IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF NATIONS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS OF FEDERAL DEFENDANTS AND MOTION TO DISMISS OF DEFENDANT MARK WOOMMAVOVAH

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INTRODUCTION

The Plaintiffs Cherokee, Chickasaw, Choctaw, and Citizen Potawatomi Nations ("CPN") (collectively, "Plaintiff Nations" or "Nations") show below that Federal Defendants'[1] motion to dismiss for lack of Article III standing under Rule 12(b)(1), Mem. Supp. Fed. Defs.' Mot. to Dismiss ("DOI Br.") at 10-24, ECF No. 106-1, and failure to state a claim upon which relief can be granted under Rule 12(b)(6), DOI Br. 24-34, and Defendant Chairman Woommavovah's motion to dismiss for lack of Article III standing under Rule 12(b)(1), Def. Mark Woommavovah's Mem. Supp. Mot. to Dismiss ("DCW Br."), ECF No. 107-1, should both be denied.

1. Plaintiff Nations have standing to protect their concrete interests in the conduct of Class III gaming under their Compacts and IGRA, and in the Secretary's fulfillment of her statutory obligations to only authorize Indian tribes to conduct Class III gaming activities in accordance with IGRA and the federal trust responsibility, and not to diminish Plaintiff Nations' rights under IGRA relative to other tribes. These interests have suffered injuries in fact as follows.

First, market participants suffer an injury in fact when the government frees their competitors from regulatory requirements, thereby allowing those competitors to engage in illegal transactions and increase competition in the marketplace. The Secretary's no-action approval of the Comanche and Otoe-Missouria Agreements, notwithstanding the invalidity and illegality of those Agreements, and the Defendant Chairmen's conduct of gaming at ten locations under those Agreements, impose such injuries on the Nations. Those actions illegally increase competition for gaming revenue in the markets in which Plaintiff Nations compete, including the Oklahoma and

[1] We refer to Federal Defendants collectively as the "Secretary," to the Tribal Leader Defendants collectively as the "Defendant Tribal Officials," to the State and Tribal Leader Defendants collectively as "Defendant State and Tribal Officials," and to Defendant Tribal Chairmen Woommavovah and Shotton as "Defendant Chairmen."

Dallas-area markets, reducing Plaintiff Nations' share of gaming revenue in those markets. *Second*, Plaintiff Nations suffer injury in fact because the Secretary's no-action approval of those Agreements permits the Defendant Chairmen to conduct illegal games that deprive Plaintiff Nations of the substantial exclusivity in Class III gaming that they were promised under their Compacts in exchange for paying the State a share of their gaming revenue. Nevertheless, Plaintiff Nations remain obligated to make those payments because the illegal games are purportedly permitted by the Secretary's no-action approval of the Agreements, rather than a change in state law (which under Plaintiff Nations' Compacts would terminate their revenue sharing obligations). That constitutes an injury in fact because it deprives Plaintiff Nations of both an essential Compact right and the remedy the Compact provides for the violation of that right. *Third*, all the Agreements divest Plaintiff Nations of the zone of exclusivity held under their Compacts and IGRA by purporting to give Defendant Governor Stitt's consent to gaming by the Comanche Nation, the Otoe-Missouria Tribe, the Kialegee Tribal Town ("KTT"), and the United Keetoowah Band ("UKB"),[2] at gaming facilities within designated areas, most of which are not Indian lands under IGRA, and which include lands within the reservation or former reservation of the Chickasaw Nation and CPN. Those opportunities are now being pursued by all four Tribes, and the Secretary has indicated that in her view those provisions are not illegal. All of these injuries are a direct result of the Secretary's no-action approvals of the Agreements and of the other Defendants' implementation of the Agreements notwithstanding their invalidity and illegality, and all will be redressed by a declaration that the Agreements are invalid under IGRA. Accordingly, the motions to dismiss for lack of standing should be denied.

[2] We refer to the Comanche, Otoe-Missouria, KTT and UKB Agreements collectively as "Agreements."

2. The Secretary's Rule 12(b)(6) motion should also be denied. The Nations have pled a cause of action for Causes of Action One to Three because under IGRA, the Secretary has authority to consider a compact only if it was "entered into" by the tribe and state, 25 U.S.C. § 2710(d)(8)(A)-(C), and controlling legal authority establishes that the State never "entered into" the Agreements. The Secretary therefore had no authority to review those Agreements, which are void. The Nations also have a cause of action for Causes of Action Four to Seven, which challenge the Secretary's decisions to allow the Agreements to go into effect by inaction, because in this Circuit the Secretary has a mandatory obligation to disapprove a compact that violates IGRA. As the Agreements contain multiple terms that are plainly illegal under IGRA, the Secretary was required to disapprove them.

ARGUMENT

I. STANDARD OF REVIEW.

A. Standards Applicable To A Motion To Dismiss For Lack Of Standing Under Rule 12(b)(1).

"To have standing, a plaintiff must 'present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.'" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019) (quoting *Davis v. FEC*, 554 U.S. 724, 733 (2008)). "The party invoking federal jurisdiction bears the burden of establishing the[] elements [of standing]." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted). "[P]laintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). "At the pleading stage, general factual allegations of injury resulting from [D]efendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S.

at 561 (second alteration in original) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

As "standing is a jurisdictional requirement," the instant motions to dismiss are evaluated under Rule 12(b)(1). *McKoy v. Spencer*, No. CV 16-1313 (CKK), 2019 WL 400615, at *3 (D.D.C. Jan. 31, 2019) (citing *Friends of Animals v. Jewell*, 828 F.3d 989, 991 (D.C. Cir. 2016); *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015)). Under Rule 12(b)(1), the court "must accept as true all factual allegations in the complaint and construe the complaint liberally, granting plaintiff the benefit of all inferences that can be drawn from the facts alleged." *Kialegee Tribal Town v. Zinke* ("*KTT*"), 330 F. Supp. 3d 255, 262 (D.D.C. 2018) (citations omitted). "[T]he court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *New Jersey v. EPA*, 989 F.3d 1038, 1045 (D.C. Cir. 2021) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003); *see also In re U.S. OPM Data Sec. Breach Litig.*, 928 F. 3d 42, 54 (D.C. Cir. 2019); *Amador Cnty., Cal. v. Salazar*, 640 F.3d 373, 378 (D.C. Cir. 2011). That includes assuming the validity of a plaintiff's interpretation of the laws and regulations on which her legal claim rests. *See Union of Concerned Scientists v. U.S. Dep't of Energy*, 998 F.3d 926, 930 (D.C. Cir. 2021).

In evaluating standing at the motion to dismiss stage "the plaintiff is protected from an evidentiary attack on his asserted theory by the defendant, just as the defendant is protected from compulsory discovery." *Ferrer v. CareFirst, Inc.*, 265 F. Supp. 3d 50, 52 (D.D.C. 2017) (quoting *Haase v. Sessions*, 835 F.2d 902, 907 (D.C. Cir. 1987)). That means Defendant Woommavovah

> "is barred *at this stage of the proceedings* from attacking the claims made [in the complaint]." *Id.* [D]efendant, therefore, cannot put forward evidence outside the pleadings to challenge a plaintiff's standing. *See id.* at 908. In short, the standing inquiry turns on the allegations in the complaint and any affidavits submitted by the plaintiff, not on evidence presented by [D]efendant. *See id.*

Id. (fourth alteration in original).[3]

"[I]f one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case." *LaRoque v. Holder*, 650 F.3d 777, 792 (D.C. Cir. 2011) (alteration in original) (quoting *Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009)); *see also Dep't of Com.*, 139 S. Ct. at 2565 ("For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue."). Once a plaintiff shows injury and establishes standing, it can assert violations of law that go against the "public interest" to overturn the government action, even if those violations do not cause the injury giving rise to standing. *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972); *Sierra Club v. Adams*, 578 F.2d 389, 391-93 (D.C. Cir. 1978); *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 n.5 (2006).

B. Standards Applicable To A Motion To Dismiss Under Rule 12(b)(6).

"A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the adequacy of a complaint on its face." *Johnson v. Comm'n on Pres.*

[3] Accordingly, this brief does not address extra-pleading evidence on which Defendant Chairman Woommavovah relies, which the Plaintiff Nations have moved to dismiss by separate motion. Defendant Chairman Woommavovah cites two cases to assert that a factual attack on standing is permitted at this stage. *See* DCW Br. 10 (citing *Oregonians for Floodplain Prot. v. U.S. Dep't of Com.*, 334 F. Supp. 3d 66 (D.D.C. 2018) and *Finca Santa Elena, Inc. v. U.S. Army Corps of Eng'rs*, 873 F. Supp. 2d 363 (D.D.C. 2012)). However, both cases considered facts outside the complaint to resolve questions of *ripeness*, not *standing*. *See Oregonians*, 334 F. Supp. 3d at 72-74 & n.4; *Finca Santa*, 873 F. Supp. 2d at 365, 370-71. No such question is posed here. *See Teva Pharms. USA, Inc. v. Sebelius*, 595 F.3d 1303, 1308-15 (D.C. Cir. 2010) (analyzing standing and ripeness as distinct but related questions); *Al-Owhali v. Ashcroft*, 279 F. Supp. 2d 13, 20 (D.D.C. 2003), ("'A motion to dismiss under 12(b)(1) for lack of standing . . . involves an examination of the face of the complaint . . . [,]' *Haase*, 835 F. 2d at 908, whereas challenges regarding ripeness or failure to exhaust administrative remedies can be either facial or factual challenges.") (alterations in original). His reliance on *FiberLight LLC v. National Railroad Passenger Corp.*, 81 F. Supp. 3d 93 (D.D.C. 2015), *see* DCW Br. 11, is also misplaced, as that court relied on *Haase* for the standard applicable to a 12(b)(1) motion to dismiss for lack of standing, *FiberLight*, 81 F.Supp.3d at 106, with which its analysis is consistent. *Id.* at 111-13. The Secretary's reliance on *Herbert v. National Academy of Sciences*, 974 F.2d 192 (D.C. Cir. 1992), DOI Br. 9, is also misplaced as subject matter jurisdiction, but not standing, was at issue there. *Herbert*, 974 F.2d at 409-414.

Debates, 202 F. Supp. 3d 159, 167 (D.D.C. 2016). Such a motion "does not test a plaintiff's ultimate likelihood of success on the merits; rather, it tests whether a plaintiff has properly stated a claim." *Connecticut v. U.S. Dep't of Interior*, 344 F. Supp. 3d 279, 295 (D.D.C. 2018) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). "In evaluating a [Rule 12(b)(6)] motion to dismiss, the Court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of plaintiff." *KTT*, 330 F. Supp. 3d at 263 (internal quotation marks omitted). "It is not necessary for the plaintiff to plead all elements of a prima facie case in the complaint." *Connecticut*, 344 F. Supp. 3d at 295-96 (citation omitted).

On a Rule 12(b)(6) motion, the court can consider matters of public record and other materials that are subject to judicial notice, *see N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1249 (D.C. Cir. 2020); *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007), and "documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss," *In re Domestic Airline Travel Antitrust Litig.*, 221 F. Supp. 3d 46, 54-55 (D.D.C. 2016).

II. PLAINTIFF NATIONS HAVE STANDING TO ASSERT THEIR CLAIMS AGAINST THE SECRETARY AND THE DEFENDANT CHAIRMEN.

To establish standing, "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical,'" *Lujan*, 504 U.S. at 560 (cleaned up); *accord Dep't of Com.*, 139 S. Ct. at 2565. Future injuries "may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Id.* (cleaned up) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414

n.5 (2013); *Union of Concerned Scientists*, 998 F.3d at 929; *New Jersey*, 989 F.3d at 1048; *In re Idaho Conservation League*, 811 F.3d 502, 508-09 (D.C. Cir. 2016)).[4]

"A 'concrete' injury must be 'de facto'; that is, it must actually exist." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). And "[f]or an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id.* at 339 (quoting *Lujan*, 504 U.S. at 560 n.1) (additional citations omitted). Importantly, Congress may "'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law,'" *id.* at 341 (alteration in original) (quoting *Lujan*, 504 U.S. at 578), though "Article III standing requires a concrete injury even in the context of a statutory violation," *id.* "As a general matter," a concrete injury is one that "has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts," and accordingly "courts should assess whether plaintiffs have identified a close historical or common-law analogue for their asserted injury," though "an exact duplicate in American history and tradition" is not required. *TransUnion*, 141 S. Ct. at 2204 (quoting *Spokeo*, 578 U.S. at 341). Plaintiff Nations have standing for each of their eight causes of action and for the relief they seek.

A. The Nations Have Concrete Interests In Gaming Under Their Compacts And In The Secretary's Lawful Discharge Of Responsibilities Under IGRA.

