UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT GOVERNOR J. KEVIN STITT'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Notwithstanding the substantial number of pages spent briefing the merits of this dispute, the issues in this case are straightforward. Plaintiffs largely do not dispute that the submission of the two challenged compacts complied with the procedural requirements of IGRA and the Secretary's implementing regulations, and that the compacts then took effect after publication in the Federal Register. So the only way Plaintiffs can invalidate those compacts is to establish that one of two points is true: (i) that IGRA requires the Secretary to correctly resolve any disputes over state (or tribal) law during the statutory 45-day period after a compact is submitted; or (ii) that state judicial decisions can retroactively unwind compacts long after those compacts have gone into effect under federal law. Neither is correct.

First, Plaintiffs still identify no support in IGRA for the notion that the Secretary must correctly resolve contested questions of state or tribal law during the statutory 45-day period before a compact may take effect. The Secretary has issued regulations specifying what documentation he requires to determine whether a compact has been "entered into between an Indian tribe and a State," 25 U.S.C. § 2710(d)(8)(A). The regulations state that the Secretary will rely on certifications of authority from the Tribe and the State, and nothing suggests that the Secretary will investigate and independently confirm those certifications are accurate under tribal and state law. *See* 25 C.F.R. § 293.8 (2008). Because Plaintiffs do not challenge those regulations as inconsistent with IGRA's requirements, they cannot complain that the Secretary acted consistent with the regulations. In arguing that this Court should nonetheless overturn that approval, Plaintiffs mostly rely on the notion that the Secretary's no-action approval is "judicially reviewable," but that just begs the question whether there is a basis to find that the Secretary's decision to no-action approve the compacts was contrary to law. There may be grounds to do so for a compact that does not

even "authorize gaming on Indian lands," *see West Flagler Assocs., Ltd.* v. *Haaland*, 71 F.4th 1059, 1067 (D.C. Cir. 2023), but as the Governor explained, the same is not true for disputes over state or tribal law. In short, Plaintiffs identify no basis in IGRA to retroactively void these compacts on the ground that the Secretary did not correctly interpret Oklahoma law.

Nor does IGRA permit state-court rulings issued after publication of compact approval in the Federal Register to retroactively nullify compacts that have already taken effect under federal law. As the Oklahoma Supreme Court itself recognized, the state-law questions resolved in the *Treat* cases are distinct from the question before this Court, which 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 subsequent state court holdings." *Cherokee Nation* v. *United States Dep't of the Interior*, 564 P.3d 58, 72 (Okla. 2025). And Plaintiffs identify nothing in IGRA's text or precedent that supports the remarkable position that state-court decisions can have the effect of unwinding federal compacts that went into effect long ago.

Finally, Plaintiffs' challenges to specific compact provisions are no more persuasive. They rest on misreadings of both IGRA and the compacts' terms. Even if any of the challenged provisions were inconsistent with IGRA, that would not provide a basis to invalidate the compacts in their entirety. Instead, as the compacts themselves set forth, it would simply provide a basis to sever the challenged provisions.

Because Plaintiffs identify no legal basis to overturn the Secretary's approval of the challenged compacts, the Court should enter judgment holding that the compacts remain in effect under IGRA.

ARGUMENT

I. PLAINTIFFS IDENTIFY NO LEGAL BASIS TO OVERTURN THE SECRETARY'S NO-ACTION APPROVAL OR INVALIDATE THE CHALLENGED COMPACTS.

A. Plaintiffs Do Not Show Any Error In The Secretary's No-Action Approval Of The Compacts.

As the Governor explained (Dkt. No. 233-1 (Stitt Br.) at 13-14), the Comanche and Otoe-Missouria compacts were submitted and approved by the Secretary consistent with the procedural requirements set forth in IGRA and the relevant implementing regulations. The Tribes submitted the compacts to the Secretary for review, bearing the signatures of the Chairmen and the Governor. Those submissions included tribal resolutions certifying that each Tribe had approved the compact consistent with tribal law, and certifications from the Governor that he had authority under Oklahoma law to enter into tribal compacts on behalf of the State. *See* 25 C.F.R. § 293.8 (2008). After the Secretary took no express action on the compacts during the ensuing 45-day statutory period, they were "considered to have been approved." Stitt Br. at 13-14. The compacts then took effect on June 29, 2020, when the Secretary published notice of the approved compacts in the Federal Register. *See* Indian Gaming; Tribal-State Class III Gaming Compacts Taking Effect in the State of Oklahoma, 85 Fed. Reg. 38,919 (June 29, 2020). Because Plaintiffs fail to show that the Secretary acted contrary to law at any step of this process, there is no basis for this Court to overturn the approvals under the APA. *See U.S. Postal Serv.* v. *Postal Regul. Comm'n*, 963 F.3d 137, 142-43 (D.C. Cir. 2020).

