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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

DEFENDANT CHAIRMAN JOHN SHOTTON'S CONSOLIDATED REPLY 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, opposes Plaintiffs Cherokee Nation, Chickasaw Nation, Choctaw Nation of Oklahoma, and Citizen Potawatomi Nations' (collectively, "Plaintiffs") Motion for Summary Judgment and files this reply memorandum in support of his Cross-Motion for Summary Judgment.

INTRODUCTION

As set forth in Defendant Shotton's opening brief, the Compact was lawfully entered into, is now in effect, and cannot be declared invalid by subsequent state-court rulings. Every substantive provision in the Compact complies with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*. And even to the extent this Court found that such provisions were inconsistent with IGRA, they could easily be severed, thereby leaving the remainder of the Compact intact. Plaintiffs' response fails to sufficiently rebut Defendant Shotton's arguments in the following ways:

First, on the issue of Article III standing, Plaintiffs fail to provide a cogent basis for allowing them to challenge the Compact's treatment of class II gaming. Their core argument is that approval of the Compact containing these provisions amounts to a "procedural violation." The allegation of a procedural violation cannot, however, overcome the fact that the Compact's treatment of class II gaming has no tangible effect on them whatsoever. They have not suffered a concrete injury-in-fact, and there is no economic possibility of such injury ever occurring.

Second, as to whether the Compact was validly "entered into," other than rehashing the same arguments contained in their opening brief, Plaintiffs cannot provide any convincing basis to refute the parties' compacting authority. Despite the post-signature state-law dispute regarding Defendant Stitt's compacting authority, the Secretary of the Interior had no duty to adjudicate that dispute during the forty-five (45) day review period. And even if he was obligated to become the judge of state law, the only legal "precedent" in front of him at the time came in the form of an opinion from the State's then-Attorney General, which was both inapposite and non-binding.

Third, the subsequent *Treat* decisions cannot undo the Secretary's approval. The validity of a tribal–state compact is a question of federal law, as all parties acknowledge. It is undeniable, then, that the Oklahoma Supreme Court overstepped its role in declaring the Compact "invalid." To its credit, though, the Oklahoma Supreme Court's more recent decision at the certified-question stage recognized that the "timing" of events in this case may have an impact on the validity and effectiveness of the Compact. Indeed, they do. Because the Compact is already "in effect" under IGRA, a state court has no power to undo it.

Fourth, Plaintiffs' arguments against the substantive provisions of the Compact lack merit. Regarding the scope of authorized games, Plaintiffs continue to ignore key language in the Compact, just like the Oklahoma Supreme Court did. Regarding the revenue-sharing, Plaintiffs ignore the fact that the Otoe–Missouria pays *less* in fees that it previously did, all while receiving even *more* concessions from the State. Regarding the Compact's treatment of class II gaming, even if Plaintiffs had standing to make a challenge, they cannot demonstrate any actual impermissible regulation under the Compact's terms. And as to the Section 20 concurrence, Plaintiffs cannot show that it is an inappropriate subject for a compact, and cannot rebut its consistency with IGRA. Moreover, as to *all* of these provisions of the Compact, Plaintiffs also fail to acknowledge that historical agency practice, even if non-binding, lends strong support to their legality.

Fifth, and finally, Plaintiffs' challenge to severability lacks merit. They misinterpret both Part 13.B of the Compact and IGRA's statutory authorization of severance. Their cited case law is inapposite to the issue entirely.

For all of the above reasons, the Court should deny Plaintiffs' Motion for Summary Judgment and grant Defendant Shotton's Cross-Motion for Summary Judgment.

ARGUMENT

I. Plaintiffs' standing position lacks merit.

In Defendant Shotton's opening brief, we contended that Plaintiffs lack standing to argue that the Compact impermissibly regulates class II gaming. Defendant Shotton's Brief in Support of Cross-Motion for Summary Judgment ("Shotton Br."), ECF 229 at 36–38. Defendant Shotton maintains that position. In response, Plaintiffs assert that they are "entitled to argue any basis on which the Secretary failed to comply with the law," including the Compact's treatment of class II gaming. *See* Plaintiffs' Consolidated Reply and Response in Opposition ("Pls.' Opp'n. Br."), ECF 239 at 15. Their argument should be rejected.

Plaintiffs argue that they are entitled to challenge the Compact's treatment of class II gaming on the theory that this aspect of the Compact required disapproval, and that the Secretary "committed a procedural violation by failing to do so." Pls.' Opp'n Br., ECF 239 at 14. It is a broad conception of Article III standing incompatible with the Supreme Court's decision in *Spokeo, Inc. v. Robins*, which held that "a bare procedural violation, divorced from any concrete harm, [does not] satisfy the injury-in-fact requirement of Article III." 578 U.S. 330, 341 (2016). While *Spokeo* acknowledged that violation of a procedural right "in some circumstances" can give rise to an injury in fact, the injury must still always be "concrete." *Id.*

Here, even assuming *arguendo* that the Compact impermissibly regulated class II gaming, the "bare procedural violation" of the Secretary allowing the Compact to go into effect did not cause Plaintiffs to suffer any "concrete" harm. As stated in Defendant Shotton's opening brief, nothing about the alleged regulation of class II gaming has any impact whatsoever on Plaintiffs' supposed competition-related injuries. Shotton Br., ECF 229 at 37. The only "competitive injury"

Plaintiffs claim is that the Compact's treatment of class II gaming creates an "illegally structured competitive environment" in which the Otoe–Missouria Tribe can engage in "statutorily forbidden" practices. Pls.' Opp'n Br., ECF 239 at 15. Assuming, again, that the structure was in any way "illegal," it still would have no competitive impact on Plaintiffs. No matter how the Compact treats class II gaming, it does not threaten Plaintiffs' market.

