IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:20-cv-02167 (TJK)
	)	
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

PLAINTIFF NATIONS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Pursuant to Fed. R. Civ. P. 56, Plaintiffs Cherokee Nation, Chickasaw Nation, Choctaw Nation of Oklahoma, and Citizen Potawatomi Nation ("CPN") (collectively, "Plaintiff Nations") seek summary judgment on all counts of their Complaint against Defendants: the Department of the Interior; Secretary of the Interior Doug Burgum ("Secretary"); William Kirkland, Assistant Secretary of the Interior – Indian Affairs; Forrest Tahdooahnippah, Chairman of the Comanche Nation; John R. Shotton, Chairman of the Otoe-Missouria Tribe;[1] and J. Kevin Stitt, Governor of Oklahoma (all collectively, "Defendants").

INTRODUCTION

The Secretary's decisions to allow the Comanche Nation ("Comanche") and Otoe-Missouria Tribe ("Otoe-Missouria") Agreements ("Agreements") to go into effect by inaction were arbitrary and capricious and contrary to law. Those decisions are judicially reviewable, *W. Flagler Assocs., Ltd. v. Haaland*, 71 F.4th 1059, 1063 (D.C. Cir. 2023) (citing *Amador County v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011)) under "25 U.S.C. § 2710(d)(8)(C)[, which] 'provides the law to apply—that is, the compact is deemed approved but only to the extent the compact is consistent with the provisions of IGRA." *Id.* at 1064-65 (quoting *Amador County*, 640 F.3d at 381) (citation modified). "If a compact has not been legally entered into under state law, it is 'invalid' under IGRA." *Cherokee Nation v. Dep't of Interior*, 643 F. Supp. 3d 90, 98 (D.D.C. 2022) (citing *Kickapoo Tribe of Indians v. Babbitt* (*Kickapoo I*), 827 F. Supp. 37, 46 (D.D.C. 1993), *rev'd on other grounds*, 43 F.3d 1491 (D.C. Cir. 1995), and *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1555, 1559 (10th Cir. 1997)). The Agreements at issue here violate IGRA because IGRA requires that a compact be "entered into" by the State, 25 U.S.C. § 2710(d)(1)(C), (d)(8)(A), and Defendant Stitt lacked authority to enter into the Agreements on behalf of the State, as the

[1] We refer to Defendants Tahdooahnippah and Shotton collectively as "Defendant Chairmen."

Oklahoma Attorney General determined before those Agreements were no-action approved in an opinion that was and is determinative of the law and binding on the Governor, and as the Oklahoma Supreme Court has squarely held. The Secretary was therefore obligated to disapprove the Agreements, which are void. *Santa Ana*, 104 F.3d at 1559. In addition, the Secretary was required to disapprove the Agreements because they contain numerous provisions that violate IGRA. This Court should reverse the Secretary's no-action approvals and remand the Agreements for disapproval.

STATUTORY BACKGROUND

IGRA governs Class III gaming, 25 U.S.C. § 2703(8), and only permits Class III gaming that is: authorized by a tribal ordinance that meets the requirements of 25 U.S.C. § 2710(b) and has been approved by the Chairman of the National Indian Gaming Commission ("NIGC"), *Amador County*, 640 F.3d at 376 (citing 25 U.S.C. § 2710(d)(1)(A), (d)(2)(C)); conducted on "Indian lands . . . located within a state that permits gaming 'for any purpose by any person, organization, or entity,'" *id.* (quoting 25 U.S.C. § 2710(d)(1)(B)); and "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under [25 U.S.C. § 2710(d)(3)] that is in effect," 25 U.S.C. § 2710(d)(1)(C).

IGRA provides that the Secretary may only approve a compact that has been "entered into between an Indian tribe and a State," *id.* § 2710(d)(8)(A), and that a compact is in effect "only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register," *id.* § 2710(d)(3)(B). An IGRA compact is "a form of contract," *Santa Ana*, 104 F.3d at 1556 (citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)); *see also Alcorn v. Wolfe*, 827 F. Supp. 47, 52 (D.D.C. 1993), and accordingly to "enter into" a compact the parties must have validly agreed to be bound by its terms, *Santa Ana*, 104 F.3d at 1556.

IGRA requires the Secretary to disapprove a compact if it violates IGRA or other federal law or trust obligations, 25 U.S.C. § 2710(d)(8)(B)(i)-(iii), "and those limitations provide the 'law to apply.'" *Amador County*, 640 F.3d at 381.

> Moreover, subsection (d)(8)(C), which governs approval by inaction, includes no exemption from this obligation to disapprove illegal compacts. Like subsection (d)(8)(B)'s list of conditions that require disapproval, subsection (d)(8)(C)'s caveat—that the compact is deemed approved 'but only to the extent the compact is consistent with the provisions of [IGRA]'—provides 'law to apply.' And just as the Secretary has no authority to affirmatively approve a compact that violates any of subsection (d)(8)(B)'s criteria for disapproval, he may not allow a compact that violates subsection (d)(8)(C)'s caveat to go into effect by operation of law.

Id. (alteration in original).

STANDARD OF REVIEW

I. SUMMARY JUDGMENT STANDARD OF REVIEW.

Summary judgment is appropriate where there is no genuine dispute of material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

Under the Administrative Procedure Act ("APA"), a court may "hold unlawful and set aside" final agency action that is "arbitrary, capricious . . . or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The publication of the Secretary's no-action approvals of the Agreements constitutes final agency action, *id.* § 704, as it "mark[s] the consummation of the agency's decisionmaking process" and is also an action "from which legal consequences will flow," *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citation modified); *see also Amador County*, 640 F.3d at 380-83 (APA review available of Secretary's no-action approval of a compact). "Questions of law are reviewed *de novo* under the APA as in ordinary cases." *Maniilaq Ass'n v. Burwell*, 72 F. Supp. 3d 227, 234 (D.D.C. 2014). "[W]hen a party seeks review of agency action under the APA . . . , the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law." *Forest Cnty. Potawatomi Cmty. v. United States*, 330 F. Supp. 3d 269, 278 (D.D.C. 2018) (quoting *Am. Biosci., Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)).

II. STANDING REQUIREMENTS ON A MOTION FOR SUMMARY JUDGMENT.

"To have standing, a plaintiff must 'present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.'" *Dep't of Com. v. New York*, 588 U.S. 752, 766 (2019) (quoting *Davis v. FEC*, 554 U.S. 724, 733 (2008)). "The party invoking federal jurisdiction bears the burden of establishing the[] elements [of standing]," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), which "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260, 267 (D.D.C. 2021), *rev'd on other grounds*, 71 F.4th 1059 (quoting *Lujan*, 504 U.S. at 561). Plaintiff Nations meet that burden. *See* Plaintiff Nations' Statement of Facts ("SOF") ¶¶ 52-80; *infra* Argument § I.

"If one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case." *LaRoque v. Holder*, 650 F.3d 777, 792 (D.C. Cir. 2011) (citation modified); *see also Dep't of Com.*, 588 U. S. at 766. In addition, a plaintiff that establishes standing can assert violations of law that are against the "public interest" to overturn the government action, even if those violations do not cause the injury giving rise to standing. *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972); *Sierra Club v. Adams*, 578 F.2d 389, 391-93 (D.C. Cir. 1978); *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 n.5 (2006).

ARGUMENT

I. PLAINTIFF NATIONS HAVE STANDING TO BRING THEIR CLAIMS.

Plaintiff Nations satisfy the three-part test for Article III standing: injury, traceability, and redressability. *See Cherokee Nation*, 643 F. Supp. 3d at 105-06.[2]

A. Plaintiff Nations Have Suffered Injuries In Fact From The Secretary's No-Action Approvals.

1. Plaintiff Nations are unable to compete on an equal footing.

IGRA "provide[s] a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1), and makes the Secretary responsible for ensuring that Indian tribes only conduct gaming in accord with IGRA's terms. *Id.* § 2710(d)(8)(A)-(C). Requiring compliance with IGRA ensures fair competition among tribes that conduct Class III gaming. And "just as the Secretary has no authority to affirmatively approve a compact that violates any of subsection (d)(8)(B)'s criteria for disapproval, he may not allow a compact that violates subsection (d)(8)(C)'s caveat to go into effect by operation of law." *Amador County*, 640 F.3d at 381. Had the Secretary complied with this statutory obligation, he would have disapproved the Agreements because they were not validly entered into by the State, as IGRA requires, 25 U.S.C. § 2710(d)(1)(C), (d)(2)(C), and contain terms that violate IGRA, *see infra* Argument §§ II-III. His failure to do so imposes an injury in fact on the Plaintiff Nations, namely "the inability to compete on an equal footing." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 497 (7th Cir.

[2] Plaintiff Nations claims fall within the "zone of interests" protected by IGRA, since they allege they are "affected by the improper federal regulation of 'Indian tribe' gaming." *Cherokee Nation*, 643 F. Supp. 3d at 110 (citing *Amador County*, 640 F.3d at 378-79). Plaintiff Nations reserve for appeal all bases for standing they argued in response to Defendants' Motions to Dismiss, *see* ECF No. 114 at 6-45, but which the Court denied in its November 2022 Order, *see Cherokee Nation*, 643 F. Supp. 3d at 111-16, and which might be urged at the Rule 56 stage.

2005) (quoting *Ne. Fla. Ch. of Assoc'd Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)).[3] Each Plaintiff Nation has a legally-protected interest in the Secretary only authorizing Indian tribes to conduct Class III gaming in accordance with IGRA. The Secretary's failure to fulfill that obligation forces the Nations to compete with ten Class III gaming facilities that are illegal under IGRA and six more such facilities that are in the pipeline, SOF ¶¶ 53-55, 75, 78; Second Am. Compl. ¶¶ 5, 128-29, 151, 186, 230, ECF No. 104 ("Compl."). "[T]he harm lies in 'the denial of equal treatment,'" *Lac du Flambeau*, 422 F.3d at 498 (quoting *Assoc'd Gen. Contractors*, 508 U.S. at 666), and in the "alteration in competitive conditions" resulting from the no-action approvals, which "clearly amounts to a concrete injury," *Forest Cnty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 12 (D.D.C. 2016) (quoting *Lac du Flambeau*, 422 U.S. at 497). Just as "a denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result," *Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998) (citing *Assoc'd Gen. Contractors*, 508 U.S. at 666), so does the Secretary's denial of the benefit of ensuring Indian tribes compete on an equal footing in the Oklahoma gaming market.

Plaintiff Nations' unequal treatment injury is concrete and particularized because they may only conduct gaming in Oklahoma in accordance with IGRA, SOF ¶¶ 13-14, but are forced to compete with Defendant Chairmen's Tribes' conduct of gaming in Oklahoma at ten existing locations and six additional locations in development, all in violation of IGRA, *see* SOF ¶¶ 52-80. That unequal treatment is an ongoing and continuing injury itself. That is confirmed by the Report of Dr. Brian Wyman (Oct. 30, 2025), Ex. 27; SOF ¶¶ 54-62, 75-80, which demonstrates that

[3] "This analysis, moreover, is not limited to cases alleging a violation of the Equal Protection Clause." *Lac du Flambeau Band*, 422 F.3d at 497. "Whether to apply this analysis depends on the nature of the alleged injury, not the source of the asserted right." *Id.* at 498 (citing *Lujan*, 504 U.S. at 576).

patrons at Plaintiff Nations' casinos also game at Comanche and Otoe-Missouria's casinos and would game at the six future casinos allowed by their Agreements. SOF at ¶¶ 54-62, 75-80. Dr. Wyman's report also shows that at least one Plaintiff Nation draws patrons from the Dallas area, which counsel for Defendant Chairmen has admitted is part of the Comanche Nation's casino "market-area." *Id*. ¶¶ 47, 54; *see id.* ¶ 77.

Plaintiff Nations' injuries are concrete because they "actually exist," *Spokeo*, *Inc. v. Robins*, 578 U.S. 330, 340 (2016), as a result of Defendant Chairmen's Tribes' conduct of gaming at ten existing locations in violation of IGRA and plans to add six more locations to their operations, SOF ¶¶ 52-80. That conduct gives Defendant Chairmen's Tribes a competitive advantage over Plaintiff Nations, who conduct gaming in compliance with IGRA and who would have to start from scratch to open a new casino on newly acquired lands. "[T]he present impact of a future though uncertain harm may establish injury in fact for standing purposes." *Lac du Flambeau*, 422 F.3d at 498-99; *see also In re Idaho Conservation League*, 811 F.3d 502, 509 (D.C. Cir. 2016) (standing existed to challenge failure to regulate mining where future development of proposed mine threatened plaintiff's present aesthetic interests in the area). And Plaintiff Nations' injuries are particularized because they "affect the plaintiff[s] in a personal and individual way." *Lac du Flambeau*, 422 F.3d at 560 n.1. Namely, the approvals increase competition in the same market in which Plaintiff Nations compete to generate revenue to fund their governmental operations and programs, consistent with IGRA, *see* 25 U.S.C. § 2710(b)(2)(B), (d)(1)(A)(ii).

2. Plaintiff Nations are suffering other competitive and economic injuries.

Plaintiff Nations also suffer competitive injury and direct economic harm from Defendant Chairmen's illegal gaming. *See* SOF ¶¶ 52-80..

"Those who must compete with allegedly illegal commercial transactions have Article III standing to challenge a regulatory order authorizing the transactions." *Assoc'd Gas Distribs. v.*

FERC, 899 F.2d 1250, 1258 (D.C. Cir. 1990). "The competitor standing doctrine recognizes 'parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition.'" *Mendoza v. Perez*, 754 F.3d 1002, 1011 (D.C. Cir. 2014) (quoting *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998); citing *Sherley v. Sebelius*, 610 F.3d 69, 72-73 (D.C. Cir. 2010)). To demonstrate an injury-in-fact under the doctrine, a plaintiff must "show an actual or imminent increase in competition," *Am. Inst. of CPAs v. IRS*, 804 F.3d 1193, 1197 (D.C. Cir. 2015) (quoting *Sherley*, 610 F.3d at 73), in a market in which the plaintiff is "a direct and current competitor," *New World Radio, Inc. v. FCC*, 294 F.3d 164, 170 (D.C. Cir. 2002) (citation modified). "[A]ny increase in competition suffices to establish Article III standing." *W. Flagler*, 573 F. Supp. 3d at 267. Indeed, a showing that a plaintiff has "at least one customer" in a market affected by such competition is sufficient. *Advanced Energy United, Inc. v. FERC*, 82 F.4th 1095, 1108 (D.C. Cir. 2023).

