MIKE HUNTER
ATTORNEY GENERAL

ATTORNEY GENERAL OPINION
2020-8

The Honorable Greg Treat
President Pro Tempore
Oklahoma State Senate
2300 N. Lincoln Blvd., Room 422
Oklahoma City, OK 73105

May 5, 2020

The Honorable Charles McCall
Speaker
Oklahoma House of Representatives
2300 N. Lincoln Blvd., Room 401
Oklahoma City, OK 73105

Dear President Pro Tempore Treat and Speaker McCall:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

> **What authority does the Governor have to enter into new compacts with tribes which contain gaming activities that are expressly prohibited by Oklahoma Statute?**

I.
BACKGROUND

A. The State-Tribal Gaming Act.

In 2004, the Legislature referred State Question 712 to the people, who approved the measure in a referendum that enacted the State-Tribal Gaming Act ("the Act"). *See* 2004 Okla. Sess. Laws ch. 316 (codified at 3A O.S.2011 & Supp.2019, §§ 261 *et seq.*). Although the terms of the tribal gaming compacts were initially formulated in discussions between the Governor and Tribal Nations in Oklahoma, it was through this exercise of legislative power that the State offered a model tribal gaming compact to all federally-recognized Indian tribes in the state. 3A O.S.Supp.2019, § 280. If that offer was accepted by a Tribe, "[n]o further action by the Governor or the state is required before the compact can take effect," though approval by the Secretary of the Interior is still necessary under federal law. *Id.* The Act offers the model compact on behalf of the State "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, and by

means of the execution of the State-Tribal Gaming Act, and with the concurrence of the State Legislature through the enactment of the State-Tribal Gaming Act." *Id.* The Act further provides that "[n]o tribe shall be required to agree to terms different than the terms set forth in the Model Tribal Gaming Compact." *Id.*

Oklahoma law for over a century has generally prohibited gambling, but under the Act "the conducting of and the participation in any game authorized by the model compact . . . are lawful when played pursuant to a compact," notwithstanding the criminal laws prohibiting gambling found in Title 21, Sections 941 through 988. *Id.*; *see also id.* § 262(A) (providing same exception to criminal prohibitions for "gaming in accordance with the provisions of this act or the model compact set forth in Section 281"). But the Act "is game-specific and shall not be construed to allow the operation of any other form of gaming unless specifically allowed by this act," and the "act shall not permit the operation of slot machines, house-banked card games, house-banked table games involving dice or roulette wheels, or games where winners are determined by the outcome of a sports contest." *Id.* § 262(H).

The model compact sets out numerous parameters for tribal gaming, including standards and regulations for conducting games, independent game testing, mechanisms to ensure oversight and compliance with the compact's terms such as monitoring, recordkeeping and auditing, permitted locations for gaming facilities, licensing for gaming facility employees and vendors, and dispute resolution. *Id.* § 281. The model compact also acknowledges that it "provides tribes with substantial exclusivity" in conducting gaming in Oklahoma that is otherwise subject to criminal prohibition and, in consideration for that exclusivity, provides for the payment of fees by the Tribe to the State from a share of gaming revenues. *Id.* § 281, Part 11. The model compact states the following as the "authority to execute" the compact on behalf of the State: "as an enactment of the people of Oklahoma, [the compact] is deemed approved by the State of Oklahoma." *Id.* § 281, Part 16.