The D.C. Circuit's decisions cited by Plaintiffs do not help them. In *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978), the court noted that "public interest" may sometimes be invoked as a basis for standing. But that 1978 decision has been undercut by more recent precedent, including the Supreme Court's decision in *Lujan v. Defenders of Wildlife*, which rejected the notion of "[v]indicating the public interest" as grounds for standing. 504 U.S. 555, 576 (1992). The Court held that vindicating the public interest cannot be "converted into an individual right" to sue. *Id.* There must be a "*separate*" and concrete injury "flowing from" the alleged procedural violation. *Id.* at 572 (emphasis added). Here, even *if* the treatment of class II gaming was unlawful, and even *if* approving a compact with such provisions constituted a "procedural violation" that involved the "public interest," Plaintiffs *still* cannot establish any injury that is both "separate" and "concrete." Again, the Compact's treatment of class II gaming has no impact on them.

IGRA's statutory text makes it clear that Congress did not intend for deemed-approved compacts to be challenged based on mere "procedural violations." As applicable here, the statute provides that when a compact is deemed approved, it goes into effect "only to the extent the compact is consistent" with IGRA. 25 U.S.C. § 2710(d)(8)(C). Thus, if a provision in a deemed-approved compact is inconsistent with IGRA—e.g., alleged regulation of class II gaming—then that provision does not go into effect, that simple. Plaintiffs' position as to the breadth of their standing would make this section of IGRA pointless.

For these reasons, the Court should refuse to hear Plaintiffs' argument that the Compact impermissibly regulates class II gaming.[1]

II. The Secretary's discretion is not contingent on a state-law dispute.

As to whether the Compact was properly "entered into," Plaintiffs' theory of this case would require the Secretary to become an arbiter of state law, a requirement flatly at odds with the text and structure of IGRA. In Plaintiffs' view, IGRA requires the Secretary to reconcile any tension between state statutes, state Attorney General opinions, state court decisions, positions of the state Executive, the state Constitution, and any potentially related precedents. Plaintiffs argue that failure to conduct this thorough state-law analysis deprives the Secretary of his discretion to approve (by action or inaction) a tribal–state compact. IGRA does not impose such a burden.

A. The statutory language supports the Secretary's discretion.

IGRA imposes just three grounds for the Secretary to disapprove a tribal–state compact: (a) violation of IGRA; (b) violation of any other part of federal law; and (c) violation of the federal government's trust responsibilities. 25 U.S.C. § 2710(d)(8)(B)(i)–(iii). Plaintiffs challenge the Secretary's approval on the theory that he failed to conduct an unenumerated threshold analysis—whether the Compact was "entered into" in the first instance. Undertaking such an analysis (especially under *state* law) is not part of the Secretary's role, and differences of opinion regarding the state-law dispute cannot constrain his exercise of discretion.

[1] Defendant Shotton agrees with Plaintiffs that it is unnecessary for the Court to analyze whether a finding that the Compact is invalid would have any permanent impact on the Otoe–Missouria Tribe's ability to resume class III gaming under the Model Compact. *See* Pls.' Opp'n Br., ECF 239 at 12. The issue is unbriefed and unnecessary to resolve this case. That said, if the Court *did* reach the issue, it should rule in Defendant Shotton's favor. If the Compact is invalid, then the clause stating that it "supersedes" the Model Compact would also be null, allowing the Otoe–Missouria Tribe to simply resume class III gaming under the Model Compact.

As Plaintiffs note, under 25 U.S.C. § 2710(d)(8)(A), "[t]he Secretary is authorized to approve any Tribal–State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe." Pls.' Opp'n Br., ECF 239 at 20. This language immediately precedes subsection (d)(8)(B), which enumerates three bases for withholding approval. 25 U.S.C. § 2710(d)(8)(B)(i)–(iii). Plaintiffs' argument, essentially, is that determining whether a compact was "entered into" under state law must be decided *before* the Secretary can proceed to conduct the inquiry of whether the compact violates any of the three enumerated grounds for disapproval. *See* Pls. Opp'n Br., ECF 239 at 20. IGRA does not require the Secretary to make this threshold finding, let alone to the extent it entails research of state law.

Plaintiffs' logic would carry absurd consequences. If IGRA required a threshold state-law inquiry under subsection (d)(8)(A), then logically it would *also* require findings related to the other elements referred to in that subsection. For example, the Secretary would not just have to determine whether the compact was "entered into" by t*he State*; he would also have to determine whether the compact was "entered into" by the respective *tribe*. 25 U.S.C. § 2710(d)(8)(A). And to answer *that* question, the Secretary would have to research the laws of the hundreds of tribes that have negotiated tribal–state compacts, each which their own legal system. Compliance with tribal constitutions, the procedures for tribal council resolutions, etc.—all would need to be examined. Congress could not have possibly envisioned the Secretary taking such a role.

As a matter of statutory interpretation, if Congress wanted to require the Secretary to resolve whether the State "entered into" a compact under state law, there would be no reason to leave that requirement out of subsection (d)(8)(B)—the subsection which actually *does* enumerate the three bases for disapproval. When a statute enumerates certain obligations, unenumerated obligations should not be implicitly read into it. The interpretive rationale is that the "mention of one thing implies exclusion of another thing." *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061 (D.C. Cir. 1995). Or otherwise said, "the more specific provision controls." *Halverson v. Slater*, 129 F.3d 180, 186 (D.C. Cir. 1997). This interpretive canon applies with full force here. There is a specific provision, § 2710(d)(8)**(B)**, which lays out the three enumerated bases for disapproving a compact. No other bases are mentioned, including any mention of a duty on the part of the Secretary to ensure that the parties had adequate compacting authority under state law. The antecedent and far more general subsection, (d)(8)**(A)**, which simply refers to a compact that was "entered into," should not be interpreted as mandating that the Secretary disapprove a compact when there is a state-law dispute over one the parties' compacting authority.

