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**UNITED STATES DISTRICT COURT**
**DISTRICT OF COLUMBIA**

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

**DEFENDANT CHAIRMAN JOHN SHOTTON'S CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT SHOTTON'S CROSS-MOTION FOR SUMMARY JUDGMENT**

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Defendant John Shotton, in his official capacity as Chairman of the Otoe-Missouria Tribe, hereby opposes Plaintiffs Cherokee Nation, Chickasaw Nation, Choctaw Nation of Oklahoma, and Citizen Potawatomi Nation's (collectively, "Plaintiffs") Motion for Summary Judgment and files this Cross-Motion for Summary Judgment on Count Eight of Plaintiffs' Complaint.

## INTRODUCTION

This case is about the exercise of sovereignty under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq*. Every tribe—including the Otoe-Missouria Tribe—has the sovereign right to conduct intergovernmental relations with their state counterpart. In the context of gaming, just because one deal makes sense for some tribes (e.g., Plaintiffs), doesn't mean that it is the best deal for all others. Every tribe is unique; some tribes may have a perspective distinct from others (even within the same state); and no applicable legal principle requires every tribe to operate under a uniform economic policy.

Each state, likewise, has the sovereign right to conduct intergovernmental relations with tribes therein. Certain doctrines of federal Indian law may restrict the jurisdiction that states can exercise in Indian country, but in general, the two sovereigns are free to deal with each other as they see fit. In Oklahoma, the tribal–state relationship is primarily overseen by the head of the State's executive branch—the Governor. The Governor has the authority to negotiate and enter into intergovernmental agreements with Oklahoma tribes. And although the state legislature is allowed input as to tribal-adjacent policies, it is not permitted to unilaterally veto the exercise of gubernatorial power.

For the Secretary of the Interior, as the federal officer charged with implementing IGRA, he must have the authority to give effect to the gaming compacts made between sovereign tribes and states. The Secretary's exercise of such authority necessarily entails discretion, including the discretion to refrain from adjudicating state-law challenges to gubernatorial compacting authority.

Undue restraints on this discretion, such as a duty to resolve state-law challenges, would pose an obstacle to the congressional purposes underlying IGRA's framework.

When disputes stemming from state law arise, although state courts are not entirely irrelevant in every tribal gaming-related dispute, they should not be able to retroactively invalidate the Secretary's exercise of his discretion. Determining whether a *federal* officer (such as the Secretary) has properly exercised their authority under a *federal* statute (such as IGRA) is a job for *federal* courts—not state courts.

Plaintiffs seek to upend these core tenets for the singular purpose of protecting their own market share. Yet, even if Plaintiffs have standing to move ahead, their arguments should be rejected on the merits.

First, there was nothing improper about Defendant Stitt's exercise of compacting authority. When the tribal–state compact between the State of Oklahoma and the Otoe–Missouria Tribe (the "Compact") was entered into, every single aspect of state law unequivocally supported his compacting authority. It was only a set of two *subsequent* state court decisions that purported to undermine it, and as explained herein, those state court rulings cannot invalidate a federal officer's discretion to allow a compact to go into effect under federal law.

Second, there is nothing improper about the substantive provisions of the Compact. Plaintiffs challenge four substantive provisions—the scope of authorized games, the revenue-share paid to the State, the treatment of class II gaming, and the Section 20 concurrence. For one of their claims (the alleged class II regulation) Plaintiffs do not even have standing. And for all of them, their arguments fail on the merits.

Third, and finally, even if there were any problematic sections of the Compact, those sections could plainly be severed. The Compact expressly provides for severability, and this Court should (if necessary) apply it, just as other courts have done with tribal–state gaming compacts.

For all of these reasons, the Court should deny Plaintiffs' Motion for Summary Judgment and grant Defendant's Motion for Summary Judgment as to Count Eight.

## BACKGROUND

### A. Statutory Background

In 1987, the Supreme Court issued its decision in *California v. Cabazon Band of Mission Indians*, recognizing that under "traditional notions of Indian sovereignty," tribes had the inherent right to conduct gaming on their lands. 480 U.S. 202, 216 (1987). Congress took notice, enacting the Indian Gaming Regulatory Act ("IGRA") in 1988.

#### 1. The Indian Gaming Regulatory Act

Like most legislation, IGRA reflects accommodation to the interests of multiple stakeholders. *Navajo Nation v. Dalley*, 896 F.3d 1196, 1201 (10th Cir. 2018). To that end, the statute was carefully designed to "promote tribal economic development, tribal self-sufficiency, and strong tribal government" while still giving the states a limited role concerning certain categories of gaming activity. *See* 25 U.S.C. § 2701(4), (5).

IGRA divides gaming into three classes, each subject to a different degree of regulation: Class I is comprised of social games for minimal value and is subject solely to tribal regulation. §§ 2703(6), 2710(a)(1). Class II involves bingo and certain non-banked card games, subject to joint regulation by tribes and the National Indian Gaming Commission ("NIGC"). §§ 2703(7)(A), 2710(b). Class III—the type at issue in this case—consists of all forms of gaming that are not class I or class II. § 2710(7)(B). This form of gaming is the most strictly regulated.

Class III gaming must be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." § 2710(d)(1)(C). Once such compact is entered into, it is submitted to the Secretary of the Interior for approval. § 2710(d)(8)(A); *see* 25 C.F.R. Part 293. The Secretary may disapprove a compact only if it violates (a) IGRA; (b) any other provision of federal law; or (c) the "trust obligations of the United States to Indians." 25 U.S.C. § 2710(d)(8)(B). If the Secretary fails to take any action within 45 days, the compact is deemed approved, "but only to the extent the compact is consistent with [IGRA]." § 2710(d)(8)(C). The Secretary then must publish notice of approval in the Federal Register, after which the compact "shall take effect." §§ 2710 (d)(3)(B), (d)(8)(c).

Through this compacting process, Congress gave states a regulatory role in class III gaming that they otherwise would have lacked under *Cabazon*. Such compacts may address a variety of subjects, so long as they are "directly related to the operation of gaming activities." § 2710(d)(3)(C)(vii).

**2. <u>Oklahoma's State-Tribal Gaming Act</u>**

For the first sixteen years following IGRA, the State of Oklahoma entered into gaming compacts only sporadically and on a tribe-by-tribe basis. *See infra* § III.A. These were not based on any uniform statutory model, but instead the result of bilateral negotiations. All of these early compacts were entered into by the State pursuant to 74 O.S. § 1221, which sets forth the Governor's general authority to negotiate "cooperative agreements" with tribal governments.

Eventually, in 2004, Oklahoma enacted the State-Tribal Gaming Act ("STGA"), 3A O.S. §§ 261 *et seq*. The STGA offered a "model tribal gaming compact" to all Oklahoma tribes. §§ 280, 281. In accordance with the IGRA's class III framework, the STGA provides that "the conducting of and participation in any game authorized by the model compact . . . are lawful when played pursuant to a compact which has become effective." § 281. That is, although certain forms of gaming were previously criminalized, through the STGA such gaming was lawful if played pursuant to a tribal-state compact. *See* 25 U.S.C. § 2710(b)(1)(A) (authorizing class III gaming when the State "permits such gaming for any purpose by any person, organization, or entity").

At the time the STGA was enacted, the Governor concurred with the terms of the Model Compact. 3A O.S. § 280 ("The State of Oklahoma through the concurrence of the Governor . . . hereby makes the following offer"). The statute recognizes the Governor's "executive prerogatives" as well as his "power to negotiate." *Id.* Moreover, although the Model Compact removed the need for each Oklahoma tribe to negotiate on an individual basis, nothing in the STGA *prohibits* a tribe from engaging in individual negotiations. Indeed, the STGA states only that "[n]o tribe shall be *required* to agree to terms different than the terms set forth in the Model Gaming Compact." § 280 (emphasis added). Nothing *prevents* a tribe from negotiating terms different than those in the Model Compact. *See id.* Likewise, nothing in the STGA purports to limit the Governor's ability to agree to terms different than those in the Model Compact.

**B. The Model Compact Renewal Dispute**

Under the STGA, the Model Compact was set to "have a term which will expire on January 1, 2020." § 281, Part 15.B. As that date neared, there was significant controversy regarding whether the Model Compact automatically renewed or whether an extension needed to be negotiated. *See* AR696 (noting the renewal dispute).

Before the Model Compact would have allegedly expired, three tribes (Plaintiffs Cherokee Nation, Choctaw Nation, and Chickasaw Nation) filed suit in the U.S. District Court for the Western District of Oklahoma seeking a declaratory judgment that the Model Compact automatically renewed. *Cherokee Nation v. Stitt*, No. 5:19-cv-1198-D, ECF 1 (W.D. Okla.). Plaintiff Citizen Potawatomi Nation soon intervened. *Id.* ECF 21, 28 (W.D. Okla.).

The District Court ordered the parties to mediate. *Id.* ECF 31 (W.D. Okla.). Shortly thereafter, the Otoe–Missouria Tribe had also intervened. *Id.* ECF 43, 48, 49 (W.D. Okla.). The parties complied with the mediation order. The mediation, however, only resulted in partial settlement, i.e., a settlement by which the Otoe–Missouria Tribe and the Comanche Nation entered into the Compacts at issue in this case. *Id.* ECF 120, 124 (W.D. Okla.).

The dispute between the other tribes and Defendant Stitt continued, and the District Court eventually issued a ruling on the merits in the favor of the tribes, holding that the Model Compact automatically renewed. *Cherokee Nation v. Stitt*, 475 F. Supp. 3d 1277 (W.D. Okla. 2020).