1. Start with the regulations. With one exception, Plaintiffs do not dispute that the compact submissions fully complied with the procedural requirements of the regulations.[1] The exception is Plaintiffs' claim (Dkt. No. 239 (Pls.' Resp.) at 51-52) that the Governor's certifications did not comply with 25 C.F.R. § 293.8 because the Governor certified that he was vested with "the power to negotiate and enter into **compacts** with federally recognized Indian tribes," rather than stating that he "is authorized to enter into **the compact** . . . in accordance with . . . State law." *See* A.R. 3, A.R. 36. Such flyspecking is hard to take seriously. The regulations do not require magic words. The Governor's certifications were submitted with the Comanche Nation and Otoe-Missouria Tribe compacts, unambiguously refer to those compacts, attest to the Governor's authority to "enter into compacts with federally recognized Indian tribes," and were contained in a PDF with the compacts themselves and captioned as "25 C.F.R. § 293.8 Certification[s]." A.R. 3, A.R. 36.

As a substantive matter, Plaintiffs cannot identify anything in the regulations obligating the Secretary to adjudicate and correctly resolve disputes about state and tribal law before allowing a compact to go into effect. They acknowledge (at 25) that 25 C.F.R. § 293.8 governs "what documents must be submitted with a compact," but claim that provision "does not purport to make those submittals determinative of the legality of their terms." But the whole purpose of Section 293.8 is to tell compacting parties what they must submit to enable the Secretary to

[1] Plaintiffs take issue with this characterization on the ground that the agreements purportedly "were not legally entered into [under state law] when they were submitted." Pls.' Resp. at 26 n.23. But that just goes to the substantive dispute about Oklahoma law. Plaintiffs do not and cannot dispute that the compacts were supported by certifications and supporting legal materials demonstrating that, in the Governor's view, the compacts *were* legally entered into under state law because the "Oklahoma Constitution, the Legislature, and the state Supreme Court have recognized that the Governor has the sole authority to compact with Indian tribes." A.R. 74.

determine whether a compact has in fact been entered into by a Tribe and State. As explained in the final rule promulgating the regulations, the subject of submitting a compact "after it has been 'legally entered into' by both parties" is "addressed . . . at 293.8," which "requires documentation from both the tribe and the State certifying that their respective representatives were authorized to execute the proposed compact." *See* 73 Fed. Reg. 74,004, 74,005 (Dec. 5, 2008). To be sure, the regulation also *authorizes* the Secretary to request "[a]ny other documentation . . . that is necessary to determine whether to approve or disapprove the compact," 25 C.F.R. § 293.8 (2008), but it does not *obligate* the Secretary to do so for any reason, nor even suggest that the Secretary will look beyond facially valid state and tribal certifications to investigate whether they correctly reflect applicable state and/or tribal law.

Grasping at straws, Plaintiffs also look for support in other provisions of the relevant regulations. They note (at 25) that Section 293.2(b)(2) refers to a compact as an agreement between "Tribal and *State governments*," rather than "between an Indian tribe and a governor," and point out that the Department rejected a comment that suggested using "State Governor's Office" rather than "State" throughout the regulations. 25 C.F.R. § 293.2(b)(2) (2008). These are obvious red herrings; the Department certainly was not stating that a governor *could not* enter into a compact on a State's behalf. As the final rule explained, the Department simply kept the word "State" to match IGRA's text. 73 Fed. Reg. at 74,005. Like IGRA itself, the regulations do not dictate to States (or Tribes) who has the authority to enter into Tribal-State compacts. The same is true of Section 293.7, which states that parties should not submit a compact to the Secretary until "after it has been legally entered into by both parties." 25 C.F.R. § 293.7 (2008). As the Governor explained (at 19-20), Section 293.7 in no way commits the Secretary to independently verify the certifications' claims of legal authority under state and tribal law. It merely tells parties

when to submit the compact for review (*i.e.*, not until it has been formally entered into by both sides). And as noted above, the Department directed parties to Section 293.8 as addressing how to demonstrate the parties' legal authority.

If Plaintiffs believe the Secretary could not fulfill his statutory duties under IGRA by relying on a "[c]ertification from the Governor . . . that he or she is authorized under State law to enter into the compact," 25 C.F.R. § 293.8(c), they should have challenged that regulation under the APA as insufficient to carry out the Secretary's statutory mandate. Because they have not asserted such a claim, and the compacts were submitted in full compliance with the regulations implementing IGRA, there is no basis for the Court to hold that the Secretary violated the law by declining to disapprove the compacts. *See Anglers Conservation Network* v. *Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) (APA review of agency inaction requires identifying "a discrete agency action that [the agency] is required to take") (quoting *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)).

To be sure, Plaintiffs obtained and submitted the May 2020 *Treat* AG Opinion in order to dispute the Governor's certification during the 45-day review period. *See* Pls.' Resp. at 31. But nothing in the regulations required the Secretary to accept that opinion over the Governor's competing certification and legal memorandum. *See* Stitt Br. at 15-16. Plaintiffs pretend that it should have been obvious to the Secretary that the Attorney General's opinion was on the right side of this dispute, but even Plaintiffs have to spend multiple pages of their brief to explain why. *See* Pls.' Resp. at 51-54. There is nothing in the regulations suggesting that the Secretary must dig into and correctly resolve this kind of state-law dispute in order to determine that the compact should be permitted to go into effect under federal law.

