meanwhile, the tribes and the State will spend millions in attorneys' fees—funds that can be much better spent on important tribal and state governmental programs and services.

To be clear, the Tribes have always believed—and continue to believe—that our existing compacts automatically renewed. And we also felt confident that our legal position regarding automatic renewal would (eventually) prevail. But notwithstanding that legal position, we felt that the wiser course of action was to put aside our differences and negotiate a good faith settlement with the State. This was purely an exercise of sovereignty.

Of course, the Compacts do not put an end to the ongoing litigation, as multiple other tribes continue to have a live dispute with the State. However, if the Department were to disapprove the Compacts, it would strongly discourage any settlement discussions with the State. These are important considerations that the Department should take into account.

Indeed, the Department has traditionally been deferential to compacts that result from negotiated settlements of litigation. For instance, in 2008, on review of an amendment to the compacts between the State of Michigan and the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians, the Department noted that the amendment was "entered into in connection with the settlement of pending litigation and thus presents a set of unique circumstances," and therefore the Department deemed it prudent to simply allow the amendment to go into effect. *See* 73 Fed. Reg. 21361 (April 21, 2008). *See also*, 73 Fed Reg. 58617 (Regarding gaming compact between Nez Perce Tribe and State of Idaho, stating "This Compact is entered into in connection with the state lottery litigation between the parties and thus presents unique circumstances resulting in our decision to neither approve nor disapprove the Compact within the 45-day statutory time frame").

In short, disapproval of these Compacts would substantially reduce the chance of the ongoing litigation ever settling. These unique circumstances weigh strongly in favor of approving the Compacts—or at a minimum, allowing them to be deemed approved.

Conclusion

We have a deep well of respect for Attorney General Hunter, but his grievances with the Compacts are simply not well-founded. The Compacts are the product of good-faith negotiations with the State. They comply entirely with federal and state law, and they should be approved.

Sincerely,

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