### C. The Otoe-Missouria Compact

The Compact at issue in this case was signed by Chairman Shotton and the Governor on April 18, 2020. AR68, AR697. The Compact was similar to the Model Compact insofar as both compacts recognize each party's sovereignty, authorize class III gaming under IGRA, contain revenue-sharing obligations, incorporate various provisions relating to licensing, and require compliance with tribal internal control standards. However, the Compact also improved upon the Model Compact in a number of ways.

First, the Compact substantially reduced the amount of revenue to be paid to the State. Under the Model Compact, tribes paid a tiered rate beginning at four percent (4%) of adjusted gross revenues and moving upwards to six percent (6%) of adjusted gross revenues for operations that exceed $20 million, plus ten percent (10%) of the net win for nonhouse-banked table games. 3A O.S. § 281, Part 11.2. The Compact lowers this to a flat 4.5% of adjusted net win for all class III gaming—a reduction that would save the Otoe–Missouria Tribe millions of dollars.

Secondly, the Compact contained provisions that, if triggered by changes in state law, would authorize certain forms of gaming, namely, event wagering and house-banked card and table games. The Compact did not unilaterally authorize the Otoe–Missouria Tribe to begin offering these games immediately, but it did establish a framework for if and when such gaming became legalized under Oklahoma law. *See infra* § III.A.

Third, the Compact contained preapprovals for new gaming facilities. For the Otoe–Missouria Tribe, the Governor provided his concurrence for one new gaming facility in each of Logan, Noble, and Payne Counties. AR53. The Compact alone did not mean that these facilities would be built immediately, but it nonetheless provided an important preapproval that would be needed during the regulatory process. *See infra* § III.D; *see also* 25 U.S.C. § 2719.

**D. Approval and Legal Challenges**

The Compact was submitted on April 23, 2020, along with the requisite certifications from the Otoe–Missouria Tribe and Governor Stitt, thereby triggering a 45-day review period set to end on June 7, 2020. AR35-68. The Governor simultaneously submitted a memorandum discussing the validity of the Compacts. AR73–83. Pushback began immediately.

On or around April 21, 2020 (days before the Compacts were formally submitted), then-Attorney General Mike Hunter publicly stated that the Compact was "not authorized by the STGA. The governor has the authority to negotiate with tribes on behalf of the state. However, only gaming activities authorized by the [STGA] may be the subject of a tribal gaming compact. Sports betting is not a prescribed 'covered game' under the [STGA]." AR104.

On April 22, 2020 (also prior to submittal), State Speaker of the House Charles McCall and Senate President *Pro Tempore* Greg Treat sent correspondence to Governor Stitt, also opposing the Compact. AR104–106. The McCall/Treat letter focused nearly entirely on the Compact's references to event wagering, flagging that recently proposed sports betting legislation "did not advance" and therefore "sports betting remains unauthorized in Oklahoma." AR106. The letter *did*, however, acknowledge the existence of an Attorney General Opinion that authorized the

Governor to enter into tribal-state gaming compacts without approval from the state legislature. AR105 (citing AG Op. 2004-27, *In re Williamson*, 2004 WL 2002612); *see infra* § II.A.

A series of letters from Plaintiffs soon followed. For example, Plaintiff Citizen Potawatomi Nation submitted a letter on April 28, 2020, expressing their views as to why the Compact should be disapproved, most of which mirrored the allegations in the complaint in this litigation. AR2697–2705. On May 1, 2020, Plaintiff Chickasaw Nation submitted their own letter also calling for disapproval, accompanied by a memorandum from the Chickasaw Nation's Senior Counsel. AR209–232. Plaintiff Cherokee Nation submitted their letter on May 7, 2020, expressing similar opposition. AR592–601.

On May 5, 2020, then-Attorney General Hunter issued an AG Opinion concluding that the Compact should be disapproved. AR494–504. The opinion set forth his position that the Compact authorized forms of gaming (event wagering and house-banked card and table games) that were illegal under state law. AR500. The opinion did *not* state the Governor's authority to "enter into" compacts was limited to the Model Compact. In fact, the opinion expressly recognized "the Governor's authority to negotiate compacts with Indian tribes *without the need to secure later approval by the Legislature*, *provided that* any such compacts conform to (and not conflict with) the laws duly enacted by the legislative branch." AR499.

The Otoe–Missouria Tribe and the Comanche Nation responded to this opposition with their own letters, one in response to the then-Attorney General, AR695-701, and another in response to some of the tribal opposition, AR819–828. Those letters explained the background of the dispute, the reasons that the Compact did not violate either Oklahoma law or IGRA, and the fact that the Compact was consistent with a multitude of other tribal–state gaming compacts that have received Secretarial approval. AR695–701, AR819–828.

At the end of the 45-day review period, the Secretary had taken no action regarding the Compact, making it approved by operation of law. *See* 25 U.S.C. § 2710(d)(8)(C).

Shortly after the no-action approval, State Representatives Treat and McCall filed an original action in the Oklahoma Supreme Court seeking to have the Compacts declared invalid. The court ruled in their favor, purporting to hold that the Compact was invalid because it (in their view) authorized forms of gaming that were illegal under state law. *Treat v. Stitt*, 473 P.3d 43 (Okla. 2020) (*Treat I*). Neither the Otoe–Missouria Tribe nor the Comanche Nation were a party to the case—a basis for which one of the Justices would have dismissed the case in its entirety. *Id.* at 45 (Kane, J., dissenting).

Representatives Treat and McCall soon initiated a second Oklahoma Supreme Court proceeding in which they sought a similar declaration regarding different compacts entered into between the State of Oklahoma and the United Keetoowah Band of Cherokee Indians and Kialegee Tribal Town. The Oklahoma Supreme Court again ruled in favor of Treat and McCall, but on broader grounds, purporting to hold that the Governor's authority to "enter into" tribal-state gaming compacts was limited to the Model Compact offered through the STGA. *Treat v. Stitt*, 481 P.3d 240 (Okla. 2021) (*Treat II*).

This litigation followed, with Plaintiffs seeking a declaration that the Secretary violated the Administrative Procedure Act by allowing the Compact to be approved, as well as a declaration that the Otoe–Missouria Tribe and Comanche Nation are operating class III gaming under an invalid tribal–state compact. ECF 104. They have made no specific claims against the State, and have named the State in none of the eight counts, but nonetheless have included the State (through the Governor) as a defendant. After certification of a state-law question to the Oklahoma Supreme Court regarding the Governor's authority to represent the State in this litigation, *see Cherokee*

*Nation v. U.S. Dep't of the Interior*, 564 P.3d 58 (Okla. 2025), the proceeding is now before this Court for summary judgment.

## STANDARD OF REVIEW

Summary judgment may be granted when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). For summary judgment purposes, a fact is material when it is capable of affecting the outcome of the litigation, and a dispute is genuine where the evidence would allow a reasonable jury to return a verdict for the nonmoving party. *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006).

## ARGUMENT

### I. Defendant Shotton's position regarding Plaintiffs' standing.

Plaintiffs assert that they have satisfied Article III's three-part standing test (injury, causation, and redressability) based on the "competitor standing doctrine," i.e., the notion that they are suffering from unfair market competition. ECF 223-1 at 5–13. In support of this argument, Plaintiffs suggest that the Compact gives the Otoe-Missouria Tribe an improper competitive advantage. *Id.* at 5-13. Plaintiffs point to features of the Compact regarding new gaming facilities, new types of gaming, and lower revenue-sharing rates. *Id.* These features, according to Plaintiffs, cause them "direct economic harm." *Id.* at 9.

In an earlier stage of this litigation, the Court largely agreed with Plaintiffs' standing argument. *Cherokee Nation v. U.S. Dep't of the Interior*, 643 F. Supp. 3d 90, 108–15 (D.D.C. 2022). However, the Court also recognized that a lower evidentiary threshold applied at the time, given that the parties were still at the pleading stage. *Id.* at 106.

Since then, Plaintiffs' standing argument remains the same, although they have now produced an expert witness report purporting to confirm their position through a patron survey in which each patron was paid $10 to answer an approximately seven-minute survey. *See* ECF 223-

29 at ¶ 85. In Defendant Shotton's view, the analysis contained in the report is conclusory at best. That said, Defendant Shotton wishes to have this case decided on the merits, and therefore takes no position regarding Plaintiffs' standing, except for two important points:

First, in their redressability analysis, Plaintiffs imply that if they prevail in this litigation, the Otoe–Missouria Tribe could *never* return to conduct class III gaming under the Model Compact. ECF 223-1 at 11-12. This argument should be rejected. Procedurally, Plaintiffs never sought this form of relief in their complaint. *See* ECF 104 at 129–31. Furthermore, such an excessively punitive remedy is wholly uncalled for and would be entirely unnecessary to "redress" Plaintiffs' alleged injuries.[1]

Second, even assuming *arguendo* that Plaintiffs have standing to challenge the Compacts generally, they lack standing for one of their claims—the argument that the Compact regulates class II gaming. This claim-specific standing deficiency is discussed in more detail *infra*. § III.C.

## II. The Compact was validly entered into and is in effect.

The Compact was negotiated in good faith between two sovereign governments, each represented by their respective chief executive (Chairman Shotton and Governor Stitt), each of whom were vested with the authority to negotiate and enter into intergovernmental agreements. Thus, pursuant to the plain language of IGRA and its implementing regulations, upon expiration of the 45-day review period, the Compact went into effect. As explained herein, subsequent and collateral state-law challenges regarding Defendant Stitt's compacting authority cannot serve as the basis for invalidation of the Compact—which, after all, is a creature of federal law.

[1] Moreover, as a matter of contractual interpretation, if the Compact was declared invalid in its entirety, that declaration would necessarily extend to Parts 12 and 13 of the Compact, which provide that the Compact "supersede[s]" the Model Compact. AR188. If the Governor lacked authority to "enter into" the Compact on behalf of the State, he necessarily lacked authority to bind the State to the position that the Model Compact was completely "superseded." Hence, the Otoe–Missouria Tribe would continue to operate class III gaming, just under the Model Compact.