2. Plaintiffs similarly fail to identify anything in IGRA that compelled the Secretary to disapprove the compacts or requires this Court to invalidate them. Plaintiffs' only effort to find support in the "plain language" of IGRA is their observation (at 20-21 & n.20) that Section 2710(d)(8)(A) refers to a compact "entered into" by "a State," but does not refer to a governor. That is also Plaintiffs' principal response to the Governor's arguments (at 17-19) that Plaintiffs' interpretation—requiring the Secretary to confirm that a compact was "*legally* entered into under *state law*"—impermissibly adds words that Congress opted not to include, *see* Pls.' Resp. at 21, n.20, and makes the operation of federal law turn on state-law issues without clear direction from Congress, *id.* at 22-23. In Plaintiffs' view, by using the word "State" without specifying that a governor may enter into a compact on behalf of the state, Congress silently required "the Secretary to determine whether a compact was entered into *by the State* before approving it," and to make that "determination . . . by applying state law." Pls.' Resp. at 20, 21.

Again, that overreading falls flat. Congress referred to the "State" simply because it is the State, not its governor or any other state official, that is the party to a "Tribal-State compact." That plainly does not impose any obligation on the Secretary to dig into state law and verify that a facially plausible assertion of authority by the governor of a State is in fact valid. To the contrary, IGRA's framework—including its strict 45-day review period after the submission of a compact that defaults to approval unless the Secretary expressly disapproves it—confirms the opposite: Congress did not seek to embroil the Secretary in disputes over state-law (or tribal-law) authority, on pains of invalidation of the compact if it later turns out that his decision did not accurately reflect state law.[2] In other words, the statute requires the Secretary to reasonably determine that

[2] Plaintiffs' argument (at 23) that requiring the Secretary to adjudicate state-law disputes is

the State has "entered into" the compact, but in the event the Secretary must choose one side of a state-law dispute over who actually has authority to bind the State, IGRA does not require the Secretary to choose correctly. *See Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989) (absent "plain indication to the contrary," Congress does not "mak[e] the application of [a] federal act dependent on state law"); *Booth* v. *Bowser*, 597 F. Supp. 3d 1, 20 (D.D.C. 2022) (courts must identify "'plain indication' that Congress intended to make the [federal statute] dependent on state law").

3. Finally, Plaintiffs again argue that *Amador County* v. *Salazar*, 640 F.3d 373 (D.C. Cir. 2011), requires invalidating the compacts even if the Secretary permissibly relied on the Governor's certification. They rely extensively on *Amador County*'s reasoning that the Secretary's no-action approval is "judicially reviewable" and that Section 2710(d)(8)(C) "provides the law to apply" by stating that compacts are only deemed approved "to the extent the compact is consistent with the provisions of IGRA." Pls.' Resp. at 27, 42-43 (internal quotation marks and citations omitted). That is true as far as it goes, but it begs the question whether there is a basis to find that the Secretary's decision not to disapprove the compacts was contrary to "the provisions of IGRA." As explained above and in the Governor's opening motion (at 16-19), there is no such basis, and nothing in *Amador County* holds otherwise.

Plaintiffs' contrary argument (at 33-34) goes as follows: *Amador County* holds that courts may invalidate a compact that is not consistent with *IGRA*; therefore, because IGRA requires that

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consistent with IGRA's framework because it "depends on the participation of the State" is a non-sequitur—the Governor *did* participate on behalf of Oklahoma. And their claim that the Governor seeks only "to decide for himself that he has authority," *id.*, is a caricature of the Governor's position, which was supported by clear authority in Oklahoma statutes, the Constitution, and an extensively reasoned legal memorandum. Upon review of those materials, the Secretary was plainly entitled to "decide" that the Governor acted within his authority.

a compact be "entered into by the Indian tribe and the State," courts may also void a compact on the ground that it is inconsistent with *state law* or *tribal law*. That reasoning does not work. In *Amador County*, the Secretary's no-action approval was challenged on the basis that the compact authorized gaming that was not even located "'on Indian lands,'" 640 F.3d at 381 (quoting 25 U.S.C. § 2710(d)(8)(A)), which plainly would cause the compact to violate "'the provisions of IGRA'" itself. *Id.* (quoting 25 U.S.C. § 2710(d)(8)(C)). Plaintiffs want the Court to extend this reasoning to hold that compacts must be "consistent with the provisions of IGRA" *and* state and tribal law. But as explained above, the fact that an approved compact may not *in fact* have been entered consistent with state and tribal law does not render that compact inconsistent with IGRA's provisions. Nothing in *Amador County* suggests otherwise, and the D.C. Circuit has already declined to extend *Amador County* beyond its specific holding (or to delve into relevant "questions of state law" in the process). *See West Flagler*, 71 F.4th at 1067-68. This Court should follow the same course.