Like the rest of the Act, the model compact allows compacting tribes to conduct "covered game[s]" only in conformity with the compact. *Id.* § 281, Part 4(A). This includes specifically enumerated games as well as games "approved by state legislation for use by any person or entity" or "approved by amendment of the State-Tribal Gaming Act." *Id.* § 281, Part 3(5).[1] In 2018 the Legislature amended the Act to include additional covered games (specifically, non-house-banked table games) that a Tribe could conduct if a Tribe elects to accept the offer, agrees to a written supplement to an existing compact, and receives approval of the supplement by the Secretary of the Interior. *Id.* § 280.1. Again, gaming played pursuant to such a compact supplement is not subject to Oklahoma's general criminal prohibitions on gambling. *Id.* § 280.1(G).[2]

[1] Other non-enumerated games that are permitted include those "approved by the Oklahoma Horse Racing Commission for use by an organizational licensee" and "upon election by the tribe by written supplement to this Compact, any Class II game in use by the tribe." *Id.*

[2] This 2018 legislation also amended Section 262(H) of Title 3A, which is quoted above, to alter the list of games not permitted by the Act. *See* 2018 Sess. Laws. chp. 11, § 1.

B. Recent developments related to Oklahoma tribal gaming compacts.

Many Tribes accepted the State's offer of the model compact, but recently a dispute between the Governor and many of those Tribes has arisen about whether those compacts are still in force after January 1, 2020 pursuant to Part 15(B) of the model compact. *See* 2020 OK AG 3, ¶¶ 2-6. Because it is currently the subject of active litigation in federal court, this Opinion takes no position on the issues raised in that dispute. *See id.* ¶ 6 (citing *Cherokee Nation et al. v. Stitt*, No. CIV-19-1198 (W.D. Okla.)).

In the midst of this litigation, the Governor of Oklahoma and two of the litigating tribes (the Comanche Nation and the Otoe-Missouria Tribe) reached an agreement on new gaming compacts.[3] These compacts do not conform to the model compact set forth in the Act. For example, the new compacts include covered games not included in the model compacts or authorized by the Act, such as house-banked card games, house-banked table games, and event wagering. Event wagering is defined in Part 2 of these new compacts as "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," excepting intercollegiate sports involving either schools or events within the state. The new compacts also deviate from the model compact in that they have different exclusivity fee rates, different processes for adding new games, a different dispute resolution clause, and different audit and compliance provisions, among many other differences. Unlike the model compacts, the new compacts purport to vest all state authority related to the compacts with the Governor alone.

The question you ask is whether the Governor has authority to unilaterally bind the State to these new gaming compacts that purport to authorize gaming activity prohibited by state law.

II.
DISCUSSION

A. The Governor's authority to negotiate compacts with Indian tribes

Your question implicates core notions of our constitutional structure: both the separation of powers between branches of state government as well as the checks and balances that those branches can impose on each other. The legislative branch sets the public policy of the State by enacting law not in conflict with the Constitution. OKLA. CONST. art. V, § 1. The Governor has a role in setting that policy through his function in the legislative process, such as signing or vetoing bills, *Id.* art. VI, § 11, but his primary role is in taking care that the law is faithfully executed, *id.* art. VI, § 8.[4] This division of powers creates the ability of one branch to check the excesses of the other: the Governor can veto bills passed by the Legislature, for example, while the Governor cannot act

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[3] *Available at* https://www.governor.ok.gov/static-assets/documents/gamingcompacts/gaming_compact_comanche_nation.pdf (last visited May 1, 2020) *and* https://www.governor.ok.gov/static-assets/documents/gamingcompacts/gaming_compact_otoe_missouria.pdf (last visited May 1, 2020).

[4] Of course, the Governor is not the only officer of the executive branch and therefore does not possess exclusive authority to execute the law. *See* OKLA. CONST. art. VI, § 1; *Wentz v. Thomas*, 1932 OK 636, ¶ 27, 15 P.2d 65, 69.

contrary to the constitutional laws enacted by the Legislature. *See Coffee v. Henry*, 2010 OK 4, ¶ 5, 240 P.3d 1056, 1057; *Dank v. Benson*, 2000 OK 40, ¶ 6 n.12, 5 P.3d 1088, 1091 n.12.