### *A. The Governor had authority to enter into the Compact on behalf of the State.*

The Governor of the State of Oklahoma has authority to negotiate and "enter into" the Compact on behalf of the State of Oklahoma, regardless of any differences with the Model Compact and regardless of subsequent case law that implies otherwise.

As a matter of state constitutional law, the "Supreme Executive power shall be vested in a Chief Magistrate, who shall be styled 'The Governor of the State of Oklahoma.'" Okla. Const., Art. VI, § 2. This executive power includes the power to negotiate and enter into intergovernmental agreements. As described in the state Constitution, the Governor shall conduct "all intercourse and business of the State with other states and with the United States." *See* Okla. Const. Art. VI, § 8. This constitutional provision does not reference Indian tribes in explicit terms. However, the Oklahoma Supreme Court has interpreted it as extending to tribal governments, recognizing that the Governor "has been and continues to be the party responsible for negotiating compacts with the sovereign nations of this state." *Sheffer v. Buffalo Run Casino*, 315 P.3d 359, 364 & n.18 (Okla. 2013) (citing Article VI, § 8 of the Oklahoma Constitution).

Apart from the Governor's executive power under the Oklahoma Constitution, the Governor's authority to negotiate and enter into agreements with Oklahoma tribes is confirmed by statute. Under 74. O.S. § 1221, the Governor is "authorized to negotiate and enter into cooperative agreements[2] on behalf of this state with federally recognized Indian tribal governments within this state to address issues of mutual interest." § 1221(C)(1).

The statute does contain residual language purporting to require that cooperative agreements obtain *post hoc* legislative approval by the Oklahoma legislature's Joint Committee on State-Tribal Relations. 74 O.S. § 1221(C)(1). However, as acknowledged in multiple Attorney

[2] It is undisputed that "cooperative agreements" include tribal-state gaming compacts.

General opinions, this requirement is invalid under the Oklahoma Constitution's separation of powers. *See In re Williamson*, AG Op. 2004-27, 2004 WL 2002612.

As noted by Attorney General Drew Edmondson in his 2004 *Williamson* opinion, under Article IV of the Oklahoma Constitution, the Governor possesses "Supreme Executive power." *Id.* (citing Okla. Const. Art. IV, § 2). This power, the Attorney General acknowledged, is not quite as absolute as the President's powers under the U.S. Constitution, as the Oklahoma Constitution vests certain other officers with "Executive Branch functions." *Id.* at 2. Yet, the *Williamson* opinion explained that under Oklahoma law, there can be "no liberty . . . when the legislative [and] executive powers are united in one body or person." *Id.* at 4.

Attorney General Edmonson elaborated that separation-of-powers questions should be resolved by reference to four criteria: (1) whether the power being exercised is exclusively legislative or executive; (2) the degree of control the legislature is trying to exercise, i.e., "coercive" versus "cooperative"; (3) the legislature's objective, i.e., "furnishing some special expertise" versus "[establishing] superiority over the executive department"; and (4) the "practical result" of blending the executive and legislative powers. *Id.* (citation omitted). Applying these factors, the Attorney General found that requiring *post hoc* legislative approval of cooperative agreements with Indian tribes would infringe upon the Governor's executive power because it would result in the legislature "carrying out" legislative policy and "applying it to various conditions." *Id.* at 6. It would also result in the legislature having "complete control" over such agreements and subjecting the Governor to "the coercive influence of the legislative department." *Id.* Rather than being in a "cooperative role," the legislature would be in "complete control over the approval process," which "would violate the Separation of Powers provision of the Oklahoma Constitution." *Id.*

In short, at the time the Compact was signed in April 2020, three key legal premises were undisputed as a matter of state law: (1) the Governor has a constitutional right to conduct intergovernmental relations, including relations with federally recognized tribes; (2) the Governor has a statutory right under 74 O.S. § 1221(C) to "negotiate and enter into" gaming compacts on behalf of the State; and (3) despite residual language in 74 O.S. § 1221(C), such gaming compacts do *not* require *post-hoc* legislative approval, as acknowledged by the Attorney General, *see In re Williamson*, AG Op. 2004-27, 2004 WL 2002612.

This was the legal backdrop against which the Compact was negotiated and signed in April 2020. The Governor had unequivocally clear statutory authority to negotiate and enter into gaming compacts on behalf of the State under 74 O.S. § 1221(C). And even though § 1221(C) purported to require *post hoc* approval by a committee of the Oklahoma legislature, an AG Opinion confirmed that such approval was in fact *not* required as a matter of state constitutional law. *See In re Williamson*, AG Op. 2004-27, 2004 WL 2002612. That same AG Opinion, in fact, was presumptively *binding* upon the Governor at the time that the Compact was signed. 74 O.S. § 18b(A)(18) (referring to AG Opinions as "determinative of the law"); *see also Keating v. Edmondson*, 37 P.3d 882, 885 (Okla. 2001).

Even *after* execution of the Compact, while pending Secretarial approval, the then-Attorney General did not take grievance with the Governor's statutory compacting authority. Indeed, in the same AG Opinion that Plaintiffs cite extensively throughout their brief, then-Attorney General Hunter confirmed "the Governor's authority to negotiate compacts with Indian tribes," including "*without the need to secure later approval by the Legislature*." *In re Treat*, AG Op. 2020-8, 2020 WL 2304499 at *4 (emphasis added). The conclusion in the then-Attorney

General's *Treat* opinion was based solely on the mistaken notion that the Compact authorized "gambling activities that are prohibited by state criminal law." *Id.* .

The STGA likewise does not even hint at any limitations on the Governor's compacting authority. Rather, as described above, the STGA acknowledges the Governor's "executive prerogatives," including his "power to negotiate the terms of a compact." 3A O.S. § 280. And again, nothing in the STGA restricts tribes (or the Governor, on behalf of the State) from negotiating or entering into a non-model compact; instead the STGA merely provides that "no tribe shall be *required* to agree to terms different than the terms set forth in the Model Compact." *See id.* (emphasis added). Put differently, the STGA allows tribes the *option* of entering into the Model Compact, but does not state that tribes can *only* enter into the Model Compact.

Thus, at the time the Compact was signed, every legal authority pointed to the same conclusion—that the Governor had authority to enter into the Compact on behalf of the State. Out of all legal authorities in existence as of the date of execution, there was nothing calling into question the Governor's authority to negotiate and enter into the Compact, despite any differences the Compact may have with the Model Compact.

That timing is critically important here, because even though *subsequent* cases have attempted to undermine the Governor's authority, such case law was nonexistent at the time the Compact was signed. And while the Governor's authority has been scrutinized in subsequent case law, those cases are not dispositive of the pending litigation, as recently conceded by the Oklahoma Supreme Court, which described "the very specific issue before the federal court" as one that "concerns the *timing* of the federal process and whether the Secretary of the Interior's approval of the compacts under IGRA is affected by subsequent state court rulings." *Cherokee Nation v. U.S.*

*Dep't of the Interior*, 564 P.3d at 72 (emphasis added). As explained *infra*, those subsequent state court rulings do *not* undo the Compact's approval under IGRA. *See* § II.C, II.D.

### *B. The Compact is in effect.*

Pursuant to IGRA's plain text, because the Secretary did not disapprove the Compact within the 45-day period following its submission, the Compact was deemed approved, and upon its publication in the Federal Register, properly went into effect. Nothing in Plaintiffs' analysis of the statute, its implementing regulations, or relevant case law can establish otherwise.

Under IGRA, the Secretary is "authorized to approve any Tribal–State compact entered into between an Indian tribe and a State." 25 U.S.C. § 2710(d)(8)(A). The Secretary's ability to disapprove a compact is limited to three circumstances: (a) violation of IGRA, (b) violation of any other provision of federal law, and (c) violation of the federal trust responsibility to Indians. § 2710(d)(8)(B)(i)–(iii). If the Secretary does not approve or disapprove a compact within 45 days, it shall be deemed approved to the extent it is consistent with IGRA. § 2710(d)(8)(C). Approval (including approval by inaction) is then published in the Federal Register, § 2710(d)(8)(D), after which the compact "shall take effect," § 2710(d)(3)(B).

Here, the process unfolded exactly as described under the statute. The Compact was signed on April 18, 2020. AR68. It was submitted to the Secretary on April 23, 2020. AR35, AR69. Forty-five days passed, and by the end of that window, the Secretary had neither approved nor disapproved the Compact. It was therefore deemed approved. *See* 25 U.S.C. § 2710(d)(8). Notice of approval was published in the Federal Register on Monday, June 29, 2020, and the Compact went into effect that same day. 85 Fed. Reg. 38919 (June 29, 2020); *see* 25 U.S.C. § 2710(d)(3)(B).

Nothing called for disapproval. First, as explained *infra* § III, nothing in the Compact violates IGRA—not the scope of authorized games, the revenue-sharing, the references to class II gaming, nor the Section 20 concurrence. Second, the Compacts do not violate any other provision of federal law, and Plaintiffs do not even allege as much. Third, the Compacts do not violate the trust responsibility.

As for the Governor's authority to "enter into" the Compacts, merits of that issue aside, it does not constitute a basis for Secretarial disapproval anyway. Assume for the sake of argument that Plaintiffs are correct that the Governor lacked authority to enter into the Compact. Even if that were true (which it is not), it would not fall within any of the three grounds for disapproval; it is not a violation of IGRA, it is not a violation of federal law, nor is it a violation of the trust responsibility. At the very most, it would be a potential violation of *state law*, i.e., the STGA and/or 74 O.S. § 1221(C). Yet, an arguable violation of state law is not grounds for disapproval under IGRA. As an officer of the *federal* government, the Secretary's responsibility is to implement *federal* law. He is not responsible for resolving questions of compacting authority under *state* law, and it would be irrational to expect otherwise.