Again, it is worth emphasizing the logical extension of Plaintiffs' position. If the Secretary is required to investigate and correctly resolve state-law disputes related to the manner in which a State entered into a given compact, then he must do the same for any *tribal*-law disputes. The same is true for this Court any time an objector seeks judicial invalidation of a compact that the Secretary reviewed and allowed to go into effect based on disputes about tribal laws. Nothing in IGRA's text, regulations, purpose or history remotely suggests that Congress wanted to embroil the Secretary or the courts in such inquiries.

B. Subsequent State-Court Decisions Did Not Retroactively Unwind Compacts That Had Already "Take[n] Effect" Under IGRA.

Plaintiffs also fail to identify any support for their contention that, even if the Secretary did not violate the APA by allowing the compacts to take effect based on the information before him

during the 45-day statutory period, subsequent decisions of the Oklahoma Supreme Court had the effect of retroactively nullifying those compacts. Pls.' Resp. at 35. The statute unambiguously defines the moment a compact "take[s] effect" under federal law: "when notice of approval by the Secretary . . . has been published by the Secretary in the Federal Register." 25 U.S.C. § 2710(d)(3)(B). That publication occurred on June 29, 2020, before the Oklahoma Supreme Court issued its rulings in either of the *Treat* cases. *See* 85 Fed. Reg. 38,919. As even the Oklahoma Supreme Court has since recognized, its "*Treat* cases did not answer" the federal-law question here—whether the "approval of the compacts under the IGRA is affected by subsequent state court holdings." *Cherokee Nation*, 564 P.3d at 72; *see Detroit Int'l Bridge Co.* v. *Gov't of Canada*, 192 F. Supp. 3d 54, 71, 76-77 (D.D.C. 2016) (explaining that a federal "[c]ompact['s] approval by the Secretary cannot be invalidated on the basis of a governor's *ultra vires* action, because a contrary rule would compel the Secretary to consider state law before approving any compact").

Plaintiffs largely fail to grapple with the separate question whether a state judicial decision can retroactively unwind a compact that has taken effect under federal law. Instead, their arguments essentially rest on their same contentions that a compact "not legally entered into by the State under State law is void." *See* Pls.' Resp. at 35-36. But even if that were true when it comes to the Secretary's determination whether a State had "entered into" the agreement during the statutory review period, that does not mean that a state-court decision issued after a compact *takes effect* under federal law can retroactively strip it of that status, at least without any further action by the Secretary.[3]

[3] As the Governor observed and the United States has previously argued (Stitt Br. at 25 (citing

Plaintiffs' continued reliance on *Kickapoo I* illustrates their failure to grapple with this distinction. As previously explained (Stitt Br. at 27), the Secretary in that case never published notice of the compact's approval in the Federal Register, so the compact never "t[ook] effect" under IGRA. *See Kickapoo Tribe of Indians* v. *Babbitt*, 827 F. Supp. 37, 40 (D.D.C. 1993) (*Kickapoo I*), *rev'd on other grounds*, 43 F.3d 1491 (D.C. Cir. 1995). Plaintiffs respond (at 37) that the court "squarely held" that the compact "was considered to have been approved by the Secretary," but approval and publication are two separate steps under IGRA. Under Section 2710(d)(3)(B), only that latter step—publication in the Federal Register—causes the "Tribal-State compact" to "take effect," thus triggering the legal consequences and reliance interests that flow from a compact that is effective under federal law. *Kickapoo I* did not address the question whether an effective federal compact could be retroactively invalidated by a state-court decision because it had no occasion to do so.

Plaintiffs also have nothing new to say about the Tenth Circuit's decision in *Pueblo of Santa Ana*. *See* Pls.' Resp. at 37-38. As the Governor has previously explained (at 31-32), that decision is inapposite and unpersuasive in numerous respects. But as most relevant, it is premised on the court's (erroneous) conclusion that the challenged compacts at issue there were not "entered into" by the State. *See Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546, 1553-58 (10th Cir. 1997). Again, even if that were true, it does not address whether a state-court decision issued after a compact has already "taken effect" under federal law can retroactively nullify it. Among its other

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Br. for the Federal Respondents in Opposition 11, 13, *Pueblo of Santa Ana* v. *Kelly*, 522 U.S. 807 (1997) (No. 96-1617)), it is a separate question whether the *Secretary* could decide to reconsider his prior approval of an effective Tribal-State compact based on subsequent state-court decisions that call into question whether the compact was validly entered into under state or tribal law. But Plaintiffs have not asked the Secretary for such relief, and they give no reason why they could not do so. *See* Pls.' Resp. at 34-39.

flaws, *Santa Ana* did not even confront that separate question, much less explain how state-law decisions could unilaterally override an effective federal agreement.