This Office examined the separation of powers as it relates to compacts between the State and the Tribes in Oklahoma Attorney General Opinion 2004-27. The Opinion began by noting the Governor's power under Article VI, Section 8 to "conduct in person or in such manner as may be prescribed by law, all intercourse and business of the State with other states and with the United States." 2004 OK AG 27, ¶ 7 (quoting OKLA. CONST. art. VI, § 8). Thus, "as a matter of State Constitutional law, it is the Governor who is empowered to conduct intercourse and business with the other states and with the United States." *Id.* ¶¶ 7-8. In contrast, the opinion continued, "the power of the Governor to contract with Indian tribes is not derived from the Constitution; it is derived from statutes," specifically citing Section 1221(C)(1) of Title 74, which states: "The 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." *Id.* ¶ 9.

The opinion then evaluated case law on the separation of powers principle restricting the Legislature's ability to control the exercise of executive authority via requirements of *post-hoc* legislative approval. *Id.* ¶¶ 22-26 (examining *In re Okla. Dep't of Transp.*, 2002 OK 74, 64 P.3d 546). Based on this case law, the opinion concluded: "[A]ny 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 . . . . Such requirements . . . would have the Legislature carrying out legislative policy and applying it to various conditions." *Id.* ¶ 27. But the opinion also recognized the balance created by the Legislature's proper role: "Of course, any agreement negotiated by the Governor must conform to the public policy enacted into law by the Legislature, as the role of the Legislative Branch is to establish public policy, and the role of the Executive Branch is to execute that policy." *Id.* ¶ 30, n.3 (citing *Tweedy v. Okla. Bar Ass'n*, 1981 OK 12, 624 P.2d 1049, 1054).

In short, our previous opinion recognizes the Governor's authority to negotiate compacts with Indian tribes without the need to secure later approval by the Legislature *provided that* any such compacts conform to (and not conflict with) the laws duly enacted by the legislative branch.

B. The Governor lacks the authority to unilaterally bind the State to compacts with Indian tribes that authorize activity prohibited by state law.

Under the framework embraced by Attorney General Opinion 2004-27, the Governor currently lacks the authority to bind the State to the compacts he recently negotiated with the Comanche Nation and the Otoe-Missouria Tribe. These compacts purport to grant the State's consent to conduct gambling activities that are prohibited by state criminal law, *see* 21 O.S.2011 & Supp.2019, §§ 941–988. State law permits gaming conducted by Indian tribes, but only if that gaming is "in accordance with the provisions of [the State-Tribal Gaming Act] or the model compact set forth in Section 281" of the Act. 3A O.S.Supp.2019, § 262(A); *see also id.* § 280. Gaming under these new compacts cannot be said to be in accordance with the model gaming compact offered by the Act because their terms differ considerably. Were the Governor able to unilaterally authorize gaming, it would render superfluous the provisions in the Act allowing gaming under the model compact "[n]otwithstanding the provisions of Sections 941 through 988 of Title 21 of the Oklahoma Statutes." *Id.* § 280; *see also id.* § 262(A); *Odom v. Penske Truck Leasing Co.*, 2018 OK 23, ¶ 36, 415 P.3d 521, 532 ("Statutes must be read to render every part operative, and to avoid rendering it superfluous or useless.").

Although the new compacts differ from the model compacts in many respects, the clearest instance of conflict with state law is in the scope of covered games. The new compacts authorize gaming such as house-banked card and table games, as well as event wagering, that are prohibited by state criminal law and not exempted by the Act.[5] Nor can it be said that because the Act permits *some* Class III gaming by compacting tribes, *all* such gaming can be authorized by a compact. Again, the State-Tribal Gaming Act "is game-specific and shall not be construed to allow the operation of any other form of gaming unless specifically allowed by this act"; specifically, the "act shall not permit the operation of . . . house-banked card games, house-banked table games involving dice or roulette wheels, or games where winners are determined by the outcome of a sports contest." 3A O.S.Supp.2019, § 262(H). Thus, these new compacts do not "conform to the public policy enacted into law by the Legislature" and as such the Governor lacks the authority to enter into them on behalf of the State. 2004 OK AG 27, ¶ 30, n.3.[6]

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[5] While the new compacts define event wagering as placing a wager only "to the extent such wagers are authorized by law," such that it could be argued the new compacts do not authorize activity prohibited by state law, this qualifying language does not exist with respect to house-banked table and card games. Further, the new compacts permit "gaming machines," which is a term that may not be coextensive with the gaming allowed by the Act, and therefore may also encompass types of gambling prohibited by Oklahoma law. Thus, even setting aside the issue of event wagering, the new compacts purport to authorize activity prohibited by state law.