Defendant Secretary's no-action approval "provides benefits to [Plaintiff Nations'] existing competitor[s]," i.e. Defendant Chairmen's Tribes, *see New World Radio*, 294 F.3d at 172, by enabling their Tribes to conduct Class III gaming in Oklahoma in violation of IGRA and in competition with Plaintiff Nations, who conduct Class III gaming in Oklahoma in compliance with IGRA. That constitutes "an actual or imminent increase in competition" that imposes injury-in-fact. *See Sherley*, 610 F.3d at 73; *accord Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 50 F.4th 164, 176 (D.C. Cir. 2022) (citing *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970)).

Defendant Chairmen's Tribes compete with Plaintiff Nations in the same gaming market. *Supra* at 6-7; *see Wash. All.*, 50 F.4th at 176 (finding competitor standing where plaintiffs averred that they seek jobs in a domestic labor market that challenged regulation would allow more foreign national workers to enter); *Advanced Energy*, 82 F.4th at 1108. And the no-action approvals benefit Defendant Chairmen's Tribes' competitiveness against Plaintiff Nations in that market for three reasons. First, the no-action approval of the Agreements allows Defendant Chairmen's Tribes to conduct Class III gaming. They otherwise have no legal right to conduct that gaming, *see* 25 U.S.C. § 2710(d)(1)(C); 18 U.S.C. § 1166, as they repudiated their prior compacts, *see, e.g.*, AR32; AR66 (Agreements Part 12.A.). That benefit permits Defendant Chairmen's Tribes to participate in the Class III gaming market, which increases competition for Plaintiff Nations. Second, Defendant Chairmen's Tribes can offer Class III games that Plaintiff Nations cannot offer under their Compacts. SOF ¶¶ 24, 43-44, 47. It is a "benefit" for a casino to be able to conduct games that their competitors cannot offer. Third, the Agreements give Defendant Chairmen's Tribes a competitive advantage in the gaming market. Defendant Chairmen's Tribes pay a lower substantial exclusivity fee rate than Plaintiff Nations do under their Compacts. That allows those Tribes to offer larger jackpots or cheaper amenities to patrons than they would under the Model Compact, while Plaintiff Nations still conduct gaming under the Model Compact and its higher substantial exclusivity fee rate.[4]

Plaintiff Nations also suffer injury because Defendant Chairmen's conduct of gaming under the Agreements causes Plaintiff Nations direct economic harm by dividing their patrons' spending, which reduces Plaintiff Nations' gaming revenues.[5] Compl. ¶¶ 129, 200; SOF ¶¶ 59-

[4] Defendant Chairmen's former counsel explained that, due to the second and third benefits, the Model Compact is "detrimental" and "not as good as" the Agreements. SOF ¶ 47 (citing Ex. 19, Robert A. Rosette, *Letter to the Editor from Rosette*, https://web.archive.org/web/20240720120900/https://comanchenation.com/blog/letter-editor-rosette (last visited Oct. 31, 2025)).

[5] The amount of actual economic harm imposed does not control whether Plaintiff Nations also experience a competitive injury, since the "*magnitude* of any injury [] has no bearing on whether [Plaintiff Nations] ha[ve] established Article III standing" under the competitive injury doctrine. *See Ipsen Biopharms., Inc. v. Becerra*, No. 20-cv-2437, 2021 WL 4399531, at *8 (D.D.C. Sept.

62. A plaintiff alleging economic injury faces a low bar. "A dollar of economic harm is still an injury-in-fact for standing purposes." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) (Kavanaugh, J.) (citing *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1029 (8th Cir. 2014) ("consumers' alleged economic harm—even if only a few pennies each—is a concrete, non-speculative injury")); *see also Czyzewski*, 580 U.S. at 464 (citing *McGowan v. Maryland*, 366 U.S. 420, 430-31 (1961) ($5 fine imposes constitutional injury)); *W. Flagler*, 573 F. Supp. 3d at 268 (diversion of "gambling spend" by "at least one . . . patron[]" establishes economic harm). Plaintiff Nations amply clear the bar. Dr. Wyman's report shows that Plaintiff Nations' patrons consistently divert money that they would otherwise spend at Plaintiff Nations' casinos, to the casinos that Defendant Chairmen's Tribes currently operate under their Agreements. *See* SOF ¶¶ 59-62. And the six casinos that Defendant Chairmen's Tribes may operate under the Agreements would have the same effect. *Id.* ¶ 75. This hurts Plaintiff Nations' bottom lines, which is "of course an injury." *Diamond Alt. Energy, LLC v. EPA*, 145 S. Ct. 2121, 2135 (2025) (quotation omitted).

These injuries satisfy Article III. As with Plaintiff Nations' equal footing injuries, their competitive and economic injuries are "concrete" because they "actually exist." *Spokeo*, 578 U.S. at 340. They are "particularized" because Plaintiff Nations face increased competition and economic loss. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024). And these injuries are both "actual" or "imminent" because they are ongoing—or in the case of the future casinos, can be realized at any time. *Id.*; *Wash. All.*, 50 F.4th at 176.

24, 2021) (citing *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017)). But it provides an additional basis to conclude Plaintiff Nations are injured by Defendant Chairmen's Tribes' operation of gaming. *See W. Flagler*, 573 F. Supp. 3d at 268 (survey of patrons' habits showing patrons divert gaming spending supports the "bottom-line conclusion" that a casino suffers injury from a competitor).

3. These injuries are traceable to Defendants' conduct and are redressable.

Plaintiff Nations also satisfy the second and third standing factors. All the injuries described above are traceable to Defendant Secretary's no-action approval of the Agreements and the non-federal Defendants' implementation of the Agreements. These injuries are caused by Defendant Chairmen's conduct of gaming and are a direct result of the Secretary's no-action approval of the Agreements, *see Amador County*, 640 F.3d at 378. Plaintiff Nations' injuries will be redressed by relief that declares the Agreements are contrary to IGRA and requires Defendant Secretary to disapprove the Agreements, which will prevent the conduct of Class III gaming pursuant to their terms. *See id.*

Previously, Defendant Tahdooahnippah argued that Plaintiff Nations' injuries are not redressable by this relief, *see* Mem. of Law in Supp. of Chairman Mark Woommavovah's Mot. to Dismiss, ECF No. 107-1, at 22-23, but his assertions fail. He relied on the severability provision of the Agreements, *id.* at 25, but the Court has already rejected such reliance as to Counts 1-3 and 8, which challenge the Agreements in their entirety for not having been "entered into" by the State, *see Cherokee Nation*, 643 F. Supp. 3d at 110-11. The Court has further concluded that for purposes of Counts 4-7, the severability of provisions of the Agreements is a merits question, *see id.* at 115 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89-93 (1998)), and when determining standing, the Court must assume the correctness of Plaintiff Nations' merits position that the Agreements should have been disapproved *in toto*. *See City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003). Moreover, these provisions are not severable from the Agreements, *see infra* at 40-43.

Defendant Tahdooahnippah also argued that Plaintiff Nations' injuries are not redressable because the Comanche Nation could return to gaming under its prior compact if the existing compact was disapproved. ECF No. 107-1, at 25. That is wrong for several reasons. First, even if that were possible, disapproval would redress Plaintiff Nations' unequal treatment injury because the Comanche Nation would again be gaming consistent with IGRA. Second, that return is not possible, because the Comanche Nation dismissed with prejudice any claim that its former compact renewed on January 1, 2020, and so its prior compact has expired. SOF ¶¶ 25-26.[6] The Comanche Nation cannot overcome that by re-signing the Model Compact now, as the Oklahoma Attorney General has concluded—in an official opinion responding to an inquiry by a state legislator that is determinative of the law, Okla. Stat. tit. 74, § 18b(A)(18)—that the State and Tribes can no longer "enter into" the Model Compact. *See In re Frix*, 2025 OK AG 7, 2025 WL 1674874, at *3-4. Because the Comanche Nation's former compact was the Model Compact, SOF ¶ 19, the *Frix* opinion makes a return to the prior compact impossible. Third, even if the Comanche Nation returned to gaming under the Model Compact, that would provide Plaintiff Nations at least "a partial remedy" to their competitor and economic injuries, which "satisfies the redressability requirement." *Uzuegbunam v. Preczewski*, 592 U.S. 279, 291 (2021) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)).[7] If the Comanche Nation returned to gaming under the Model Compact, it would pay a higher substantial exclusivity fee and could offer only the games that Plaintiff Nations can offer. That would eliminate the Comanche Nation's competitive advantage against Plaintiff Nations and as a matter of "commonsense economic

[6] In addition, any claim by Defendant Tahdooahnippah that the Comanche Nation could return to its prior compact would be barred by claim preclusion, as "the weight of authority in this district suggests that a stipulation of dismissal with prejudice under Rule 41(a) is a final judgment on the merits for the purpose of claim preclusion," *Stonehill v. U.S. Dep't of Just. Tax Div.*, No. 1:19-cv-03770, 2022 WL 407145, at *6 (D.D.C. Feb. 10, 2022) (footnote omitted), and the elements of claim preclusion, *see id.*, would plainly be satisfied here.

[7] If the Comanche Nation entered into a new compact after its Agreement was invalidated, that would provide Plaintiff Nations a partial remedy because the Comanche Nation could not operate Class III gaming while it sought approval of the new compact, *see Frix*, 2025 WL 1674874, at *5.

inferences," that would reduce the injury Plaintiff Nations suffer from the Agreements. *Diamond*, 145 S. Ct. at 2136-38.

II. SUMMARY JUDGMENT SHOULD BE GRANTED ON COUNTS 1-3 AND 8 BECAUSE THE COMPACTS WERE NOT VALIDLY ENTERED INTO.

Counts one, two, three, and eight of the Complaint "allege that the compacts are entirely illegal and invalid because they were not legally 'entered into' as required by IGRA." *Cherokee Nation*, 643 F. Supp. 3d at 108. These counts are resolved by three legal principles: (1) IGRA requires that a compact be legally "entered into" by the State, which is a question answered by state law, and a compact not legally entered into by the State is invalid under IGRA, *id.* at 98; (2) the Secretary must disapprove a compact that does not comply with IGRA, *id.* at 116-17; and (3) a decision by the Secretary not to act on a compact during the forty-five-day review period is judicially reviewable, *W. Flagler*, 71 F.4th at 1063, and the reviewing court must direct the Secretary to disapprove the compact if it does not comply with IGRA, *Amador County*, 640 F.3d at 382.

These principles resolve Plaintiff Nations' motion in their favor. The D.C. Circuit's decisions in *Amador County* and *West Flagler* are binding on this Court, *Cherokee Nation*, 643 F. Supp. 3d at 117 n.16; *Las Ams. Immigrant Advoc. Ctr. v. U.S. Dep't of Homeland Sec.*, 348 F.R.D. 397, 402 (D.D.C. 2025); *United States v. Scott*, 215 F. Supp. 3d 9, 11 (D.D.C. 2012). And this Court's rulings in *Cherokee Nation* and the Memorandum Opinion and Order of July 9, 2025, ECF No. 215, are the law of the case.[8] In addition, further examination of IGRA, its regulations, and federal case law confirms the correctness of the three principles set out above.

[8] "[T]he *same* issue presented a second time in the *same cas*e in the *same court* should lead to the *same result*." *Smith v. Athena Constr. Grp., Inc.*, No. 18-CV-02080 (APM), 2024 WL 1213393, at *2 (D.D.C. Mar. 20, 2024) (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc)).

A. A Compact Approved By Secretarial Inaction Is Void If It Was Not Legally Entered Into By The State Under State Law.

As this Court has squarely held:

> Once the tribe and the state have negotiated a compact, it then must be "legally entered into by both parties." *See* 25 C.F.R. § 293.7; *see also* 25 U.S.C. § 2710(d)(3)(B), (d)(8)(A). State law governs whether the state has "legally entered into" the compact. *See, e.g.*, [*Kickapoo I*, 827 F. Supp. at 46]; *accord* [*Santa Ana*, 104 F.3d at 1553, 1557-58]. If a compact has not been legally entered into under state law, it is "invalid" under IGRA. *See, e.g.,* [*Kickapoo I*], 827 F. Supp. at 46 (citing 25 U.S.C. § 2710(d)(8)(A)); accord . . . *Santa Ana*, 104 F.3d at 1555, 1559.

Cherokee Nation, 643 F. Supp. 3d at 98. Furthermore, the Secretary must determine whether a compact was legally entered into by the State during the forty-five-day review period "because []he has an affirmative duty to disapprove any compacts that do not comply with IGRA before that period expires." *Id.* at 116 (citing *Amador County*, 640 F.3d at 381).[9]

Defendant Stitt contends that "as a matter of federal law, 'after-the-fact state-law decisions like the *Treat* cases cannot unwind an approved compact that has gone into effect under' IGRA," purporting to rely "on a close reading of IGRA, its implementing regulations, and federal case law." Def. J. Kevin Stitt's Br.-In-Chief, *Cherokee Nation v. U.S. Dep't of Interior*, 2025 OK 4, 564 P.3d 58 (No. 122,108), 2024 WL 4186106, at *8 ("Stitt CQ Brief") (citing Mem. L. in Supp.

[9] In a footnote, the Court explained

> Courts in other jurisdictions have reasoned that IGRA does not require the Secretary to resolve "state law issues" to this effect in the forty-five-day review period. *See Pueblo of Santa Ana*, 104 F.3d at 1556-57; *accord Rhode Island v. Narragansett Indian Tribe*, No. Civ. A. 94-0619-T, 1995 WL 17017347, at *2 (D.R.I. Feb. 3, 1995). But of course, this Court must follow *Amador County*, which dictates that the Secretary may not no-action approve a compact that violates IGRA, as such a compact would if it were not validly "entered into" under state law. *See* 640 F.3d at 381.