The present case illustrates the lack of merit in Plaintiffs' argument. Resolving a dispute regarding Defendant Stitt's compacting authority would require the Secretary to conduct research into Article VI of the Oklahoma Constitution, the Governor's statutory authority under 74 O.S. § 1221, the STGA, a variety of AG Opinions, and a slew of case law. Historical practices in Oklahoma likewise shed necessary light on the issue and may therefore need to be examined. To expect the Secretary to wade through all of it within a 45-day window is patently unreasonable.

Federal regulations confirm this interpretation of the Secretary's role under IGRA. Rather than requiring the Secretary to devote considerable resources to resolving state-law disputes over the Governor's compacting authority, IGRA streamlines the matter. All that is required is "[c]ertification from the Governor or other representative of the State that they are authorized to enter into the compact or amendment in accordance with applicable State law." 25 C.F.R.

§ 293.8(c). Once the Governor (or other State representative) provides that certification, the Secretary can proceed to make the necessary determinations—whether the compact violates (a) IGRA, (b) other federal law, or (c) the trust responsibility. *See* 25 U.S.C. § 2710(d)(8)(B).

Here, the prerequisite certification was provided by both Defendant Shotton and Defendant Stitt. For Defendant Stitt's part, he submitted a letter on official letterhead stating in pertinent part the following:

> 25 C.F.R. § 293.8(c) requires certification from the governor that he is empowered under the laws of the State to enter into a compact or amendment.
>
> In Oklahoma, the Governor, as Chief Magistrate, is constitutionally vested with Supreme Executive power, including the power to negotiate and enter into compacts with federally recognized Indian tribes.

AR3. The second paragraph included a footnote providing as follows:

> *See* Okla. Const. art. VI, §§ 1, 2 & 8; and Sheffer v. Buffalo Run Casino, Inc., 2013 OK 77, ¶ 12. *See also* 74 O.S. § 1221(C)(1) ("The Governor is authorized to negotiate and enter into cooperative agreements on behalf of this state with federally recognized Indian tribal governments. . ."); and 2004 OK AG 27 ("[A] any [*sic*] requirement that individual agreements or compacts negotiated by the Governor on behalf of the State with other sovereigns, such as Indian tribes, be approved by the Legislature would violate the principles of separation of powers.").

*Id.* This correspondence meets the requirements of 25 C.F.R. § 293.8(c), as it is clearly a "certification by the Governor or other representative of the State that they are authorized to enter into the compact or amendment in accordance with applicable State law."[3]

The Tenth Circuit's decision in *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997), heavily relied upon by Plaintiffs, does not call for a different conclusion, for at least two reasons. First, to the extent that *Santa Ana* implies that the Secretary is required to undertake a

[3] Of course, this is not to say that the Secretary is *required* to accept every certification or that he is prohibited from making any inquiry into the validity of the certification. If there are reasonable grounds for the Secretary to question the legitimacy of the certification, then he can request further information pursuant to 25 C.F.R. § 293.8(e).

complex analysis of state law, the Tenth Circuit was wrong. The court engaged in no meaningful analysis of the statutory text, relying almost entirely on legislative history and vague notions about accommodating "state interests." *Id.* at 1553–54. Indeed, the Department's recent regulations from 2024 acknowledge the *Santa Ana* decision but maintain the position that "in enacting IGRA, Congress did not contemplate the Department would address or resolve complex issues of State law during the 45-day review period, and such issues are outside the scope of the Secretary's review." 89 Fed. Reg. 13232, 13253–54 (Feb. 21, 2024) (citing *Santa Ana*).

*Santa Ana* was wrong enough as-is, and any further expansion of its analysis would create non-uniformity throughout the country, as it would make the application of IGRA largely dependent on state law. And although Congress did intend to provide states with some input as to class III gaming activity within state borders, there is no indication that Congress intended for IGRA to completely incorporate state law in the way that Plaintiffs suggest. By Plaintiffs' logic, differences in state law that have nothing to do with gaming would have the potential to invalidate a compact in State A while not invalidating a compact in State B—a result that deeply undermines Congress's intent to establish a "uniform national standard." *See Chemehuevi v. Wilson*, 987 F. Supp. 804, 806 (N.D. Cal. 1997). Congress did not incorporate every aspect of state law into IGRA's framework. Accordingly, IGRA permits the Secretary to rely upon certification of compacting authority.

Second, even taking *Santa Ana* at face value, the case is distinguishable. While the panel states that determination of whether a compact has been properly "entered into" is susceptible to a subsequent analysis under state law, the panel left open the question of whether federal courts are bound to "independently decide" the issues addressed in a subsequent state court ruling. 104 F.3d at 1559 (acknowledging that U.S. Supreme Court precedent may require federal courts to "independently examine state law" but finding that "we need not explore that issue further . . . as a resolution of the matter would not change the outcome of this case"). As explained *infra*, if this Court reaches the question left open in *Santa Ana*, it should rule in the Defendants' favor and find that the subsequent state court cases (*Treat I* and *Treat II*) were wrongly decided. *See infra* § III.C.

### *C. The* **Treat** *cases do not invalidate the Compact.*

All parties agree that only a *federal court* can determine the validity of a tribal–state gaming compact. *See* ECF 223-1 at 24. Indeed, as Plaintiffs recognize, "the validity of a compact is a federal question." *Id.* (citations omitted). This being the case, as explained below, it necessarily follows that the *Treat* cases cannot dictate the outcome of this litigation.

#### 1. IGRA establishes an expansive federal regulatory framework.

One of the core tenets of federal Indian law is that absent congressional authorization states have minimal jurisdiction in Indian country. *See Worcester v. Georgia*, 31 U.S. 515, 520 (1832); *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (describing the "barriers to the assertion of state regulatory authority" over Indian tribes). Consistent with that longstanding principle, Congress carefully designed IGRA's framework in a manner such that state court decisions cannot invalidate a tribal-state gaming compact.

In enacting IGRA, Congress intended to "expressly preempt the field in the governance of gaming activities on Indian lands." *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996) (citation omitted). It established "*Federal* standards" for tribal gaming. 25 U.S.C. § 2702(3). It established an entirely new *federal* agency—the NIGC—and vested that agency with broad powers to oversee many aspects of tribal gaming activity. §§ 2704; 2706. Before a tribe can engage in any gaming activity (except class I), it must enact a tribal ordinance and have that ordinance be approved by the NIGC. *See* § 2710(b)(1)(B), (d)(1)(A)(iii). The federal government's role is pervasive.

As to the judiciary's role, Congress "foresaw that it would be federal courts which made determinations about gaming." *Gaming Corp.*, 88 F.3d at 545. To that end, es explained below, although state courts are not entirely precluded from deciding every kind of gaming-related dispute, their role is sharply limited.

**2. State-law decisions are not binding.**

IGRA established a tripartite regulatory framework, and of course states do have *some* oversight of tribal gaming. But their role is limited. And in the case of state *courts*, their role is limited even further.

Of course, there are *some* instances in which state court decisions may influence the outcome of gaming-related disputes. For example, IGRA does not prohibit compacting parties from allowing state courts to exercise jurisdiction over personal-injury cases that arise in a tribal casino. *E.g.*, *Doe v. Santa Clara Pueblo*, 154 P.3d 644, 652–55 (N.M. 2007). But this does not mean that IGRA allows state courts to take the much more intrusive step of purporting to invalidate a tribal–state compact. State courts clearly lack such authority, even when the dispute involves questions of state law.

There is, granted, a tendency of federal courts to adopt state court interpretations of state law, usually in cases arising under diversity jurisdiction. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Yet, even among the federal judiciary, state court interpretations of state law have never been held to be inflexibly binding. In fact, an array of U.S. Supreme Court decisions underscores the principle that federal courts are not precluded from inquiring into the reasoning of a state court decision and setting a state court's analysis aside when appropriate.

The analogy drawn in Defendant Stitt's previous Rule 12(c) motion to interstate compacts is directly on point. *See* ECF 154. As the Tenth Circuit previously put it, "a gaming compact is similar to a congressionally sanctioned interstate compact the interpretation of which presents a question of federal law." *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1238–39 (10th Cir. 2018). Hence, both interstate compacts and tribal–state gaming compacts must be governed by the same principle when it comes to the effect of a state court decision.

The U.S. Supreme Court has squarely held that state court decisions may be set aside if necessary to uphold an interstate compact's validity. One prominent example is *Dyer v. Sims*, 341 U.S. 22 (1951), which involved an interstate compact for regulation of pollution in the Ohio River system entered into between eight states and ratified by Congress pursuant to the Compact Clause. *Id.* at 24; *see* 54 Stat. 752. An official from one of the states, West Virginia, refused to release appropriations to fund West Virginia's obligations under the compact. *Id.* at 25. The Supreme Court of Appeals of West Virginia subsequently held that the state's approval of the compact violated the West Virginia Constitution, thereby placing the entire interstate compact in jeopardy. *Id.* at 26. The U.S. Supreme Court, mindful of the common deference to state courts, nonetheless maintained that it has "final power to pass upon the meaning and validity of compacts," regardless of what a state court happens to opine. *Id.* at 28. The Court explained: "Deference is one thing; submission to a State's own determination of whether it has undertaken an obligation, what that obligation is . . . is quite another." *Id.* With those considerations, the Court rejected the West Virginia court's interpretation of the West Virginia Constitution and enforced West Virginia's obligations under the interstate compact. *Id.* at 32.