[6] Because of this clear deviation from state law, we need not analyze whether compacts that differ from the model compact in other respects—such as audit and compliance measures, permitted locations for gaming facilities, or dispute resolution—would be permitted by state law. Nor need we determine whether the Governor could unilaterally enter into new gaming compacts that differ from the model compact only with respect to gaming exclusivity and exclusivity fees, pursuant to the model compact's provision allowing the Governor to "request to renegotiate the terms of subsections A and E of Part 11 of this Compact." 3A O.S.Supp.2019, § 281, Part 15(B). And while the new compacts contain a severability clause, it only applies if "any federal court" declares a provision invalid, which does not impact our analysis of state law and in any event may be of limited relevance because the new compacts depart from the State-Tribal Gaming Act in so many different respects.

Notably, the exemptions from the State's criminal prohibitions on gambling in the Act are not only for "the conducting of" gaming by an Indian tribe on Indian lands, but also "the participation in" such gaming by any person, including non-Indians. 3A O.S.Supp.2019, §§ 262(A), 280. So even if sovereign immunity would preclude the State from prosecuting tribes conducting gaming in violation of state law, nonmembers would still be subject to prosecution for participating in such gaming—and the Governor lacks authority to unilaterally declare their actions are legal by means of a tribal compact. The Governor can no more permit gambling prohibited by state criminal law via unilateral compact than he could agree to allow a Tribe to sell illicit controlled substances to members of the public in Indian country.

This plain reading of the text of the law and our previous opinion on the topic is supported by historical practice. *See N.L.R.B. v. Noel Canning*, 573 U.S. 513, 524 (2014) (holding in separation of powers case that the Court "put[s] significant weight upon historical practice" when interpreting the Constitution). History confirms that although the Governor has the authority to enter into negotiations with Indian tribes, any compact resulting from those negotiations can be agreed to on behalf of the State only if consistent with state law or if authorized by state law enacted for that purpose. The model compacts were initially drafted pursuant to talks between the Governor and tribal nations. *See* 3A O.S.Supp.2019, § 280 (recognizing the Governor's "power to negotiate the terms of a compact between the state and a tribe"). But the State only entered into them "through the concurrence of the Governor . . . by means of the execution of the State-Tribal Gaming Act, and with the concurrence of the State Legislature through the enactment of the State-Tribal Gaming Act." *Id.* § 280. The model gaming compact itself states the "authority to execute" the compact on behalf of the State is based on the fact that, "as an enactment of the people of Oklahoma, [it] is deemed approved by the State of Oklahoma." *Id.* § 281, Part 16. And when in the past the State and the Tribes sought to expand the scope of covered games authorized by state law and the gaming compacts, they did so pursuant to the model compact's authorization of games "approved by amendment of the State-Tribal Gaming Act," *id.* § 281, Part 3(5). Specifically, the Legislature and Governor enacted a law in 2018 that amended the Act and provided for supplements to the model compact that tribes could agree to in order to permit non-house-banked table games. *Id.* § 280.1. In contrast, the new forms of gaming contemplated in the compacts negotiated with the Comanche Nation and the Otoe-Missouria Tribe have not been authorized by state law and so cannot be said to have been agreed to by the State, nor is the State validly bound to those compacts.[7]