Each Plaintiff Nation has a legally-protected interest in the conduct of Class III gaming under IGRA and its Compact, *see* Compl. ¶¶ 70-72. Each Plaintiff Nation entered into an IGRA

[4] That standard controls here, not the more limited one on which the Secretary relies. *See* DOI Br. 11-12 (citing *Ctr. for Biological Diversity v. Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009); *La. Env't Action Network v. Browner*, 87 F.3d 1379, 1384 (D.C. Cir. 1996)). The Secretary misstates the law in asserting that a "certainly impending injury" is required to establish standing, *see* DOI Br. 1, 10, 11, 13, 14, 15, 24, 28, 34.

compact with the State,[5] *id.* ¶ 56, which was then approved or deemed approved by the Secretary, 25 U.S.C. § 2710(d)(8)(A), (d)(8)(C), and went into effect under IGRA, *id.* § 2710(d)(3)(B), Compl. ¶ 60. Each Plaintiff Nation conducts Class III gaming under its Compact today. Compl. ¶¶ 60, 69. Consistent with IGRA, each Plaintiff Nation's gaming revenues fund government operations and provide for the general welfare on its territory. Compl. ¶ 70.

Each Plaintiff Nation also has a legally-protected interest in the Secretary's fulfillment of her statutory obligations to only authorize Indian tribes to conduct Class III gaming activities in accordance with IGRA and the federal trust responsibility, and not to diminish the Plaintiff Nations' rights under IGRA relative to other tribes. Compl. ¶¶ 43-48, 72, 128; 25 U.S.C. § 5123(f). The Secretary is obligated to carry out those obligations in several ways.

First, the Secretary is only authorized to approve a compact that has been "entered into between an Indian tribe and a State." 25 U.S.C. § 2710(d)(8)(A); *see* 25 C.F.R. § 293.7. A compact executed by a state governor who lacks authority to bind the state is void. Compl. ¶¶ 43-48. In addition, 25 U.S.C. § 2710(d)(8)(A) "authorizes approval only of compacts 'governing gaming on *Indian lands*.'" *Amador Cnty.*, 640 F.3d at 381 (quoting 25 U.S.C. § 2710(d)(8)(A)); Compl. ¶ 26. *Second*, the Secretary "may disapprove a compact . . . only if such compact violates—(i) any provision of [IGRA], (ii) any other provision of Federal law . . . , or (iii) the trust obligations of the United States to Indians." 25 U.S.C. § 2710(d)(8)(B)(i)-(iii). "The Secretary must, however, disapprove a compact if it would violate any of the three limitations in that subsection, and those limitations provide the 'law to apply.'" *Amador Cnty.*, 640 F.3d at 381; Compl. ¶ 46. *Third*, "[i]f the Secretary does not approve or disapprove a compact" within forty-

[5] The State-Tribal Gaming Act ("STGA"), Okla. Stat. tit. 3A, §§ 261-282, offered Oklahoma tribes a Model Compact under which they could, after approval by the Secretary, "engage in Class III gaming on tribal lands" under IGRA, Compl. ¶ 53.

five days of its submission, the compact is deemed approved, "but only to the extent the compact is consistent with the provisions" of IGRA, 25 U.S.C. § 2710(d)(8)(C), and "subsection (d)(8)(C) . . . includes no exemption from th[e] obligation to disapprove illegal compacts" in § 2710(d)(8)(B), *Amador Cnty.*, 640 F.3d at 381. "[J]ust as the Secretary has no authority to affirmatively approve a compact that violates any of subsection (d)(8)(B)'s criteria for disapproval, he may not allow a compact that violates subsection (d)(8)(C)'s caveat to go into effect by operation of law." *Id.*; Compl. ¶ 47.[6] *Fourth*, the Secretary may not make decisions under IGRA that "classif[y], enhance[], or diminish[] the privileges and immunities available to the [Plaintiff Nations] relative to [the Comanche Nation, Otoe-Missouria Tribe, UKB, and KTT]. . . ." Compl. ¶ 128 (quoting 25 U.S.C. § 5123(f)). These provisions grant procedural rights to all Indian tribes, including the Nations. *Id.* ¶¶ 5, 127, 152, 186, 199, 230.

Plaintiff Nations also have a procedural right to challenge the Secretary's no-action approvals of the Agreements as arbitrary, capricious, and contrary to law, 5 U.S.C. § 706(2)(a); *see* Compl. ¶¶ 234, 238, 243, 249, 255, 260, 264.[7] The Nations properly rely on violations of their procedural rights to establish their standing. While "a bare procedural violation, divorced from any concrete harm, [does not] satisfy the injury-in-fact requirement of Article III." *Spokeo*, 578 U.S. at 341 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) and *Lujan*, 504 U.S.

[6] Accordingly, the Secretary's argument that she has no responsibility to disapprove compacts with illegal terms, DOI Br.14 n.8, is wrong, as we further show *infra* Section III.A.

[7] These allegations reject Defendant Chairman Woommavovah's assertion that IGRA's compacting process is designed to protect only the compacting tribes, DCW Br. 13, that the Nations lack a legally-protected interest in competing for gaming revenue, and that IGRA does not protect Indian tribes from competition in gaming, DCW Br. 26-27. Moreover, this briefly-sketched argument is not sufficiently supported for the Court to consider it. *See, e.g.*, *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." (quoting *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005))).

at 572)), "[t]his does not mean, . . . , that the risk of real harm cannot satisfy the requirement of concreteness," *id.* (citing *Clapper*). "[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Id.* Furthermore, "[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572 n.7. Once the plaintiff has asserted a "concrete interest" that is more than "a mere general interest in the alleged procedural violation common to all members of the public," *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014) (citing *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996)), "the normal standards for immediacy and redressability are relaxed," *id.* (citing *Lujan*, 504 U.S. at 572 n.7).[8]

B. The Plaintiff Nations' Standing Is Properly Grounded In The Secretary's Failure To Review And Disapprove The Agreements Under IGRA.

"Standing is usually self-evident when the petitioner is an object of the challenged government action." *New Jersey*, 989 F.3d at 1045 (citing *Lujan*, 504 U.S. at 561-62). It may also be shown when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," in which case "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction," and "it becomes the burden of the plaintiff to adduce facts showing that those choices

[8] Furthermore,

> the plaintiff "need not demonstrate that but for the procedural violation the agency action would have been different," and does not need to "establish that correcting the procedural violation would necessarily alter the final effect of the agency's action on the plaintiff's interest," *id.* "Rather, if the plaintiff[] can 'demonstrate a causal relationship between the final agency action and the alleged injuries,' the court will 'assume[] the causal relationship between the procedural defect and the final agency action.'"

Id. (second alteration in original) (quoting *Mendoza*, 754 F.3d at 1010, and *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1160 (D.C. Cir. 2005)).

have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562 (citing *Warth v. Seldin*, 422 U.S. 490, 505 (1975)). Movants argue that "one can not have standing in federal court by asserting an injury to someone else," and that therefore the unlawful taxation and regulation authorized by the Agreements cannot establish Plaintiff Nations' standing. DOI Br. 19 (quoting *Viet. Veterans of Am. v. Shinseki*, 599 F.3d 654, 662 (D.C. Cir. 2010)); DCW Br. 12-13 (advancing like argument with respect to the Agreements' illegal regulation of Class II gaming and revenue sharing, and illegal authorization of the iLottery). That argument fails because Plaintiff Nations rely on the illegality of these provisions to show that the Secretary had a legal obligation to disapprove the Agreements, not to establish an injury from these provisions. *See* Compl. ¶¶ 158, 153, 181, 186, 199-200. The injury to Plaintiff Nations arises from the Secretary's no-action approval of the Agreements notwithstanding these illegal provisions, *id.* ¶¶ 186-187, 199-200, which is a proper basis for standing because the Defendant State and Tribal Officials responded to the Secretary's no-action approval of the Agreements by making choices, *see infra* at 15, that "produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 561-62; *see Morton*, 405 U.S. at 737; *Adams*, 578 F.2d at 391-93.

Plaintiff Nations have standing to challenge the Secretary's failure to disapprove the Agreements because this case satisfies the "two categories of cases where standing exists to challenge government action though the direct cause of injury is the action of a third party." *Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1275 (D.C. Cir. 2007).

> First, standing exists where the challenged government action authorized conduct that would otherwise have been illegal. In such cases, if the authorization is removed, the conduct will become illegal and therefore very likely cease. Hence, "[c]ausation and redressability . . . are satisfied in this category of cases, because the intervening choices of third parties are not truly independent of government policy. . . . [T]hey could only preclude redress if those third parties took the extraordinary measure of continuing their injurious conduct in violation of the law."

> Second, standing has been found "where the record presented substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress."

Id. (alterations in original) (citation and quotation omitted).

The Secretary's no-action approvals of the Agreements "authorized conduct that would otherwise have been illegal," *id.*, namely the operation and regulation of Class III gaming activities, which are lawful only if "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under [§ 2710(d)(3)] that is in effect," 25 U.S.C. § 2710(d)(1)(C). And as Defendant State and Tribal Officials submitted the Agreements to the Secretary for approval as compacts under IGRA in order to establish the legality of the activities purportedly authorized by their terms, Compl. ¶¶ 81, 101 & Exs. 1-4 (Agreements pmbl.), "[c]ausation and redressability . . . are satisfied in this . . . case[], because the intervening choices of [the Defendant Tribal Officials] are not truly independent of government policy," *Renal Physicians*, 489 F.3d at 1275 (first and second alterations in original). And "if the authorization is removed, the conduct will become illegal and therefore very likely cease." *Id.* The second category is also satisfied here, as the Defendant Chairmen's conduct of Class III gaming in reliance on the Secretary's no-action approval of the Agreements, "leav[es] little doubt as to causation and the likelihood of redress." *Id.* (quotation omitted).[9]

[9] The cases on which the Secretary relies to argue standing is lacking here, *see* DOI Br. 19-20, are inapposite because the Plaintiff Nations have concrete interest that have sustained injuries in fact as a direct result of the Secretary's no-action approval and the actions taken by the Defendant Chairmen in reliance on the Secretary's action, which is a proper basis for standing under *Lujan*, 504 U.S. at 562, and *Renal Physicians*, 489 F.3d at 1275.

C. The Secretary's And Defendant Tribal Officials' Actions Under The Agreements Impose Injuries In Fact On The Plaintiff Nations.

1. The Plaintiff Nations suffer a competitive injury from the Secretary's and Defendant Chairmen's actions under the Agreements.

The complaint properly alleges that Plaintiff Nations have competitive standing. They suffer an injury in fact as a direct result of the Secretary's no-action approvals of the Agreements, which the Defendant Chairmen rely on to conduct gaming at ten locations within the same markets in which the Plaintiff Nations compete, notwithstanding that the Agreements were not validly entered into by the State and contain multiple terms that violate IGRA. Under the competitive injury doctrine, "economic actors suffer an injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them." *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 211-12 (D.C. Cir. 2013) (quoting *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010)); *accord Mendoza*, 754 F.3d at 1011; *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998); *see also Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 394 (1987); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970). "The nub of the 'competitive standing' doctrine is that when a challenged agency action authorizes allegedly illegal transactions that will almost surely cause petitioner to lose business, there is no need to wait for injury from specific transactions to claim standing." *El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995). The competitive standing doctrine applies here.

The Secretary's no-action approvals lift IGRA's regulatory restrictions by allowing Agreements to go into effect that are invalid under IGRA, Compl. ¶¶ 107-130, and contain multiple terms that violate IGRA, *id.* ¶¶ 131-231.z. The Secretary's no-action approval also allows the Defendant Chairmen to engage in illegal transactions as IGRA requires a valid compact for gaming on Indian lands to be lawful, 25 U.S.C. § 2710(d)(1)(C), and they conduct Class III gaming "without a compact that was validly entered into by the State, under agreements that violate

IGRA," Compl. ¶ 109.[10] Counsel for Defendant Chairmen refuse to recognize as binding the Oklahoma Supreme Court ruling that the Comanche and Otoe-Missouria Agreements are invalid, *see id.* ¶¶ 96 231.m (quoting *Treat v. Stitt* ("*Treat I*"), 2020 OK 64, ¶¶ 4-5, 473 P.3d 43); DCW Br. 15 n.6. Instead they "continue[] to represent that their respective Agreements are valid compacts under IGRA," under which they continue to conduct Class III gaming, Compl. ¶ 231.q.