Cherokee Nation, 643 F. Supp. 3d at 117 n.16.

of Def. Gov. J. Kevin Stitt's R. 12(c) Mot., ECF No. 154-1 at 18) (emphasis omitted). This argument is rejected by the sources on which he relies.

1. As *Kickapoo I* and *Santa Ana* confirm, the Secretary's no-action approval of a compact does not validate a compact that was not legally entered into by the State.

This District's decision in *Kickapoo I* and the Tenth Circuit decision in *Santa Ana*—both already relied on by this Court, 643 F. Supp. 3d at 98—confirm that a compact is invalid if a State's court of last resort determines it was not legally entered into by that State, notwithstanding that the Secretary took no action on the compact before the forty-five-day deadline.

In *Kickapoo I*, the Tribe sent a compact signed by the Governor of Kansas to the Secretary for approval. 827 F. Supp. at 39. The next day the Kansas Attorney General sent the Secretary a letter advising that the Governor did not have authority under state law to enter into the compact. *Id.* The Governor disputed that contention in another letter to the Secretary, and the Attorney General then filed suit in the Kansas Supreme Court seeking a judgment that the Governor lacked authority to cause the State to enter into an IGRA compact. *Id.* (citing *State ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan. 1995)). In the meantime, IGRA's forty-five-day review period ran out. *Id.* at 39-40. The Tribe and others then filed suit in federal court, seeking a declaration that the compact had gone into effect by operation of law. *Id.* at 40. While that case was pending, the Kansas Supreme Court determined that, under state law, the Governor lacked authority to enter into the compact on behalf of the State. *Id.*; *see Finney*, 836 P.2d at 1185.

Relying on a "plain reading of the statute," the federal court in *Kickapoo I* held that while the compact was considered to have been approved under 25 U.S.C. § 2710(d)(8)(C), it was "deemed approved 'only to the extent the compact is consistent with the provisions of this chapter [i.e., IGRA],' [and that] if the compact conflicts with any provision of IGRA, the fact that the Secretary failed to act within the forty-five day approval period is irrelevant; the compact still would be void." 827 F. Supp. at 44 (first alteration in original). The court then found the validity of the compact "is a federal question," *id.* at 44-45, "accept[ed] the determination of the Supreme Court of Kansas that the Governor did not have the authority to bind the State," and held that "because only the Governor—a person without authority—signed the compact, the State did not enter into the compact. Thus, the compact does not comply with § 2710(d)(8)(A) and is invalid." *Id.* at 46.

The Tenth Circuit's decision in *Santa Ana* also confirms that a compact not legally entered into by the State under State law is invalid under IGRA. *See Cherokee Nation*, 643 F. Supp. 3d at 98. In *Santa Ana*, the Tenth Circuit held that

> (1) IGRA imposes two separate requirements—the State and the Tribe must have "entered into" a compact *and* the compact must be "in effect" pursuant to Secretarial approval—before class III gaming is authorized; (2) state law determines the procedures by which a state may validly enter into a compact; and (3) in determining whether the State and the Tribes have entered into compacts, valid and binding under New Mexico law, we agree with and follow the New Mexico Supreme Court's decision in *Clark*.

104 F.3d at 1553. Here, as in *Kickapoo I* and *Santa Ana*, the relevant state court decision was issued after Secretarial approval. These decisions compel the same result here.

Defendant Stitt assails *Santa Ana* on the ground that it "misread the stature" and relied instead on legislative history. ECF No. 154-1 at 15-16. That is not correct. *See* 104 F.3d at 1557-58. The court "first examine[d] IGRA's language to determine whether the 'entered into' and the 'in effect' requirements are separate," found that "[b]oth [25 U.S.C. § 2710(d)(1) and (d)(6)] separate the 'entered into' requirement from the 'in effect' requirement," and that "IGRA unambiguously provides that a compact goes into 'effect' when it is approved by the Secretary and notice is published in the Federal Register," but that IGRA "does not define what is necessary for a tribe and state to 'enter[ ] into' a compact, nor does it state which branch of state government can or must sign a compact." *Id.* at 1553 (final alteration in original). Upon examination of that issue, the court concluded that "State law must determine whether a state has validly bound itself to a compact," relying on the decision in *Washington v. Confederated Bands and Tribes of the Yakima Indian Reservation*, 439 U.S. 463 (1979), which "required the application of state law to the procedural amendment requirement" arising under § 6 of Public Law No. 83-280, 67 Stat. 588 (1953) ("Public Law 280"), *see infra* at 29 n.19, and "agree[d] with the district court that IGRA's very silence on this point supports the view that 'Congress intended that state law determine the procedure for executing valid gaming compacts.'" *Id.* at 1557-58 (citing *Yakima*, 439 U.S. at 493 & n. 39, and *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1294 (D.N.M. 1996)).

The *Santa Ana* court also found some guidance in IGRA's legislative history, which the Tribes in that case had relied on. *Id.* at 1553-54. The court did "not agree that Congress expressed little concern for state interests when it enacted IGRA," pointing to references in the legislative history that showed "respect for state interests relating to class III gaming was also of great concern." *Id.* The court was therefore "hesitant to conclude that Congress intended to permit a state to be bound by a compact regulating class III gaming which it never validly entered." *Id.* (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) ("observing that IGRA 'provides that an Indian tribe may conduct certain gaming activities only in conformance with a *valid* compact between the tribe and the State'" (emphasis added by *Santa Ana* court); and *Kickapoo Tribe of Indian of Kickapoo Rsrv. v. Babbitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995) ("'Clearly, . . . the State of Kansas has an interest in the validity of a compact to which it is a party . . . .'" (alterations by *Santa Ana* court))).

The *Santa Ana* court also considered the various district court decisions addressing "the effect, if any, of a subsequent determination that the particular state representative who entered into the compact in fact lacked the authority to do so," finding that "[t]wo of the three courts have reached the same conclusion as the three district courts in New Mexico—that a compact entered into by someone without authority to bind the state is void and without effect, regardless of the Secretary's approval of the compact." *Id.* at 1554-55 (citing *Narragansett Indian Tribe of Rhode Island v. Rhode Island* (*Narragansett II*), Nos. 94-0618-T, 94-0619-T, 95-0034-T, 1996 WL 97856, at *2 (D.R.I. Feb.13, 1996); and *Kickapoo I*, 827 F. Supp. at 46). The court also acknowledged that another district court in *Willis v. Fordice*, 850 F. Supp. 523, 532-33 (S.D. Miss. 1994), *aff'd*, 55 F.3d 633 (5th Cir. 1995) (per curiam), had rejected a challenge to a Governor's authority to enter into a compact, and that in *Langley v. Edwards*, 872 F. Supp. 1531, 1535 (W.D. La. 1995), *aff'd sub nom. Langley v. Dardenne*, 77 F.3d 479 (5th Cir. 1996) (per curiam), a district court had held that "[c]ompact approval by the Secretary cannot be invalidated on the basis of a governor's *ultra vires* action." *Id.* at 1555.[10] After examining these decisions, the court "conclude[d] that the 'entered into' language imposes an independent requirement and the compact must be validly entered into by a state before it can go into effect, via Secretarial approval, under

[10] Defendant Stitt relies on *Langley* to argue that in IGRA, "Congress was focused on the expedient, final resolution of compact decisions" and that "[o]nce the Secretary has [reviewed a State official's certification of their compacting authority] and approved a compact, '[n]o substantive right exists to challenge the approval on the basis of alleged state law irregularities.'" ECF No. 154-1 at 15, 18 (citing and quoting *Langley*, 872 F. Supp. at 1535) (final alteration in original). This argument fails because the D.C. Circuit's decision in *West Flagler* establishes that "the Secretary's decision to take no action within 45 days of receiving [a] compact, thereby allowing the compact to go into effect under [§ 2710(d)(8)(C)], is judicially reviewable," 71 F.4th at 1063, and that in such a case "25 U.S.C. § 2710(d)(8)(C) 'provides the law to apply[ ]'—that is, 'the compact is deemed approved but only to the extent the compact is consistent with the provisions of [IGRA],'" *id.* at 1064-65 (quoting *Amador County*, 640 F.3d at 381) (some internal quotation marks omitted) (second and third alteration by the court). In addition, the *Langley* court actually dismissed the case for lack of standing, 872 F. Supp. at 1533-34, and on the basis of the United States' sovereign immunity under the Quiet Title Act, 28 U.S.C. § 2409(a), *id.* at 1534-35. (The Fifth Circuit affirmed in a non-precedential opinion, only addressing standing. 77 F.3d 479, 1996 WL 46781, at *1 n.1, *2.) While the district court went on to consider the merits, *Langley*'s poorly reasoned dictum cannot overcome *Amador County* or the well-reasoned logic of *Kickapoo I* and *Santa Ana*. *Cf. In re Fed. Nat'l Mortg. Ass'n Secs., Derivative, & "ERISA" Litig.*, 503 F. Supp. 2d 25, 35 n.8 (D.D.C. 2007)

IGRA." *Id.*;[11] *see also Muhammad v. Comanche Nation Casino*, No. CIV-09-968-D, 2010 WL 4365568, at *3 n.5 (W.D. Okla. Oct. 27, 2010) ("To be valid and effective, a gaming compact must have been entered into by the state in compliance with state law . . . ." (citing *Santa Ana*, 104 F.3d at 1557)). In sum, the *Santa Ana* court's consideration of IGRA was comprehensive and correct.

In so holding, the court also rejected the Tribes' argument that "the district court's decision undermines finality and forever subjects a compact to collateral attack on state law grounds," ruling that (1) "[a] compact is a form of contract," and that "[a]s with any contract, [the parties] must assure themselves that each contracting party is authorized to enter into the contract," which can be done through "familiar, and well-established means," (2) "[i]n this case, as in the others in which the Governor's authority to sign a compact has been questioned, the challenge came promptly and was quickly resolved," and (3) as "most of the[Tribes] commenced gaming well before these compacts were signed[,] . . . their claimed need for finality now seems less tenable." *Santa Ana*, 104 F.3d at 1556 (footnote omitted). The court's first and second points apply here for precisely the same reasons. Indeed, Defendant Chairmen's Tribes knew even before the forty-five-day review period ended that under state law the Governor lacked authority to enter into the Agreements, as *In re Treat*, 2020 OK AG 8, 2020 WL 2304499, made clear, and as the Oklahoma Supreme Court confirmed promptly in *Treat v. Stitt* (*Treat I*), 2020 OK 64, 473 P.3d 43. *See infra* at 35-39. In these circumstances, Defendants cannot claim an interest in finality, as they decided

[11] The court also rejected reliance on the retrocession cases, discussed *infra* at 27-29, finding that "[t]he district court distinguished those cases from the situation here, holding that state retrocession 'is a one-time event between the state and the United States;' that the policy behind the retrocession statute strongly favored federal jurisdiction; that gaming compacts are ongoing agreements imposing affirmative duties on the states; and that the policy of finality, important to the retrocession statute, is less important to IGRA," *Santa Ana*, 104 F.3d at 1555 n.12 (quoting *Santa Ana*, 932 F. Supp. at 1295-97), and "agree[d] with the district court that the retrocession cases involve different considerations from this case, and do not control this case," *id.*

to proceed fully aware of the risks they were taking by relying on the Secretary's no-action approval under 25 U.S.C. § 2710(d)(8)(C).

In short, *Kickapoo I* and *Santa Ana* explain why the Secretary's no-action approval does not validate a compact that a state court of last resort later determines violates state law, and their holdings are both consistent with the plain text of IGRA and reject Defendant Stitt's contrary arguments.

2. IGRA's plain language confirms that a no-action approval does not validate a compact the State did not legally enter into.

Defendant Stitt also asserts that IGRA does not require a valid compact because "that is not what IGRA says." ECF No. 154-1 at 11. To the contrary, IGRA's plain language provides that Class III gaming "shall be lawful on Indian lands" "only if . . . 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). That means what it says: *the State* must enter into the compact. *Accord* Am. Heritage Dictionary 594 (5th ed. 2018) (defining "enter into" as "[t]o become party to (a contract)"); New Oxford Am. Dictionary 578 (3d ed. 2010) ("undertake to bind oneself by (an agreement or other commitment)"). Sovereigns, like states and tribes, "enter into" such agreements only as authorized by their laws. *See Yakima*, 439 U.S. at 493; *Santa Ana*, 104 F.3d at 1554 (IGRA protects tribal and state sovereign interests); *see also N.C. State Bd. Of Dental Exam'rs v. FTC*, 574 U.S. 494, 504 (2015) (exercise of a State's sovereign power is shown by "State legislation and 'decision[s] of a state supreme court, acting legislatively rather than judicially'" (alteration in original)). Furthermore, it is irrational to assert that an unlawful compact can make Class III gaming lawful. Nor does IGRA authorize the Governor to enter into a compact for the State, other than in compliance with state law. IGRA only authorizes the "Secretary . . . to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe." 25 U.S.C. § 2710(d)(8)(A); *see also id.* (d)(8)(B), (C) (both referring to "a compact described in subparagraph (A)"). If Congress had intended to empower the Governor alone to bind the State, it would have said so expressly. *See id.* § 2719(b)(1)(A) (requiring the concurrence of "the Governor of the State" in the Secretary's determination that certain gaming "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community").[12]

Defendant Stitt's reliance on cases that do not concern IGRA is unavailing. *See* ECF No. 154-1 at 12-13 (quoting *Bank of N.Y. v. FDIC*, 453 F. Supp. 2d 82, 94 (D.D.C. 2006), *aff'd*, 508 F.3d 1 (D.C. Cir. 2007), and *Little Sisters of Poor Sts. Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 677 (2020)). *Bank of New York* concerns whether the words "entered into," as used in the Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA") mean to be "a party to." 453 F. Supp. 2d at 93 (quoting 12 U.S.C. § 1821(e)(12)(A) (currently codified at 12 U.S.C. § 1821(e)(13))). The Court of Appeals explained that whenever an entity agrees to undertake obligations and gain rights in a contract, that entity has 'entered into' the contract." 508 F.3d at 5. IGRA requires that entity be the State, not the Governor, and state law controls Defendant Stitt's power to "agree[] to undertake obligations and gain rights in a contract" on behalf of the State. *Bank of New York* does not suggest, much less hold, otherwise.