And as the Governor showed by analogy to numerous other contexts, a state judicial decision *cannot* retroactively invalidate an agreement that has gone into effect under federal law. Plaintiffs attempt to distinguish each of these analogous contexts (at 39-44), arguing that "different laws have different requirements." But these arguments only underscore that they cannot identify *any* federal framework in which an agreement that has been approved and taken effect under a federal statutory process can be retroactively unwound by a later decision of a state supreme court.

In any event, Plaintiffs' efforts to distinguish the other cases making up this judicial consensus fall flat. Take *Dyer* v. *Sims*, which held that an interstate compact—an "agreement solemnly entered into between States"—cannot be "unilaterally nullified, or given final meaning by an organ of one of the contracting States." 341 U.S. 22, 28 (1951). Plaintiffs again argue that IGRA compacts are not "instrument[s] of federal law" that preempt state law, Pls.' Resp. 28, 43 (citing *West Flagler*, 71 F.4th at 1067), but do not explain how that distinction helps them. After all, IGRA compacts are approved and made effective under federal law pursuant to a congressionally prescribed process. Plaintiffs do not explain why the fact that such compacts do not preempt state law means that state-court decisions can unilaterally strip them of their federal effectiveness.

Plaintiffs also point out that in *Dyer*, the Supreme Court "determined whether West Virginia had validly entered into an interstate compact by reviewing state law." Pls.' Resp. at 44 (emphasis omitted). But that case cuts against their position: the Supreme Court gave "every deference" to the state supreme court's determination but still concluded that the compact could not be invalidated on the basis of that ruling. 341 U.S. at 28, 30-32. In other words, even when

the highest court of a State declared that the State's participation in a compact was ultra vires, the compact's effectiveness under federal law was not disturbed. Plaintiffs cannot explain why a different rule should apply here.

Plaintiffs simply repeat their prior attempts to distinguish the jurisdictional retrocession (at 40-42) and International Bridge Act cases (at 42-43), as well as their overall mantra that a compact is void under IGRA if the Governor did not in fact have state-law authority to enter into it. There is no need to belabor the points the Governor has previously made in response to these same arguments, *see* Stitt Br. at 26-30, but it is again telling what the Court will *not* find in Plaintiffs' lengthy briefs: any authority in which a court has held and given a considered explanation of how a state judicial decision can retroactively unwind an agreement that is in effect under federal law.

II. PLAINTIFFS' CHALLENGES TO INDIVIDUAL COMPACT PROVISIONS PROVIDE NO GROUNDS TO INVALIDATE THE COMPACTS.

Plaintiffs' fallback theory—that discrete provisions of the compacts violate IGRA and require invalidation of the entire agreements—fails for at least two reasons. First, the challenged provisions do not violate IGRA. To the contrary, they are well within the range of topics IGRA permits Tribes and States to address in compacts governing class III gaming. *See* 25 U.S.C. § 2710(d)(3)(C). Plaintiffs' contrary arguments rest on strained readings of both the statute and the compacts' text.

Second, even if Plaintiffs were correct about any of the individual provisions, that still would not justify setting aside the compacts in their entirety. Each compact has a severability clause confirming that any defect in a discrete provision would not require nullification of the agreements as a whole; instead, the offending provision should be severed. *See Citizen Potawatomi Nation* v. *Oklahoma*, 881 F.3d 1226, 1240-41 (10th Cir. 2018). Plaintiffs offer no reason not to give full effect to those severability provisions.

A. Plaintiffs Fail To Show That Any Of The Challenged Provisions Violates IGRA.

1. The compacts do not authorize class III gaming activities that are otherwise unlawful in Oklahoma.

As the Governor previously explained (at 34-35), Plaintiffs' argument that the compacts authorize class III gaming activities that were not authorized under Oklahoma law rests on a misreading of the relevant compact provisions. The compacts *refer* to forms of gaming—such as event wagering and house-banked games—that Oklahoma law did not allow at the time the compacts were executed and approved, but they do not *authorize* those activities. A.R. 8 (Comanche Nation Compact pt. 2.A.7); A.R. 41 (Otoe-Missouria Compact pt. 2.A.6). Because the definition of "covered games" under the compacts includes a condition that "such game has been approved by the [State Compliance Agency]," A.R. 8, A.R. 41, and the compacts unambiguously permit event wagering only "to the extent such wagers are authorized by law," A.R. 8 (Comanche Nation Compact), the provisions do not run afoul of IGRA. Instead, they fall squarely within IGRA's provision allowing compacts to address "any other subjects that are directly related to the operation of [class III] gaming." 25 U.S.C. § 2710(d)(3)(C)(vii); *see West Flagler*, 71 F.4th at 1062 (IGRA "expressly contemplates that a compact 'may' [discuss activities outside of Indian lands] where the activity is 'directly related to' gaming," even though IGRA compacts cannot "independently authoriz[e]" those activities).