As a result of these statutory violations, the Plaintiff Nations suffer harms that are concrete and particularized. *See Spokeo,* 578 U.S. at 339-40. "As a direct result of the Defendant Secretary's failure to disapprove the Agreements under IGRA, the Plaintiff Nations must compete with the Comanche Nation, Otoe-Missouria Tribe, UKB, and KTT for Class III gaming revenues in the highly competitive Oklahoma gaming market, which will cause the Plaintiff Nations economic injury." Compl. ¶ 129. That injuries will arise from competition in the same market is "basic economic logic," and courts accept allegations of "future injury that are firmly rooted in the basic laws of economics." *United Transp. Union v. ICC,* 891 F.2d 908, 912 n.7 (D.C. Cir. 1989). More competitors give gaming patrons more choices of where to gamble which spreads gaming revenue thinner. And when competitors are competing without legal authorization, as are Comanche and Otoe-Missouria, it deprives those lawfully competing, i.e., Plaintiff Nations, of

[10] The Secretary's actions also violate her "statutory obligations under IGRA [to] protect the rights of all Indian tribes, including Plaintiff Nations, to conduct gaming under IGRA 'as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,' *id.* § 2702(1), and ensure that no tribe, including the Comanche, Otoe-Missouria, UKB, and KTT, may gain a competitive advantage over another, including Plaintiff Nations, by failing to comply with IGRA." Compl. ¶ 128. That does not mean, however, that all Indian tribes must conduct gaming under the same compact terms. *See* DOI Br. 23; DCW Br. 27. IGRA leaves it to the tribe and state to negotiate compact terms but requires that they do so within the limits IGRA prescribes. 25 U.S.C. § 2710(d)(3)(C). IGRA then imposes an obligation on the Secretary to review all compacts, *id.* § 2710(d)(8)(A)-(C), which ensures that only tribes with compacts that comport with IGRA may compete for gaming revenue. That is the meaning of the equal footing that the Secretary is obligated to provide under IGRA and 25 U.S.C. § 5123(f). Compl. ¶¶ 25, 72. Defendant Chairman Woommavovah's contrary argument therefore fails. DCW Br. 26-28.

gaming revenue. Relying on their invalid and illegal Agreements, Comanche and Otoe-Missouria currently operate a total of ten Class III gaming facilities "in the gaming market in which Plaintiff Nations compete, including the Oklahoma City and Dallas-area markets, which reduces the Plaintiff Nations' share of those markets and reduces the casino revenues earned by Plaintiff Nations, which constitutes an injury in fact." Compl. ¶ 231.y.[11] That injury is concrete because it "actually exists" *Spokeo*, 578 U.S. at 340, and it is "actual [and] imminent," *Spokeo*, 578 U.S. at 340, because it is ongoing. The injury is also particularized, as it affects each Plaintiff Nation's gaming revenue, which each uses for essential governmental purposes, Compl. ¶¶ 70, 231.b.-e.

Comanche and Otoe-Missouria also have a competitive advantage over tribes that conduct gaming under the Model Compact, such as Plaintiff Nations, because they pay less to the State under the Agreements than they did under their Former Compacts. Compl. ¶¶ 163, 231.n., o. That affords those Tribes additional revenue to improve their competitive position, by developing new facilities (like Comanche's new facility in Cache, Compl. ¶ 231.r.), acquiring property eligible for gaming under their Agreement (like Comanche has done on the Chickasaw Reservation, *id*. ¶ 231.s., and Otoe-Missouria is doing elsewhere, Compl. ¶ 231.o.), increasing payout rates, or making improvements to existing facilities. When some take such actions, other competitors are compelled to expend additional resources to keep pace, which necessarily requires anticipatory business planning and action. *See Sanchez v. Office of State Superintendent of Educ.*, No. 18-975 (RC), 2019 WL 935330, at *1-2, *4-5 (D.D.C. Feb. 26, 2019) (plaintiffs had standing to challenge future changes in licensing regulations where they would need to begin education imminently to

[11] These allegations reject Defendant Chairman Woommavovah's assertion that Plaintiff Nations do not allege that Comanche competes for gaming revenue in these markets. DCW Br. 24. Furthermore, the Comanche Nation's counsel has expressly stated that the Comanche Agreement "will provide the Nation with a competitive advantage over all other tribes *in its market-area, including the Dallas market*." *Id.* ¶ 231.o. (emphasis added).

meet those licensing qualifications); *New Jersey*, 989 F.3d at 1046 ("the exacerbated administrative costs and burdens imposed by the [EPA] Rule on petitioner constitute a concrete and particularized injury"). The Secretary's suggestion that the lower revenue sharing payments paid under the Comanche Agreement do not increase the competitiveness of gaming conducted under that Agreement, DOI Br. 21-22, is thus rejected by the allegations of the complaint and "basic laws of economics," *United Transp.*, 891 F.2d at 912 n.7. Nothing more is required because "on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. at 561-62 (alteration in original).

Accordingly, Plaintiff Nations have suffered an injury in fact under the competitive injury doctrine, which in this case provides more than just the requisite "common-law analogue," *TransUnion*, 141 S. Ct. at 2204, and thus readily confirms that the harm here is concrete. Furthermore, as the Secretary admits, "tribes have standing to challenge compacts that impose anti-competitive conditions aimed at frustrating IGRA's purpose of promoting economic development for all tribes." DOI Br. 23 (citing *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490 (7th Cir. 2005); *Forest Cnty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6 (D.D.C. 2016)).[12] And the competitive advantage afforded Defendant Chairmen as a result of the Secretary's no-action approval of their Agreements is considerably greater than in *Lac du Flambeau* and *Forest County*. Those cases concerned claims of future harm arising from provisions in one tribe's compact that would have required the signatory state to compensate a tribe for revenue lost if the state approved another tribe's off-reservation gaming application, which put the second tribe at a "competitive disadvantage when seeking state approval for off-

[12] The Secretary also cites *Confederated Tribes of Grande Ronde Community of Oregon v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016), which does not mention standing or the competitive injury doctrine.

reservation gaming," *Forest Cnty.*, 317 F.R.D. at 12-13; *Lac du Flambeau*, 422 F.3d at 496. In this case, by contrast, the Secretary's no-action approval of the Comanche and Otoe-Missouria Agreements already permits Comanche and Otoe-Missouria to compete for gaming revenue in the same markets—including the Oklahoma City and Dallas markets—in which Plaintiff Nations compete under Agreements that are invalid and on terms that are illegal. Compl. ¶¶ 129, 231.o., v., y. Nothing is more anti-competitive than lifting regulations on some but not others, which is "anti-competitive conduct targeting []other tribe[s]," DCW Br. 27 (acknowledging IGRA protects against such harms), namely those tribes conducting gaming under valid compacts and in compliance with IGRA. "[T]he harm lies in the denial of equal treatment," *Lac du Flambeau*, 422 F.3d at 498 (cleaned up), and in the "alteration in competitive conditions" resulting from the no-action approvals, which "clearly amounts to a concrete injury," *Forest Cnty.*, 317 F.R.D. at 12 (quoting *Clinton v. City of New York*, 524 U.S. 417, 433 (1998)).[13]

The Secretary attempts to show that the Defendant Chairmen conduct of gaming does not constitute an injury in fact by misrepresenting the Plaintiff Nations' position: "Plaintiffs disclaim any objection to Comanche and Otoe-Missouria offering the games permitted by the model compact—the games Comanche and Otoe-Missouria are offering now." DOI Br. 18 (citing ECF No. 103 at 15). Not so. The Plaintiff Nations stated that they do not object to gaming *that is lawfully conducted under IGRA*, i.e., gaming conducted under the Model Compact. ECF No. 103 at 15. The gaming conducted by Defendant Chairmen under the Comanche and Otoe-Missouria Agreements is not lawful under IGRA. Accordingly, Plaintiff Nations have not disclaimed any objection to the games that Comanche and Otoe-Missouria are conducting. Compl. ¶ 231.v., y.

[13] Accordingly, the Secretary's assertion that the invalidity and illegality of the Agreements is "untethered to any alleged harm" and is simply a "generalized grievance" is wrong and the cases she relies on are therefore inapposite. *See* DOI Br. 24 n.12.

The Secretary is also wrong in asserting that Comanche and Otoe-Missouria are conducting games permitted under the Model Compact. The gaming devices purportedly authorized under the Comanche and Otoe-Missouria Agreements are legally distinct from those authorized under the Plaintiff Nations' Compacts. The Agreements define "Gaming Machine" to mean:

> a mechanical, electromechanical, or an electronic contrivance or machine that uses a random number generator for an outcome and that, upon insertion of a coin, token, or similar object, or upon payment of any consideration in any manner, is available to play or operate a game of chance in which the outcome depends to a material degree on an element of chance, notwithstanding that some skill may be a factor, whether the payoff is made automatically from the Gaming Machine or in any other manner.

Comanche Agreement Part 2.A.19.; Otoe-Missouria Agreement Part 2.A.18.; UKB & KTT Agreements Part 2.A.16. The games permitted under the Model Compact, namely "electronic amusement games," "electronic bonanza-style bingo games," and "electronic instant bingo games," Compact Part 3.5., which organization licensees are permitted to conduct under the STGA, Okla. Stat. tit. 3A, § 262(C), are defined differently. Compact Part 3.10-12; Okla. Stat. tit. 3A, § 269(5)-(7).[14] In *Treat v. Stitt* ("*Treat II*"), 2021 OK 3, 481 P.3d 240, the Oklahoma Supreme Court made clear that these differences have legal significance by holding that "[t]he new compacts

[14] The Model Compact provides in Parts 3.10 to 12. that:

> 10. Electronic amusement game means a game that is played in an electronic environment in which a players performance and opportunity for success can be improved by skill that conforms to the standards set forth in the State-Tribal Gaming Act;
>
> 11. Electronic bonanza-style bingo game means a game played in an electronic environment in which some or all of the numbers or symbols are drawn or electronically determined before the electronic bingo cards for that game are sold that conforms to the standards set forth in the State-Tribal Gaming Act;
>
> 12. Electronic instant bingo game means a game played in an electronic environment in which a player wins if his or her electronic instant bingo card contains a combination of numbers or symbols that was designated in advance of the game as a winning combination. There may be multiple winning combinations in each game and multiple winning cards that conform to the standards set forth in the State-Tribal Gaming Act . . . .

contain terms that are *different or outside the Model Compact provisions* altogether. Due to the statutory nature of the Model Compact, *the new and differing provisions operate as the enactment of new laws and/or amend existing laws*, which exceeds the authority of the Executive branch." *id.* ¶ 11 (emphasis added). Accordingly, the games Comanche and Otoe-Missouria claim to be authorized to conduct are not permitted under the Model Compact.

Defendant Chairman Woommavovah's like contention also fails. He asserts that even if Comanche did compete with Plaintiff Nations for customers from Dallas or Oklahoma City under the Comanche Agreement, and that agreement is illegal, Comanche could nonetheless conduct Class III gaming under its Former Compact.[15] DCW Br. 24-25.[16] That is wrong. Their Agreements are the sole legal basis on which Comanche and Otoe-Missouria may claim a right to conduct Class III gaming. Compl. ¶¶ 76-79, 109; ECF No. 72 at 42-43. In proceedings before the Federal District Court for the Western District of Oklahoma, Comanche and Otoe-Missouria had earlier claimed that its Former Compact automatically renewed on January 1, 2020, but they then moved to dismiss that claim with prejudice, and the Court granted that motion on April 24, 2020. Compl. ¶¶ 69, 73-79. Having given up a claim that its Former Compact was in effect after January 1, 2020, Comanche cannot now claim rights under that Compact. Nor does the severability clause of the Comanche Agreement save its conduct of Class III gaming. *Cf.* DCW Br. 25. The Comanche Agreement, including the severability clause, is invalid *in toto* because it was not

[15] Comanche and Otoe-Missouria earlier accepted the Model Compact and thereby entered into IGRA compacts. We refer to these compacts as the "Former Compacts." Compl. ¶ 57.

[16] Chairman Woommavovah attacks a strawman by arguing that Comanche could still conduct Class II gaming, as it does not require a compact, DCW Br. 25. Class II gaming is not at issue in this action, except with respect to the illegal provisions of the Agreements that purport to regulate it. *See* Compl. ¶¶ 189-200. Notably, Comanche now appears to admit that a compact cannot lawfully regulate Class II gaming, as the Secretary earlier determined in approving Comanche's Former Compact. ECF No. 72-5 at 3.

validly entered into. *See In re Treat*, 2020 OK AG 8, 2020 WL 2304499; *Treat I*; *Treat II*. Moreover, nothing in that clause purports to revive rights that Comanche dismissed with prejudice. Finally, even if these contentions had merit, they cannot be relied on now to defeat Plaintiff Nations' standing because in determining standing the court "must . . . assume that on the merits the plaintiffs would be successful in their claims," *New Jersey*, 989 F.3d at 1045 (quoting *City of Waukesha*, 320 F.3d at 235).

In sum, Plaintiff Nations suffer an injury in fact under the competitive injury doctrine as a result of the Secretary's no-action approval of the Comanche and Otoe-Missouria Agreements. That injury establishes standing for causes of action one to seven of the complaint. Had the Secretary complied with her statutory obligations under IGRA to consider whether the Agreements were validly entered into by the State (causes one and three, Compl. ¶¶ 232-235, 241-244) and whether any of the provisions of the Agreements are invalid (causes two and four to seven, Compl. ¶¶ 236-240, 245-265), she would have disapproved the Agreements, which would have avoided the harm to the Nations from the Defendants' conduct of gaming at ten locations within the same markets in which the Plaintiff Nations compete. This case also satisfies each of the "two categories of cases where standing exists to challenge government action though the direct cause of injury is the action of a third party," *Renal Physicians.*, 489 F.3d 1267 at 1274, which in this case is the Defendant Chairmen, *see supra* at 11-12. That injury also supports standing for the Nations' claim against the Defendant Chairmen because the direct cause of the injury is the conduct of gaming at ten locations by Comanche and Otoe-Missouria in reliance on the Secretary's no-action approval of the Agreements.

2. The Agreements deprive Plaintiff Nations of their Compact rights to substantial exclusivity in Class III gaming, which is an injury in fact.