Plaintiffs' reliance on the framework of IGRA fares no better. Pls.' Opp'n Br., ECF 239 at 23. To be sure, IGRA *does* provide a role for states in the compacting process. States are free to negotiate a variety of topics when entering into a compact, so long as those topics are "directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C). But the states' ability to negotiate compact terms has nothing to do with whether the Secretary is required to perform a state-law analysis—a duty that is found nowhere in the underlying statute.

B. Federal regulations support the Secretary's discretion.

Plaintiffs' interpretation of IGRA's implementing regulations runs contrary to both the regulations' plain language and existing precedent. Properly understood, the regulations make it clear that once the parties certify their compacting authority, the Secretary is not obligated to second-guess that authority by delving into a state-law dispute.

As Defendant Shotton previously noted, under 25 C.F.R. § 293.8, at the initial stage of the compact-approval process, the parties must submit to the Secretary a number of documents, including written confirmation of their requisite authority to enter into the compact. For the State, the pertinent document is referred to as "Certification 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) (2008).[2] If the Secretary wants additional information, he may request it under § 293.8(d).

Plaintiffs insist that § 293.8 does not support Secretarial discretion because the regulation "does not purport to make those submittals determinative of the legality of their terms." Pls.' Opp'n Br., ECF 239 at 25. Perhaps not; but that misses the point. The point is that, for the purposes of approval, the Secretary must simply receive some certification of compacting authority. He is not required to engage in a thorough analysis of state law (or tribal law, for that matter) to adjudicate whether that certification is correct.

Plaintiffs nonetheless urge that § 293.8(d) "ensures that the Secretary is to decide that issue by authorizing him to request 'any other documentation that is necessary to determine whether to approve or disapprove the compact.'" Pls.' Opp'n Br., ECF 239 at 25. Yet, even considering the Secretary's power to request additional documents, Plaintiffs' argument that "the Secretary is to decide that issue" is irreconcilable with the plethora of existing case law making it clear that it is not the Secretary's job to resolve questions of state law. *See, e.g.*, *West Flagler Associates, Ltd. v. Haaland*, 71 F.4th 1059, 1068 (D.C. Cir. 2023) (recognizing that "questions of state law are outside the scope of the Secretary's review").

Plaintiffs next try, to no greater avail, framing the same argument a different way, relying on the "context of the 25 C.F.R. part 293 regulations as a whole." Pls.' Opp'n Br., ECF 239 at 25. They cite § 293.2(b)(2), which defines a compact as "an intergovernmental agreement executed between Tribal and State governments." Plaintiffs emphasize that, in light of § 293.2(b)(2), "[a] compact is therefore not an agreement between an Indian tribe and a governor." Pls.' Opp'n Br.,

[2] All references to the Part 293 regulations are to their 2008 version, which controls in this case.

ECF 239 at 25. But nobody has disputed as much. In the end, all § 293.2(b)(2) does is define what a compact *is*; it does not purport to declare *who* has compacting authority. Nor does it impose upon the Secretary any duty to independently research the issue.

Plaintiffs also quote 25 C.F.R. § 293.7, which (in the 2008 version) states that "[t]he Indian tribe or State should submit the compact or amendment after it has been *legally entered into* by both parties." Pls. Opp'n Br., ECF 239 at 26 (emphasis in original). But as Defendant Stitt has pointed out, all that regulation does is speak to *timing*. In fact, the heading of the regulation itself plainly sets forth its purpose: "*When* should the Indian Tribe or the State submit a compact or amendment for review and approval?" 25 C.F.R. § 293.7 (emphasis added). It says nothing about compacting authority.

Plaintiffs then pose the rhetorical question: "in what circumstances would a governor that signed a compact decline to certify that he had authority to enter into the compact for the State?" Pls.' Opp'n Br., ECF 239 at 26. This hypothetical ignores the fact that the Secretary has discretion to inquire into whether the "certification" is legitimate, if he deems it necessary. If the certification bears indications of illegitimacy, then the Secretary is permitted, under § 293.8(d), to request additional documentation. Thus, ultimately, Plaintiffs' hypothetical is just another way of them saying that the Secretary has an obligation to resolve state-law disputes—a premise that has been rejected by every court that has considered the issue. *See West Flagler*, 71 F.4th at 1068.

III. ***Post-hoc*** **state-law decisions are an insufficient basis for invalidating a compact governed by federal law.**

Plaintiffs' argument that the Compact was not validly "entered into" rests principally on a non-binding Oklahoma Attorney General Opinion, *In re Treat*, AG Op. 2020-8, 2020 WL 2304499, and a set of two state-court decisions, *Treat v. Stitt*, 473 P.3d 43 (Okla. 2020) (*Treat I*) and *Treat v. Stitt*, 481 P.3d 240 (Okla. 2021) (*Treat II*), all of which are legally insufficient to undo a deemed-approved tribal–state gaming compact. Plaintiffs' argument distorts the effect of those decisions and cannot be squared with IGRA's statutory framework.