Cases in other areas of the law follow the same principle—state court interpretations of state law are not universally binding on subsequent federal court decisions, particularly when issues of federal law are intertwined. Any inflexible deference to a state court's interpretation of state law would wreak havoc in nearly every area of federal law that incorporates even the smallest state-law component. Not just interstate compacting, but also areas like election law[4] and property law.[5]

So too should be the case in federal Indian law. When *federal* rights are at issue—such as class III gaming rights under federal statute—a state court should not have the power to invalidate those rights on the basis of a state-law dispute. Simply put, as implied (albeit not squarely decided) in *Santa Ana*, a state court cannot bind a federal court to invalidate a tribal–state compact. 104 F.3d at 1558–59. The Oklahoma Supreme Court's decision in *Treat I* and *Treat II* are therefore not dispositive in this case.

This Court should consider the myriad deficiencies in the Oklahoma Supreme Court's analysis in *Treat I*. That opinion failed entirely to address key language in the Compact, specifically, the fact that event wagering is permitted only "to the extent such wagers are authorized by law." *See* Compact at Part 2.A.12., AR42. The opinion similarly failed to address the fact that *all* "Covered Games," including house-banked card and table games, must first be approved by a state regulatory agency (an agency that must be presumed to act lawfully). *See* Compact at Part 2.A.6, AR41. This language is critical in interpreting the Compact, as explained *infra*. § III.A. Furthermore, nowhere in the *Treat I* opinion did the court address the Compact's severability clause, which would have allowed severance of the event-wagering and house-banked games language and leave the remainder of the Compact intact.[6]

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[4] *Moore v. Harper*, 600 U.S. 1, 34 (2023) (holding that "state courts do not have free rein" in interpreting state law when election rights are at issue).
[5] *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164–67 (1998) (explaining that although state common law can have a role in defining property rights, such judge-made law cannot "sidestep the Takings Clause").
[6] This Court should also disregard *Treat I* because neither the Otoe–Missouria Tribe nor the Comanche Nation were a party to the case—again, a basis for which one of the Justices would have dismissed the case. *Treat I*, 473 P.3d at 45 (Kane, J., dissenting).

As to *Treat II*, the Oklahoma Supreme Court failed to address fundamental issues that should have affected the outcome. Regarding the Governor's authority to enter into cooperative agreements with tribes under 74 O.S. § 1221(C), the court provided no analysis as to whether requiring *post hoc* legislative approval of non-model compacts violated the separation of powers, *despite* the fact that the then-Attorney General acknowledged during the 45-day review period that *post hoc* approval was not constitutionally required. *See* AR499. There is a long-recognized four-pronged analysis under Oklahoma law as to whether a statute unconstitutionally infringes upon the Governor's executive authority, as noted in the 2004 AG opinion from Attorney General Edmondson, *see* 2004 WL 2002612, and nowhere did the court purport to apply that framework. This Court has the power to independently reexamine the state-law analysis in *Treat II*, an approach that has long been endorsed by U.S. Supreme Court precedent. *E.g.*, *Dyer*, 341 U.S. 22; *see also Santa Ana*, 104 F.3d at 1558.

In any event, though, regardless of how the Court views the analysis of *Treat I* and *Treat II*, as explained below, a separate principle may be invoked to uphold the Compact—the principle that a deemed-approved compact cannot be invalidated by a subsequent state-court decision.

***D. Subsequent state-court decisions cannot invalidate a deemed-approved compact.***

Even if the Court found the *Treat* cases persuasive, those cases *still* could not invalidate the Compact by collateral attack. Any ruling to the contrary would be inconsistent with IGRA's plain language and contravene the congressional intent underlying the statute.

As to the statutory language, IGRA requires that a compact be "enter*ed* into" by the compacting tribe and state. 25 U.S.C. § 2710(d)(1)(C). The Secretary does not have to monitor developments in state law that occur during—or, as here, *after*—the 45-day review period. Nor should this Court invalidate a compact when all then-existing sources of state law *supported* the Governor's compacting authority.

Again, at the moment that the parties executed the Compact, there was unmistakable support of Defendant Stitt's compacting authority. As his certification outlined, he possesses constitutional authority to conduct intergovernmental relations under Article VI of the Oklahoma Constitution and statutory authority to enter into agreements with tribes pursuant to 74 O.S. § 1221(C). AR3. And while § 1221(C) contains a clause purporting to require *post hoc* legislative approval for certain kinds of agreement, at the moment of execution, there was binding authority providing that such a requirement was unconstitutional under state law. This was recognized not just by the Governor, but also by the then-Attorney General. AR3, AR499.

Indeed, the timing is critical. As the Oklahoma Supreme Court recently noted, "the very specific issue before the federal court . . . concerns the *timing* of the federal process and whether the Secretary of the Interior's approval of the compacts under IGRA is affected by subsequent state court rulings." *Cherokee Nation v. U.S. Dep't of the Interior*, 564 P.3d at 72 (emphasis added). When that timing is considered, it is clear that when the Compact was signed and submitted to the Secretary, the Governor had lawful authority to enter into it on behalf of the State. *See supra* § II.A.

Federal regulations confirm that the Compact was lawfully entered into. Those regulations require each party to provide certification of their compacting authority. 25 C.F.R. § 293.8(b), (c); AR36–38. The body of state law in existence when the Compact was submitted clearly supported the parties' compacting authorities. *Supra* § II.A. The certifications were therefore plainly sufficient under IGRA. The regulations also establish a mechanism for the Secretary to request further evidence of the parties' compacting authority. 25 C.F.R. § 293.8(e). However, given that all state law in existence at the time supported the certifications, there was no reason for the Secretary to request anything further. Indeed, even the then-Attorney General acknowledged that the Governor did not need *post hoc* legislative approval when entering into a compact. AR499. The regulatory process was followed to the letter, and the Compact went into effect accordingly. Subsequent state court decisions like the *Treat* cases cannot compel a finding otherwise.

Allowing subsequent state court decisions to undo an approved tribal–state compact would be inconsistent with the congressional purpose underlying IGRA. Congress intended for the approval process to move forward expeditiously and with finality. The 45-day review period serves that purpose, as it gives the Secretary a reasonable opportunity to review the compact to ensure that it complies with (a) IGRA, (b) other federal laws, and (c) the federal trust responsibility. 25 U.S.C. § 2710(d)(8)(B), (d)(8)(C). This process allows the tribe to move forward with their gaming operations without having to be concerned about a collateral attack. Put differently, the process protects tribes' reliance interests.

*Santa Ana* may have discounted these reliance interests, but only under fact-specific circumstances. The tribes in that case began class III gaming before they had *any* compact in place, leaving them with effectively unclean hands. 104 F.3d at 1549. The Tenth Circuit thus found that the tribes "[bore] some responsibility" due to their "admittedly precipitous conduct." *Id.* at 1556. Here, in contrast, while the Otoe–Missouria Tribe was already engaged in gaming prior to entering into the Compact, such gaming was lawful under the Tribe's *prior* compact (i.e., the Model Compact). There were no unclean hands that would justify this Court disregarding the need for finality. In fact, as explained *infra*, the Otoe–Missouria Tribe has relied heavily on the Compact, especially the lower revenue-share paid to the State, which has allowed the Tribe to operate with an increased budget and thus allow for more robust tribal programs. *See infra* § III.B. This would all be at risk if the Court were to give binding effect to the faulty conclusions in the *Treat* cases.

**III. The Compacts' terms do not violate IGRA.**

Plaintiffs' arguments relating to the substantive provisions of the Compact should be rejected. Every feature of the Compact is consistent with applicable law, and in fact all of the challenged provisions of the Compact mirror provisions of other compacts that have already received approval from the Secretary, going back decades. If this Court were to hold that any of the targeted provisions of the Compact somehow violate IGRA, it would call into question the legality of compacts all around the country.

***A. The Compact does not authorize unlawful gaming.***

Plaintiffs first claim that the Compact "authorize(s) Class III games that are not permitted in Oklahoma," including event wagering and certain house-banked games. ECF 223-1 at 43. The plain text of the Compact dispels their position. In explicit terms, the Compact provides that only games that are lawful under Oklahoma law are permitted under the Compact.

Under IGRA, class III gaming is confined to those games that are permitted within the state "for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). Defendant Shotton does not dispute that Oklahoma law does not authorize event wagering or house-banked card or table games "for any purpose by any person, organization, or entity." And contrary to what Plaintiffs claim, the Compact does *not* purport to unilaterally authorize such games.

The Compact's definition of "Event Wagering" makes it clear that it does not unilaterally authorize any illegal form of event wagering (e.g., sports betting). It defines "Event Wagering" as "the placing of a wager on the outcome of a Sport event, including E-Sports, or any other events, ***to the extent such wagers are authorized by law*** . . ." Compact at Part 2.A.12, AR42. If the relevant form of event wagering is not "authorized by law," i.e., Oklahoma law, then it is not authorized under the Compact. It is that simple. Indeed, Plaintiffs fail to offer any alternative interpretation of what "authorized by law" could otherwise mean.

Plaintiffs argue that because the phrase "to the extent . . . authorized by law" "only appears in the definition of 'Event Wagering'" it therefore does not extend *beyond* Event Wagering, i.e., it does not prevent house-banked card and table games from being conducted. ECF 223-1 at 44. Their argument belies the text and structure of the Compact. The Compact places house-banked card and table games within the category of "Covered Games." The definition of "Covered Game," in turn, requires the relevant game to be "approved by the [State Compliance Agency]." Compact at Part 2.A.7, AR41. The State Compliance Agency ("SCA") is the Oklahoma Office of Management and Enterprise Services—the agency charged with administering tribal-state gaming compacts on behalf of the State, *see* 3A O.S. § 281 Part 3(25). As a government agency, the SCA does not have authority to approve games that are unlawful, and the Court should interpret the Compact in accordance with the longstanding presumption that government officials/agencies will act lawfully. *See Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 758 (2005). Indeed, in the near-six years since the Compact went into effect, Plaintiffs have not alleged a single game improperly approved by the SCA. *See generally* ECF 223-1 (containing no allegations that the SCA has approved any form of event wagering or house-banked card or table game).