Plaintiff Nations also suffer an injury in fact because the Secretary's no-action approvals of the Agreements and Defendant Chairmen's actions under their Agreements deprive Plaintiff Nations of their Compact rights to substantial exclusivity in Class III gaming and of the remedy their Compacts provide for the divestiture of that right. In their Compacts, Plaintiff Nations were promised substantial exclusivity in exchange for agreeing to pay the State a share of their gaming revenue "*so long as the state does not . . . change its laws to permit any additional electronic or machine gaming within Oklahoma*." Compact Part 11.A. (emphasis added). The Agreements divest the Plaintiff Nations of these Compact rights, which IGRA protects,[17] by purporting to authorize gaming that constitutes "additional electronic or machine gaming," *see infra* at 23-24, without terminating their obligations to make revenue sharing payments to the State as the Agreements, rather than state law, purport to authorize those games. If the Secretary had disapproved the Agreements, Plaintiff Nations' substantial exclusivity would be intact. Alternatively, if the Secretary had ruled that the new games authorized under the Agreements were permitted under state law, Plaintiff Nations would no longer be obligated to pay revenue sharing to the State. The Secretary avoided both of these outcomes by approving the Agreements by inaction. This constitutes an injury in fact because the Secretary's actions deprive Plaintiff Nations of both an essential Compact right and the remedy the Compact provides for the violation of that right. And because the Defendant Chairmen are both conducting and claim the right to conduct, "additional electronic or machine gaming" under the Agreements—relying on the Secretary's no-

[17] As the Plaintiff Nations' Class III gaming ordinances have been approved, Compl. ¶ 49, "class III gaming activity on the[ir] Indian lands . . . shall be fully subject to the terms and conditions of the Tribal-State compact entered into under [25 U.S.C. § 2710(d)(3)] that is in effect," as are the Nations' Compacts. Compl. ¶¶ 60, 69.

action approval—their actions impose an injury in fact on Plaintiff Nations. That harms both the Nations' IGRA-protected Compact rights and their private rights under the Compacts as contracts, *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1556 (10th Cir. 1997) ("A compact is a form of contract."). The latter harm "has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts," *TransUnion*, 141 S. Ct. at 2204 (quoting *Spokeo*, 578 U.S. at 341), namely interference with contract, *see* Restatement (Third) of Torts: Liab. for Econ. Harm § 17 (2020) ("Restatement § 17").[18]

[18] This is readily shown by analogy to the six elements of interference with contract. *See* Restatement § 17. First, a "valid contract[s] existed between the plaintiff [Nations] and a third party [the State]," *Id.* § 17(1)(a), i.e. the Compacts, Compl. ¶ 60-61. Second, "the defendant[s] knew of the" Compacts, Restatement § 17(1)(b), Compl. ¶¶ 62, 69, 72-79, 100. Third, "the defendant[s] engaged in wrongful conduct as defined in Subsection (2)," Restatement § 17(1)(c), because "the defendant's conduct constituted an independent and intentional legal wrong" under Restatement § 17(2)(b). That is shown by: the Secretary's unlawful no-action approval of the Agreements even though she was informed that the Agreements were invalid, Compl. ¶¶ 80-91, 96-97, 102, 109, 124-125, 231.v., and Defendant State and Tribal Officials' unlawful submission of the Agreements to the Secretary for approval under IGRA and their actions under the Agreements, *id.* ¶¶ 96-98, 112, 123, 126, 130, 140, 146, 153, 231.i.-j., m., p.-r. Fourth, "the defendant[s] intended to cause a breach of the contract or disruption of its performance." Restatement § 17(d). That is shown by: (i) Defendant Governor Stitt's strategy of placing the Plaintiff Nations in a competitive disadvantage in gaming in Oklahoma, and the Secretary's complicity in that strategy, Compl. ¶¶ 107-09, 231.v.; (ii) the Secretary's decision to no-action approve the Agreements even though they authorize games that are illegal under IGRA and that afford Comanche and Otoe-Missouria a significant competitive advantage, Compl. ¶ 151, and also authorize Comanche to pursue gaming opportunities on Chickasaw Nation's and CPN's reservations or former reservations, *id.* ¶¶ 206-209, again notwithstanding that she was informed of these legal defects, which meant her unlawful conduct was "deliberate and intentional," *id.* ¶ 231.v.; (iii) Defendant Tribal Officials' admission that the Agreements secured them a competitive advantage over tribes that conduct gaming under the Model Compact, *id.* ¶¶ 231.n.-s.; (iv) Defendant Tribal Officials' commitment to continue to conduct gaming under the Agreements even after *In re Treat*, *Treat I* and *Treat II*, *see* Compl. ¶¶ 96-98, 231.i.-j., m., p.-r.; and (v) Defendant Chairman Woommavovah's predecessor's entry into the Comanche Agreement, which purports to authorize the Comanche Nation to pursue gaming opportunities on the reservation or former reservation of the Chickasaw Nation and CPN, *id.* ¶ 206-09. Fifth, "the defendant[s'] wrongful conduct caused a breach of the contract or disruption of performance," Restatement § 17(e), as shown by the injuries in fact suffered by the Nations, *see supra* at 13-20, and by the loss of Plaintiff Nations' substantial exclusivity in Class III gaming on terms which still require Plaintiff Nations to pay revenue sharing to the State, *see supra*/*infra* at 21-26, and is a

The Compacts expressly secure Plaintiff Nations substantial exclusivity with respect to "covered games," Okla. Stat. tit. 3A, § 281 ("Compacts") Parts 3.5.,[19] 4.A., 11.A. In exchange, Plaintiff Nations agree to pay the State a share of their Class III gaming revenues "*so long as the state does not* change its laws to permit the operation of any additional form of gaming by any such organization licensee, or *change its laws to permit any additional electronic or machine gaming within Oklahoma*." *Id.* Part 11.A. (emphasis added). The Compacts further provide that

> [the State] will not, during the term of this Compact, permit *the nontribal operation of any machines or devices to play covered games or electronic or mechanical gaming devices otherwise presently prohibited by law within the state in excess of the number and outside of the designated locations authorized by the State-Tribal Gaming Act*.

Id. Part 11.E. (emphasis added). "[I]n the event of a breach of this provision by the state," the State must pay liquidated damages to eligible tribes. *Id.* The Agreements deprive Plaintiff Nations of these Compact rights by authorizing various additional forms of electronic or machine gaming, including additional nontribal gaming of that kind.

The Agreements authorize each signatory tribe to operate "Gaming Machines," which are a "covered game" under the Agreements, Comanche Agreement Part 2.A.7.; Otoe-Missouria

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breach of the Compacts. Sixth, and finally, "the plaintiff [Nations] suffered economic loss as a result," Restatement § 17(f), as shown by the Plaintiff Nations' competitive injuries arising from the conduct of gaming by the Comanche and Otoe-Missouria at ten locations, *see infra* at 28, by the loss of Plaintiff Nations' substantial exclusivity in Class III gaming on terms which still require Plaintiff Nations to pay revenue sharing to the State, *see supra*/*infra* at 21-26, and by the substantial risk to Plaintiff Nations' gaming revenues posed by the eight new facilities that the Agreements permit Defendant Tribal Officials to pursue, and which they are now pursuing, *see infra* at 34-35.

[19] Under Part 3.5. of Plaintiff Nations' Compacts, "covered games" are

> an electronic bonanza-style bingo game, an electronic amusement game, an electronic instant bingo game, nonhouse-banked card games; [and] any other game, if the operation of such game by a tribe would require a compact and if such game has been: (i) approved by the Oklahoma Horse Racing Commission for use by an organizational licensee, (ii) approved by state legislation for use by any person or entity, or (iii) approved by amendment of the [STGA]; . . . .

Agreement Part 2.A.6.; UKB & KTT Agreements Part 2.A.6, but are not a "covered game" under the Model Compact, *Treat II* at ¶ 11, or Plaintiff Nations' Compacts. *See supra* at 23 & n.19. Their authorization and use at ten locations by Defendant Chairmen deprive Plaintiff Nations of the substantial exclusivity held under Part 11.A. of their Compacts. The Comanche and Otoe-Missouria Agreements also permit those two tribes to conduct "Event Wagering," either "over the counter or electronically," Comanche Agreement Parts 2.A.7., 13., 13.d.; Otoe-Missouria Agreement Part 2.A.6., 12., 12.d., and authorizes the State to "license up to five (5) non-tribal Event Wagering locations," Comanche Agreement Part 2.A.13.b; Otoe-Missouria Agreement Part 2.A.12.b., which constitutes "additional electronic or machine gaming" under the Model Compact and Plaintiff Nations' Compacts, Part 11.A. Because Event Wagering is not authorized under state law, and IGRA does not authorize a state to conduct gaming under a compact, these provisions are also illegal under IGRA. Compl. ¶¶ 131-32, 139; 25 U.S.C. §§ 2710(d)(1)(B), 2710(d)(3)(C).

All four Agreements also authorize the State to conduct the "iLottery," Agreements Part 3.B, which includes any electronic lottery game with the "elements of consideration, chance, and prize." Comanche Agreement Part 2.25.; Otoe-Missouria Agreement Part 2.23.; UKB & KTT Agreements Part 2.18. This permits a much broader array of games than state law authorizes—contrary to the Secretary's assertion, DOI Br. 17—and those additional games are illegal under IGRA. Compl. ¶¶ 184. The Oklahoma Lottery Commission ("OLC") is only authorized to conduct the Lottery, Okla. Stat. tit. 3A, § 703(9),[20] and to accept entries in "lottery-sponsored

[20] The Lottery Act "exclude[es] charity bingo and games conducted pursuant to the Oklahoma Charity Games Act, poker, blackjack, slot machines, pulltab machines, card games, dice, dominos, roulette wheels, or other similar forms of gambling, *or electronic or video forms of these gambling activities*, or games where winners are determined by the outcome of a sports contest, or pari-mutuel betting conducted pursuant to the Oklahoma Horse Racing Act." Okla. Stat. tit. 3A, § 703(9). The Agreements provide substantially identical exclusions, *see* Compl. ¶ 183, and thus do not impose new limits, contrary to the position taken by the Secretary. DOI Br. 17.

promotions and second-chance drawing promotions offered by the Commission" through "a web application provided or sponsored by the Commission." H.B. 3538, 2018 Okla. Sess. Laws 125, § 1(A)-(B), *codified at* Okla. Stat. tit. 3A, § 724.5(A)-(B). That is a far cry from the broad forms of iLottery games authorized by the Agreements.

The Secretary's no-action approvals of the Agreements constitutes an injury in fact because it puts Plaintiff Nations in the worst possible position: the Agreements authorize "additional electronic [and] machine gam[es]" that deprive Plaintiff Nations of the substantial exclusivity in gaming in exchange for which they agreed to pay revenue sharing to the State, Compacts Part 11.A., but because the Agreements, rather than state law, purport to authorize those games, the Plaintiff Nations remain obligated to pay revenue sharing to the State.[21] The injury is concrete as it "actually exist[s]," *Spokeo*, 578 U.S. at 341 (cleaned up), and for the reasons shown *supra* at n.18. Defendant Chairmen are conducting "additional electronic or machine gaming" by using Gaming Machines, relying on the Secretary's no-action approval of the Agreements, and Plaintiff Nations are conducting gaming under their Compacts, Compl. ¶ 70, without the substantial

[21] The Secretary's conduct was wrongful, *see supra* at n.18; Restatement § 17(1)(c), for the additional reason that the Secretary "acted for the purpose of appropriating the benefits of the plaintiff's contract." *Id.* § 17(2)(a). The Secretary earlier relied on Plaintiff Nations' right to substantial exclusivity in gaming to approve revenue sharing payments under the Compacts, finding that they did not violate 25 U.S.C. § 2710(d)(4) because the State had made meaningful concessions in exchange for those payments. ECF No. 72-8 at 3; ECF No. 72-9 at 3-4; ECF No. 72-10 at 3; ECF No. 72-11 at 3 ("Compact Approval Letters"). The Secretary also found that "both the Tribe and State agree that [Part 11 of the Compacts] provides for the cessation of revenue-sharing payments to the State should the exclusive rights of compacting tribes to operate covered games be diminished. *Id.* The Secretary is chargeable with knowledge of these terms, and accordingly her no-action approval of the Agreements purposely deprived Plaintiff Nations of the substantial exclusivity promised by the Compacts without negating the revenue sharing provisions and while denying Plaintiff Nations their Compact remedy for the loss of substantial exclusivity. That is consistent with her complicity in the State's effort to put the Plaintiff Nations at a competitive disadvantage against the Tribes that signed the Agreements. Compl. ¶¶ 107-109; 231.v.

exclusivity they were promised, but remain obligated to pay revenue sharing to the State. That imposes a "particularized" injury because it "affect[s] [each Plaintiff Nation] in a personal and individual way," *Spokeo*, 578 U.S. at 341, namely, each Plaintiff Nation must compete for gaming revenue with competitors offering "additional electronic or machine gaming" in violation of Plaintiff Nations' Compact rights, which is a competitive injury, *see supra* at 13-20, and must also make revenue sharing to the State.[22] And it is "actual [and] imminent," *Spokeo*, 578 U.S. at 340, because it is presently ongoing. That injury establishes standing for causes of action one to four of the complaint, Compl. ¶¶ 232-250, because had the Secretary complied with her statutory obligations under IGRA to consider whether any of the provisions of the Agreements are invalid, she would have disapproved the Agreements because the additional games they purport to authorize violate the Plaintiff Nations Compact rights and are illegal under IGRA and state law, which would have avoided the harm to the Nations' Compact right to substantial exclusivity in Class III gaming. That injury also supports standing for the Nations' claim against the Defendant Chairmen, Compl. ¶¶ 266-268, because the direct cause of the injury is their conduct of gaming at ten locations, and their claim of right to conduct "additional electronic or machine gaming" under the Agreements either at a time of their choice, or upon State legislative approval of such games.