A. The Secretary properly allowed the Compact to go into effect by operation of law.

As Defendant Shotton's opening brief explained, the Compact went through the statutory and regulatory process for approval, culminating in publication in the Federal Register, after which it went "into effect" by operation of law. Shotton Br., ECF 229 at 16**.** All relevant sources of law available to the Secretary at the time supported his discretion to allow it to go into effect by operation of law, and his exercise of discretion should not be undone based on post-submittal state-court rulings. Plaintiffs' arguments to the contrary lack merit.

Plaintiffs seem to argue that the Compact is not "in effect" because it was *deemed* approved, as opposed to affirmatively approved. *See* Pls.' Opp'n Br., ECF 239 at 35–36. Yet, IGRA draws no distinction between compacts that are affirmatively approved versus deemed approved, except for one: a deemed-approved compact "shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter." 25 U.S.C. § 2710(d)(8)(C). Otherwise, affirmatively-approved and deemed-approved compacts are treated equally; there are no extra limitations on when the latter goes into "effect."

Plaintiffs' remaining arguments that the Compact is not "in effect" are merely reiterations of their argument that it was not properly "entered into." *See* Pls.' Opp'n Br., ECF 239 at 37–38. This argument has been addressed in Defendant Shotton's opening brief and restated elsewhere herein, *supra* § II; *see also* Shotton Br., ECF 229 at § II, and need not be elaborated further in this section. In short, the Compact was "entered into" because it was signed by both compacting parties, with all appropriate certifications, and without any then-existing disputes as to the Governor's compacting authority.

B. The **Treat** *decisions do not support invalidation of the Compact.*

By and large, Plaintiffs' theory of the case rests on two decisions of the Oklahoma Supreme Court: *Treat I* and *Treat II*, both of which were issued after the Compact went into effect. With all respect to the role that state courts play in our national government, their views cannot control the outcome of this federal-question case.

The timeline of events is crucial in this case—even the Oklahoma Supreme Court has said so. At the certified-question stage of this litigation, when the Oklahoma Supreme Court ruled that the Governor, not the Attorney General, has the power to defend the State's interests in this litigation, the court also noted that the sequence of events has a bearing on the merits. As they explained, the issue before *this* Court goes "further" than the Oklahoma Supreme Court's view as to the Governor's compacting authority. *Cherokee Nation v. Stitt*, 564 P.3d 58, 2025 OK 4, at ¶ 43. *This* case, the Oklahoma Supreme Court determined, "concerns the timing of the federal process and whether the Secretary of the Interior's approval of the compacts under the IGRA is affected by the subsequent state court holdings." *Id.* As the Oklahoma Supreme Court conceded, "[t]he *Treat* cases did not answer that question." *Id.*

As Defendant Shotton's opening brief explained, subsequent state court rulings cannot invalidate a compact entered into under federal law. *See* Shotton Br., ECF 229 at 24–26. The Supreme Court has so held, specifically in the context of *interstate* compacts. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951). Meanwhile, the courts of appeals routinely analogize tribal–state gaming compacts to interstate compacts. *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1238–39 (10th Cir. 2018) (recognizing that tribal–state compacts are "similar to a congressional sanctioned interstate compact"); *see also Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1056 (9th Cir. 2010) (noting that they "resemble" interstate compacts "very closely"). Given the similarities, there is no reason for this Court to treat the

Compact with any less deference than it would give to an interstate compact. Ergo, just as the Supreme Court refused to allow a subsequent decision from a West Virginia court to invalidate an interstate compact, this Court must not allow a subsequent Oklahoma court decision to invalidate the Compact.

Plaintiffs address this timing issue only in a single footnote of their brief, Pls.' Opp'n Br., ECF 239 at 55 n.47, but the authorities cited therein do not support their challenge. The cases cited by Plaintiffs stand for the unremarkable proposition that a judicial interpretation of a statute often applies retroactively. That proposition is not relevant here. While the Oklahoma Supreme Court did offer its truncated interpretation of certain aspects of *the Compact*—e.g., whether it "authorizes" event-wagering—they did not provide any interpretation of *IGRA*. In fact, the only commentary from the Oklahoma Supreme Court regarding IGRA was acknowledgment of what they *did not* decide—whether, under IGRA, a subsequent state court decision can affect a compact that has already been approved. *See Cherokee Nation*, 564 P.3d 58, 2025 OK 4, at ¶ 43. *Treat I* and *Treat II* thus do not compel a finding that the Compact is invalid.

This Court's previous decision in *Cherokee Nation v. Department of the Interior*, 643 F. Supp. 3d 90 (D.D.C. 2022), likewise does not compel invalidation of the Compact on the basis of the *Treat* decisions. In that interlocutory ruling, in allowing Plaintiffs to proceed past the motion-to-dismiss stage, this Court commented that "embroil[ing] the Secretary in investigations into whether the compact was legally entered into under state law is of no moment, under [*Amador County v. Salazar*, 640 F.3d 535 (D.C. Cir. 2011)]." *Id.* at 116 (internal quotation marks omitted). This Court acknowledged that "[c]ourts in other jurisdictions have reasoned that IGRA does not require the Secretary to resolve 'state law issues' to this effect in the forty-five day review period," but nonetheless cited *Amador County* as a basis to depart from those courts' reasoning. *Id.* at 116–

17 & n.16. *Amador County* has since been significantly curtailed by the D.C. Circuit, creating a conflict with this Court's earlier analysis.