[12] That IGRA affords limited grandfather protection to certain Class II gaming activities "legally operated" before May 1, 1988, *see* 25 U.S.C. § 2703(7)(C)-(E), and provides that this exception as set forth in subparagraph (E) would terminate if "there is a final judicial determination that the gaming . . . is not legal as a matter of state law," *id.* § 2703(7)(F), is irrelevant, because that provision is a limitation on which judicial decisions might terminate the right to Class II gaming under that grandfather clause. In contrast, this case concerns the Class III gaming requirement that Class III gaming "shall be lawful on Indian lands" "only if . . . 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). Defendant Stitt's reliance on that provision, *see* ECF No. 154-1 at 14, therefore fails.

Moreover, the district court's analysis hinged on the fact that elsewhere in FIRREA, Congress had referred to "any contract . . . to which such institution is a party," 12 U.S.C. § 1821(e)(1), implying that "entered into" *as used in another section of FIRREA* did not mean "to be a party to." 453 F. Supp. 2d at 93-94. This case neither concerns FIRREA, nor is there any dispute over whether "entered into" means to be a party to *as used in IGRA*, as IGRA expressly refers to a "compact entered into between an Indian tribe and a State," 25 U.S.C. § 2710(d)(8)(A). Indeed, when Congress wanted to authorize the Governor to satisfy a requirement it imposed in IGRA, it expressly used those words, as it did in 25 U.S.C. § 2719(b)(1)(A). *See infra* at 20-21. Congress did not do so in 25 U.S.C. § 2710(d)(1)(C) and (d)(3).[13]

Even farther afield is Defendant Stitt's reliance on *Little Sisters*, *see* ECF No. 154-1 at 13, which concerned a statute requiring health insurance providers to cover services "as provided for" in federal guidelines. 591 U.S. at 675. Respondents argued that this language only allowed agencies to require coverage, not create exemptions to requirements. *Id.* The Supreme Court reasoned that the term "provided for" is a capacious one that allows an agency to provide requirements and craft exemptions, and that reading it as respondents did would "introduc[e] a limitation not found in the statute," thereby "alter[ing], rather than [interpreting]," the law. *Id.* at 677. *Little Sisters* has nothing to do with the meaning of "entered into" under IGRA—which is a

[13] This also disposes of Defendant Stitt's reliance on *Bates v. United States*, 522 U.S. 23, 29 (1997), *see* ECF No. 154-1 at 12, which applied the interpretive rule that when Congress uses different terms in the same statute, those terms have different meanings. *Bates*, 522 U.S. at 29-30. And while Defendant Stitt asserts that Plaintiff Nations seek to "'supply words' to the statute that they claim 'have been omitted,'" ECF No. 154-1 at 12 (quoting Antonin Scalia & Brian Garner, *Reading Law* 93 (2012)), Plaintiff Nations simply contend that by requiring that a compact be "entered into between an Indian tribe and a State," 25 U.S.C. § 2710(d)(8)(A), IGRA requires that the compact be lawfully entered into by those parties, as the IGRA regulations in effect in 2020 confirm. *See infra* at 25-26. Had Congress intended otherwise, it would have said so. "The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it." *Reading Law* at 93.

limitation prescribed by the statute, *see* 25 U.S.C. § 2710(d)(1)(C), (d)(2)(C), (d)(3)(B), (d)(6)(A), (d)(8)(A).

Defendant Stitt also argues that "Plaintiffs' interpretation of IGRA ignores the rule that 'in the absence of a plain indication to the contrary,' Congress does not 'mak[e] the application of the federal act dependent on state law,'" ECF No. 154-1 at 13-14 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989)), and that "courts must identify a 'plain indication that Congress intended to make the [federal statute] dependent on state law,'" but that "[n]o such indication (much less a plain one) exists here," *id.* at 14 (quoting *Booth v. Bowser*, 597 F. Supp. 3d 1, 20 (D.D.C. Mar. 18, 2022) (citation modified)). As *Holyfield* makes plain, however, this presumption depends on what Congress intended when it passed the statute, since the presumption gives way when Congress clearly did not intend a statute to have nationwide uniformity or where the federal program would not be impaired if state law controls. 490 U.S. at 43-44. "For this reason, 'we look to the purpose of the statute to ascertain what is intended.'" *Id.* at 44 (quoting *United States v. Pelzer*, 312 U.S. 399, 403 (1941)). In order to determine that purpose, "in the absence of a statutory definition we 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'" *Id.* at 47 (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962); and citing *Russello v. United States*, 464 U.S. 16, 21 (1983)). "We do so, of course, in the light of the 'object and policy' of the statute." *Id.* (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956)).

And here that analysis shows that whether a State has entered into a compact is determined by applying state law. IGRA is a federal statute that "creates a framework for regulating gaming activity on Indian lands." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014) (citing 25 U.S.C. § 2702(3)); *see id.* (Section 2702(3) "describ[es] the statute's purpose as establishing 'regulatory authority . . . [and] standards for gaming on Indian lands'"). That framework also "grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands." *Id.* at 795 (quoting *Seminole Tribe*, 517 U.S. at 58). "A tribe may conduct [Class III] gaming on Indian lands only pursuant to, and in compliance with, a compact *it has negotiated with the surrounding State*." *Id.* at 785 (emphasis added) (citing 25 U.S.C. § 2710(d)(1)(C)).

Thus, Class III gaming under IGRA works on a tribe-by-tribe, state-by-state basis, and to that extent the "entered into" requirement is *not* "intended to have uniform nationwide application," *Holyfield*, 490 U.S. at 43. Nor is the federal program IGRA authorizes impaired by using state law to determine if a State has "entered into" a compact. To the contrary, IGRA's purpose would be impaired if it bound a State to a compact it had *not* lawfully entered into. IGRA "provides that an Indian tribe may conduct certain gaming activities only in conformance with a *valid* compact between the tribe and the State." *Seminole Tribe*, 517 U.S. at 47 (emphasis added). And "to permit a state actor to purport to bind the state when in fact he or she lacks the authority to do so undermines the significance of the compact process as a means of providing meaningful state involvement if a state so desires." *Santa Ana*, 104 F.3d at 1556. Furthermore, any danger of undermining IGRA by applying state law for that limited purpose is avoided by the rule that the validity of a compact "is a federal question" and that "it is for the federal court to determine whether the Governor's approval of the Tribal-State compact is sufficient for purposes of IGRA." *Kickapoo I*, 827 F. Supp. at 44-45 (citations omitted); *Santa Ana*, 104 F3d at 1557 ("IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court.").

That conclusion is also confirmed by the 25 C.F.R. part 293 regulations in effect when the compacts were before the Defendant Secretary for review, which prescribed how the Secretary must implement the compact review process. *See* 73 Fed. Reg. 74004 (Dec. 5, 2008).[14] "In interpreting the IGRA and its implementing regulations, this Court must start 'with the plain meaning of the text, looking to the "language itself, the specific context in which that language is used, and the broader context of the statute as a whole."'" *Connecticut v. U.S. Dep't of Interior*, 363 F. Supp. 3d 45, 65 (D.D.C. 2019) (quoting *Blackman v. District of Columbia*, 456 F.3d 167, 176 (D.C. Cir. 2006)). The regulations provide that "*Compact* . . . means an intergovernmental agreement *executed between Tribal and State governments* . . . that establishes between the parties the terms and conditions for the operation and regulation of the tribe's Class III gaming activities," 25 C.F.R. § 293.2(b)(2) (2008), and that "[t]he Indian Tribe or State should submit the compact or amendment after it has been *legally entered into* by both parties," *id.* § 293.7 (2008) (emphasis added). As the Bureau of Indian Affairs explained when it promulgated this rule, 25 C.F.R. § 293.7 (2008) requires that "a compact or amendment may only be submitted to the Secretary after it has been *legally entered into*." 73 Fed. Reg. at 74006 (emphasis added).

Defendant Stitt ignores 25 C.F.R. § 293.2(b)(2) (2008), instead reads 25 C.F.R. § 293.7 (2008) to only address "the *timing* of submitting a compact," and says the Nations "appear to read the word 'legally' to inject an additional requirement to ensure state-law validity, but that is a misreading of the rule." ECF No. 154-1 at 13. Not so. "Legally" means what it says: the *State* must have, "in a manner that accords with the law" or "according to the law," *Black's Law*

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[14] Those regulations were revised in 2024. 89 Fed. Reg. 13232 (Feb. 21, 2024). The revised regulations "do[] not alter final agency decisions made pursuant to this part before March 22, 2024," and thus do not apply to the Secretary's no-action approvals at issue in this case. *Id.* at 13247, 13260.

Dictionary (12th ed. 2024), entered into the compact before submitting it to the Secretary. And 25 C.F.R. § 293.8(c) (2008) confirms that to enter into a compact legally, the State representative must have authority to do so *under state law*, as it requires that the "[d]ocumentation submitted with a compact . . . must include" a "[c]ertification from the Governor or other representative of the State that he or she is *authorized under State law to enter into the compact*." 25 C.F.R. § 293.8(c) (2008) (emphasis added). Defendant Stitt construes this to only require that a certification "bears *facial indicia* of state-law authority, and [that] a Governor can credibly represent apparent authority to bind the State." ECF No. 154-1 at 11.[15] This argument fails because it has no textual support and rewrites the regulation, ironically "supplying words to the statute that [he] claim[s] have been omitted," *cf. id.* at 12.[16] Furthermore, nothing in 25 C.F.R. § 293.8(c) (2008) makes the Governor's certification conclusive of whether he holds state law authority. Indeed, the Secretary may request "[a]ny other documentation … that is necessary to determine whether to approve or disapprove the compact." *Id.* § 293.8(d) (2008). Finally, as the regulations also make clear, "[i]f the Secretary neither affirmatively approves nor disapproves a compact or amendment within the 45-day review period, the compact or amendment is considered to have been approved, but only to the extent it complies with the provisions of [IGRA]." *Id.*

[15] Defendant Stitt cannot himself represent that he has apparent authority because "[a]pparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal *and that belief is traceable to the principal's manifestations*." *SACE S.p.A. v. Paraguay*, 243 F. Supp. 3d 21, 39 (D.D.C. 2017) (emphasis added) (quoting Restatement (Third) of Agency § 2.03; and citing *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1245 (11th Cir. 2002)). In addition, "[w]ith respect to the manifestation requirement, '[a] person manifests assent or intention through written or spoken words or other conduct.'" *Id.* (second alteration in original) (quoting Restatement (Third) of Agency § 1.03). There is no such manifestation by the State here.

[16] It also gains no traction because due to *In re Treat* the Governor's certification had no "*facial indicia* of state-law authority" nor could the Governor "credibly represent apparent authority to bind the State," even assuming, *arguendo*, that apparent authority could be established by his own representations, which it cannot be, *see supra* at 26 n.15.

§ 293.12 (2008). So if the Governor had no authority under state law to enter into a compact, it is invalid. *See Cherokee Nation*, 643 F. Supp. 3d at 98.

3. Defendant Stitt's analogical arguments have no merit.

Defendant Stitt also attempts to analogize IGRA compacts to Public Law 280 retrocessions, agreements under the International Bridge Act ("IBA"), 33 U.S.C. §§ 535-535i, and to interstate compacts approved by Congress under the Compact Clause, U.S. Const., art. I, § 10, cl. 3, contending that these authorities do not permit an agreement approved under its terms to later be invalidated by a state court determination. ECF No. 154-1 at 16-21. These arguments are rejected by the statute that applies here, namely IGRA, and the law of this Circuit that interprets it.

i. Public Law 280's Retrocession Provision is Inapposite.

The *Kickapoo I* court rejected reliance on cases concerning retrocession under Public Law 280, cited by Defendant Stitt. *See* ECF No. 154-1 at 18-20.[17] These cases concerned a State's power to "retrocede" jurisdiction in Indian country that it had formerly acquired under Public Law 280. In these decisions, some federal courts—all out-of-Circuit—held the Secretary was authorized by 25 U.S.C. § 1323[18] to accept the retrocession by the State even though the action on which retrocession was based was contrary to state law. *See Kickapoo I*, 827 F. Supp. at 45-46. In *Kickapoo I*, the Tribe contended that under these cases, the Secretary's no-action approval made the compacts "completely binding, regardless of the Supreme Court of Kansas' determination that the Governor did not have authority to conclude the compact." *Id.* at 45. Defendant Stitt relies on

[17] *See United States v. Lawrence*, 595 F.2d 1149 (9th Cir. 1979); *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976), *rev'd on other grounds*, 435 U.S. 191 (1978); *Omaha Tribe of Neb. v. Walthill*, 334 F. Supp. 823 (D. Neb. 1971), *aff'd* 460 F.2d 1327 (8th Cir. 1972); *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971).

[18] 25 U.S.C. § 1323 provides that "[t]he United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to" Public Law 280, before 1968.

these same cases for the same purpose, and his argument fails for the reasons that the *Kickapoo I* court rejected them.

The *Kickapoo I* court explained that in the retrocession cases, the Secretary "had *affirmatively accepted* the act of retrocession, however expressed," while in the IGRA case before the court, the Secretary's "approval of the compact [wa]s the result of a statutory approval procedure" that expressly provides that a compact approved by inaction "is considered to have been approved . . . *only to the extent the compact is consistent with the provisions of [IGRA]*." *Id.* at 44, 46 (first emphasis in original) (quoting 25 U.S.C. § 2710(d)(8)(C)). The court also found that "the concerns which supported the *Brown* decision"—the first of the retrocession decisions, *see supra* at 27 n.17—were not present in the case before it, in which "the Supreme Court of Kansas was soon to answer the question for the Secretary," "the issue regarding future nullification of an accepted agreement [wa]s not relevant as the Secretary never accepted the compact," and "the question of finality never came into play since neither the State of Kansas nor the Kickapoo Tribe has begun to operate under the terms of the compact." *Id.* at 46.