The Secretary argues that any harm from the illegal games authorized by the Agreements is "far from certainly impending," asserting that those games are not played in Oklahoma, and that Defendant Tribal Officials have said they will not play those games "until the Oklahoma legislature changes Oklahoma law." DOI Br. 13-14; *see also* DCW Br. 15-17. The Secretary has

[22] That the other tribes that conduct gaming under the Model Compact suffer this injury as well, makes no difference. "[T]he particularity requirement does not mean, . . . , that a plaintiff lacks standing merely because it asserts an injury that is shared by many people. . . . [W]here a harm is concrete, though widely shared, the [Supreme] Court has found 'injury in fact.'" *Lac du Flambeau*, 422 F.3d 497 (citing *FEC v. Akins*, 524 U.S. 11, 23-25 (1998)).

the standard wrong in two critical ways. First, an injury in fact may be shown where "there is a substantial risk that the harm will occur," *Dep't of Com.*, 139 S. Ct. at 2565 (citation and internal quotation marks omitted). Second, the Complaint alleges that the Secretary committed a procedural violation by failing to disapprove the Agreements when they were submitted to him because they authorize games that are illegal, Compl. ¶¶ 4, 72, 127, 151-152. Thus, the question is not whether the Defendant Chairmen are playing the illegal games now, but whether the Secretary should have disapproved the Agreements when they were before him because they authorize illegal games. The answer to that question is clear: IGRA only authorizes a tribe to conduct Class III gaming activities that are "located in a State that permits such gaming for any purpose by any person, organization, or entity," 25 U.S.C. § 2710(d)(1)(B), and obligates the Secretary to disapprove a compact that violates IGRA. *Amador Cnty.*, 640 F.3d at 381; Compl. ¶ 47. And the Secretary's admission that "the [new] games are not currently permitted by Oklahoma law," DOI Br. 14, effectively concedes that the Secretary should have disapproved the Agreements for that reason. Had the Secretary done so, Plaintiff Nations would have retained their substantial exclusivity in gaming. *See supra* at 21-25.

The Secretary is also wrong in asserting that Defendant Chairmen are not conducting illegal games, as the Agreements are invalid and thus all gaming conducted under their terms is illegal, and the Agreements purport to authorize the conduct of gaming using Gaming Machines that are illegal under state law because they are distinctly different from the electronic gaming authorized under the Model Compact. *See supra* at 23-24. And Plaintiff Nations suffer a competitive injury from Defendant Chairmen's conduct of those games. *See supra* at 13-17. The Secretary's related claim that "the proposition . . . that the Compacting tribes will conduct illegal gaming" is unsupported by "factual allegations," DOI Br. 14, fails for obvious reasons: Defendant Chairmen

refuse to recognize that the Agreements are invalid, as determined in *In re Treat*, *Treat I*, and *Treat II*, and are conducting illegal gaming at ten locations under the purported authority of the Agreements. Compl. ¶¶ 98, 231.h., i., m., q., y. Indeed, the Comanche Nation is building a new casino that will offer an additional 250 Gaming Machines. *Id.* ¶ 231.r.[23] The Secretary's assertion that "the Complaint does not allege any fact showing the Compacting Tribes intend to [conduct event wagering]," DOI Br. 15, is also wrong. Plaintiff Nations allege that the former Chairman Nelson's statements on that issue "are not binding and may change at any time," Compl. ¶ 140. And while Defendant Chairman Woommavovah admits that *Treat I* held that the Governor "did not have authority to authorize the additional games in the compact," he asserts that Comanche is not bound by *Treat I* and states that it "has made the business decision not to offer house-banked card games, house-banked table games, or event wagering." DCW Br. 15 n.6 (citing ECF 54-2 ¶ 7). In other words, the Comanche Nation's position is based on its own business interests, which can change at any time. For these reasons, Movants' assertion that Defendant Chairmen will not conduct event wagering and house-banked card and table games until they are lawful because they have so stated, DOI Br. 14-15 (quoting Compl. ¶ 140), DCW Br. 15-16, is unpersuasive.

Accordingly, there is a substantial risk that that Comanche will conduct illegal games, which will afford them a competitive advantage over the Plaintiff Nations. Compl. ¶ 151.[24] As

[23] Notably, that casino is not authorized by any agreement of any kind. The Comanche Agreement only purports to authorize gaming at "Existing Facilities," which means "those Facilities operated by the Tribe as of the Effective Date of the Compact," Comanche Agreement Parts 2.A.14., 4.J.1., and "New Facilities," which means facilities in Cleveland, Grady, or Love County, *id.* Part 4.J.2. The Cache casino is not an "Existing Facility" because the effective date of the Comanche Agreement was June 29, 2020, Compl. ¶ 93, and the Comanche Agreement did not break ground for that casino until April 3, 2021, Compl. ¶ 231.r., and because Cache is in Comanche County, *Comanche County, OK*, Google Maps, https://bit.ly/3oBfmwg (last visited Nov. 18, 2021).

[24] Defendant Chairman Woommavovah's contrary assertions, DCW Br. 16-17, fail because the allegations of the complaint must be accepted as true on his motion. *See supra* at 4.

counsel for the Comanche Nation has stated, "these types of new games will provide the [Comanche] Nation with a competitive advantage over all other tribes in its market-area." Complaint ¶ 231.o. The Secretary's contention that this is "hypothetical[]" is rejected by these facts,[25] and her assertion that Plaintiff Nations lack standing because the activity they are challenging is illegal, DOI Br. 15, is dead wrong: the fact that Defendants' conduct is illegal, and the Secretary's defiance of her obligation to disapprove the Agreements under IGRA for that very reason make this action necessary.

[25] The cases on which the Secretary relies to describe the risk posed here as "hypothetical[]" provide no support for that position. DOI Br. 16 (citing *Clapper*, 568 U.S. at 409; *City of Houston v. Dep't of Hous. & Urban Dev*., 24 F.3d 1421, 1429 n.6 (D.C. Cir. 1994); *Yoche Dehe Wintun Nation v. U.S. Dep't of Interior*, 3 F.4th 427, 431 (D.C. Cir. 2021)). *Clapper* acknowledged the "substantial risk" standard, 568 U.S. at 414 n.5, that the Secretary has consistently refused to acknowledge. *See supra* at n.4. *City of Houston* simply observed that "requests for declaratory relief which aim to prevent future illegal acts often will implicate standing concerns," 24 F.3d at 1429 n.6, and then recited the standard applicable to such claims, *id*., without referencing the substantial risk standard later recognized in *Clapper*. And in *Yocha Dehe*, the Secretary had issued an Indian Lands Opinion unfavorable to a casino project that the Scotts Valley Band of Pomo Indians sought to pursue. 3 F.4th at 428-29. Scotts Valley then brought an APA action to challenge that Opinion, in which the Yocha Dehe Wintun Nation—which opposed Scotts Valley's project—sought to intervene. To establish its standing, Yocha Dehe relied on a "claimed threat of future harm," namely, the possibility that the Opinion might be reversed. 3 F.4th at 430-31. The court held Yocha Dehe lacked standing because Yocha Dehe's relationship to the Opinion was indirect and based on "the as-yet remote nature of any harm to Yocha Dehe from a Scotts Valley casino." *Id.* at 431. More specifically, "neither Yocha Dehe nor its property [wa]s the direct subject of the Indian Lands Opinion." *Id.* at 431. Furthermore, Scotts Valley was not conducting gaming on the property, nor did it have a Tribal-State compact, nor had it enacted the tribal gaming ordinance that IGRA requires. *Id.* at 431. By contrast, in this case, the Secretary has approved the Agreements by inaction (which deprives Plaintiff Nations of their right to substantial exclusivity), Defendant Chairmen are conducting gaming at ten locations under the Agreements, including games that are illegal, Defendant Chairman Woommavovah asserts that whether to conduct Event Wagering, House-Banked Card Games, and House-Banked Table Games is a business decision for Comanche, and both Defendant Chairmen are pursuing additional gaming opportunities under the Agreements, which purport to allow Comanche and Otoe-Missouria to acquire land for gaming purposes on the Chickasaw Reservation, which constitutes an infringement on the sovereignty of the Chickasaw Nation, and makes Chickasaw a direct subject of the Secretary's no-action approval of the Comanche Agreement.

Finally, it is also clear that the Comanche Nation intends to conduct Event Wagering, House-Banked Card Games, and House-Banked Table Games when such games are authorized by state law. DCW Br. 15 & n.6. And at that time, Comanche and Otoe-Missouria will have a significant competitive advantage over Plaintiff Nations. "A competitor who offers new games has a significant competitive advantage over competitors who cannot offer those games, especially when those games include sports betting, for which the market is enormous." Compl. ¶ 151. In addition, while the Secretary considers the only hurdles for Comanche and Otoe-Missouria to be based on state law, DOI Br. 16, the Secretary takes the position that for Plaintiff Nations to conduct a new game that has been authorized by state law, her approval is necessary because it is a "substantial modification of the terms of the Compact." Compact Approval Letters at 3. The Secretary could therefore hold Plaintiff Nations up for as long as she wishes.[26]

3. The Nations have suffered an injury in fact because the Agreements deprive them of the "zone of exclusivity" promised by their Compacts.

The Secretary earlier determined that Plaintiff Nations' Compacts "provide[] for a zone of exclusivity." Compact Approval Letters at 2. The Compacts do so by expressly providing that "[t]he tribe may establish and operate enterprises and facilities that operate covered games only on its Indian lands as defined by IGRA," and that "[n]othing herein shall be construed as expanding or otherwise altering the term 'Indian lands', as that term is defined in the IGRA, nor shall anything herein be construed as altering the federal process governing the tribal acquisition of 'Indian lands' for gaming purposes." Compact Part 5.L. That limits each tribe that accepted the Model Compact to gaming on its own Indian lands.[27] That limitation is commanded by IGRA. "Everything—

[26] Defendant Chairman Woommavovah's assertion that Plaintiff Nations could conduct the new games as soon as Comanche could, DCW Br. 28, is therefore wrong.

[27] IGRA, 25 U.S.C. § 2703(4), defines "Indian lands" as:

(A) all lands within the limits of any Indian reservation; and

literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014). Furthermore, IGRA only authorizes an Indian tribe to conduct Class III gaming on Indian lands within its own jurisdiction.[28] 25 U.S.C. §§ 2710(d)(1)(A) (requiring tribal Class III gaming ordinance to meet requirements applicable to Class II gaming ordinance), 2710(b)(2) (Class II ordinance must "concern[] . . . class II gaming on the Indian lands within the tribe's jurisdiction."); *id*. § 2710(d)(2)(C) (upon approval and publication of tribal ordinance "class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact."); 2710(d)(3)(B) ("[a]ny State and any Indian tribe may enter into a Tribal-State compact governing gaming on the Indian lands of the Indian tribe"). The Secretary's authority to approve, disapprove, or approve by inaction, a compact is also limited to compacts that govern gaming "on Indian lands." 25 U.S.C. § 2710(d)(8)(A); *id*. (d)(8)(B) (Secretary "may disapprove a compact described in subparagraph (A)"); *id*. (d)(8)(C) (Secretary may approve by inaction "a compact described in subparagraph (A)"). Indeed, the Secretary concedes that "'Class

> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

[28] IGRA does not provide a process by which land may be taken in trust, which may be done under other statutes. Compl. ¶ 202. The Secretary thus errs in stating that land is taken into trust under § 2719(b)(1)(A), DOI Br. 25, as do the Comanche and Otoe-Missouria Agreements in referring to lands being "taken into trust pursuant to 25 U.S.C. § 2719(b)(1)(A)." *Id.* Part 4.J.2. IGRA simply provides under that provision that, if land was taken into trust after IGRA was enacted and is not on a reservation or former reservation in Oklahoma, IGRA-regulated gaming can only occur there if the Secretary, after consultation with state, local, and tribal officials, "determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," and the state's Governor concurs. 25 U.S.C. § 2719(b)(1)(A); *see id.* § 2719(a)(1), (a)(2)(A)(i); 25 C.F.R. § 292.2.

III gaming is lawful only on 'Indian lands,'" DOI Br. 25 (quoting Compl. ¶ 201), as does Defendant Chairman Woommavovah, DCW Br. 4 (quoting 25 U.S.C. § 2710(b)(1), (d)(1)).