Plaintiffs tellingly do not grapple with the Governor's arguments regarding these provisions beyond referring back to their earlier analysis. Pls.' Resp. at 70. Instead, Plaintiffs try to dodge the issue. They now puzzlingly assert (at 69) that the Governor's arguments are foreclosed by his Answer. But the Answer simply "denie[d] the allegations contained in Paragraph 139 of the Second Amended Complaint" (Dkt. No. 110, ¶ 139)—which stated that "Event Wagering is not lawful under IGRA, because Event Wagering is not presently permitted in the

State 'for any purpose by any person, organization, or entity.'" *See* Second Amended and Supplemented Complaint, Dkt. No. 104 (SAC), ¶ 139. Nor do Plaintiffs explain how the Governor is bound in this litigation by a position articulated in the memorandum submitted with the compacts by the Governor's general counsel to the Secretary. Pls.' Resp. at 69.

2. The compacts' revenue-sharing provisions do not operate as a tax.

Plaintiffs' revenue-sharing challenge rests almost entirely on a single claim: that the compacts' promise of "substantial exclusivity"—which undisputedly would be a proper concession by the State in return for payments—is "meaningless" in these compacts because "[n]othing in the Agreements . . . limits the additional gaming that the State may authorize itself or others to conduct." Pls.' Resp. at 70. From that premise, Plaintiffs reason that the revenue-sharing provisions amount to a "tax, fee, charge, or other assessment" in violation of 25 U.S.C. § 2710(d)(4). That reasoning is wrong at every step.

To refresh, IGRA does not bar Tribes and States from negotiating revenue-sharing provisions; it prohibits only unilateral exactions. Where the State provides "meaningful concessions" in return for payments, the State is exercising its authority to negotiate, not imposing a tax. *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1112 (9th Cir. 2003). And the Secretary has long allowed revenue-sharing where the State offers concessions yielding "substantial and quantifiable economic benefits" and payments are "appropriate in light of the value" of those concessions. *See* Stitt Br. at 37-38.

Plaintiffs do not meaningfully dispute those principles, but contend that "substantial exclusivity" must entail something approaching absolute exclusivity to be "meaningful." That argument finds no support in IGRA, the case law, or the Secretary's historic practice. The compacts expressly provide each Tribe with "substantial exclusivity over class III Covered Gaming consistent with the goals of IGRA." A.R. 27, A.R. 61 (Agreements Parts 10.A, B). That

is the Department's paradigmatic "meaningful concession," because it gives a Tribe a protected market position: the "'right to conduct Class III gaming activities that are on more favorable terms than . . . non-Indians.'" Stitt Br. 38 (quoting Letter from Aurene M. Martin, Deputy Assistant Sec'y Indian Affs., Dep't of Interior, to Ernie Jones, Sr., President, Yavapai-Prescott Tribe 2 (Aug. 11, 2003)).

Were Plaintiffs correct that the State's ability to authorize other gaming (such as event wagering) renders the exclusivity promise "meaningless," Pls.' Resp. at 70, no compact could lawfully include revenue-sharing provisions unless the State agreed never to authorize any form of gaming by anyone else. Neither the Secretary nor any court has required such an extraordinary commitment. Indeed, the very concept of "substantial" exclusivity recognizes that something less than absolute exclusivity can serve as a meaningful concession.

Plaintiffs also dismiss the other concessions in the compacts—provisions addressing the Governor's agreement to concur in future trust-acquisition determinations, A.R. 19, A.R. 53,—as illusory. Pls.' Resp. at 71. But Plaintiffs' own pleadings belie that characterization. In their Second Amended Complaint, Plaintiffs repeatedly allege that the compacts confer "significant competitive advantage[s]" on the Tribes. SAC ¶¶ 5, 129, 151. A provision cannot simultaneously provide a "significant competitive advantage" and be "meaningless." As Plaintiffs' own allegations confirm, the revenue-sharing provisions reflect negotiated consideration for real economic value, not an impermissible tax.

3. The revenue certification and reporting provisions address permissible topics and do not impermissibly regulate class II gaming.

Plaintiffs next argue (at 71) that the compact provisions requiring the Tribes to certify the percentage of revenue derived from class III games and to report the total number of gaming devices in each facility regulate class II gaming in violation of IGRA. Pls.' Resp. at 71. These

provisions address permissible topics. *See* 25 U.S.C. § 2710(d)(3)(C); Stitt. Br. at 39. The amount of revenue a Tribe derives from class III games indisputably is "directly related" to the operation of class III gaming. 25 U.S.C. § 2710(d)(3)(C)(vii). And the provision requiring the Tribes to record and "report at least quarterly to the [State Compliance Agency], the number of [class III games] and class II devices in each Facility," A.R. 19; A.R. 53, relates to the "maintenance of the gaming facility." 25 U.S.C. § 2710(d)(3)(C)(vi).

Plaintiffs argue (at 72) that the challenged provisions violate IGRA's "separate bar to state regulation of Class II gaming." But nothing in IGRA prohibits compacts from containing any reference to class II gaming. As the Governor previously observed (at 40), the fact that the Secretary has previously approved compacts that incidentally affect class II activities supports the conclusion that he acted lawfully in declining to disapprove the Comanche Nation and Otoe-Missouria Tribe compacts on those grounds.