Similarly, in this case, before the forty-five-day review period ended, the Secretary was informed by the opinion of the Oklahoma Attorney General in *In re Treat* that Defendant Stitt did not have authority to enter into the compacts. *See* SOF ¶¶ 30-32; *infra* at 36-37. No issue of nullification arises here as Defendants knew that Secretarial inaction deems a compact approved only "to the extent the compact is consistent with the provisions of [IGRA]," 25 U.S.C. § 2710(d)(8)(C), and *In re Treat* made clear to Defendants *before the Secretary acted* that the compacts were invalid under IGRA. Moreover, *Treat I* was commenced before the forty-five-day review period ended, and resolved whether the Governor "entered into" the compacts soon after. SOF ¶¶ 34, 39-40. The *Kickapoo I* court also "question[ed] the validity of *Brown* and its progeny in light of" *Yakima*, 439 U.S. 483, in which the Supreme Court "acknowledged that the issue regarding appropriate state procedures was a question of state law."[19] 827 F. Supp. at 46. Accordingly, the *Kickapoo I* court was "not comfortable in disregarding a decision of the Supreme Court of Kansas and binding the state to a compact entered into without appropriate authority." *Id.* (footnote omitted). So too here: assuming, *arguendo*, that Public Law 280 provides an appropriate analog, the Supreme Court's *Yakima* decision, which is more recent than the retrocession cases, is the better guide.

ii. The International Bridge Act is Irrelevant.

The IBA argument, *see* ECF No. 154-1 at 16-17, relies on the district court decision in *Detroit International Bridge Co. v. Government of Canada*, 192 F. Supp. 3d 54 (D.D.C. 2016), and ignores the D.C. Circuit's later decision in that case, 883 F.3d 895 (D.C. Cir. 2018), which demonstrates that the IBA has no application here. *Detroit International Bridge* arose from a challenge by a bridge company ("Company" or "DIBC") to a new bridge across the U.S.-Canada border. *Id.* at 897. Michigan and Canada entered into an agreement to build the new bridge ("Crossing Agreement"). *Id.* The United States Secretary of State (or "USDS") approved that agreement under Section 3 of the IBA, 33 U.S.C. § 535a, under which "[t]he consent of Congress is hereby granted for a State or a subdivision or instrumentality thereof to enter into agreements" with the governments of Canada or Mexico or a political subdivision thereof, and that "[t]he

[19] The *Kickapoo I* court explained that in *Yakima*, "involving the cessation of jurisdiction over Indian lands from the federal government to the states under Pub. L. 280, the Supreme Court held that it was up to state law to determine what procedures a state needed to follow in order to amend its constitution." 827 F. Supp. at 45; *see Yakima*, 439 U.S. at 493 ("If as a matter of state law a constitutional amendment is required, that procedure must—as a matter of state law—be followed. . . . The Washington Supreme Court having determined that for purposes of the repeal of Art. XXVI of the Washington Constitution legislative action is sufficient, and appropriate state legislation having been enacted, it follows that the State of Washington has satisfied the procedural requirements of § 6.").

effectiveness of such agreement shall be conditioned on its approval by the Secretary of State." *Id.*; *see Detroit Int'l Bridge*, 883 F.3d at 897, 899. The Company challenged the Secretary's approval of the Crossing Agreement, asserting that Section 3 "authorize[s] approval of only valid agreements" and that "the Secretary failed to inquire adequately into Michigan law." *Detroit Int'l Bridge*, 883 F.3d at 899. The Court of Appeals held that "[n]either the plain text of Section 3 nor other provisions of the IBA appear to require the Secretary to inquire into state law. . . . Instead, . . . the Secretary's function is to assess the effects the Crossing Agreement would have on the foreign policy of the United States." *Id.*

The rule set forth in *Amador County* and reaffirmed in *West Flagler* controls this case—not *Detroit International Bridge*. And unlike under the IBA, "under *Amador County*, the Secretary must determine whether a compact submitted for review complies with IGRA during the forty-five-day review period because she has an affirmative duty to disapprove any compacts that do not comply with IGRA before that period expires," *Cherokee Nation*, 643 F. Supp. 3d at 116 (citing *Amador County*, 640 F.3d at 381). In addition, in a judicial challenge to a no-action approval, "25 U.S.C. § 2710(d)(8)(C) provides the law to apply[]—that is, the compact is deemed approved but only to the extent the compact is consistent with the provisions of [IGRA]." *W. Flagler*, 71 F.4th at 1064-65 (quoting *Amador County*, 640 F.3d at 381) (citation modified). And "*Amador County* … dictates that the Secretary may not no-action approve a compact that violates IGRA, as such a compact would if it were not validly 'entered into' under state law." *Cherokee Nation*, 643 F. Supp. 3d at 117 n.16.

But even if *Detroit International Bridge* were considered here, it would support the view that the Secretary could not solely rely on the Governor's certification to allow the Agreements to go into effect. *See infra* at 36-37. *Detroit International Bridge* found the Secretary of State had properly evaluated state law by relying on an opinion by the Office of the Michigan Attorney General, which the court considered to "speak[] authoritatively on Michigan law." 883 F.3d at 900. The court also found:

> Notably, this is not a case in which the Michigan Supreme Court had spoken on the state-law question to the contrary or where there was evidence that the Crossing Agreement was facially invalid. Indeed, a court has confirmed the officials' authority. *See Michigan Dep't of Transp* [*v. Riverview-Trenton R.R. Co., et. al.*], No. 17-000536-CC [(Mich. Ct. App. Oct. 11, 2017)]. Additionally, the Company fails to show that the Crossing Agreement is plainly invalid under Michigan law.

Id.

And while Defendant Stitt relies on the district court's decision in *Detroit International Bridge*, 192 F. Supp. 3d 54, he misinterprets it. He contends it "implicitly rejected" *Kickapoo I*'s interpretation of IGRA, ECF No. 154-1 at 16-17. In fact, the district court cited *Kickapoo I* as holding "that IGRA contains two independent substantive requirements: (1) 'a compact entered into by [a] tribe and [a] state [*i.e.*, validity of the compact] (2) which is in effect' [*i.e.*, effectiveness of the compact]." 192 F. Supp. 3d at 75 (quoting *Santa Ana*, 104 F.3d at 1552-53; and citing *Rhode Island v. Narragansett Indian Tribe of R.I.*, No. Civ.A. 94-0619-T, 1995 WL 17017347, at *1-3 (D.R.I. Feb. 3, 1995); and *Kickapoo I*, 827 F. Supp. at 43-46) (alterations in original). The court found the IBA "also contains these two separate, substantive requirements[, *s*]*ee* 33 U.S.C. § [535a]," and that "'state law determines the procedures by which a state may validly enter into a compact' authorized under the IBA." *Id.* at 75-76 (quoting *Santa Ana*, 104 F.3d at 1553; citing *Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1154-56 (D. Or. 2005); *Narragansett II*, 1996 WL 97856, at *1-3; *Willis*, 850 F. Supp. at 532; *Kickapoo I*, 827 F. Supp. at 46).

Defendant Stitt is also incorrect in asserting that *Detroit International Bridge* "rejected an argument that a bridge agreement approved by the Secretary of State pursuant to the International Bridge Act was invalid because Michigan's governor lacked authority to enter into the agreement."

ECF No. 154-1 at 16. In fact, the court emphasized that the Company "does not seek declaratory relief that the Crossing Agreement was unlawfully executed under Michigan law," 192 F. Supp. 3d at 76 (footnote omitted), that "[i]n order for DIBC to prevail, the IBA must have required USDS to examine whether the Crossing Agreement was validly executed under Michigan law," *id.,* and held that the IBA imposed no such requirement. *Id.*[20] In contrast, IGRA requires the Secretary to disapprove a compact not validly entered into by the State. *See supra* at 14-20.

Finally, Defendant Stitt wrongly contends that the district court in *Detroit International Bridge* "rejected a parallel claim to the one Plaintiffs raise here—that the Secretary's decision was arbitrary and capricious under the APA." ECF No. 154-1 at 16. He asserts that the district court held that the "Department [of State] 'did not exceed its authority when it approved' the relevant agreement, and the challengers 'lack[ed] a substantive right . . . to challenge the approval on the basis of alleged state law irregularities.'" ECF No. 154-1 at 16-17 (quoting *Detroit Int'l Bridge*, 192 F. Supp. 3d at 77). In fact, the district court rejected DIBC's arbitrary and capricious claim because it sought "to invalidate the approval of the Crossing Agreement on the basis that USDS failed to consider properly a factor that Congress did not identify for consideration: the legality of the Crossing Agreement under Michigan law," ruling that "this argument finds no support in the APA" because "[t]he validity of the Crossing Agreement under Michigan law was not a factor required to be considered as part of the duties entrusted to USDS in the IBA." 192 F. Supp. 3d at 78. The district court went even further, stating that "[e]ven *assuming arguendo* that USDS failed to consider properly this 'factor' or 'part of the problem,' USDS did not act arbitrarily or

[20] To be sure, the court supported that holding by analogizing the IBA to IGRA cases, including *Santa Ana* and *Kickapoo I*. *See* 192 F. Supp. 3d at 76-77. But the court had earlier relied on *Kickapoo I*'s central holding in interpreting the IBA, *see supra* at 31, and its later reference to *Kickapoo I* did not unsettle that reliance.

capriciously. USDS acted reasonably when: (1) it requested the views of Michigan's Attorney General concerning the Crossing Agreement's legality under Michigan law; and (2) relied on opinions of the Offices of Michigan's Governor and Attorney General confirming the Agreement's legality." *Id.* In contrast, here not only does IGRA require the Secretary to disapprove a compact not validly entered into, but the Secretary failed to rely on the Oklahoma Attorney General's opinion in *In re Treat* finding the Governor lacked authority to bind the State in the Agreements.

iii. IGRA Compacts, Unlike Interstate Compacts, are not Federal Law and are Approved in a Different Legal Context.

Defendant Stitt also argues that "[i]n *State ex rel. Dyer* v. *Sims*, 341 U.S. 22 (1951), the Supreme Court held that an interstate compact could not be invalidated on the basis of a State's later determination that the compact violated state law" and that "[l]ike an interstate compact, an IGRA compact, once approved, becomes a creature of federal law. It cannot thereafter be undone by a State's attempt to disavow its obligations under that agreement." ECF No. 154-1 at 20-21.

IGRA compacts cannot be analogized to interstate compacts under the D.C. Circuit's decision in *West Flagler*. The court there rejected an argument that "an approved IGRA compact is an 'instrument of federal law' which 'preempts state law[,]'" 71 F.4th at 1067 (alteration in original). It held instead that "[i]n actuality, the approval process exists so that the Secretary may ensure that a compact does not violate certain federal laws, and her approval is a prerequisite for the compact to have legal effect: nothing more, nothing less." *Id.* at 1068. Defendant Stitt's argument is also rejected by the plain language of § 2710(d)(8)(C), which provides the standard of review for this Court's review of the Secretary's no-action approval. 71 F.4th at 1064-65 (quoting *Amador County*, 640 F.3d at 381). By contrast, once approved by Congress, an interstate compact "is transform[ed] . . . into a law of the United States.'" *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 627 n.8 (2013) (quoting *Virginia v. Maryland*, 540 U.S. 56, 66 (2003) (alteration in original)); *Cuyler v. Adams*, 449 U.S. 433, 440 (1981) ("[T]he consent of Congress transforms the States' agreement into federal law under the Compact Clause." (footnote omitted)). And the Supreme Court's treatment of state court decisions in that context is controlled by that Court's unique constitutional role in "determin[ing] the nature and scope of obligations as between States," *Dyer*, 341 U.S. at 28 (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938)), as "[j]ust as [the Supreme Court] has [the] power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts," *id.*; *see Nebraska v. Iowa*, 406 U.S. 117, 118 n.1 (1972) (citing *Dyer* and 28 U.S.C. § 1251 (giving the Supreme Court "original and exclusive jurisdiction of all controversies between two or more States")). Those constitutional implications are not presented here.[21]

B. Summary Judgment Should Be Granted Because The Compacts Were Not Legally Entered Into By The State And Are Therefore Invalid Under IGRA.