The Agreements divest Plaintiff Nations of the zone of exclusivity held under their Compacts and IGRA by purporting to give the Oklahoma Governor's consent to gaming by Comanche, Otoe-Missouria, KTT, and UKB at gaming facilities within designated areas, most of which are not Indian lands under IGRA, 25 U.S.C. § 2703(4). The future concurrence provisions of the Comanche and Otoe-Missouria Agreements designate areas that are mostly not within the reservation or former reservation of the Comanche Nation or the Otoe-Missouria Tribe. *See* Comanche and Otoe-Missouria Agreements Part J.2.a.; Comanche Agreement Part 2.A.5., 2.A.21., 2.A.27.; Otoe-Missouria Agreement Part 2.A.25., 2.A.28., 2.A.32.; Compl. ¶¶ 206, 210. No part of the designated areas in the future concurrence provisions of the UKB and KTT Agreements is within any KTT or UKB reservation or former reservation. KTT Agreement Part 4.L.; UKB Agreement Part 4.L.; Compl. ¶¶ 216, 219. To the extent the designated areas in these provisions concern lands that are not now Indian lands under IGRA, 25 U.S.C. § 2703(4), they are illegal.[29] Indeed, the Secretary admits that the lands that are the subject of the future concurrence provisions are not "'Indian lands' eligible for gaming under IGRA." DOI Br. 11.[30]

[29] Because the UKB and KTT Agreements do not concern "Indian lands," 25 U.S.C. § 2703(4), the Secretary had no authority to consider them, and they are entirely invalid.

[30] Perhaps recognizing that defect, all four Agreements attempt to redefine the term "Indian lands" to reference § 2719. Comanche & Otoe-Missouria Agreements pmbl. (entered into "for the purpose of authorizing and regulating the operation of Covered Games (as defined herein) on the Tribe's Indian lands, as defined by [IGRA], 25 U.S.C. §§ 2703(4) and 2719"); *id*. Part 4.J. (referring to "Indian lands as defined by IGRA, 25 U.S.C. §§ 2703(4) and 2719"); UKB & KTT Agreements, Part 2.A.20 ("'Indian lands' shall mean Indian lands as defined in IGRA, 25 U.S.C. § 2719(b)(1)."). Section 2719 does not define Indian lands; only § 2703(4) does. These provisions are invalid for the obvious reason that Defendant Tribal and State Officials cannot make up their own definition of Indian lands, nor can the Secretary approve such a definition.

There is more. Comanche's designated area includes parts of the reservation or former reservation of the Chickasaw Nation and CPN, Compl. ¶¶ 207, 209. That makes those Plaintiff Nations the direct object of the Secretary's no-action approval. When "the plaintiff is himself an object of the action (or forgone action) at issue[,] . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62; *see also New Jersey*, 989 F.3d at 1045. And more still: The Agreements further provide that "the State through its Governor, . . . hereby agrees to concur in any determination by the Secretary of the Interior that land [within each tribe's designated area] "should be taken in trust for gaming purposes, and such lands are eligible for Gaming under 25 U.S.C. § 2719(b)(1)(A)" and that "no other action from the State is required for approval of th[e] land's eligibility for Gaming." Comanche & Otoe-Missouria Agreements Part J.2.a.; UKB & KTT Agreements Part 4.K. These provisions are not an authorized subject of compact negotiations, 25 U.S.C. § 2710(d)(3)(C); Compl. ¶ 226, and § 2719(b)(1)(A) requires the Secretary's determination to precede the Governor's concurrence, or there would be nothing in which the Governor could concur, Compl. ¶ 28.

Notwithstanding the fact that the future concurrence provisions are illegal on multiple grounds, the Secretary allowed the Agreements to go into effect by inaction, in violation of IGRA.[31] The Secretary argues that the future concurrence provisions "at most, may remove a single potential impediment to authorizing gaming on new lands that may be acquired in trust," DOI Br. 24-25, and Defendant Chairman Woommavovah asserts that harm from the future concurrence provisions is "speculative." DCW Br. 18-20. In fact, the Secretary's no-action

[31] The appropriate common-law analogue for the injury in fact arising from the future concurrence provisions is interference with contract. *See supra* at 20-21 & n.18.

approvals of the Agreements create "'a substantial risk that the harm [threatened by those provisions] will occur,'" *Dep't of Com.*, 139 S. Ct. at 2565 (quoting *Driehaus*, 573 U.S. at 158). The testimony of an Interior official cited by Chairman Woommavovah, DCW Br. 20,[32] suggests that gubernatorial concurrence has occurred much less frequently than Secretarial approval (three times between 1988 at 2006). In other words, the future concurrence provisions remove a substantial impediment to having land taken into trust, thereby establishing a substantial risk of competition which imposes injury in fact on Plaintiff Nations.[33]

And in fact, Defendant Tribal Officials are already implementing the future concurrence provisions. Comanche and Otoe-Missouria have identified the locations of the three new gaming facilities authorized for each under the Agreements, Compl. ¶ 231.o., and Comanche has already purchased a parcel of land within the Chickasaw Reservation that fulfills the requirements of the future concurrence provisions if its Agreement, *id.* ¶ 231.s. Chief Bunch and Mekko Givens are also implementing the future concurrence provisions of their Agreements. *Id.* 231.k. In October 2020, Chief Bunch informed the UKB membership that the Department of the Interior "has approved our compact for tribal gaming in Logan County, which is north of Oklahoma City," and that "[w]e have one more major step to place that land into trust with the federal government." *Id.* ¶ 231.*l*. *Beforehand*, the Assistant Chief of UKB and Chairman of the UKB Corporate Board had announced that "[t]he UKB Corporate Board will now work with its developers to select a casino

[32] *See* DCW Br. 20 (citing *Oversight Hearing Before the Comm. on Indian Affairs, U.S. Sen., Concerning Off-Reservation Gaming: The Process for Considering Gaming Applications* (Feb. 1, 2006) (statement of George T. Skibine, Acting Deputy Assistant Sec'y-Indian Affairs for Policy & Econ. Dev., Dep't of Interior), *available at* https://www.doi.gov/ocl/reservation-gaming-0).

[33] Since April of 2020, the Secretary has approved three two-part determinations for off-reservation gaming. *See Departmental Gaming Decisions*, U.S. Dep't of Interior, https://www.bia.gov/as-ia/oig/departmental-gaming-decisions (last visited Nov. 19, 2021). That too establishes a substantial risk of injury in fact from the future concurrence provisions.

site in Logan County, as specified in the Compact." *Id.* Chief Bunch's announcement implies that a site has been selected and acquired and that only placement in trust remains to be done.[34]

The Secretary also grossly understates the effect of her action. The Agreements give the consent of the Governor *and the State* to future land acquisitions within the designated areas. Comanche & Otoe-Missouria Agreements Part J.2.a. ("no other action from the State is required for approval of th[e] land's eligibility for Gaming"); UKB & KTT Agreements Part 4.K. (same). That leaves the matter exclusively in the Secretary's control, and she has already demonstrated a lack of commitment to proper implementation of IGRA by approving the Agreements. The Agreements themselves facilitate fee-to-trust acquisitions by reciting that "the Tribe desires to offer the play of the Covered Games . . . , as a means of generating revenues for purposes authorized by [IGRA]," and that "the positive effects of this Compact will extend beyond the Tribe's lands to the Tribe's neighbors and surrounding communities and will generally benefit all of Oklahoma." Agreements, 5th & 7th whereas clauses; *cf.* 25 U.S.C. § 2719(b)(1)(A). Those recitals "form a material part of this [Agreement] and are hereby incorporated by reference," Agreements Part 1.A., and they bring the future concurrence provisions' designated areas squarely within the scope of the federal government's land acquisition policy. Under that policy, land that is located outside a tribe's reservation or former reservation in Oklahoma may be taken in trust if the tribe already owns the land (as does Comanche with respect to the Grady County property) or when the Secretary determines that the acquisition in trust is "necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3(a); Compl. ¶¶ 30, 203. To be sure, other requirements must be met for off-reservation land acquisitions, *see* 25

[34] The Secretary reads the timing of these statements backwards and writes her own words into Chief Bunch's statement, DOI Br. 26 (asserting that the lands are "[not yet acquired]").

C.F.R. § 151.11, but the Secretary is responsible for considering these issues, and only state and local governments are provided notice and the opportunity to comment on such acquisitions, *id.* § 151.11(d).[35] The Secretary's no-action approvals clear the path for the acquisition in trust of lands within the designated areas described in the Agreements. And having approved the Agreements with such terms, despite their illegality, the Secretary cannot credibly claim otherwise.

In addition, while the Secretary points to the consent required for a tribe to acquire land on another tribe's reservation, DOI Br. 25-26, the Secretary has already violated that provision by approving by inaction Agreements that give gubernatorial consent to Comanche land acquisitions within the reservation or former reservation of the Chickasaw Nation and CPN, Compl. ¶¶ 207, 209, over the objections of and thus without the consent of the Chickasaw Nation or CPN. Compl. ¶¶ 85-86, 214. IGRA "requir[es] that the Secretary disapprove a compact that violates "(i) any provision of [IGRA], (ii) any other provision of Federal law . . . , or (iii) the trust obligations of the United States to Indians," *id.* § 2710(d)(8)(B)(i)-(iii); *Amador Cnty.*, 640 F. 3d at 381, and "[h]ad the Defendant Secretary complied with these statutory obligations, [s]he would have disapproved the Agreements on the ground that the Defendant Governor Stitt's purported future concurrence in the Agreements in future off-reservation trust land acquisitions violates IGRA." Compl. ¶ 230. The Secretary notes that Plaintiff Nations "retain the ability to object to land acquisition," DOI Br. 26, but the Secretary's actions in approving Agreements that preemptively concur in and support approval of such acquisitions suggest that such objections would be in vain.[36]

[35] The BIA must solicit comments *only* from tribes located within twenty-five miles of a proposed gaming with respect to the Secretary's two-part determination, 25 C.F.R. §§ 292.2, 292.19(a)(2).

[36] The Secretary's reliance on comments submitted by Plaintiff Nations to the Secretary, DOI Br. 26 (citing Compl. ¶ 85), does not suggest otherwise, as they predated the Secretary's illegal no-action approvals.

The Secretary is also wrong to urge that the future concurrence provisions impose "hypothetical" or "highly conjectural" competitive harms. DOI Br. 24, 26. The development of a Comanche gaming facility on the Chickasaw Reservation—which Comanche is pursuing, Compl. ¶ 231.s.—would subject the Chickasaw Nation to competition in a market where it holds exclusive gaming rights. 25 U.S.C. § 2710(d)(3)(A).[37] In addition, development of new gaming facilities in the Oklahoma City metropolitan area, as envisioned by the Agreements, would have an outsized effect on all Plaintiff Nations' gaming revenue because that is "a critical source of present and future gaming revenue for all the Plaintiff Nations." Compl. ¶ 231.f. Furthermore, under both the UKB and KTT Agreements, a new casino could be placed in the Oklahoma City metropolitan area on land not within the Nations' reservations or former reservations and their consent to have the land taken in trust would not be required, *id.* ¶¶ 231.f.-g., enhancing the risk.

Placement of a new casino in the Oklahoma City metropolitan area would have an especially devastating effect on CPN, which operates two gaming facilities on I-40 which rely on patronage from the Oklahoma City market for a substantial portion of their revenues. *Id.* ¶ 231.g. The placement of a casino along I-40 between Oklahoma City and CPN's Reservation or former Reservation—as permitted under the KTT Agreement—would divert from CPN many patrons and substantial revenue. *Id.* The construction of a casino in the Oklahoma City suburbs or counties immediately surrounding Oklahoma City, including Logan County—which is permitted under the UKB Agreement—would have a similar effect. *Id.* Furthermore, the Secretary does not need CPN's consent to take land into trust for KTT or UKB in the portions of Oklahoma and Logan

[37] There is nothing speculative about that. *Cf.* DCW Br. 17, 21-22. It is "basic economic logic" that injuries will result from competition in the same market. *United Transp.*, 891 F.2d at 912 n.7.