Plaintiffs also cite (at 71-72 & n.64) *Forest County Potawatomi Community* v. *United States* for the principle that "Class II gaming is not an authorized subject of negotiation for Class III compacts." 330 F. Supp. 3d 269, 286 (D.D.C. 2018). But as Plaintiffs acknowledge in the text (but misstate in footnote 64 of their brief), the language Plaintiffs quote is not the "holding" of that case. It is instead a statement by the Assistant Secretary of the Interior, which in no way displaces the clear meaning of the challenged provisions.

In any event, were there any doubt as to their scope, the agreements expressly provide that "[c]lass II gaming, as defined by IGRA, is expressly excluded," A.R. 8; A.R. 41, from the set of games authorized by the compacts. And each one states: "nothing in this Compact shall limit the Tribe's right to operate any game that is class II under IGRA." A.R. 13; A.R. 47.

4. The compacts' concurrence provisions are permissible under IGRA and consistent with federal trust obligations.

Plaintiffs continue to press a grab bag of arguments against the compacts' concurrence provisions, contending that (1) land-into-trust provisions are not permissible compact subjects; (2) the Governor cannot "pre-concur" in a Secretarial determination that does not yet exist; and (3) the provisions violate the federal trust obligation because they concern lands within other Tribes' reservations. Pls.' Resp. at 72-75. Each of these arguments fails.

First, Plaintiffs argue that land-into-trust provisions are not a permissible compact subject, citing *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 792 (2014), for the proposition that "land acquisition is not a gaming activity." Pls.' Resp. at 73. They contend that allowing such provisions in compacts would make the prohibition on gaming on "after-acquired lands" in 25 U.S.C. § 2719 "unnecessary" and "easily circumvented." *Id.* Both arguments misunderstand the concurrence provisions, which do not purport to allow for the outright acquisition of land. Those provisions instead address the possible *location* of future gaming facilities within certain counties—a topic squarely within IGRA's catch-all provision for "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii); A.R. 19; A.R. 53. And the concurrence provisions simply memorialize the Governor's intent to concur if the Secretary later makes the required determination under Section 2719(b)(1)(A).

Nor do the concurrence provisions threaten to circumvent Section 2719; to the contrary, the provisions are expressly conditioned on compliance with Section 2719. For example, the Comanche compact provides that "New Facilities" may be located within certain corridors of Cleveland, Grady, and Love Counties "subject to the land being taken into trust pursuant to 25 U.S.C. § 2719(b)(1)(A)." A.R. 19; *see* A.R. 53 (Otoe-Missouria compact outlining a near-identical provision). Every step of the Section 2719 process—the Secretary's consultation with state and

local officials, the determination that gaming would not be detrimental to the surrounding community, and the Governor's concurrence—must still occur. The compact simply memorializes the Governor's intent with respect to one of those steps.

As the Governor explained, this practice is neither novel nor controversial, as the Secretary has repeatedly approved compacts with similar language. *See* Stitt Br. 42-43. As with those compacts, the Governor's concurrence here is conditioned on a future Secretarial determination under Section 2719(b)(1)(A) that has not yet occurred. Plaintiffs cannot distinguish those compacts, so they are left to claim in conclusory fashion that they do not "bear the weight [the Governor] puts on them." Pls.' Resp. at 73.

Second, Plaintiffs argue that the Governor cannot "concur in a non-existent Secretarial Determination." Pls.' Resp. at 73. But the Governor has not concurred with anything. He has agreed to concur in the future, *if and when* the Secretary makes a favorable determination. That is the very nature of a conditional commitment—it looks forward, not backward.

Third, Plaintiffs renew their argument (at 74) that the concurrence provisions in the Comanche Nation compact violate the federal trust obligation because they concern lands within other Tribes' reservations or former reservations. The argument is still wrong, because the compact does not authorize any outright acquisition. It simply identifies locations where new facilities might be located "subject to the land being taken into trust pursuant to 25 U.S.C. § 2719(b)(1)(A)." A.R. 19; A.R. 53. Nor does the compact purport to override the requirement under 25 C.F.R. §§ 151.2 and 151.7 that a Tribe obtain consent before land within another Tribe's reservation is taken into trust, because any *future* trust acquisition would still have to comply with all applicable regulations, including the consent requirement.

Plaintiffs' resort to broader invocations of trust obligations fares no better. They assert (at 74) that the Secretary owes "a general trust responsibility to Indian tribes" under IGRA, but have not identified a "specific trust dut[y]" imposed by statute, regulation, or treaty. *El Paso Nat. Gas Co.* v. *United States*, 750 F.3d 863, 892 (D.C. Cir. 2014). Section 2710(d)(8)(B)(iii)'s reference to "trust obligations" does not create a freestanding fiduciary duty; it simply directs the Secretary to disapprove compacts that violate trust obligations found elsewhere. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *United States*, 259 F. Supp. 2d 783, 790 (W.D. Wis. 2003) (IGRA "does not create a fiduciary duty; it is a regulatory scheme that balances the competing interests of the states, the federal government and Indian tribes."). Plaintiffs do not identify any other statute or regulation that creates a specific trust duty violated by the concurrence provisions.