Specifically, less than a year after this Court's interlocutory ruling, the D.C. Circuit issued its opinion in *West Flagler*, *supra*, narrowing *Amador County*'s reasoning and thereby negating some of the key legal premises underlying this Court's prior decision. *West Flagler* acknowledged that, under *Amador County*, the Secretary's decision to allow a compact to go into effect by operation of law can sometimes be subject to judicial review under the Administrative Procedure Act. *West Flagler*, 71 F.4th at 1063. However, *West Flagler* refused to extend *Amador County*'s reasoning as to the *scope* of that judicial review. The panel held that certain matters of state law "fall[] outside the scope of the Secretary's review." *Id.* at 1065. And although that case primarily concerned the legality of online sports betting under Florida law, there is no reason to limit its rationale to those circumstances. Its logic maps directly onto this case, making it clear that the Secretary should not be expected to resolve *any* state-law dispute within forty-five (45) days, including the parties' compacting authority.

For all of the above reasons, this Court should reject Plaintiffs' attempt to use the *Treat* decisions as a basis to undo the Secretary's approval of the Compact. That said, to the extent that this Court nonetheless deems the *Treat* decisions relevant, the Court should independently examine their reasoning. Even giving some level of "deference" to state courts (and/or the State Attorney General), the reasoning in the *Treat* decisions cannot withstand scrutiny.

1. *In re Treat*

Plaintiffs' argument that *In re Treat* required disapproval of the Compact is incorrect. The AG Opinion was not "binding" upon the Secretary, or upon *anyone*, for several reasons:

First, under a straightforward application of state-law precedent, *In re Treat* could not "bind" the Governor so as to prevent him from "entering into" the Compact, as the Opinion dealt with an issue of state constitutional law, not just a statutory issue. Under Oklahoma law, when an AG opinion involves a constitutional issue, it is *never* considered binding. *Hendrick v. Walters*, 865 P.2d 1232, 1993 OK 162, ¶ 20.

Plaintiffs assert that this limitation applies only when an AG opinion "find[s] a statute unconstitutional," and not when it "concern[s] the lawfulness of an action by the Governor." Pls.' Opp'n Br., ECF 239 at 51. But that's incorrect. Although some of Plaintiffs' cited authorities do involve AG opinions finding a statute unconstitutional, those cases were context-specific. Other more general precedent has clarified that an AG opinion is "*always* merely advisory on a constitutional issue." *Hendrick*, 1993 OK 162 at ¶ 20 (emphasis in original). That is, the Attorney General's opinion on *any* constitutional issue is merely advisory.

In re Treat involved an issue of state constitutional law; as the Attorney General put it, the legal issue "implicates core notions of our constitutional structure: both the separation of powers between branches of state government as well as the checks and balances that those branches can impose on each other." 2020 WL 2304499 at *1. Because the issue was constitutional, under *Hendrick*, *supra*, the AG Opinion was "merely advisory." *See Hendrick*, 1993 OK 162, at ¶ 20. It had no binding effect on the Governor, and there was no need for the Secretary to defer to it.

Second, to the extent an AG opinion can control the conduct of state officials at all, it would operate only *prospectively*. As the Oklahoma Supreme Court has held, when an AG opinion concerns a statutory issue, state officials are generally required to "*heed*" the opinion's "*advice*." *Hendrick*, 1993 OK 162, at ¶ 20 (emphasis in original). An AG opinion thus operates only to conduct going forward, and even then, only regarding *statutory* issues. After all, under Oklahoma law, the Attorney General is simply "a legal advisor to state agencies." *Lafalier v. Lead-Impacted Communities Relocation Assistance Trust*, 237 P.3d 181, 2010 OK 48, at ¶ 3. As a legal *advisor*, the Attorney General does not have the power to issue authoritative judgments regarding matters that have already occurred. His opinions are only issued in a "*quasi*-judicial" capacity. *State v. Turpen*, 681 P.2d 763, 1984 OK 26, at ¶ 11. The Attorney General is not a judge; he just provides legal "advice." *See id.*

Taking these two principles together, at the very most, an AG opinion can bind a state officer's *prospective* execution of *statutory* law. The Attorney General may act in a "quasi-judicial" capacity when called upon by certain government officials to provide a legal opinion, but his advisory opinions do not carry the weight of court judgments in individual cases or controversies. He therefore had no power to issue any ruling on Defendant Stitt's compacting authority regarding the already-executed Compact. Hence, even assuming *arguendo* that the Secretary had some duty to undertake review of the state-law dispute (which he did not), *In re Treat* was non-determinative.

2. *Treat I* and *Treat II*

As stated above, *supra* pp. 11-12, subsequent state-court decisions cannot render a tribal–state compact invalid, just as a subsequent state-court decision cannot render an interstate compact invalid. That aside, Plaintiffs' reliance on *Treat I* and *Treat II* is still misplaced.

Regarding *Treat I*, putting aside the Oklahoma Supreme Court's conclusory statement that the Compact is "invalid" (a finding that they were not legally entitled to make),[3] their analysis was limited to the narrow issue of whether the Compact authorizes event wagering and/or house-

[3] *See, e.g.*, *Kickapoo Tribe of Indians v. Babbitt*, 827 F. Supp. 37, 45–45 (D.D.C. 1993) (noting that the validity of a tribal–state gaming compact is "a federal question" and "it is for the federal court to determine").

banked games in violation of state law. Indeed, these provisions were the *sole* basis for finding that the Governor lacked authority to "enter into" the Compact. *Treat I*, 473 P.3d 43, 2020 OK 64, at ¶¶ 5–8. Yet, a closer reading of the Compact shows just how incorrect that reasoning was. The Compact does not "authorize" such forms of gaming; it just *discusses* them. *See infra* § IV.A.