Counties in which those Tribes' Agreements allows them to construct casinos, as they are not within CPN's reservation or former reservation, *see* 25 C.F.R. § 151.8. [38]

Defendant Chairman Woommavovah's argument that the risk from the future concurrence provisions is "hypothetical" fails for the same reasons. DCW Br. 18-20. And the cases on which he relies do not help him. *Yocha Dehe* is inapplicable, as shown *supra* at n.25. *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941 (7th Cir. 2000), only decided whether a tribe could intervene in a case, not standing, *id.* at 946. And the court expressly declined to decide whether a tribe's interest in being free from economic competition was protectable because there was "a deeper flaw with the [tribe's] argument," namely that the administrative process had "barely" begun, "it [wa]s anyone's guess what the Secretary's final decision w[ould] be," and the tribe asserted only a generalized interest in the procedures that would be used to make that decision. *Id.* at 947-48. By contrast, here, Plaintiff Nations have a concrete interest in the Secretary's compliance with her responsibilities under IGRA, *see supra* at 7-10, the Secretary has already taken final action by approving the Agreements—including the future concurrence provisions—by inaction, and Comanche is already pursuing the off-reservation gaming opportunities afforded

[38] As the Secretary has already caused the Nations to suffer injuries in fact, including injuries based on the substantial risk of harm from the future concurrence provisions, the Secretary's reliance on cases involving different facts, and no injury in fact, is unavailing. *See* DOI Br. 26-27. *Cause of Action Institute v. U.S. Department of Justice*, 282 F. Supp. 3d 66, 76 (D.D.C. 2017), concerns whether to grant leave to amend a complaint, and *Thorp v. District of Columbia*, 325 F.R.D. 510, 514 (D.D.C. 2018), whether to permit the plaintiff to file a supplemental complaint. *Center for Democracy & Technology v. Trump*, 507 F. Supp. 3d 213, 223 (D.D.C. 2020), is inapt because here "the government [has] issue[d decisions] that [the Nations] do[] not like," *id.*, causing them injury. *American Association of Bioanalysts v. Shalala*, No. 99-CV-00649 (TFH), 2000 U.S. Dist. LEXIS 2603, at *6-7 (D.D.C. Mar. 1, 2000), is inapplicable because in this case there is an injury in fact and the Secretary has made her decision. And the Secretary's reliance on *Clapper* fails because here there is a substantial risk of harm, *see* 568 U.S. at 414 n.5. And while *Keepseagle v. Vilsack*, 307 F.R.D. 233, 240 (D.D.C. 2014), held that "any injury will arise only if a multitude of speculative events occur," *id.*, the Nations have already suffered injury in fact from the loss of their zone of exclusivity, *see supra* at 30-32. And *Yocha Dehe* is inapplicable, *see supra* at n.25.

by the future concurrence provisions, including one on the Chickasaw Reservation. *See supra* at 34-37. *Sault St. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910 (6th Cir. 2002), is also inapposite. The standing issue there arose in summary judgment proceedings, *id*. at 914-16, not "[a]t the pleading stage, [where] general factual allegations of injury resulting from [D]efendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. at 561 (fourth alteration in original) (quoting *Nat'l Wildlife Fed'n*, 497 U.S. at 889). That makes *Sault St. Marie* inapplicable here. It is not relevant in any event. There, a tribe opposing Interior's decision to take land in trust for another tribe's casino asked the court to take judicial notice that its casino was forty miles further north of the other tribe's casino and stated that if the new casino were not built, some patrons might drive to the plaintiff's casino. *Id.* at 915. On appeal, the plaintiff took the position that it had shown a competitive injury simply by pleading that "it has been injured, and that the injury was caused by the defendant." *Id.* at 916. The Circuit court held otherwise. *Id.* In contrast, the substantial risk to the Plaintiff Nations from the future concurrence provisions is supported by the competitive injury doctrine, as more gaming facilities spread gaming revenue thinner, *see supra* at 13-21, and by the specific allegations of the complaint that detail the substantial risk of these provisions, *see supra* at 34-35, and by Comanche's pursuit of a gaming opportunity on the Chickasaw Reservation, *see supra* at 37.

Defendant Chairman Woommavovah also argues, relying on outdated information, *see supra* at nn.32-33, that "[o]btaining [] approval for off-reservation gaming is hardly a guaranteed outcome for the Comanche Nation." DCW Br. 20. But "absolute certainty is not required; it is enough that the increased risk of harm is substantial." *Union of Concerned Scientists*, 998 F.3d at 930 (citing *Clapper*, 568 U.S. at 414 n.5; *Driehaus*, 573 U.S. at 158; *N.Y. Republican State Comm.*

v. SEC, 927 F.3d 499, 504-05 (D.C. Cir. 2019)). In fact the Secretary's no-action approval of the Agreements puts the Nations at substantial risk of harm because Comanche is pursuing the placement of a gaming facility on the Chickasaw Reservation,[39] and because the Nations cannot stop the placement of a new casino in the Oklahoma City metropolitan area *except* through this action.[40] They are otherwise left to the vagaries of the consultation process, *see* DOI Br. 25, which their prior submissions to the Secretary indicate would be futile. Compl. ¶¶ 83-88, 93, 102, 106.

For all of these reasons, the Secretary's approval of, and the Defendant Chairmen's actions under, the future concurrence provisions of the Agreements impose an injury in fact on the Plaintiff Nations, which establishes standing for cause of action seven of the complaint, Compl. ¶¶ 262-265. The Secretary's no-action approvals of the future concurrence provisions over Chickasaw's and CPN's specific objections and without their consent is a concrete and particularized injury, *Spokeo*, 578 U.S. at 341, that is also "actual [and] imminent" because it has already occurred. The

[39] Defendant Chairman Woommavovah argues that Comanche could pursue off-reservation gaming without the Agreement. DCW Br. 22-23. That possibility, however, does not create a substantial risk of harm, while the future concurrence provisions do so because the Secretary has already approved those provisions and because Comanche is implementing those provisions at Defendant Chairman Woommavovah's direction.

[40] This case is analogous to *Clinton*. As *Lac du Flambeau* explained, in *Clinton*, the President had used a line item veto, the effect of which was that the State of New York could be obligated to repay federal subsidies, which it then would have required the City of New York—the ultimate subsidy recipient—to repay their value to the State. 422 F.3d at 498-99. The federal government had authority to waive the liability, *id.* at 498-99, so the President argued the City lacked standing to challenge his veto because the federal government might issue a waiver, *id.* at 499. The *Clinton* Court disagreed: as a result of the veto, "[t]he State now has a multibillion dollar contingent liability," and the President caused "an immediate, concrete injury the moment that [he] used the Line Item Veto . . . ." *Id.* (quoting *Clinton*, 524 U.S. at 430) (first alteration in original). Here, Plaintiff Nations suffered "an immediate, concrete injury the moment that the [Secretary] used [IGRA]" to allow the Agreements to go into effect because, *inter alia*, they purport to give the State's consent to Comanche's and Otoe-Missouria's acquisition of land for gaming purposes within the Chickasaw Reservation and CPN's reservation or former reservation. That Comanche and Otoe-Missouria have discretion whether to pursue those opportunities (which they are doing), does not avoid the injury any more than HHS's discretion to waive liability did in *Clinton.*

Plaintiff Nations also suffer an injury in fact because for the reasons just shown, there is "'a substantial risk that the harm [threatened by the future concurrence provisions] will occur,'" *Dep't of Com.*, 139 S. Ct. at 2565 (quoting *Driehaus*, 573 U.S. at 158). As the Complaint alleges, had the Secretary complied with his statutory obligation to disapprove a compact if it violates IGRA, she would have disapproved the Agreements on the ground that the future concurrence provisions violate IGRA, Compl. ¶ 230, which would have avoided the harm from the Defendant Chairmen's implementation of those provisions. His failure to do so constitutes a procedural injury, which relaxes "the normal standards for redressability and *immediacy*," *Lujan*, 504 U.S. 572 n.7 (emphasis added); *Mendoza*, 754 F. 3d at 1010), and obviates the need for Plaintiff Nations to "establish that correcting the procedural violation would necessarily alter the final effect of the agency's action on the plaintiff's interest," *id.*, though it plainly would do so because the future concurrence provisions are illegal under IGRA, *see supra* at 32-33.

Finally, the future concurrence provisions of the Agreement also impose an injury in fact by interfering with the Chickasaw Nation's sovereign authority over its Reservation and jeopardizing its ability to generate gaming revenue within its own territory. Compl. ¶¶ 4, 263. As a direct result of the Secretary's no-action approval of the Comanche Agreement, the future concurrence provisions give the Governor's concurrence to land within the Chickasaw Reservation being taken into trust for gaming purposes by the Comanche Nation. In addition, the Comanche Nation has already identified and purchased land within the Chickasaw Reservation that satisfies the requirements of the future concurrence provisions. These actions establish an injury in fact because they infringe on the Chickasaw Nation's jurisdictional integrity and sovereignty, and because "tribes, like states, are afforded 'special solicitude in our standing analysis,'" *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 463 (2d Cir. 2013) (quoting

Massachusetts v. EPA, 549 U.S. 497, 520 (2007)), and accordingly "actual infringements on a tribe's sovereignty constitute a concrete injury sufficient to confer standing" because "[t]]his injury, . . . implicates 'the substantive interest which Congress has sought to protect [in] tribal self-government.'" (quoting *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 469 n.7 (1976)); *Mescalero Apache Tribe v. New Mexico*, 630 F.2d 724, 727 (10th Cir. 1980) ("[w]hen one sovereign entity is alleged to have usurped the authority lawfully belonging to another, the injured sovereign must have standing to challenge the usurpation"), *vacated*, 630 F. 2d 724 (1981), *opinion reinstated*, 677 F.2d 55 (10th Cir. 1982), *aff'd* 462 U.S. 324 (1983); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1242 (10th Cir. 2001) (Tribe had standing to challenge state's refusal to recognize tribal vehicle titling and registration laws because that refusal interfered with tribal self-government); *Okla. Dep't of Env't Quality v. EPA* ("*ODEQ*"), 740 F.3d 185, 189-90 (D.C. Cir. 2014) ("divest[iture of Oklahoma's] regulatory authority over areas otherwise within [its] purview" is an injury in fact) (second alteration in original).[41]

In addition, the Chickasaw Nation has suffered an injury in fact because the Secretary's and Comanche's actions "make[] [the Nations'] 'task of complying with [IGRA] more difficult and onerous,'" *New Jersey*, 989 F.3d at 1046 (quoting *id.* at 1057 (Walker, J., dissenting) (cleaned up)). IGRA only allows a tribe to conduct Class III gaming on lands over which it has jurisdiction, 25 U.S.C. § 2710(d)(3)(A), and Comanche does not have jurisdiction over lands on the Chickasaw Reservation. To comply with IGRA, the Chickasaw Nation must therefore resist Comanche's effort to conduct gaming on the Chickasaw Reservation. *Clapper*, 568 U.S. at 414 n.5 ("a 'substantial risk' that the harm will occur, [] may prompt plaintiffs to reasonably incur costs to

[41] These decisions provide an additional common-law analogue under *TransUnion*, 141 S. Ct. at 2204, for the injury in fact arising from Secretary's approval, and Comanche's pursuit, of gaming on the Chickasaw Reservation.

mitigate or avoid that harm."). And that constitutes an injury in fact. *New Jersey*, 989 F.3d at 1045 (even though "the [EPA] Rule itself does not formally regulate petitioner, it directly implicates petitioner's ability to comply with its statutory obligations in administering the NSR program," which establishes standing). The Nations earlier opposed the Secretary's approval of these provisions, Compl. ¶¶ 83-87, but to no avail, *id*. ¶¶ 92-93, which has required the Chickasaw Nation to monitor the situation, which led to the discovery that Comanche has already purchased land in Grady County that is within the Chickasaw reservation or former reservation that fulfills all the requirements of the future concurrence provisions in its Agreement. *See* Compl. ¶ 231.s. Whether the Secretary would honor the Chickasaw objections to an on-Reservation acquisition by Comanche is at best uncertain, given her expressly stated position that the outcome of such an objection is uncertain and her no-action approval of the Comanche Agreement. *See* DOI Br. at 33; *ODEQ*, 740 F.3d at 190 (EPA's failure to state that it would take administrative action it claimed would avoid plaintiff's injury shows that injury is not speculative.) The Chickasaw Nation thus has standing to challenge the Secretary's no-action approval of the future concurrence provisions and Comanche's implementation of them on the Chickasaw Reservation.

D. The Plaintiff Nations Meet the Causation And Redressability Elements Of Standing.

"Causation, or 'traceability,' examines whether it is substantially probable that the challenged acts of Defendant, not of some absent third party, will cause the particularized injury of the plaintiff." *Fla. Audubon*, 94 F.3d at 663 (citations omitted). "Redressability examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff." *Id.* at 663-64 (citations omitted). Both are met here.

1. The Nations' injuries in fact meet the causation requirement.

Plaintiff Nations' competitive injuries satisfy the traceability requirement—contrary to Movants' views, DOI Br. 17, DCW Br. 12—because they are a direct result of Defendants' actions. Had the Secretary complied with her obligations under IGRA and 25 U.S.C. § 5123(f) to disapprove compacts that were not validly entered into and that contain terms that violate IGRA, she would have disapproved the Agreements, rather than allow the Agreements to go into effect. And "[b]ecause the Tribe[s] may proceed with gaming only with secretarial approval of the compact, there is a direct causal connection between the Secretary's no-action approval and the alleged harm." *Amador Cnty.*, 640 F.3d at 378. Relying on the Secretary's no-action approval, Defendant State and Tribal Officials represent that the Agreements are compacts and are implementing them by, *inter alia*, conducting Class III gaming without valid compacts.

The injury in fact Plaintiff Nations suffer from the loss of their substantial exclusivity in Class III gaming also satisfies the traceability requirement because those injuries are a direct result of the Secretary's no-action approval of the Agreements and Defendants' actions under the Agreements. Had the Secretary complied with her obligations under IGRA to disapprove a compact whose terms violate IGRA, she would have disapproved the Agreements, and the Nations would have retained their right of substantial exclusivity. Instead, relying on the Secretary's no-action approval to authorize their actions, which establishes "a direct causal connection," *Amador Cnty.*, 640 F.3d at 378, Defendant Chairmen are conducting gaming using Gaming Machines that are "additional electronic or machine gaming within Oklahoma" under Plaintiff Nations' Compacts, violating their substantial exclusivity rights. Defendant Chairmen and Defendant Governor Stitt also claim the right—again relying on the Agreements—to conduct "Event Wagering," and Defendant Governor claims the right to conduct the iLottery, Comanche Agreement Part 2.25.; Otoe-Missouria Agreement Part 2.23.; UKB & KTT Agreements Part 2.18.,

which also violate the Plaintiff Nations' substantial exclusivity rights. This rejects the Secretary's argument that the Nations' injuries from new games are not traceable to her actions. DOI Br. 17.