Plaintiffs also argue that the SCA's approval is not necessary on the theory that the definition of "Covered Games" "only requires the [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." ECF 223-1 at 57. This interpretation ignores the actual language of the Compact. As set forth in full, the definition provides:

> "Covered Game" or any derivative thereof means all Gaming Machines, House-banked Card Games, Nonhouse-Banked Card Games, House-Banked Table Games, Nonhouse-Banked Table Games, and Event Wagering, which are conducted in accordance with the Standards as applicable, if the operation of such game by the Tribe would require a Compact **<u>and if such game has been approved</u>**

> **by the SCA.** Class II gaming, as defined by IGRA, is expressly excluded from this definition.

Compact at Part 2.A.6, AR41 (emphasis added). The emphasized language dispels Plaintiffs' argument in two ways. First, it makes it clear that SCA approval *is* in fact required for a game to be considered a "Covered Game," as the definition only encapsulates a type of gaming "*if* such game has been approved by the SCA." The word "if" therefore supplies a necessary precondition, requiring SCA approval *before* a game can be considered a "Covered Game." Indeed, even one of the tribes that opposed Secretarial approval during the 45-day review period (the Wichita & Affiliated Tribes) acknowledged that games "*must first be approved by the [SCA]* to be considered a 'covered game.'" AR544 (emphasis in original). Second, nothing in the definition of "Covered Game" requires the SCA to approve a game merely because it meets technical standards.[7] The definition imposes no unconditional obligations; there are no terms like "shall," "must," etc. The definition allows the SCA to determine whether approval is consistent with applicable state law.

To the extent *Treat I* suggests a different interpretation of what games are authorized by the Compact, those decisions are not and should not be considered binding upon this Court, for a number of reasons. For one, insofar as *Treat I* is described as holding that the Compact authorizes unlawful event wagering, that characterization is incorrect—*Treat I* skirted the issue. Nowhere in the *Treat I* opinion did the Oklahoma Supreme Court grapple with the argument that the words "to the extent authorized by law" necessarily meant that the Compact did not authorize event wagering (since Oklahoma law itself does not authorize such activity). Instead, the Oklahoma Supreme Court simply stated the uncontested premise that Oklahoma law does not authorize event wagering and from there jumped to conclude that Defendant Stitt unlawfully bound the State to an agreement

[7] Essentially, the "Standards" relate to technical specifications involving component parts, transaction systems, and software. *See* Compact at Part 2.A.38, AR46; *see also* 3A O.S. § 281 Part 3(23) (Model Compact's similar definition of "Standards").

that unilaterally authorizes such activity. The opinion does not engage in any analysis of whether the Compact's *actual language* unilaterally authorizes event wagering. There was simply no textual reasoning.

Similarly, *Treat I* also failed to address whether the actual Compact language authorizes house-banked card and table games. As stated above, the Compact only permits such games if they are "approved by the SCA." Compact at Part 2.A.6, AR41. *Treat I* does not acknowledge this language at all. Instead, as with the event wagering provisions, the Oklahoma Supreme Court jumped from the premise that house-banked card and table games are illegal to the conclusion that Defendant Stitt unlawfully bound the State to an agreement that unilaterally permits such activity. The critical part of the analysis—whether the Compact's text *actually* authorizes such gaming—is nowhere to be found.

In any event, as explained *supra*, even if *Treat I* purported to hold that the Compact authorizes event wagering or house-banked card and table games, that "holding" from a state court could not invalidate a federally approved intergovernmental agreement. *See supra* § II.C.

Even assuming *arguendo* that the Compact's language regarding event wagering and house-banked games plausibly supported Plaintiffs' interpretation, this Court should not adopt such an interpretation when Defendants' interpretation is also plausible. When faced with two competing interpretations, both of which are plausible, the Court should always adopt the interpretation that preserves the legality of a tribal–state compact. As the D.C. Circuit recently instructed in the context of IGRA, provisions in a compact "should, if possible, be interpreted in such a fashion as to render it lawful rather than unlawful." *W. Flagler Associates, Ltd. v. Haaland*, 71 F.4th 1059, 1066 (D.C. Cir. 2023). Thus, even if the Court were prone to side with Plaintiffs' interpretation of the Compact language, it should refrain from doing so in this case. *See id.*

Moreover, the mere passing reference to a presently unauthorized game cannot invalidate a tribal–state gaming compact. As historical practices make clear, it is common for a tribal–state gaming compact to contemplate forms of class III games that *might* be authorized in the future, even if they are not yet authorized at the time of compacting. If a simple reference to such games was a basis for disapproval, it would call into doubt the validity of many other compacts that are now in effect.

Consider the State of Arizona's compacts with numerous tribes in 2002 and 2003. Those compacts contained explicit references to Internet gaming, which had yet to be permitted under state law. The compacts stated: "The Tribe shall not be permitted to conduct gaming on the Internet unless Persons other than Indian tribes within the State or the State are authorized by State law to conduct gaming on the Internet." *E.g.*, Compact between the State of Arizona and the Havasupai Indian Tribe, § 3(y) (2002)[8]; Defendant Shotton's Statements of Fact ("SOF") at ¶8. Those compacts were affirmatively approved. 68 Fed. Reg. 5912 (Feb. 5, 2003).

A similar compact between the State of California and the Iipay Nation of Santa Ysabel was approved in 2003. That compact provided that the tribe would not offer certain games "through use of the Internet unless others in the state are permitted to do so under state and federal law." *See* Compact between the State of California and the Iipay Nation of Santa Ysabel, § 4.1(c) (2003)[9]; SOF ¶ 9. As in Arizona, California outlawed Internet gaming. And yet, the Secretary nonetheless approved the compact. 68 Fed. Reg. 71131–32 (Dec. 22, 2003).

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[8] *Available at* https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/pdf/508_compliant_2003.02.05_havasupai_indian_tribal_gaming_compact.pdf

[9] *Available at* https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/pdf/508%20Compliant%202003.12.22%20Iipay%20Nation%20of%20Santa%20Ysabel%20Tribal%20State%20Gaming%20Compact.pdf

To be sure, the Havasupai and Iipay Nation of Santa Ysabel compacts addressed then-unlawful gaming in generic terms, more or less prohibiting the activity unless later authorized under state law. But the lack of a detailed framework is immaterial as far as agency practice is concerned. In 2013, for example, Massachusetts compacted with the Mashpee Wampanoag Tribe to establish a more detailed framework for Internet gaming, even though such gaming was illegal at the time. That compact provided: "If Internet Gaming is authorized by the Commonwealth and permitted to be conducted by any Category 1 Licensee or other commercial entity licensed by the Commonwealth, the Tribe may conduct Internet Gaming in the same manner and to the same extent that Internet Gaming is permitted to be conducted in the Commonwealth by any Category 1 Licensee or other licensed commercial entity, provided the Tribe first complies with subpart 4.4 of this Compact." *See* Compact between the Commonwealth of Massachusetts and the Mashpee Wampanoag Tribe, § 4.3.2(b) (2013)[10]; SOF at ¶ 10. The compact was deemed approved.

Even within Oklahoma there is history of tribal-state gaming compacts being approved despite references to games that may have been unlawful at the time. In 1992, Plaintiff Citizen Band Potawatomi Nation entered into a compact with the State of Oklahoma purporting to authorize "video lottery terminals." *See* Compact between the State of Oklahoma and the Citizen Potawatomi Nation, § 2(b) (1992) (defining "Authorized Class III Gaming")[11]; SOF at ¶ 2. In reviewing the compact, the Secretary noted that the Justice Department had concerns about the legality of video lottery terminals under Oklahoma law. *Id.* Nonetheless, the Secretary approved the compact, finding it unnecessary to resolve the state-law issue. *Id.*

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[10] *Available at* https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/pdf/508_compliant_2014.02.03_mashpee_wampanoag_tribal_state_gaming_compact.pdf

[11] *Available at* https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/pdf/508_compliant_1992.10.23_citizen_potawatomi_nation_tribal_state_gaming_compact.pdf

Of course, the Secretary's approval (by action or inaction) of a different compact does not constitute binding judicial precedent. But nonetheless, this historical agency practice is indicative of the existence of a consistent policy—that provisions relating to presently unauthorized games is no basis to disapprove a tribal–state gaming compact. And that consistency itself undermines the notion that the Secretary acted arbitrarily or capriciously in allowing the Compact to go into effect by operation of law. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (explaining that "inconsistency in agency policy" can be indicative of arbitrary and capricious decision-making).

Insofar as Plaintiffs take aim at hypothetical off-reservation gaming licensed by the State—i.e., event wagering and iLottery—that part of the challenge also fails under recent Circuit precedent. *See* ECF 223-1 at 46. Plaintiffs depict the Compact as providing the State with unbridled discretion to conduct iLottery and to license "at some future time" up to five off-reservation event wagering locations. *Id.* Even if their depiction was accurate (and it's not), it would be no basis to find such provisions invalid under IGRA. Indeed, in *West Flager Associates Inc. v. Haaland*, the D.C. Circuit addressed a nearly exact issue. In that case, a compact between the State of Florida and the Seminole Tribe authorized the Seminole Tribe to offer online sports betting throughout the state. 71 F.4th at 1063. A group of non-tribal brick-and-mortar casinos challenged the Secretary's no-action approval on the theory that the compact's authorization of off-reservation sports betting violated IGRA. *Id.* The court rejected the challenge, reasoning that IGRA "does not restrict or regulate tribal, or any other, activity outside of Indian lands." *Id.* at 1065. As the court explained, IGRA regulates gaming "on Indian lands, and nowhere else." *Id.* (citing *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 795 (2014)). The legality of off-reservation wagering was wholly irrelevant. Thus, a compact's incorporation of provisions relating to off-reservation gaming (tribal or non-tribal) was held to be no basis for disapproval under IGRA. *Id.* Here, like in *West Flagler*, the Compact references hypothetical off-reservation event wagering and iLottery to be conducted by the State (if, and only if, such activity becomes authorized by state law). AR42, AR44. And as in *West Flagler*, because IGRA only addresses *on*-reservation gaming, the legality of any kind of *off*-reservation event wagering by the State of Oklahoma is irrelevant under IGRA.