[7] Many other state-tribal compacts are specifically contemplated by, or at least not in conflict with, state law. *See, e.g.*, 68 O.S. 2011 & Supp. 2019, §§ 346 *et seq.* (taxes on cigarette sales); 68 O.S.2011, § 500.63 (taxes on motor fuel sales); 47 O.S.2011, § 2-108.3 (tribal license plates); 70 O.S.Supp.2019, § 3311.4 (cross-deputization agreements); 21 O.S.Supp.2019, § 99a (same); 21 O.S.2011, § 648 (same). The existence of compacts entered into by the Governor without approval by the Legislature does not undermine our conclusion here because such compacts do not authorize activity prohibited by state law, but instead promote compliance with state law. *Cf.* Informal Op. by A.A.G. Neal Leader, 93-685 (agreement with Cherokee to promote cooperative law enforcement did not constitute exercise of legislative authority and thus did not interfere with the separation of powers).

C. Federal law does not determine how the State can consent to a tribal gaming compact, nor can it dictate the allocation of power within state government.

The federal law governing state-tribal gaming compacts—the Indian Gaming Regulatory Act ("IGRA")—does not alter this analysis. "IGRA creates a cooperative federal-state-tribal scheme for regulation of gaming hosted by federally recognized Indian tribes on Indian land." *KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1, 7 (1st Cir. 2012). Under IGRA, Class III tribal gaming is lawful only if authorized by tribal ordinance, "located in a State that permits such gaming for any purpose by any person, organization, or entity," and "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1). Upon request from a tribe to negotiate a gaming compact, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." *Id.* at § 2710(d)(3)(A). These compacts take effect only if approved by the Secretary of the Interior. *Id.* at § 2710(d)(3)(B). Nothing in this law attempts to dictate *how* a state's government agrees to the terms of a compact, whether by executive action alone, legislative action, or the concurrence of the two.

While IGRA purports to require states to enter into good-faith compact negotiations on Class III gaming, it only authorizes tribal Class III gaming if state law "permits such gaming for any purpose by any person, organization, or entity." *Id.* at § 2710(d)(1)(B). In other words, "where a state does not 'permit' gaming activities sought by a tribe, the tribe has no right to engage in these activities, and the state thus has no duty to negotiate with respect to them." *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1256 (9th Cir. 1994). "The State must first legalize a game, even if only for tribes, before it can become a compact term." *American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1067 (D. Ariz. 2001), *vacated on other grounds*, 305 F.3d 1015 (9th Cir. 2002). Thus, "[i]n order to determine the appropriate scope of negotiations between the Tribe and the state . . . , it is critical to determine the scope of gaming permitted by state law." *N. Arapaho Tribe v. State of Wyoming*, 389 F.3d 1308, 1311 (10th Cir. 2004). IGRA does not preempt a state's decision to prohibit specific types of Class III gaming, nor require a state to enter into a compact permitting a specific type of Class III gaming that is prohibited by state law. Rather, in determining the proper scope of a federally-authorized compact, IGRA *defers* to state law. *See also Rumsey*, 64 F.3d at 1258 ("[A] state need only allow Indian Tribes to operate games that others can operate, but need not give tribes what others cannot have.").[8]

This approach, like the provisions of the State-Tribal Gaming Act, is game-specific. IGRA "requires a particularized inquiry into the proposed gambling activity" and "look[s] at the state's public policy toward the specific gaming activities proposed by the tribes." *Seminole Tribe of Fla. v. State of Fla.*, No. 91-cv-6756, 1993 WL 475999, at *8 & n.1 (S.D. Fla. Sept. 22, 1993). The relevant inquiry is "whether applicable state law permits a specific type of game rather than a broad category of gaming," and "if the state entirely prohibits a particular game, the state is not required to negotiate with a tribe to permit that game, even if the state permits other games in the same