B. Even If Any Of The Challenged Provisions Were Unlawful, The Appropriate Remedy Would Be To Sever Them, Not Invalidate The Entire Compacts.

More broadly, in light of the compacts' unambiguous severability clauses, Plaintiffs are wrong that the unlawfulness of any one of the challenged individual provisions would be a basis to invalidate the entire agreements. *See* Stitt Br. at 44-45. Plaintiffs advance several arguments against giving effect to the severability clauses, but none is persuasive.

First, Plaintiffs contend (at 67) that, because the compacts were not validly entered into by the State (and thus are "invalid in toto"), the severability clauses themselves are void. This argument is circular and largely academic, as it is premised on Plaintiffs' succeeding on their broader arguments challenging the entire compacts. If the Court agrees with the Governor that the compacts properly went into effect under IGRA, the severability clauses are fully operative.

Second, Plaintiffs argue that *Amador County* forecloses severability by stating that the Secretary must "'disapprove a compact if it would violate any of the three limitations in [25 U.S.C.

§ 2710(d)(8)(B)].'" Pls.' Resp. at 67 (quoting 640 F.3d at 381). But the provision at the very heart of *Amador County* actually supports severance. Section 2710(d)(8)(C) provides that a no-action compact is *approved*, "but *only* to the extent [it] is consistent with the provisions of" IGRA. 25 U.S.C. § 2710(d)(8)(C) (emphasis added). That statutory language—particularly the phrase "to the extent"—functions as a built-in severability mechanism, making clear that a compact can be partially approved: consistent provisions take effect, while inconsistent provisions do not. *See West Flagler*, 71 F.4th at 1063 (Secretary's approval extends "only to the extent the compact is consistent with . . . [IGRA]"). Plaintiffs assert (at 67) that "nothing in *West Flagler* unsettles" *Amador County*'s reasoning in this respect, but that misses the point. No one disputes that provisions that violate IGRA are invalid. The question is the remedy for a finding that *some* provisions, but not all of them, fall into that bucket. IGRA's "only to the extent" language answers that question by expressly contemplating partial invalidation. *See Citizen Potawatomi*, 881 F.3d at 1240-41 (concluding that the district court erred "in refusing to sever" one of the compact's provisions).[4]

Third, Plaintiffs contend (at 68) that the challenged provisions were each "an essential part of the agreed exchange" and therefore cannot be severed. But they can point to nothing in the compacts themselves that says that. To the contrary, the express terms of the compacts' severability clauses unambiguously state that if any provision "is subsequently determined by any federal court to be invalid or unenforceable under any present or future law," "the remainder of

[4] Plaintiffs' latest attempt to distinguish *Citizen Potawatomi* is again unavailing. They point out (at 67-68) that it "was not an APA case" and involved severance of a remedy provision, rather than a substantive compact term. But again, the point is that ordinary severability principles apply to IGRA compacts just like other contracts, regardless of whether "remedy" or "substantive" provisions are involved.

this Compact shall not be affected thereby." A.R. 32-33; A.R. 66. The parties thus expressly agreed that no individual provision is so essential as to require the invalidation of the entire compact if it is struck down. That contractual decision should be given its full effect. *See Citizen Potawatomi*, 881 F.3d at 1240-41.

Finally, wholesale invalidation of the compacts based on the presence of one or two unlawful provisions would be deeply disruptive and contrary to IGRA's purposes. The compacts govern ongoing gaming operations that affect numerous employees and tribal members. Severance preserves the valid provisions that define the parties' ongoing relationship while permitting correction of any isolated deficiency. Wholesale invalidation, by contrast, would wipe away perfectly lawful provisions of the compacts—a result Congress could not have intended when it enacted IGRA to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

CONCLUSION

For the foregoing reasons, Defendant Governor Stitt respectfully requests that the Court grant summary judgment in his favor and against Plaintiffs.

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Respectfully submitted,

/s/ Judson O. Littleton

Phillip G. Whaley (admitted pro hac vice)
RYAN WHALEY
400 North Walnut Avenue
Oklahoma City, OK 73104
(405) 239-6040
pwhaley@ryanwhaley.com

Jeffrey B. Wall
D.C. Bar. No. 500301
Judson O. Littleton
D.C. Bar No. 1027310
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036
(202) 955-8533
JWall@gibsondunn.com
(202) 955-8531
JLittleton@gibsondunn.com

Daniel A. Mejia-Cruz
D.C. Bar No. 90020466
SULLIVAN & CROMWELL LLP
1700 New York Avenue, N.W., Suite 700
Washington, D.C. 20006
(202) 956-7500
meijacruzd@sullcrom.com

Attorneys for Defendant Governor J. Kevin Stitt