In short, contrary to Plaintiffs' arguments, the Compact does not authorize event wagering or house-banked card and table games—it just *contemplates* such activity, which is no violation of IGRA, and thus constitutes no basis for disapproval.

***B. The Compact's revenue-sharing provisions comply with IGRA.***

Plaintiffs next argue that the Compacts violate IGRA because they impose prohibited revenue-sharing obligations. This argument should be rejected.

It is of course true that IGRA generally prohibits states from "impos[ing] any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in class III activity." 25 U.S.C. § 2710(d)(4). However, if a state offers "meaningful concessions" that it is not otherwise required to make, then the parties are free to negotiate for reasonable fees in the form of a share of class III gaming revenues. *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1112 (9th Cir. 2003). The Secretary has long recognized such concessions when determining whether to approve a gaming compact, as Plaintiffs acknowledge. ECF 223-1 at 47.

Here, the State has made a number of meaningful concessions. First, as with the Model Compact, the Compact provides for substantial exclusivity, thus protecting the Otoe–Missouria Tribe against most non-tribal competition. Compact at Part 10, AR61. As a constitutional matter, State is obviously not *required* to refrain from authorizing non-tribal casinos, as many other states have done. But because it has agreed to refrain from doing so, the Compact provides for a reasonable revenue share in return, just like the Model Compact does. 3A O.S. § 281 Part 11.

Plaintiffs argue that the Compact's version of substantial exclusivity is somehow less meaningful than its counterpart in the Model Compact. In their view, the Compact's lack of a specific definition of "substantial exclusivity" makes the term meaningless. Contrary to Plaintiffs' arguments, however, the Compact *does* provide the Otoe–Missouria Tribe with substantial exclusivity, despite the fact that "substantial exclusivity" is not a specifically defined term in the Compact. Tribal gaming has been conducted in Oklahoma for over forty years, and throughout that time, various terms have developed a known meaning. "Substantial exclusivity" is one of those terms. Essentially, the State cannot modify its laws so as to expand non-tribal gaming beyond what currently exists. 3A O.S. § 281 Part 11.

Of course, expansion of certain forms of non-tribal gaming is contemplated in the Compact, i.e., event wagering and iLottery. Both of those expansions would require new state legislation, which has not occurred. But even if such legislation was enacted and these hypothetical games *did* come into existence, that does not mean that "substantial exclusivity" is meaningless. The expansion is limited to those two forms of gaming, as opposed to a broad proliferation of non-tribal brick-and-mortar casinos. And in return for that minimal (and hypothetical) expansion, the Compact allows the Otoe–Missouria Tribe to pay the State a substantially lower share of class III gaming revenues. This is a perfectly lawful trade-off.

Plaintiffs' argument also fails as a matter of basic math. Under the Compact, the Otoe–Missouria Tribe pays a flat 4.5% of the adjusted net win attributable to class III gaming. Compact at Part 10.b.1.a, AR62. In contrast, under their prior compact (the Model Compact), the Otoe–Missouria Tribe was obligated to pay a much higher rate. The difference between what the Otoe–Missouria Tribe pays now versus what it would have paid under the Model Compact is stark.

The Model Compact incorporates a tiered fee structure. For electronic machine games (i.e., class III slot machines), tribes pay four percent (4%) of the first $10 million of adjusted gross revenue; five percent (5%) of the next $10 million of adjusted gross revenue; and six percent (6%) of all subsequent adjusted gross revenue. For card and table games, tribes pay ten percent (10%) of net win. *See* 3A O.S. § 281, Part 11.A.2.

For Otoe–Missouria, again, the Tribe pays a flat 4.5% of adjusted net win. AR62. In each year the Tribe has operated under the Compact, it has saved hundreds of thousands of dollars that would otherwise be paid to the State. As calculated by the Chief Financial Officer that oversees gaming operations, over the five years that the Compact has been in effect, the Otoe–Missouria Tribe has benefited from savings of over **$3.1 million**. *See* Declaration of Ikrom Mamatmuminov, SOF at ¶¶ 11–18. With these savings, the Tribe has been able to substantially increase its operating budget and provide meaningful services for tribal members—a benefit that would not exist if the Tribe was operating under the Model Compact. *Id.*

The Compact also provides a meaningful concession in the form of a Section 20 concurrence, which, as explained *infra*, establishes what is effectively a preapproval on the State's part that certain lands may be put into trust for gaming purposes. Plaintiffs object to the legality of the Section 20 concurrence, but their objection is meritless. *See infra* § III.D.

In short, because the Compact provides for all of the Model Compact's concessions *and more*, while requiring *less* fees in return, it is illogical for Plaintiffs to say that the revenue share is an "illegal tax." It was the product of a good-faith negotiation between sovereign governments, plainly allowed under IGRA.

### *C. The Compact does not regulate Class II gaming.*

Plaintiffs' claim that the Compact improperly regulates class II gaming is also without merit. Jurisdictionally, Plaintiffs lack standing to make the claim. And even assuming *arguendo* that they did have standing, the claim is inconsistent with the text of the Compact and applicable law, as indicated by longstanding agency practice.

As to jurisdiction, Plaintiffs have no Article III standing to argue that the Compact's treatment of class II gaming is unlawful. To have Article III standing, a plaintiff must demonstrate three elements: (1) injury-in-fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Standing is claim-specific, meaning that "a plaintiff must demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (citation omitted). With regard to Plaintiffs' class II-related claim, Plaintiffs cannot establish the first two of these three constitutional elements: injury and causation.

*Injury.* Even if the Compact *did* regulate class II gaming (which it does not, as explained herein), such regulation would pose no harm to Plaintiffs. There is nothing detrimental whatsoever to Plaintiffs regarding the alleged class II regulation under the Compact. Assuming for the sake of argument that the Compact did regulate the Otoe–Missouria Tribe's class II gaming operations, such a feature would have no bearing on *Plaintiffs'* gaming operations. Plaintiffs can continue to conduct their gaming (class II and class III) as they always have. Indeed, neither the Complaint nor anything in Plaintiffs' Motion for Summary Judgment sets forth any link between the Compact's alleged regulation of class II gaming and any "injury" incurred by Plaintiffs—because there is none. *See* ECF 223-1 at 9 (alleging competitive injury through new games and lower exclusivity rates). They have no skin in the game as to how the Compact treats class II gaming.

*Causation*. Similarly, Plaintiffs cannot satisfy the causation element of Article III standing because they cannot link the alleged regulation of class II gaming to any "injury" they purport to have suffered. The causation element "examines whether it is substantially probable that the challenged acts of the defendant . . . will cause the particularized injury of the plaintiff." *Florida*

*Audubon Society v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (citations omitted). Plaintiffs' alleged injury, essentially, is market competition. More specifically, they allege (wrongly) that the Compact authorizes certain games that are unavailable to them (event wagering and certain house-banked games), paves the way for additional casinos that (in their view) would compromise their market share, and allows the Otoe–Missouria Tribe to offer "larger jackpots and cheaper amenities" due to lower exclusivity rates. ECF 223-1 at 9. Nothing about the regulation of class II gaming has any link to those alleged injuries. No matter how the Compact treats class II gaming, it plainly does not give the Otoe-Missouria Tribe any competitive advantage over Plaintiffs. By illustration, if the provisions relating to class II gaming were taken out of the Compact, it would not protect Plaintiffs from any allegedly "unfair" competition. There is no chain of causation, and Plaintiffs thus have no standing to make the argument that the Compact unlawfully regulates class II gaming.

To the substance of their argument, nothing in the actual Compact itself constitutes regulation of class II gaming. Plaintiffs claim that class II regulation is encapsulated within two provisions of the Compact: Part 3.D, under which the Tribe must certify that a certain percentage of gaming revenues come from class III games, and Part 4.K, under which the Tribe must keep a record of the number of class II devices within their facilities, their name or type, identifying number, and denomination of bets accepted. Neither of these provisions regulates the operation of class II gaming.

In fact, the Compact explicitly *disavows* any regulation of class II gaming. It unequivocally states: "nothing in this Compact shall limit the Tribe's right to operate any game that is class II under IGRA." Compact at Part 3.A, AR47. The Compact only regulates the operation of "Covered Games." The definition of that term states clearly: "Class II gaming, as defined by IGRA, is expressly excluded from this definition." Compact at Part 2.A.6, AR41. The actual text of the Compact thus makes it clear that in no way is class II gaming subject to regulation thereunder.

The certification of the ratio of class II and class III revenue has no unlawful effect on the Otoe–Missouria Tribe's ability to operate class II gaming. The Tribe can operate class II games however it wishes, so long as the operation complies with IGRA and tribal law. *See* 25 U.S.C. § 2710(b). The fact that the Tribe has to issue reports that contain class II-related information is not prohibited under IGRA any more than provisions in any other gaming compact that have tangential effects on class II gaming. And under IGRA, there is nothing unlawful about a compact having tangential effects on class II gaming so long as the relevant provisions relate to matters such as "maintenance of [a] gaming facility" or "any other subjects that are directly related to the operation of gaming activities." § 2710(d)(3)(C).

The Department's historical practice confirms that indirect effects relating to class II gaming are not prohibited. For example, as highlighted during the 45-day review period, in 2021 the Secretary affirmatively approved the compact between the State of Arizona and the Ak-Chin Indian Community which specifically limited the tribe to a certain number of "Gaming Devices"—a term that expressly *included* class II machines. *See* Compact between the State of Arizona and the Ak-Chin Indian Community, §§ 2(nn), 3(c) (2021)[12]; AR825; SOF at ¶ 19.