Thus, if the Court looks to *Treat I* at all, it would entirely appropriate to disagree with its reasoning and conclude that the Compact does not authorize such gaming. Independent review of *Treat I* would also align with the Tenth Circuit's reasoning in *Pueblo of Santa Ana v. Kelly*, which recognized that it could be appropriate under Supreme Court precedent to "independently examine" state law when necessary to uphold a compact that is a creature of federal law (such as a tribal–state gaming compact). 104 F.3d 1546, 1558 (10th Cir. 1997).

As to *Treat II*, that case involved different compacts entirely, involving the United Keetoowah Band of Cherokee Indians and Kialegee Tribal Town, and is therefore inapplicable to the Compact here. But moreover, to the extent that *Treat II* implied that approval by the "Joint Committee on State-Tribal Relations" was required, its analysis failed to address the constitutionality of the Joint Committee-approval requirement. As Defendant Shotton's opening brief explained, this requirement was already found unconstitutional by a previous Attorney General—an issue that the Oklahoma Supreme Court overlooked in *Treat II*. *See* Shotton Br., ECF 229, at 12–13.

Of course, in any event, a *third* decision of the Oklahoma Supreme Court, *Cherokee Nation*, recognized that neither *Treat I* nor *Treat II* have bearing on the issue before *this* Court, acknowledging that "the *Treat* cases did not answer [the] question" of whether the Secretary's approval was proper under IGRA and whether the Compact remains in effect. 564 P.3d 58, 2025

OK 4, at ¶ 43. For that reason, this Court should not delve into the *Treat* cases' reasoning at all, and should just simply set them aside.

In short, the Compact is an instrument of *federal* law, much like an interstate compact. And much like interstate compacts, a subsequent *state*-court ruling cannot result in a declaration that the Compact is invalid.

IV. The Compact's terms comply with IGRA.

Plaintiffs' challenge to the substantive provisions of the Compact should be rejected. Every provision in the Compact can and should be upheld. And even if this Court found any of them problematic, they can be severed.

A. The Compact's mere discussion of event wagering and house-banked games is consistent with IGRA.

Plaintiffs' challenge to the Compact's references to event wagering and house-banked games is without merit. Properly understood, those provisions just refer to forms of gaming that might be authorized in the future. They do *not* unilaterally authorize such gaming, as shown by the plain text of the Compact, and they are perfectly compatible with IGRA.

Plaintiffs argue that IGRA requires compacts to only include gaming that is "presently" lawful at the time of compacting. *See* Pls.' Opp'n Br., ECF 239 at 69. For this proposition, they cite 25 U.S.C. § 2710(d)(1)(B), which provides that class III gaming shall be lawful only when "located in a State that permits such gaming for any purpose by any person, organization, or entity." In their view, the present tense "permits" means that a game must be lawful *at the time of compacting*. This is a misreading of the statute, because § 2710(d)(1)(B) does not specify what can be included in a *compact*; it refers only to the actual *operation* of gaming activities. The proper subjects of a compact are set forth in a separate part of the statute, and it includes the catchall "subjects that are directly related to the operation of gaming activities." § 2710(d)(3)(C)(vii). Potential future gaming plainly falls within that category.

Plaintiffs also fail to grapple with the pertinent language in the Compact—the language providing that event wagering is permitted only "to the extent such wagers are authorized by law" and that house-banked games must be approved by the state regulatory agency before being authorized. *See* Shotton Br., ECF 229 at 27–28; *see* Compact at Part 2.A.7, 2.A.12, AR41–42. Instead, Plaintiffs posit that these arguments "were presented to and rejected by the Oklahoma Supreme Court" in *Treat I*. Pls.' Opp'n Br., ECF 239 at 64. Their position reads far more into *Treat I* than the decision's actual reasoning provides.

It is true that similar arguments were *briefed* by Defendant Stitt during *Treat I*. *See* Pls.' Opp'n Br., ECF 239 at 63. So in that token sense, yes, as Plaintiffs note, the argument was "presented" to the Oklahoma Supreme Court. But nowhere in the Oklahoma Supreme Court's actual *opinion* is there any discussion whatsoever *addressing* the argument. Nor can Plaintiffs point to any part of the *Treat I* opinion that tries to interpret the relevant language of the Compact.

Plaintiffs discredit (in one footnote) the myriad compacts that have been approved with provisions that reference yet-to-be authorized forms of gaming. Pls.' Opp'n Br., ECF 239 at 70 n. 62. As set forth in Defendant Shotton's opening brief, those include the compacts of numerous Arizona tribes, the Iipay Nation of Santa Ysabel in California, and the Mashpee Wampanoag Tribe in Massachusetts. *See* Shotton Br., ECF 229 at 31–32. Those analogous compacts have persuasive value that this Court should consider. Indeed, judges in this district have acknowledged—in the context of tribal–state compacting—that the Secretary should generally be expected to "follow past decisions" regarding "similar compacts [that have] been approved or deemed approved in the past." *Forest Cnty. Potawatomi Community v. United States*, 330 F. Supp. 3d 269, 289 (D.D.C. 2018).

If the Secretary's pattern of approving similar compacts was not enough, then the D.C. Circuit's *West Flagler* decision confirms that a compact can refer to games that are not yet authorized under state law. In that case, the compact at issue had detailed provisions relating to online sports betting. When those provisions were challenged, the D.C. Circuit held that nothing about references to such gaming compelled the Secretary to disapprove the compact, regardless of their legality under state law. The D.C. Circuit agreed with the Secretary's position in that case that forms of gaming can be "addressed" or "discussed" in a compact even if they are not specifically "authorized." *Id.* at 1065.