[8] If state law permits a specific type of gaming but only under certain conditions or regulations, IGRA contemplates that a state will in good-faith negotiate with a tribe to conduct that same type of gaming even if conducted in a manner that state law would otherwise prohibit. *N. Arapaho Tribe*, 389 F.3d at 1311-13. Thus, for example, if state law permitted pari-mutuel wagering on horse races but limited the commercial organizer's profits to 25% of the total wagers, gaming compact negotiations on pari-mutuel wagering on horse races need not impose that same profit limitation on the compacting tribe. *Id.*

classification." *Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1151 (D. Or. 2005); *see also Cheyenne River Sioux Tribe v. State of S.D.*, 3 F.3d 273, 278-79 (8th Cir. 1993) (merely because state law permitted video keno does not mean the state was required to negotiate a compact whereby a tribe could conduct traditional keno). Here, merely because Oklahoma has permitted pari-mutuel wagering on horse racing does not mean that the State has broadly authorized *all* forms of event wagering, such as betting on the outcomes of local elections, professional basketball games, high school football matches, or little-league baseball games.[9] Similarly, merely because the Act has permitted non-house-banked table and card games does not mean the State has broadly authorized all forms of table and card games, including house-banked games. *See Rumsey*, 64 F.3d at 1256-58 (holding that though state permitted nonbanked card gaming, it was not required to negotiate banked card gaming).

In any event, the relevant question here is **not** the proper scope of IGRA *negotiations* between Oklahoma and tribal nations, it is whether the Governor can unilaterally *enter into* compacts on behalf of the State in a manner that is contrary to state law. Even if IGRA required that certain games be part of good-faith negotiations with tribes desiring to enter into gaming compacts, nothing in IGRA authorizes the Governor to unilaterally bind the State to a compact when agreeing to its terms conflicts with the public policy of the State as expressed in statute, permits activity criminalized by state law, or undermines our Constitution's separation of powers and system of checks and balances. IGRA creates a framework for states, tribes, and the federal government to cooperate in the regulation of tribal gaming, but *state law* determines when and how the State consents to a compact negotiated within IGRA's framework. These issues were extensively discussed by the Tenth Circuit in the analogous case of *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997). That court's careful and well-reasoned decision obviates the need to further discuss the relevant law here.

Nor could IGRA constitutionally compel the State to legalize specific forms of gaming or dictate which branches of state government may enter into a compact on behalf of the State. The Tenth Amendment recognizes a federal constitutional structure that, under the anticommandeering doctrine, prohibits the national government from forcing arms of state governments to carry out federal law or enact specific legislation into state law. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018); *Printz v. United States*, 521 U.S. 898, 924 (1997) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.") (citation omitted); *New York v. United States*, 505 U.S. 144, 145 (1992) ("Congress may not commandeer the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program."). In *Murphy*, for example, the U.S. Supreme Court held that a federal law making it unlawful for a State to authorize sports gambling violates the anticommandeering

[9] Nor is it the case that, because the State has authorized certain activities at sporting events that are *outside* the definition of wagering, the State has thereby authorized a form of sports wagering. *See* 2005 OK AG 18, ¶¶ 14-23 (discussing the exclusion of "purses, prizes, or premiums" from the statutory definition of "bet" in 21 O.S.2011, § 981); 1999 OK AG 5 (same); 1995 OK AG 6 (same).

doctrine because the law "unequivocally dictates what a state legislature may and may not do." *Id.* at 1478. The federal law unconstitutionally "put [state legislatures] under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals." *Id.*

For these reasons, the Oklahoma Constitution's separation of powers and system of checks and balances is not altered by federal law in the context of tribal gaming compacts, nor does IGRA change how the State decides whether to enter into a gaming compact. This Office's longstanding analysis of state law endures: the Governor has the authority to negotiate compacts with Indian tribes but he cannot bind the state to any such compact if doing so authorizes activity prohibited by state law or would otherwise be contrary to state law.

It is, therefore, the official Opinion of the Attorney General that:

The Governor lacks authority to enter into and bind the State to compacts with Indian tribes that authorize gaming activity prohibited by state law.

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

MITHUN MANSINGHANI
SOLICITOR GENERAL OF OKLAHOMA

ATTORNEY GENERAL OF OKLAHOMA
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