In this way, the Compact resembles other class III compacts that have been approved. The provisions relating to class II gaming are perfectly lawful.

[12] *Available at* https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/pdf/508%20Compliant%202021.05.24%20Ak-Chin%20Indian%20Community%20Tribal%20State%20Gaming%20Compact.pdf

### *D. The Section 20 concurrence complies with IGRA.*

Plaintiffs' final substantive challenge to the Compact targets the Section 20 concurrence, pursuant to which the Governor commits to concur in the Tribe's efforts to put land into trust for new gaming facilities, providing that those facilities are located in certain locations. This challenge fails as well. Nothing about the Section 20 concurrence is violative of IGRA and it is clearly a proper subject of compact negotiations.

It is undisputed that IGRA generally prohibits gaming on lands taken into trust after October 17, 1988. *See* 25 U.S.C. § 2719. It is also undisputed that under Section 20 of IGRA, tribes can conduct gaming on after-acquired lands if the property goes through what is commonly referred to as the "two-part determination" process. *See* § 2719(b)(1)(A). The process requires an agreement (or "concurrence") between the Secretary and the Governor of the relevant state that "a gaming 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." *Id.* As part of that process, the Secretary is directed to "consult[] with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes." *Id.*

The Compact streamlines the Governor's role in this process, automatically requiring his or her concurrence so long as the properties meet certain geographic criteria. Specifically, for the Otoe–Missouria Tribe, "the State, through its Governor . . . agrees to concur in any determination by the Secretary of the Interior that lands relating to [one facility in each of Logan, Noble, and Payne Counties] are eligible for gaming under 25 U.S.C. § 2719(b)(1)(A)." Compact at Part 4.J.2, AR53. The Compact expressly states that "no other action from the State is required for approval of those lands' eligibility for gaming." *Id.*

Plaintiffs claim that this provision of the Compact violates IGRA on three grounds, one of which has no applicability to the Otoe–Missouria Tribe,[13] and therefore will not be addressed here. As to the other two arguments, they fail as a matter of law:

First, Plaintiffs claim that a concurrence in a two-part determination is "not an authorized subject for compact negotiations." ECF 223-1 at 51. Yet, IGRA authorizes a number of subjects for compact negotiations, including the catch-all category: "subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C). The Section 20 concurrence fits squarely within this catch-all category. Indeed, it is hard to imagine a subject more "directly related to the operation of gaming activities" than the actual geographic location where gaming activities can be conducted.

Once again, agency practice demonstrates that a Section 20 concurrence is an allowable subject in a tribal–state compact. As pointed out during the 45-day review period, various compacts have been approved with similar features. For example, in 2004, the Secretary affirmatively approved a compact between the State of California and the Fort Mojave Tribe in which Governor Schwarzenegger explicitly stated his intent to concur in any future two-part determination so long as (a) the Secretary find that gaming on the parcel would be in the best interest of the tribe and not detrimental to the surrounding community and (b) the local county and civil officials and electorate also approve of the location. *See* Compact between the State of California and the Fort Mojave Tribe, Preamble (I) (2004);[14] *see* AR819, AR826; SOF at ¶ 20. Plaintiffs argue that Governor Schwarzenegger only gave his "intent" to concur and thereby

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[13] Plaintiffs allege that the Section 20 concurrence improperly purports to authorize the Comanche Nation to operate gaming facilities within other tribes' territorial boundaries, specifically the Chickasaw Nation and Citizen Potawatomi Nations. ECF 223-1 at 53. They make no such allegations regarding the Otoe–Missouria Tribe.

[14] *Available at* https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/pdf/508_compliant_2004.12.20_fort_mojave_indian_tribe_tribal_state_gaming_compact.pdf.

"plainly [did] not commit" to do so. ECF 223-1 at 52. The sounder interpretation is that announcing his "intent" *did* constitute a commitment because of the enumerated preconditions (federal and local approval); but in any event, the degree to which his "intent" was enforceable has nothing to do with whether the concurrence was a proper subject for compact negotiations.

Second, Plaintiffs argue that the Section 20 concurrence violates IGRA because the Secretary must "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." ECF 223-1 at 66 (emphasis in original). In their view, the Governor cannot "pre-concur." Yet, nothing in IGRA prevents the Governor from doing exactly that. It might be more common for two-part determinations to follow a sequence in which the Governor only considers the acquisition after the Secretary has made their determination, but the fact that one sequence may be more typical does *not* mean that the Governor is somehow statutorily prohibited from considering *beforehand* whether a county-specific location is acceptable.[15]

In short, Plaintiffs' challenge to the Section 20 concurrence fails because a two-part determination is "directly related to the operation of gaming activities," and the appropriateness of such a compact provision is amply supported by the Department's established practice of approving compacts with similar terms.

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[15] If anything, Plaintiffs' emphasis on the procedural aspects of a two-part determination reveals a another defect of their argument—if the land-into-trust process does eventually move forward, nothing will prevent Plaintiffs from raising objections at that time, at the federal level. As they acknowledge, before the Secretary can make a determination that a particular parcel should be eligible for gaming, the Secretary must consult with "officials of other nearby Indian tribes." 25 U.S.C. § 2719(b)(1)(A).

**IV. The Compact's terms are severable and subject to reformation.**

Finally, even assuming *arguendo* that Plaintiffs were correct in any challenges to the substantive provisions of the Compact violate IGRA, the Court should still uphold the Compact because any purported defect can be severed and the remainder of the Compact can be maintained.

The Compact's severability clause reads in pertinent part as follows:

> If any clause or provision of this Compact is subsequently determined by any federal court to be invalid or unenforceable under any present or future law, including but not limited to the scope of Covered Games, the remainder of this Compact shall not be affected thereby. It is the intention of the Parties that if any such provision is held to be illegal, invalid or unenforceable, there will be added in lieu thereof a provision as similar to such provision as is possible to be legal, valid and enforceable.

Compact at Part 13.B, AR66. The application of this provision is straightforward. If the Court decides that any provision of the Compact is invalid, that provision is to be severed. This could apply to *any* provision, including the exact provisions challenged by Plaintiffs—the scope of "Covered Games," the revenue-sharing, the treatment of class II gaming, and the Section 20 concurrence. Any of these provisions can be severed or reformed.

Plaintiffs claim that severability is not possible because (a) the Compact was invalidly entered into, and (b) the D.C. Circuit's decision in *Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011), "forecloses severance" if any part of the Compact violates IGRA. ECF 223-1 at 40. The first argument rests on a false premise, as the Governor *did* have authority to enter into the Compact, as already explained. *See supra* § II. The second fails as a matter of precedent.

Nothing in *Amador County* prevents this Court from invoking the Compact's severability clause. *Amador County* did not address severability at all. The court only decided (a) that Amador County had standing to challenge the Secretary's no-action approval of a tribal–state compact, and (b) that the Secretary's no-action approval was subject to judicial review under the APA. 640 F.3d at 378–83. The case does not bear on the issue of severability whatsoever.

Plaintiffs' reading of *Amador County* also flies in the face of on-point precedent involving their own compact (the Model Compact), itself once reformed under its severability clause. Specifically, the Model Compact contains a dispute resolution clause that provided for binding arbitration with both parties having the right to seek *de novo* review of the arbitration award in federal court. *See* 3A O.S. § 281, Part 12(3). A few years after the Model Compact was offered under the STGA, the U.S. Supreme Court held in *Hall Street Associates, LLC v. Mattel*, 552 U.S. 576 (2008), that a materially identical mechanism was invalid under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. The Tenth Circuit subsequently held that *Hall* applied to the Model Compact's dispute resolution clause. *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d at 1228. However, instead of invalidating the entire Model Compact, the court invoked the Model Compact's severability clause. *Id.* at 1240–41.

Plaintiffs contend that *Citizen Potawatomi* is distinguishable on the basis that it "was not APA case and so is not governed by *Amador County*." ECF 223-1 at 40–41, n. 26. The difference is immaterial. There is nothing in *Citizen Potawatomi*'s reasoning that is limited to non-APA cases. To the contrary, *Citizen Potawatomi* relied on "[g]eneral principles of federal contract law," which are plainly applicable in any case involving tribal–state compacts. 881 F.3d at 1238–39.

Plaintiffs also argue that the remedy provision in *Citizen Potawatomi* (*de novo* federal court review of arbitration awards) was "not essential to the bargain the parties struck," whereas here, according to Plaintiffs, the challenged provisions are "essential to the parties." ECF 223-1 at 54–55. Their argument distorts the Tenth Circuit's opinion, which stated that "*de novo* review was a *material* aspect of the parties' agreement to arbitrate." 881 F.3d at 1240 (emphasis added). More fundamentally, though, their argument ignores the text of the Compact's severability clause itself. If any of the challenged provisions were "essential" to Defendants Shotton or Stitt, then the severability clause would have included a carve-out for such provisions. The severability clause contains no such carve-out. It provides exactly the opposite, stating that severability shall apply to "*any* clause or provision" that may subsequently be found to be "invalid or unenforceable." Compact at Part 13.B, AR66 (emphasis added). Severability is thus a perfectly viable option.

**CONCLUSION**

For the reasons stated herein, the Court should DENY Plaintiffs' Motion for Summary Judgment and GRANT Defendant Shotton's Motion for Summary Judgment.

Dated: January 23, 2026

Respectfully submitted,

By: */s/ Brett Stavin*

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 23, 2026, I electronically transmitted the foregoing document to the Clerk of Court using the ECF filing system and transmittal of a Notice of Electronic Filing to all individuals registered to receive this case's ECF filings.

*/s/ Brett Stavin*
Brett Stavin