West Flagler's analysis directly applies here. The Compact "addresses" and "discusses" event wagering and house-banked games, but does not unilaterally "authorize" them, as such gaming is not yet authorized under Oklahoma law.[4] Hence, just as *West Flagler* held that references to online sports betting outside of the Seminole Tribe's lands did not call for invalidation of that tribe's compact with the State of Florida, nor do the references to event wagering or house-banked games call for invalidation of the Compact in this case.

B. Meaningful concessions were received in exchange for revenue-sharing.

Plaintiffs likewise fail to adequately refute the validity of the Compact's revenue-sharing provisions. In fact, Plaintiffs have failed to address any of the arguments relating to those provisions that were raised in Defendant Shotton's opening brief. Defendant Shotton noted that even though the Compact does not separately define "substantial exclusivity," the term has a known meaning and is separately defined in state law, i.e., the State-Tribal Gaming Act, 3A O.S.

[4] Indeed, in the six years since the Compact went into effect, the Otoe–Missouria Tribe has never attempted to offer such forms of gaming at its casinos.

§ 281, Part 11.A; *see* Shotton Br., ECF 229 at 35. Defendant Shotton also noted that the math behind Plaintiffs' argument doesn't add up. The Otoe–Missouria Tribe pays *less* under its Compact than it did before, and it receives the same "substantial exclusivity" that it did before. *See* Shotton Br., ECF 229 at 36. Plaintiffs have ignored these considerations.

C. The Compact allows unfettered ability to conduct class II gaming.

Plaintiffs' challenge to the Compact's treatment of class II gaming also fails. Even if, *arguendo*, they had standing to make the challenge, they have failed to provide a meaningful rebuttal to Defendant Shotton's defense of those provisions.

As Defendant Shotton explained, the Compact's language explicitly states that "nothing in this Compact shall limit the Tribe's right to operate any game that is class II under IGRA." Shotton Br., ECF 229 at 38 (citing Compact at Part 3.A, AR47). In response, Plaintiffs point to certain reporting requirements. But simply "reporting" about class II games does nothing to "regulate" them. Again, the Tribe can conduct class II gaming however it wants.

Moreover, once again, Plaintiffs fail to rebut the Secretary's longstanding practice of approving compacts with provisions relating to class II gaming. In one sentence, Plaintiffs just argue that prior agency practice "makes no difference." Pls.' Opp'n Br., ECF 239 at 72 n.65. That is untrue, as agency practice is often taken into account in disputes relating to tribal–state compacts. *See Forest Cnty.*, 330 F. Supp. 3d at 289.

D. IGRA does not prohibit the Compact's Section 20 concurrence.

The taking of land into trust for gaming purposes is an authorized subject of compact negotiations and the Section 20 concurrence in the Compact is completely appropriate. Insofar as Plaintiffs contest otherwise, their position cannot be squared with the statute itself, implementing regulations, existing case law, and agency practice.

Plaintiffs argue that the Governor cannot "pre-concur" because until the Secretary has acted "there is . . . nothing for the Governor to concur in." Pls.' Opp'n Br., ECF 239 at 73. But this misconstrues the Compact. The Compact does not provide that the Governor will concur in *any* two-part determination no matter what. Rather, the Governor's concurrence is restricted to land located within certain geographic areas. For the Otoe–Missouria Tribe, the concurrence is restricted to one for each of three counties—Logan, Noble, and Payne—and in each of those counties the gaming facility must be located within one (1) mile of a state or federal highway. AR53. While this description does not resemble a title abstract, it is not open-ended either. The Governor's concurrence is not state-wide; nor is it unfettered within each of the three (3) counties, as there is also a roadway access requirement. *Id.* For that reason, there clearly *is* something for the Governor to concur in—i.e., geography and roadway access.

Moreover, Plaintiffs' argument that "taking land in trust for gaming purposes is not an authorized subject of compact negotiations" is belied by the statutory text. Under IGRA, a compact may include any subject that is "directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(c)(C)(vii). Plaintiffs' response is merely that "the acquisition of land is not a gaming activity." Pls.' Opp'n Br., ECF 239 at 73. Again, this misses the point. Obviously, the mere acquisition of *land* is not literally gaming activity, but the process of making that land eligible for gaming *is* "directly related" to gaming activity.

Nor does the Section 20 concurrence make 25 U.S.C. § 2719 "unnecessary" or "easily circumvented," as Plaintiffs suggest. Pls.' Opp'n Br., ECF 239 at 73. The Compact does not "circumvent" § 2719; rather, the Compact just implements one part of § 2719. Any potential acquisition would still require the concurrence of the Secretary (not to mention other regulatory hurdles in the fee-to-trust process), and therefore the statute is not circumvented at all.

The regulation cited by Plaintiffs, 25 C.F.R. § 292.22, does not support them. It does not prohibit any "pre-concurrence." It just says that "[i]f the Secretary makes a favorable Secretarial Determination," the Secretary will send certain materials to the Governor, including "[a] request for the Governor's concurrence." 25 C.F.R. § 292.22. Nothing in the regulation's actual text prohibits the Governor from contractually committing to grant his or her concurrence *ex ante*.

Available case law confirms Defendant Shotton's interpretation. The Ninth Circuit, in discussing the sequence of the Secretary's and Governor's respective concurrences under § 2719, expressly stated that "the formality of which official acts first should not be determinative. The important consideration is that both officials must act." *Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688, 696 (9th Cir. 1997). That case involved a constitutional challenge to § 2719 on the theory that it gave a state official improper "veto" power over a federal official, but the point remains—it does not matter who acts first, all that matters is that they concur.