"If a compact has not been legally entered into under state law, it is 'invalid' under IGRA." *Cherokee Nation*, 643 F. Supp. 3d at 98 (citing *Kickapoo I*, 827 F. Supp. at 46; *Santa Ana*, 104 F.3d at 1555, 1559). And "[f]or such claims, . . . courts 'need no agency reasoning' at all because '[e]ither the compact meets the requirements of IGRA, in which case [courts] must reject the challenge, or it does not, in which case [courts] must direct the Secretary to disapprove the compact.'" Mem. Op. & Order of July 9, 2025 at 8-9 n.4 (quoting *Amador County*, 640 F.3d at 382 (first alteration added)). Under these settled rules, Plaintiff Nations are entitled to summary

[21] Even if *Dyer* were applicable by analogy, the Supreme Court there determined whether West Virginia had validly entered into an interstate compact *by reviewing state law*, giving "every deference . . . to what the highest court of a State deems to be the law and policy of its State, particularly when recondite or unique features of local law are urged." 341 U.S. at 28, 30-32. The Governor has conceded that the Oklahoma Supreme Court's ruling on state law in *Treat I* is correct, *see infra* at 35, and state law prevents the Governor from entering into the Agreements for the State for the reasons the Oklahoma Supreme Court and Attorney General have explained, *see infra* at 36-39.

judgment on counts one, two, three, and eight of the Complaint, each of which "allege[s] that the compacts are entirely illegal and invalid because they were not legally 'entered into' as required by IGRA." *Cherokee Nation*, 643 F. Supp. 3d at 108.[22]

There is no question that the Agreements at issue in this case were not legally entered under state law. In the proceedings before the Oklahoma Supreme Court on the question certified to it by this Court, *see* ECF No. 195, Defendant Stitt conceded that issue, stating: "The Governor has never contested this Court's determinations in *Treat I* and [*Treat v. Stitt* (*Treat II*), 2021 OK 3, 481 P.3d 240] that the compacts are inconsistent with Oklahoma law." Stitt CQ Brief, 2024 WL 4186106, at *4 (citing ECF No. 154-1); *id.* at *8 ("The Governor has never contested or refused to recognize the *Treat* decisions, *nor has he ever suggested that they are not the final word on whether the underlying compacts comply with Oklahoma law*." (quoting ECF No. 154-1 at 18) (emphasis added)). The Oklahoma Supreme Court, relying on that representation, expressly found that "Governor Stitt, a named defendant in the federal case, does not contest this Court's findings in the *Treat I* and *Treat II* cases," and squarely held that "whether or not the compacts received approval under the federal IGRA process, their invalidity under Oklahoma law has been decided by this Court in *Treat I* and *Treat II*. It is Oklahoma law that determines whether a tribal gaming

[22] Defendants may not offer their own version of the Secretary's reasons for approving the Agreements by inaction because counts one through seven of the complaint challenge the lawfulness of the Secretary's no-action approval of the Agreements. *See* Compl. ¶¶ 234, 238, 243, 249, 255, 260, 264. Even assuming, *arguendo*, that this Court's Mem. Op. and Order of July 9, 2025 at 8-9 n. 4 was not controlling with respect to that issue, the Secretary's no-action approval are also arbitrary and capricious as the Secretary provided no explanation of his no-action approval of the Agreements, SOF ¶ 38, and the law is clear that "[a]n agency action qualifies as 'arbitrary' or 'capricious' if it is not 'reasonable and reasonably explained.'" *Ohio v. EPA*, 603 U.S. 279, 292 (2024) (quoting *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021)); *Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 644 (D.C. Cir. 2020) ("It is axiomatic that the APA requires an agency to explain its basis for a decision.").

compact is consistent with the IGRA." *Cherokee Nation v. U.S. Dep't of Interior*, 2025 OK 4, ¶¶ 43, 45, 564 P.3d at 72 (citing *Treat I*, 2020 OK 64, ¶ 6, 473 P.3d at 45).

That holding is correct. As shown *supra* at 14-20, Defendant Stitt's argument that "'after-the-fact state-law decisions like the *Treat* cases cannot unwind an approved compact that has gone into effect under' IGRA," Stitt CQ Brief, 2024 WL 4186106 at *8 (quoting ECF No. 154-1 at 18), has no merit. But even assuming otherwise, only *arguendo*, the Agreements were deemed invalid before the forty-five-day review period ended by the Oklahoma Attorney General's opinion in *In re Treat*, which holds that "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," 2020 OK AG 8, ¶¶ 12-15, 2020 WL 2304499, at *4. And he transmitted that opinion to the Secretary on the day it was issued, with a signed cover letter under the seal of the Office of the Attorney General which stated that

> [i]n issuing the attached Opinion on the permissibility of the Governor's actions under state law, I act in a quasi-judicial capacity and 'state officers are bound by these Attorney General opinions until relieved of that duty' by the courts of Oklahoma. *State ex rel. York v. Turpen*, 681 P.2d 763, 767 (Okla. 1984).

AR518; *see* AR518-19 (cover letter); AR520-28 (copy of *In re Treat*); SOF ¶ 32.

As *In re Treat* explained, state law only permits gaming by Indian tribes "in accordance with the provisions of [the State-Tribal Gaming Act] or the model compact set forth in [Okla. Stat. tit. 3A, § 262(A)]." 2020 OK AG 8, ¶ 12, 2020 WL 2304499, at *4. And as the Comanche and Otoe-Missouria Agreements "differ considerably" from the Model Compact, the Governor could not force the State to enter into them, because "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." *Id.* ¶¶ 12, 15, 2020 WL 2304499, at *4-5. The Attorney General therefore concluded that "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." *Id.* ¶ 15, 2020 WL 2304499, at *5. Turning to IGRA, the Attorney General noted that "*state law* determines when and how the State consents to a compact negotiated within IGRA's framework," *id.* ¶ 19, 2020 WL 2304499, at *7, and that IGRA cannot

> 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,

id. ¶ 20, 2020 WL 2304499, at *7 (citations omitted).

As an official opinion by the Attorney General issued in response to request by a state legislator, this decision was "determinative of the law" regarding the subject matter it addressed. Okla. Stat. tit. 74, § 18b(A)(18). That means it both defined the authority of, and was binding on, public officers in Oklahoma—including the Governor. *Keating v. Edmondson*, 2001 OK 110, ¶ 4 & n.8, 37 P.3d 882, 885; *Hendrick v. Walters*, 865 P.2d 1232, 1243 (Okla. 1993); *Turpen*, 681 P.2d at 767; *Rasure v. Sparks*, 183 P. 495, 498 (Okla. 1919).[23]

The Oklahoma Supreme Court confirmed the Attorney General's conclusion in *Treat I*, explaining that under Oklahoma law, "[t]he legislative branch sets the public policy of the State by enacting law," and "[t]he Governor has a role in setting that policy through his function in the

[23] The pendency of *Treat I* and *II* did not affect the binding nature of the Attorney General's opinion. Such opinions are "determinative of the law," Okla. Stat. tit. 74, § 18b(A)(18), and the Governor has a "duty to follow the Attorney General's opinion *until overturned by a court of competent jurisdiction*," including during the court's consideration of lawsuits challenging it, *see Keating*, 2001 OK 110, ¶ 4, 37 P.3d at 885 (emphasis added).

legislative process, but the Governor's primary role is in the faithful execution of the law." 2020 OK 64, ¶ 4, 473 P.3d at 44 (citing Okla. Const. art. V, § 1; *id.* art. VI, §§ 8, 11). The "law" governing the approval of tribal-state gaming compacts had been enacted by "[t]he Legislature, through the vote of the people," in the STGA, and "the Governor must negotiate the compacts within the bounds of the laws enacted by the Legislature, including the [STGA]." *Id.* ¶ 5, 473 P.3d at 44. Instead, in the Agreements, the Governor purported to authorize forms of gaming not authorized by the STGA. *Id.* ¶¶ 6-7, 473 P.3d at 45. Thus, the Governor lacked authority to enter into those Agreements on behalf of the State and they were "invalid." *Id.* ¶ 7, 473 P.3d at 45.[24]

In *Treat II*, the Oklahoma Supreme Court confirmed and expanded on that conclusion, holding that Defendant Stitt also lacked authority to enter into the United Keetoowah Band of Cherokee Indians ("UKB") and Kialegee Tribal Town ("KTT") Agreements on behalf of the State. *Treat II*, 2021 OK 3, ¶¶ 3, 6, 11, 12, 481 P.3d at 241, 242, 243-44. The court ruled, on terms that apply equally to the Agreements now at issue, that the Governor cannot enter into tribal-state compacts that are inconsistent with the terms of the Model Compact:

> The Executive branch did not follow either the Model Compact method or the Joint Committee method in negotiating the new compacts with [UKB] and [KTT]. The Executive branch's authority to negotiate the provisions of the Model Compact is constrained to advocating for fees and exclusivity, which are not at issue in this case. The new compacts contain terms that are different or outside the Model Compact provisions altogether. Due to the statutory nature of the Model Compact,

[24] The Court further rejected the notion that the Agreements could have been authorized under Okla. Stat. tit. 74, § 1221(C)(1), which authorizes the Governor to "negotiate and enter into cooperative agreements on behalf of [the] state with federally recognized Indian tribal governments" but requires that "[e]xcept as otherwise provided by this subsection, such agreements shall become effective upon approval by the Joint Committee on State-Tribal Relations," *id.*, and that, if such agreements involve trust responsibilities, then approval by the Secretary is also required, *id.* § 1221(C)(2). *Treat I* concluded that, even if the Agreements had been submitted to the Joint Committee, it could not have approved the Agreements since they do not conform to the STGA, and "[j]ust as the Governor is constrained by the statutory limitations on Class III gaming, so too is the Joint Committee." 2020 OK 64, ¶ 7, 473 P.3d at 45.

> the new and differing provisions operate as the enactment of new laws and/or amend existing laws, which exceeds the authority of the Executive branch.

Id. ¶ 11, 481 P.3d at 243. *Treat II* thereby confirmed what was already established under *Treat I* and *In re Treat*.

Thus, *In re Treat*, *Treat I*, and *Treat II* show that Defendant Stitt could not and did not enter into the Agreements on behalf of the State, and as a result, Defendant Secretary's decisions to allow those Agreements to go into effect by inaction were contrary to IGRA. Defendant Secretary's decisions were therefore "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and "without observance of procedure required by law," *id.* § 706(2)(D). *Santa Ana*, 104 F.3d at 1558 (the courts "are required, absent extraordinary circumstances, to accept" state court determination that governor lacked authority to enter gaming compacts); *Douglass v. Pike County*, 101 U.S. 677, 686 (1879) (federal courts "treat the construction which the highest court of a State has given a statute of the State as part of the statute, and govern [them]selves accordingly").

III. SUMMARY JUDGMENT SHOULD BE GRANTED ON COUNTS 4 TO 7 AND 8 BECAUSE THE AGREEMENTS CONTAIN TERMS THAT VIOLATE IGRA.

As "the compacts do not comply with IGRA because the state never validly entered into them, [this Court] need not address IGRA's other requirements." *Santa Ana*, 104 F.3d at 1559. If reached, however, Plaintiff Nations are also entitled to summary judgment on counts four, five, six, and seven of the Complaint, which allege that specific provisions of the compacts violate IGRA, and that therefore the compacts must be disapproved and the Secretary acted arbitrarily, capriciously, and contrary to law by failing to do so. For those same reasons, the Nations are entitled to summary judgment on count eight. Again, the Secretary's no-action approval is judicially reviewable under 25 U.S.C. § 2710(d)(8)(C), which provides the law to apply and under which "'the compact is deemed approved but only to the extent the compact is consistent with the provisions of [IGRA].'" *W. Flagler*, 71 F.4th at 1064-65 (quoting *Amador County*, 640 F.3d at 381) (alteration in original). "For such claims, . . . courts 'need no agency reasoning' at all because '[e]ither the compact meets the requirements of IGRA, in which case [courts] must reject the challenge, or it does not, in which case [courts] must direct the Secretary to disapprove the compact.'" Mem. Op. & Order of July 9, 2025 at 8-9 n. 4 (quoting *Amador County*, 640 F.3d at 382) (alterations in original).[25]

Defendant Stitt contends that "to the extent Plaintiffs could demonstrate that any of the challenged provisions is invalid, the proper remedy would be to sever any such provision from the compacts, not to invalidate the compacts in their entirety," as "[e]ach of the compacts contains a severability clause." ECF No. 154-1 at 28 (citing Agreements Part 13.B (AR32-33, AR66)). That argument fails because the Agreements, including their severability clause, are invalid *in toto* because they were not validly entered into by the State. Furthermore, severance is not available here as *Amador County* holds that "[t]he Secretary must . . . disapprove a compact if it would violate any of the three limitations in [25 U.S.C. § 2710(d)(8)(B)]," one of which is "if such compact violates—(i) any provision of [IGRA]," and that "subsection (d)(8)(C), which governs approval by inaction, includes no exemption from this obligation to disapprove illegal compacts." 640 F.3d at 380-81; *see id.* at 378 ("Either the compact meets the requirements of IGRA, in which case we must reject the challenge, or it does not, in which case we must direct the Secretary to disapprove the compact."). *Amador County* forecloses severance and requires disapproval of the Agreements.[26]

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[25] Even assuming, *arguendo*, that this Court's Mem. Op. and Order of July 9, 2025 at 8-9 n. 4 was not controlling with respect to that issue, the Secretary's no-action approval are also arbitrary and capricious for the reasons set forth *supra* at 32 n.22.

[26] Defendant Stitt asserts that *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1240-41 (10th Cir. 2018) and the Letter from Michael D. Olson, Principal Deputy Assistant Secretary—

Finally, even if *Amador County* did not so provide, the Court could not sever these provisions and leave the rest of the Agreements in place, because each provision challenged in Counts 4-7 was an "essential part of the agreed exchange" with Defendant Stitt. *See Meyer Grp., Ltd. v. Rayborn*, 695 F. Supp. 3d 39, 54 (D.D.C. 2023) (quoting Restatement (Second) of Contracts § 184 (1981)); *Jacobsen v. Oliver*, 555 F. Supp. 2d 72, 80 (D.D.C. 2008) (unlawful clauses may be severed if they are "not 'essential part[s] of the agreed exchange'" (quoting Restatement (Second) of Contracts § 184) (alteration in original)).[27]

Defendant Chairmen would not have signed the Agreements unless the Agreements purported to give their Tribes the ability to engage in new forms of gaming and promised future concurrence in a two-part determination, because those provisions increased their competitiveness

Indian Affairs, to Bill Anoatubby, Governor, Chickasaw Nation (Jan. 12, 2005), Ex. 33 ("Chickasaw Letter"), both endorse severance in this case. Not so. *Citizen Potawatomi* was not an APA case and so is not governed by *Amador County*. It instead concerned the enforcement in federal court of an arbitration award entered under the dispute resolution provision of the Model Compact. The Model Compact contains a clause allowing any invalid provision of the compact to be severed from the rest, "unless the invalidated provision, section or subsection is material." 881 F.3d at 1240 & n.20 (quoting Okla. Stat. tit. 3A, § 281, Part 13.A.). The Tenth Circuit concluded that a provision requiring de novo federal court review of arbitration awards for disputes arising under the compact was both invalid and "a material aspect of the parties' agreement to engage in binding arbitration." *Id.* at 1238. The court therefore severed the whole arbitration clause from the compact. *Id.* at 1236-41. And the Principal Deputy Assistant Secretary's letter only shows that in *approving* a compact under IGRA, as the letter did, Chickasaw Letter at 1, the Secretary may sever an invalid provision as inconsistent with IGRA. In this case, by contrast, the compacts were approved by the Secretary's inaction, he did not sever any provision of the compacts at issue, and therefore his action is subject to review under the rule of *Amador County*. Moreover, in both instances, the reviewing authority severed a remedy provision that was not essential to the bargain the parties struck. *See infra* at 41-43; Williston on Contracts § 19:70 (4th ed. 2025 update) ("An illegal portion of an agreement that relates to the remedy is more readily separable."). That is unlike this case, where the invalid provisions of the Agreements were essential to the parties.

[27] *See Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155, 1163 (9th Cir. 2015) ("General principles of federal contract law govern . . . [c]ompacts, which were entered pursuant to IGRA."); *Nat'l Ass'n of Realtors v. United States*, 97 F.4th 951, 956 (D.C. Cir. 2024) (the "federal common law" of contracts "looks to the Restatement of Contracts").

in the Oklahoma gaming market, *see supra* at 8-9; SOF ¶ 24; AR5, AR39 (Comanche and Otoe-Missouria Agreements fifth whereas clause (stating one reason for Agreement is that "the Tribe desires to offer the play of Covered Games, as defined in Part 2(A)(6) of this [Agreement]")), AR19, 53 ("[T]he Tribe was materially induced to enter into this Compact" by the future concurrence provision). Statements by Tribal Chairman Defendants that were brought to the Secretary's attention, *see* AR0226, make crystal clear that these features were central to the bargain, *see* SOF ¶ 24.[28] Moreover, these purported concessions by Defendant Stitt are relied on to justify the substantial exclusivity payments of the Agreements under the Secretary's longstanding interpretation of IGRA, *see infra* at 47-49. Although these particular concessions are illusory, the parties treated them as if they were meaningful for purposes of complying with IGRA, and they were therefore essential to the bargains struck in the Agreements.

Defendant Stitt also would not have signed the Agreements without the revenue sharing provisions or provisions that regulate the conduct of Class II gaming, which are intended to re-define and guarantee the State certain substantial exclusivity fees. As the Secretary knew when he reviewed the Agreements, *see* AR2866; AR0213, when Defendant Stitt signed the Agreements,

[28] Ex. 13, Kyle Payne, *Comanche Nation Leaders Discuss New Gaming Compact*, KSWO (Apr. 22, 2020) ("'They gave us an incentive, no ante on poker games and that's really good.' . . . 'This is going to allow us to expand, and that's great for the nation, it[]s members,' said Comanche Nation Entertainment CEO Mia Tahdooahnippah. That ability to fund expansion is something [Comanche Chairman] Nelson said is a win-win for both parties involved. 'Having the option to build outside the bound of our 3 locations will bring a bigger percentage to the state, but also bring more revenue to our gaming establishments," said Nelson."); Ex. 14, Editor, *Otoe-Missouria Tribe Signs New Gaming Compact With State*, Newkirk Herald Journal (Apr. 30, 2020) ("'If we were able to offer sports betting, it would definitely be a benefit to First Council, and we'd be looking at more revenue and staffing,' [Otoe-Missouria Chairman] Shotton said. 'By having a lower fee, we'd be able to bring in additional revenues to our tribe.' . . . 'I believe the tribe has an opportunity to see great revenue, especially if we open new facilities,' Shotton said. 'With the expansion of gaming, I think our patrons will enjoy more gaming volume. That will bring in more people, more excitement at First Council. We'll bring in lots of people from out of state, Kansas, Missouri, so it's definitely a benefit to First Council.'")).

he made clear that the "central goals" of the Agreements included "create[ing] certainty and clarity around the value of exclusivity" and "establish[ing] competitive, market fees that benefit both the tribes and the State," while also "expand[ing] gaming" by "allow[ing] tribes to maximize new technology and enhancements utilized in gaming markets across the nation." AR2833; SOF ¶ 24. As these elements of the Agreements are central to the bargain, they cannot be severed.

A. The Agreements Purport To Authorize Games That Are Illegal Under IGRA.

Under IGRA, an Indian tribe may lawfully conduct Class III gaming activities on Indian lands only if "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B).

The Agreements violate IGRA because they purport to authorize Class III games that are not permitted in Oklahoma. They define the "covered games" to include "Event Wagering," "House-banked Card Games," and "House-banked Table Games." AR8 (Comanche Agreement Part 2.A.7.); AR41 (Otoe-Missouria Agreement Part 2.A.6.). These games are not lawful under IGRA, because they are not presently permitted in the State "for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). "The State-Tribal Gaming Act expressly bars house-banked card games, house-banked table games involving dice or roulette wheels, and event wagering." *Treat I*, 2020 OK 64, ¶ 7, 473 P.3d at 45 (citing Okla. Stat. tit. 3A, § 262(H)); *accord Cherokee Nation*, 2025 OK 4 at ¶ 10, 564 P.3d at 63. The games that are presently permitted in Oklahoma are set forth in the Model Compact, which only authorizes Tribes to conduct:

> an electronic bonanza-style bingo game, an electronic amusement game, an electronic instant bingo game, nonhouse-banked card games; [and] 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 [STGA]; . . . .

Okla. Stat. tit. 3A, § 281, Part 3.5. Accordingly, the terms of the Agreements that purport to authorize Defendant Chairmen's Tribes to conduct "Event Wagering," "House-banked Card Games," and "House-banked Table Games," violate IGRA, and Defendant Secretary was required to disapprove the Agreements for that reason.

Defendant Stitt has admitted that these games "are not currently permitted under Oklahoma law," but insists "the compacts do not *authorize* any of those things," and that "[i]nstead, the compacts allow the Tribes to offer such gaming activities *only* 'if such game has been approved by the [State Compliance Agency],' or 'to the extent . . . authorized by law.'" ECF No. 154-1 at 22 (citing Comanche Agreement Parts 2.A.7, 2.A.13 (AR8)). But the definition of "Covered Game" to which he refers, *see* AR8 (Comanche Agreement Part 2.A.7.); AR41 (Otoe-Missouria Agreement Part 2.A.6.), only requires the State Compliance Agency ("SCA") to approve games conducted in accordance with the "Standards," which refers to specifications applicable to the three electronic games set forth in the STGA. AR 12, AR46 (Agreements Part 2.A.38. (defining "Standards")); AR14, AR48 (Part 3.C. (requiring SCA approval of Gaming Machines prior to their being placed in operation)); AR10 (Comanche Agreement Part 2.A.19.) & AR44 (Otoe-Missouria Agreement Part 2.A.18.) (defining "Gaming Machine" to include electronic games). Thus, the compacts do not require approval of the SCA for "Event Wagering," "House-banked Card Games," and "House-banked Table Games," which are not games set forth in the STGA.

As for the claim that those gaming activities are authorized only "to the extent . . . authorized by law," that phrase only appears in the definition of "Event Wagering," AR8 (Comanche Agreement Part 2.A.13.); AR42 (Otoe-Missouria Agreement Part 2.A.12.), and so could only limit the authorization of Tribes to engage in Event Wagering. And the Agreements go on to say that "the extent" to which wagers are authorized by law is "subject to the following terms and conditions," AR8, AR42, which include guarantees that the signatory Tribe "shall be permitted to conduct Event Wagering at no more than two (2) Facilities." AR9 (Comanche Agreement Part 2.A.13.g.); AR43 (Otoe-Missouria Agreement Part 2.A.12.g.). So the "extent . . . authorized by law" defined in the Agreements allows the signatory Tribes to conduct Event Wagering without further action by the State. Indeed, Defendants Stitt and Tahdooahnippah both now deny that Event Wagering is unlawful in Oklahoma. SOF ¶ 45 (citing Stitt Ans. ¶ 139; Tahdooahnippah Ans. ¶ 139).

Defendant Stitt also contends that IGRA authorizes a compact to address "not-yet-authorized forms of gaming," ECF No. 154-1 at 22, by providing that a compact may include provisions "directly related to the operation of gaming activities," 25 U.S.C. § 2710(d)(3)(C)(vii). That argument fails because however broadly that provision is read, it cannot void the express terms of IGRA that do not allow a compact to authorize gaming that is not permitted in the State, *id.* § 2710(d)(1)(B). That the Secretary approved by inaction a compact that purports to do so, *see* ECF No. 154-1 at 22 (citing Compact Between Mashpee-Wampanoag Tribe & Massachusetts § 4.3.2), does not alter that conclusion, since that compact only went into effect to the extent it was consistent with IGRA, *see* 25 U.S.C. § 2710(d)(8)(C).

While Defendant Chairmen have stated in the past that they do not intend to offer the illegal games until they are lawful, *see* Compl. ¶ 140, the Secretary cannot authorize illegal games on the excuse that the tribe may later say it won't play them until they're legal. In addition, those statements and Defendants' position are not binding and may change at any time—as they actually have with regard to Event Wagering, *see* SOF ¶ 45. In any event, "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of Earth, Inc. v. Laidlaw Env't Servs. (TOC) Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

The Agreements also purport to authorize the State to conduct Event Wagering, AR9 (Comanche Agreement Part 2.A.13.b.); AR42-43 (Otoe-Missouria Agreement Part 2.A.12.b.); and the iLottery, AR13, AR47 (Agreements Part 3.B.), which includes electronic lottery games with the "elements of consideration, chance and prize," AR11 (Comanche Agreement Part 2.A.25.); AR44-45 (Otoe-Missouria Agreement Part 2.A.23.). These provisions are illegal under IGRA because neither Event Wagering nor the iLottery as defined in the Agreements are permitted in the State "for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). Furthermore, while IGRA permits a compact to include provisions "directly related to the operation of gaming activities," 25 U.S.C. § 2710(d)(3)(C)(vii), the conduct of illegal gaming cannot be an authorized subject of negotiations. Finally, the compacts provide that "[a]t some future time, the State may license up to five (5) non-tribal Event Wagering locations, with the same requirements as those under this Compact," AR9 (Comanche Agreement Part 2.A.13.b.); AR42-43 (Otoe-Missouria Agreement Part 2.A.12.b.). Yet the State has no authority to license such locations under IGRA, which provides that Class III gaming is lawful on Indian lands "only if such activities are . . . authorized by" a *tribal* ordinance. 25 U.S.C. § 2710(d)(1)(A). Nor can the State claim authority under a compact to license gaming activities off Indian lands, as "IGRA 'regulate[s] gaming on Indian lands, and nowhere else,'" *W. Flagler*, 71 F.4th at 1061-62 (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014)). Thus, even assuming, *arguendo*, that gaming by the State were a permitted subject of negotiation under 25 U.S.C. § 2710(d)(3)(C)(vii), the Agreements could not authorize it.

Accordingly, the Secretary was required to disapprove the Agreements because they purport to authorize illegal games.

B. The Agreements' Revenue Sharing Provisions Impose An Illegal Tax That Violates IGRA.

IGRA provides that, except for state regulatory assessments that may be negotiated and agreed upon pursuant to 25 U.S.C. § 2710(d)(3)(C)(iii), it does not "confer[] upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in a class III activity." *Id.* § 2710(d)(4). Nevertheless, the Secretary has approved compact provisions that provide for a tribe to make revenue sharing payments to a State in some circumstances, as the Secretary explained when he approved the Comanche Nation's Former Compact, stating that

> To determine whether a revenue-sharing provision is permissible under IGRA, we have required the state to offer significant or meaningful concessions over which it is not required to negotiate in good faith, resulting in substantial and quantifiable economic benefits to the Indian tribe. In addition, the payment to the state must be appropriate in light of the value of the economic benefits conferred on the tribe.

Ex. 32, Letter from Mike Olsen, Principal Deputy Assistant Sec'y-Indian Affs., Dep't of Interior to Wallace Coffey, Chairman, Comanche Nation at 2 (Dec. 23, 2004) ("Comanche Letter"). Applying that standard, the Secretary has outright rejected several compacts with revenue sharing provisions that were inconsistent with IGRA.[29] "Substantial exclusivity" is neither defined, nor is

[29] *See* Ex. 36, Letter from Kevin K. Washburn, Assistant Sec'y-Indian Affs., Dep't of Interior to Deval Patrick, Governor, Commonwealth of Massachusetts, at 11-17 (Oct. 12, 2012) (disapproving a compact in part because its revenue sharing provision did not involve a concession by the State of substantial economic benefit to the Tribe, within the scope of permissible topics of an IGRA compact); Ex. 37, Letter from Kevin K. Washburn, Assistant Sec'y-Indian Affs., Dep't of Interior to Janice Prairie Chief-Boswell, Governor, Cheyenne-Arapaho Tribes, at 3-4 (Aug. 1, 2013) (disapproving compact amendment which provided that the Tribes could engage in online gaming in exchange for payment to the State of 20% of the revenues from the conduct of such gaming, as the State had made no meaningful concession in exchange, because such gaming was simply "a different method of delivering types of games already permitted under the Compact"

it provided in the Agreements, which actually expands the gaming that the State may conduct. To be sure, the Agreements provide that "[t]he Parties acknowledge and agree that this Compact provides the Tribe with substantial exclusivity over class III Covered Gaming consistent with the goals of IGRA," AR27, AR61 (Agreements Part 10.A.), and that "[i]n consideration of the Acknowledgement set forth in [Part 10.A.], the adequacy of which is hereby agreed to, and pursuant to the terms of this valid Compact, the Tribe agrees to pay the following Substantial Exclusivity Fees as provided for below," *id.* (Agreements Part 10.B). Nothing in the Agreements, however, limits the additional gaming that the State may authorize itself or others to conduct. To the contrary, the Agreements authorize the State to conduct "Event Wagering" and the iLottery, *see supra* at 46. Accordingly, the "substantial exclusivity" to which the Agreements refer is meaningless. The Agreements also impose an exclusivity fee (that does not depend on the actions of other gaming operators) for a set term which is reassessed at the end of that term according to the agreement of the signatories or according to the "market valuation" of the signatory tribe's substantial exclusivity as determined by a third-party panel. *Cf.* AR27-31, AR61-65 (Agreements Part 10.). These terms make the revenue sharing provisions of the Agreements invalid and accordingly, those provisions impose a "tax, fee, charge, or other assessment" in violation of IGRA, 25 U.S.C. § 2710(d)(4).