Agency practice also confirms that the Section 20 concurrence is entirely appropriate. As Defendant Shotton's opening brief set forth, it is not unheard of for a compact to address a future potential trust acquisition under § 2719. And as stated *supra*, the Secretary should generally be expected to "follow past decisions" regarding "similar compacts [that have] been approved or deemed approved in the past." *Forest Cnty.*, 330 F. Supp. 3d at 289. Plaintiffs have offered no convincing reason to disregard agency practice.

Finally, while Plaintiffs have maintained that the Section 20 concurrence is unenforceable, *see* Pls.' Opp'n Br., ECF 239 at 71, such considerations are irrelevant. Whether Defendant Shotton faces political or regulatory obstacles in enforcing the Section 20 concurrence has nothing to do with whether it was lawful to include it in the Compact.[5]

[5] Plaintiffs' last argument regarding the Section 20 concurrence applies solely to the Comanche Nation's Compact, as it targets the specific locations of the potential Section 20 acquisitions being

V. Severance remains an option.

Finally, if any of the substantive provisions were found to be problematic, this Court has the power to sever those provisions and leave the remainder of the Compact intact. Severance is authorized both by IGRA itself as well as the Compact's plain language. Plaintiffs fail to show any reason for this Court to disregard those clear directions.

Putting IGRA aside for the moment, severance is obviously authorized as a matter of contract law. The interpretation of tribal–state compacts is governed by "[g]eneral principles of federal contract law." *Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155, 1163 (9th Cir. 2015). Under those general principles, "if the terms of a contract are not ambiguous, [the] court determines the parties' intent from the language of the agreement itself." *Citizen Potawatomi*, 881 F.3d at 1239.

Here, contractual intent is easy to discern. The Compact itself, just like many other compacts (including Oklahoma's Model Compact), expressly states that invalid provisions should be severed. Part 13.B of the Compact, titled "Entire Agreement; Severability," unequivocally states that "[i]f *any* clause or provision of this Compact is subsequently determined by any federal court to be invalid or unenforceable . . . the remainder of this Compact shall not be affected thereby." Compact at Part 13.B, AR66. This Court should, if necessary, apply Part 13.B, as doing so would align with the compacting parties' unambiguous intent.

Plaintiffs' attempt to distinguish this language rests on a false premise. Repeating the argument from their opening brief, Plaintiffs contend that the provisions being challenged were each an "essential part of the agreed exchange" and thus cannot be severed. Pls.' Opp'n Br., ECF 239 at 68. In fact, they now go further to claim that "Defendants ignore[d] this argument and have

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"within another tribe's reservation or former reservation." *See* Pls.' Opp'n Br., ECF 239 at 74. As this argument is inapplicable to the Otoe–Missouria Tribe, it will not be addressed here.

therefore conceded it." *Id.* That is wrong. Defendant Shotton's opening brief argued that the absence of any "carve-out" in the severability clause shows that no provision was so "essential" as to preclude severance. Shotton Br., ECF 229 at 44–45. As stated in that brief, by the Compact's unambiguous text, severability shall apply to "*any* clause or provision." *Id.* at 44 (citing Compact at Part 13.B, AR 66) (emphasis added). Far from having "conceded" Plaintiffs' argument, Defendant Shotton has already shown why it is inconsistent with the Compact's language.

Seeking to sidestep the Compact's language, Plaintiffs' other argument centers on the D.C. Circuit's decision in *Amador County*. But as Defendant Shotton's opening brief explained, *Amador County* did not address severance at all, let alone foreclose it as an option. Shotton Br., ECF 229 at 43. Plaintiffs do not contest the fact that *Amador County* had nothing to do with severance; instead, they point out that "[n]o question concerning the applicability of 25 U.S.C. § 2710(d)(8)(C) to the severance of illegal compact provisions was presented." Pls.' Opp'n Br., ECF 239 at 68. Yet, obviously, because severance was a non-issue in *Amador County*, the D.C. Circuit had no reason to analyze whether severance was statutorily required under § 2710(d)(8)(C). Indeed, by Plaintiffs' own interpretation, *Amador County* was about whether the Secretary had an "obligation to disapprove a compact." Pls. Opp'n Br., ECF 239 at 67. Approval and disapproval of a compact have nothing to do with severance.

Unlike the *Amador County* decision, the Tenth Circuit's decision in *Citizen Potawatomi*, *supra*, *does* address severance. In that case, the Tenth Circuit found that severance was a proper remedy when the compact turned out to have a provision that violated the Federal Arbitration Act. The court severed the arbitration clause and upheld the validity of the compact. *Citizen Potawatomi*, 881 F.3d at 1240–41. The same course of action can be taken here, if necessary to uphold the Compact.

Compact language aside, there is also a statutory basis to invoke severability—25 U.S.C. § 2710(d)(8)(C), which refers to compacts being deemed approved, but "only to the extent the compact is consistent with" IGRA. In accordance with that provision, because the Compact in this case was deemed approved (as opposed to affirmatively approved), if there is a provision found to violate IGRA, that discrete provision should be deemed unenforceable, i.e., severed. Disallowing severance in such a scenario would make § 2710(d)(8)(C) meaningless. And indeed, Plaintiffs have failed to provide any alternative interpretation of § 2710(d)(8)(C), instead repeating once again the same argument that the Secretary should have disapproved the entire Compact because—in their view—it was not properly "entered into."

In short, there is both a contractual basis for severance (Part 13.B) and a statutory basis for severance (25 U.S.C. § 2710(d)(8)(C)). If the Court finds that any of the substantive provisions of the Compact to be invalid, it should invoke this authority and sever those provisions.

CONCLUSION

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

Dated: April 24, 2026

Respectfully submitted,

By: */s/ Brett Stavin*

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 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