Defendant Stitt contends that "the compacts provide other meaningful concessions, such as provisions that address not-yet-authorized forms of class III gaming and concurrences in future off-reservation trust acquisitions." ECF No. 154-1 at 27 (citing Comanche Agreement Part 4.J.2.a. (AR19); Otoe-Missouria Agreement Part 4.J.2.a. (AR53)). Those concessions are illusory, as the

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and because the Tribes had provided no economic analysis to show that they would actually receive a substantial benefit in exchange for revenue sharing).

additional games are illegal, *see supra* at 43-47, and the future concurrence provisions are invalid, *see infra* at 50-54.

C. The Compacts Regulate Class II Gaming In Violation Of IGRA.

The Agreements also violate IGRA by permitting state regulation of Class II gaming, 25 U.S.C. § 2710(a)(2), (d)(3)(C). The Agreements provide that each signatory tribe will certify to the State that certain, set percentages of its gaming revenues from Facilities are derived from "Covered Games." AR14, AR48 (Agreements Part 3.D.). Those Agreements also provide that "Class II gaming, as defined by IGRA, is expressly excluded" from "Covered Games." AR8 (Comanche Agreement Part 2.A.7.); AR41 (Otoe-Missouria Agreement Part 2.A.6.). They further provide:

> The Enterprise shall keep a record of, and shall report at least quarterly to the SCA, *the number of Covered Games and class II devices in each Facility, by the name or type of each and its identifying number, and denomination of bets accepted*. This list shall include both class II and class III games. *Failure to report in accordance herewith shall result in a penalty of $5,000 per each Facility per report to be remitted to the SCA for purposes of deposit and expenditure in connection with Part [1]0.C. of this Compact*.

AR19, AR53 (Agreements Part 4.K.) (emphasis added). These provisions regulate Class II gaming in violation of IGRA, by requiring that a certain amount of tribal gaming revenue be derived from Class II games and requiring the signatory Tribe to report on its Class II Games to the SCA.

"Class II gaming is not an authorized subject of negotiation for Class III compacts." *Forest Cnty. Potawatomi Cmty.*, 330 F. Supp. 3d at 286 (citation omitted). Indeed, the Secretary earlier made that determination when he reviewed the Comanche Nation's Former Compact. Comanche Letter at 3 ("It is our view that Class III gaming compacts can only regulate Class III games, and cannot regulate Class II games under the IGRA."). The Secretary was required to disapprove the compacts for that reason.

Defendant Stitt defends the provisions regulating Class II gaming as permissible because they are "directly related to the operation of gaming activities," 25 U.S.C. § 2710(d)(3)(C)(vii). That argument fails, as that provision cannot authorize a compact to include terms that violate IGRA's separate bar to state regulation of Class II gaming.[30] *See Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 136 (D.C. Cir. 2006) ("[*U]nlike class II gaming*, a tribe conducts class III gaming pursuant to a compact with the state." (emphasis added)).

D. The Agreements Purport To Provide The Governor's Concurrence In Non-Existent Secretarial Determinations Of Land for Gaming Purposes.

IGRA prohibits gaming on lands acquired in trust after October 17, 1988 ("after-acquired lands"), 25 U.S.C. § 2719(a), unless those lands are within or contiguous to the Tribe's reservation, *id.* § 2719(a)(1), or if such lands are in Oklahoma, the lands are within or contiguous to the Tribe's former reservation, *id.* § 2719(a)(2)(A). A Tribe can only conduct Class III gaming on after-acquired lands outside of its reservation or former reservation in Oklahoma if the Secretary consults with state and local officials, including nearby Tribes, determines that such gaming would not be detrimental to the surrounding community, and the Governor of the State concurs in the Secretary's determination. *Id.* § 2719(b)(1)(A).[31]

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[30] That the Secretary may not have uniformly enforced the bar on state regulation of Class II gaming under a Tribal-State compact, *see* ECF No. 154-1 at 24, makes no difference here. *See* Ex. 38, Letter from Kevin K. Washburn, Assistant Sec'y-Indian Affs., Dep't of Interior to Cedric Cromwell, Chairman, Mashpee Wampanoag Tribe, at 3 (Jan. 6, 2014) ("[A]cknowled[ing] that the Department has not always spoken with a clear voice on this use [sic]" and that "[i]n prior determinations, the Department approved compacts that included provisions regarding the operation of class II gaming," and going on to "take this opportunity to emphasize that IGRA does not permit the regulation of class II gaming in tribal-state compacts" and that "[i]n the future, states and tribes should avoid including any language in a compact that could be construed as providing for the potential state regulation of class II gaming.").

[31] Under 25 U.S.C. § 2719(b)(1)(A), an Indian tribe can only conduct class III gaming on after-acquired lands located outside of its reservation or former reservation in Oklahoma if

> the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming

In the Agreements, Defendant Stitt purports to authorize Defendant Chairmen's Tribes to conduct Class III gaming at six new facilities, to be located on land to be acquired in specified areas of certain counties, and also to concur in any determination by the Secretary that the lands should be taken in trust for gaming purposes and that gaming may be conducted on those lands. AR19, AR 53 (Agreements Part 4.J.2.).[32] These provisions violate IGRA for three reasons.

First, the taking of land in trust for gaming purposes is not an authorized subject for compact negotiations, 25 U.S.C. § 2710(d)(3)(C); if it were, 25 U.S.C. § 2719—which expressly addresses that subject—would be unnecessary and its terms could be easily circumvented. It cannot be said to be "directly related to the operation of gaming activities" under 25 U.S.C. § 2710(d)(3)(C)(vii) for that same reason, and because "'class III gaming activity' is what goes on in a casino—each roll of the dice and spin of the wheel," *Bay Mills*, 572 U.S. at 792, and placing land in trust is obviously not gaming activity. That the Secretary may have allowed such

> establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination . . . .

See id. § 2719(a)(1), (a)(2)(A)(i); 25 C.F.R. § 292.2 (defining "reservation" as including a Tribe's former reservation in Oklahoma and defining their boundaries for IGRA purposes).

[32] Part 4.J.2. of the Agreements provides:

> In addition to its Existing Facilities, the Tribe may establish and operate [three new facilities] (collectively the "*New Facilities*"), subject to the land being taken into trust pursuant to 25 U.S.C. § 2719(b)(1)(A) . . . .
>
> a. Section 20 Concurrence. By entering into this Compact, the State through its Governor, in order to provide a meaningful concession to the Tribe, the adequacy of which is acknowledged and by which the Tribe was materially induced to enter into this Compact, hereby agrees to concur in any determination by the Secretary of the Interior that lands relating to the [three new facilities], should be taken into trust for gaming purposes, and such lands are eligible for gaming under 25 U.S.C. § 2719(b)(1)(A). The Parties agree that no other action from the State is required for approval of those lands' eligibility for gaming.

circumvention in other instances, *see* ECF No. 154-1 at 25 (citing Compact Between Confederated Tribes of Warm Springs Rsrv. of Or. & Oregon, art. II.I; Compact Between Fort Mojave Indian Tribe & California, pmbl.), does not justify it here. Nor do the compacts Defendant Stitt cites bear the weight he puts on them. The first compact, between Warm Springs and Oregon, was amended and restated in 2011, *see* Ex. 34. As amended and restated, it provides the Warm Springs Compact:

> does not authorize gaming at Cascade Locks unless and until at least all of the following events occur: 1) the Department of Interior takes the casino site into trust pursuant to 25 CFR, Part 151, 2) the Secretary of Interior issues a "two-part" determination making the casino site eligible for gaming pursuant to IGRA Section 20 (b)(l)(A), and 3) the Governor concurs in the two-part determination. *Neither the fact that the Governor is entering into this Highway 26 Compact nor any of the provisions of this Highway 26 Compact shall be construed as a limitation on, or affecting in any way, the current Governor's discretion, or the discretion of any future governor, to concur or decline to concur with a two-part determination pursuant to 25 U.S.C. Sec. 2719 (b)(1)(A).*

Id. Section 4.C.3 (emphasis added). The second compact, between Fort Mojave and California, *see* Ex. 35, says more than he acknowledges. It provides

> In light of the Tribe's willingness to locate its Gaming Facility on the 300 Acre Parcel outside the City of Needles, the Governor *intends* to grant his concurrence *as long as* (i) the Secretary of Interior determines that the Gaming Facility would be in the bests interests of the Tribe and its members and not detrimental to the surrounding community, (ii) the Board of Supervisors of the County of San Bernardino and the City Council of the City of Needles approves of the location in the form of a resolution or other appropriate instrument, and (iii) a favorable advisory vote is given by the electorate in the City of Needles, which would be the affected local community in this case

Id. pmbl. § I (emphasis added). These instruments plainly do not commit the Governor to concur in future trust acquisitions of after-acquired lands.

<u>Second</u>, 25 U.S.C. § 2719(b)(1)(A) requires that the Secretary consult with state and local officials, including nearby tribes, and determine that gaming on after-acquired lands would not be detrimental to the surrounding community, *before* seeking the Governor's concurrence in the Secretary's determination, *id.*, as there is otherwise nothing for the Governor to concur in. *See* 25

C.F.R. § 292.22 ("If the Secretary makes a favorable Secretarial Determination, the Secretary will send to the Governor of the State: (a) A written notification of the Secretarial Determination and Findings of Fact supporting the determination; (b) A copy of the entire application record; and (c) A request for the Governor's concurrence in the Secretarial Determination."). 25 U.S.C. § 2719 does not authorize the Governor of a State to concur in a *non-existent* Secretarial determination. Defendant Stitt cannot use 25 U.S.C. § 2710 to circumvent 25 U.S.C. § 2719 by concurring with a Secretarial determination that does not exist.

Third, an Indian tribe cannot have land taken into trust within another tribe's reservation or former reservation in Oklahoma unless the other tribe consents, 25 C.F.R. §§ 151.2, 151.7. The lands that are the subject of the future concurrence provisions of the Comanche Agreement include lands within the Reservation or former reservation of two Plaintiff Nations, and the Comanche Nation has not obtained their requisite consent. The Comanche Nation Agreement purports to provide that the Comanche Nation's "New Facilities" can be located "within one (1) mile of a state or federal highway or turnpike running through" Cleveland, Grady, and Love Counties, Oklahoma. SOF ¶ 69 (citing AR7, AR10-11, AR19 (Parts 2.A.5., 2.A.21., 2.A.27., 4.J.2., 4.J.2.a.)). Love County is located entirely within the Chickasaw Nation's Reservation. *See* SOF ¶¶ 72, 91. Part of the area of Grady County defined in the Comanche Nation Agreement is also within the Chickasaw Reservation. *Id.* A portion of the area of Cleveland County defined in the Comanche Nation Agreement is located within the territory of CPN. SOF ¶¶ 73, 91. CPN is a federally-recognized Indian tribe, and the lands within its territory constitute its reservation or "former reservation," 25 C.F.R. § 292.2, in Oklahoma, with boundaries recognized by the Secretary, over which CPN exercises jurisdiction. Without Chickasaw Nation's or CPN's consent for a land-into-trust acquisition, an IGRA compact cannot lawfully purport to allow another Tribe to game there.

In these circumstances, the Secretary had an obligation to disapprove the future concurrence provisions in the compacts because they violate "the trust obligations of the United States to Indians." 25 U.S.C. § 2710(d)(8)(B)(iii). Federal agencies owe a general trust responsibility to Indian tribes, and "this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 144 (D.D.C. 2017) (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998)). The future concurrence provisions purport to authorize activity that violates 25 C.F.R. §§ 151.2, 151.7, and for that reason they violate the federal trust responsibility and the Secretary should have disapproved the Agreements.

In sum, by allowing the Agreements to go into effect through inaction, the Secretary acted contrary to law by failing to disapprove purported compacts that contain terms that violate IGRA. Therefore, this Court should conclude that the Agreements are void, and the Secretary's failure to disapprove them violated IGRA.

CONCLUSION

Plaintiff Nations respectfully submit that this Court should grant Plaintiff Nations' motion for summary judgment and remand to the Secretary for disapproval of the Agreements.

Respectfully submitted,

Dated: October 31, 2025

By: */s/ Frank S. Holleman*

Frank S. Holleman, D.C. Bar # 1011376
Anne DeLong, D.C. Bar # 90031783
Sonosky, Chambers, Sachse,
Endreson & Perry, LLP
1425 K St. NW, Suite 600
Washington, DC 20005
Tel: 202-682-0240
E-mail: fholleman@sonosky.com
adelong@sonosky.com

Colin Cloud Hampson, D.C. Bar # 448481
Sonosky, Chambers, Sachse,
Endreson & Perry, LLP
145 Willow Road, Suite 200
Bonita, CA 91902
Tel: 619-267-1306
E-mail: champson@sonoskysd.com

Lead Counsel for the Cherokee, Chickasaw,
Choctaw, and Citizen Potawatomi Nations

Chad Harsha, OK Bar # 31579, *pro hac vice*
Attorney General
Cherokee Nation
Office of Attorney General
P.O. Box 948
Tahlequah, OK 74466
Tel: 918-453-5369
E-mail: chad-harsha@cherokee.org

Stephen Greetham, OK Bar # 21510, *pro hac vice*
Greetham Law, P.L.L.C.
621 Greenwood Road
Chapel Hill, NC 27514-5921
Tel: 984-261-7240
E-mail: sgreetham@greethamlaw.net

Meredith Turpin, OK Bar # 22690, *pro hac vice*
Office of Executive Council
2021 Arlington St.
Ada, OK 74820
Tel: 580-272-5748
E-mail: meredith.turpin@chickasaw.net

Brian Danker, OK Bar # 16638, *pro hac vice*
1802 Chukka Hina Drive
Durant, OK 74701
Counsel for Choctaw Nation
Tel: 580-924-8280
E-mail: bdanker@choctawnation.com

Gregory M. Quinlan, NM Bar # 4450, CO Bar #
21605, *pro hac vice*
1601 S Cooper Dr
Shawnee, OK 74801
Counsel for Citizen Potawatomi Nation
Tel: 405-275-3121
Email: greg.quinlan@potawatomi.org

Attorneys for Plaintiff Nations

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2025, I electronically filed the above and foregoing document and attachments with the Clerk of Court via the ECF System for filing.

/s/ Frank S. Holleman
Frank S. Holleman