The injury in fact Plaintiff Nations suffer from the loss of the "zone of exclusivity" promised by their Compacts satisfies the traceability requirement because that injury is a direct result of the Secretary's no-action approval of the Agreements and Defendants' actions under the Agreements. Had the Secretary complied with her obligations under IGRA to disapprove compacts whose terms violate IGRA, she would have disapproved the Agreements, and the Nations would have retained their right of substantial exclusivity. Instead, the Secretary allowed the Agreements to go into effect, and relying on the Secretary's no-action approval, which again establishes "a direct causal connection," *Amador Cnty.*, 640 F.3d at 378, Defendant Tribal Officials are already implementing those provisions.

2. The Nations' injuries in fact meet the redressability requirement.

The Nations' injury in fact are all redressable for the same reason: "if the [Nations] succeed[] on the merits and obtain[] a declaration that the [Agreements are invalid and violate IGRA], the Secretary would have to reject the [Agreements]." *Amador Cnty.*, 640 F.3d at 378. The Nations' injuries are all redressable by a decision of this Court declaring that the Agreements were not validly "entered into" under state law and therefore are not "in effect" under IGRA, reversing the Secretary's no-action approvals of the Agreements and remanding for disapproval.

III. THE SECRETARY'S RULE 12(B)(6) MOTION SHOULD BE DENIED.

A. The Plaintiff Nations Have A Cause Of Action For Causes Of Action One To Three Because the Secretary Was Required To Disapprove The Agreements.

IGRA requires that to conduct Class III gaming, a tribe must have "entered into" a compact with the State, and that compact must be "in effect." 25 U.S.C. § 2710(d)(1)(C); Compl. ¶¶ 43, 48. "The plain language of IGRA makes it clear that Secretarial approval and publication places

a compact 'into effect,'" while "[s]tate law must determine whether a state has validly bound itself to a compact." *Kelly*, 104 F.3d at 1557-58 (citing *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 493 & n.39 (1979)). And a compact that was "never validly 'entered into' by the state . . . do[es] not comply with IGRA." *Id.* at 1559.

Under IGRA, the Secretary has authority to consider a compact only if it was "entered into" by the tribe and state. 25 U.S.C. § 2710(d)(8)(A)-(C). *See* Compl. ¶¶ 43, 45. And Defendant Department's own regulations provide that a compact is "an 'intergovernmental agreement executed between Tribal and State governments under'" IGRA. *Connecticut*, 344 F. Supp. 3d at 309 (quoting 25 C.F.R. § 293.2(b)(2)). Under the text of IGRA and its governing regulations, the Secretary has no authority to consider a compact unless it is an intergovernmental agreement that has been entered into by the tribe and the state. Accordingly, the Secretary must determine whether a compact was "entered into" by the tribe and the state before considering it.

The Secretary nevertheless argues that "IGRA does not require the Secretary to resolve a dispute about gubernatorial authority, nor to disapprove a compact because such a dispute exists." DOI Br. 29. But here, the Secretary was not required to resolve a purported dispute. Rather, her decision was arbitrary and capricious because, instead of determining whether the Agreements met the definition of a "compact," *see* 25 U.S.C. § 2710(d)(8)(A); 25 C.F.R. § 293.2(b)(2), she allowed them to go into effect, ignoring controlling authority that the State never "entered into" them.

That controlling legal authority is *In re Treat*, the opinion that the Oklahoma Attorney General provided to the Secretary while she was considering the Comanche and Otoe-Missouria Agreements. *See* Compl. ¶¶ 89-90; ECF No. 72-7. *In re Treat* concluded that the Governor could not unilaterally bind the State to a compact where the terms of the compact were not consistent with state law because they purported to allow gaming on terms other than those permitted in the

STGA and Model Compact. 2020 OK AG 8, ¶¶ 12-15. The Attorney General explained in a cover letter, ECF No. 72-7 at 2,

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

In re Treat answered whether the Governor had authority without any need for the Secretary to resolve any "dispute" regarding state law. The Attorney General noted his official opinions are binding on the State's officers. *Id.*; *see* Okla. Stat. tit. 74, § 18b(A)(18) (Oklahoma Attorney General opinion issued in response to request by state legislator is "determinative of the law regarding such subject matter"); *Hendrick v. Walters*, 865 P.2d 1232, 1243 (Okla. 1993) (Oklahoma Attorney General opinion is "binding upon the state officials whom it affects . . . until they are judicially relieved of compliance.") (footnotes omitted); *Turpen*, 681 P.2d at 767; *Rasure v. Sparks*, 183 P. 495, 498 (Okla. 1919). That includes the Governor. *Keating v. Edmondson*, 2001 OK 110, ¶ 4 & n.8, 37 P.3d 882. For that reason, the Governor's counsel's earlier opinion that the Agreements were legal, *see* ECF No. 82-1, was irrelevant, as the Attorney General's comments to the Secretary explained. *See* ECF No. 72-7 at 2; Compl. ¶ 89. After the Attorney General issued his opinion, statements by executive officers could not establish a "dispute" of state law about this issue, no more than if they now expressed disagreement with the Oklahoma Supreme Court's decisions in *Treat I* and *Treat II*.[42] So there was no dispute for the Secretary to resolve.

[42] The pendency of *Treat I* and *Treat II* did not affect the binding nature of *In re Treat*, as the Governor has a "duty to follow the Attorney General's opinion until overturned by a court of competent jurisdiction," including during the court's consideration of lawsuits challenging the Attorney General's Opinion. *See Keating* ¶ 4. Had the Oklahoma Supreme Court later upheld the Governor's actions, he could have resubmitted the Agreements. *See KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 26 n.28 (1st Cir. 2012) ("[T]here is no explicit requirement as to when a compact must be submitted after it has been agreed on by the state and the tribe . . . .").

She had only to apply a plain statement of the law.[43] That statement was later confirmed by the Oklahoma Supreme Court, and "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994). *See Waterkeeper All., Inc. v. Wheeler*, No. 18-2230 (JDB), 2020 WL 1873564, *1-2, *5-7 (D.D.C. Apr. 15, 2020) (vacating and remanding agency action relying on rule that was later invalidated).

Therefore, it was not necessary for the Secretary to "resolve" a state law question to disapprove the Agreements. It was only necessary to determine that the Attorney General's opinion was definitive—which the Attorney General himself had explained. That falls within the Secretary's practice not to defer to a Governor who clearly lacks authority. *See Kelly*, 104 F.3d at 1557; *Rhode Island v. Narragansett Indian Tribe*, No. Civ. A. 94-0619-T, 1995 WL 17017347, at *3 (D.R.I. Feb. 3, 1995) (citing with approval the Interior Solicitor's statement that "[this Department] defer[] to the representations of Governors, . . . unless it is clear beyond cavil that a Governor lacks the authority to sign a compact."). If a Governor lacks authority to enter into an IGRA compact, then "consequences should . . . flow, such as a determination that the compact is invalid," *Kelly*, 104 F.3d at 1557, and the compact "would be a nullity," *Narragansett*, No. Civ. 1995 WL 17017347, at *2.[44]

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[43] Even if the controlling nature of *In re Treat* was not pellucid, it is consistent with the Secretary's prior understanding of how Oklahoma enters into IGRA compacts. The Secretary noted in the approval letters on Plaintiff Nations' current compacts, ECF Nos. 72-8 to 72-11, and Comanche's, Otoe-Missouria's, and KTT's Former Compacts, ECF Nos. 72-5, 72-12 to 72-13, "*[t]he Compact is authorized by recent legislation enacted by the State of Oklahoma.* Prior to this legislation, Indian tribes in the State of Oklahoma could only operate Class II gaming machines and engage in pari-mutuel wagering." *Id.* at 2 (emphasis added). *See* Compl. ¶ 60. The approval letters are public government documents. *See Indian Gaming Compacts*, U.S. Dep't of Interior, https://www.bia.gov/as-ia/oig/gaming-compacts (last accessed Nov. 20, 2021).

[44] *Langley v. Edwards*, 972 F. Supp. 1531 (W.D. La. 1995), opined after disposing of the case on jurisdictional grounds that the court should not inquire into the merits of state law because the

As the Attorney General's opinion makes it clear beyond cavil that the Governor lacked such authority, the Secretary was not required to undertake an "extensive" inquiry, *cf.* DOI Br. 29, yet wrongly chose to allow the Agreements to go "into effect." Nor could the forty-five-day deadline excuse the Secretary from making a straightforward inquiry into whether the compact was "entered into" under state law. *See Amador Cnty.*, 640 F.3d at 381 (rejecting notion that forty-five day timeline excused Secretary from disapproving compact that violates IGRA); *see also Kickapoo Tribe of Indians v. Babbitt* ("*Kickapoo I*"), 827 F. Supp. 37, 44 (D.D.C. 1993) *rev'd on other grounds*, 43 F.3d 1491 (D.C. Cir. 1995) (Secretary could not toll forty-five day period, but "[i]f the Secretary wanted to hold that [the state governor's] approval was insufficient to form a compact" in light of state supreme court ruling, "he could have done so"). The Oklahoma Supreme Court's subsequent opinions foreclose any argument that the Secretary's actions can be sustained.

The Secretary relies on the Circuit's decision in *Detroit International Bridge Co. v. Government of Canada*, 883 F.3d 895 (D.C. Cir. 2018), to argue otherwise. DOI Br. 29. There, the court found the Secretary of State was not required to consider state law to approve a proposed bridge, when his only statutory duty was to consider impacts on the nation's foreign policy. 883 F.3d at 899. In contrast, IGRA requires a compact be "entered into" by a State, 25 U.S.C. § 2710(d)(1)(C), (d)(8)(A), and the Secretary must disapprove a compact that violates IGRA, *Amador County*, 640 F.3d at 381.[45]

Governor's inability to enter into a compact under state law is not a basis to invalidate an IGRA compact. *Id.* at 1535. That out-of-circuit dictum is unconvincing and should not be followed here. *See* Pl. Nations' Points & Auths. in Opp. to Mot. to Dismiss at 31 & n.18, ECF No. 57.

[45] Nevertheless, *International Bridge* found the Secretary of State properly evaluated state law by relying on a Michigan Attorney General opinion. 883 F.3d at 900. As in Oklahoma, Michigan Attorney General opinions bind state officials. *See* Mich. Comp. Laws § 14.32; *In re Proposal C*, 185 N.W.2d 9, 15 n.2 (Mich. 1971); *Mich. Beer & Wine Wholesalers Ass'n v. Att'y Gen.*, 370 N.W.2d 328, 331 (Mich. Ct. App. 1985); *In re Jansen*, No. 7225, 2009 WL 739961, at *2 n.7 (Mich. A.G. Feb. 27, 2009). Although in *Narragansett*, the Secretary and the court did not rely

Contrary to the Secretary's argument, DOI Br. 29-30, the Secretary could not solely rely on the Governor's certification and ignore the controlling authority that they were invalid. IGRA regulations require that an Indian tribe or State "should submit the compact. . .*after it has been legally entered into by both parties*." 25 C.F.R. § 293.7 (emphasis added). When the Bureau of Indian Affairs promulgated this rule, it explained that 25 C.F.R. § 293.7 requires that "a compact or amendment may only be submitted to the Secretary after it has been legally entered into," and that 25 C.F.R. § 293.14 authorizes the Secretary to "disapprove a compact or amendment that violates any IGRA provision," including the requirement that "the compact or amendment be legally entered into," 73 Fed. Reg. 74,004, 74,006-07 (Dec. 5, 2008). Although 25 C.F.R. § 293.8(b)-(c) requires that the tribe and State submit certification that they entered into the compact, it does not provide that the mere submission of any certification is determinative or that this is the only information that establishes whether the State has entered into a compact. Indeed, the Secretary may request "[a]ny other documentation . . . that is necessary to determine whether to approve or disapprove the compact," *id.* § 293.8(d).

It follows that even if the Governor submitted a certification, it would not establish that the Agreements had been "entered into" for purposes of IGRA. Nor should the Secretary have relied on the Governor's certification to the exclusion of a subsequent authoritative opinion that the Governor lacked authority to cause the State to enter into the Agreements. The only basis for Defendant Governor Stitt's certification was his own assertion of authority, which was quickly negated by *In re Treat*, which the Governor was required to follow. By ignoring that patently

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on an opinion by the state Attorney General, *see* 1995 WL 17017347, at *3, *5, Rhode Island Attorney General opinions are not binding, *see* 42 R.I. Gen. Laws § 42-9-6; *Pine v. Charlestown Town Council*, C.A. No. 95-491, 1997 WL 839926, at *3 n.4 (R.I. Super. Ct. June 4, 1997); *In re Donahue*, No. U97-01, 1997 WL 33165851, at *3 (R.I.A.G. Nov. 13, 1997).

controlling authority, the Secretary arbitrarily and capriciously aided Defendant Governor Stitt's scheme to push unilateral and void "compacts" on other tribes in Oklahoma.

IGRA clearly does not allow such a result.[46] As the Tenth Circuit explained in *Kelly*, "to permit a state actor to purport to bind the state when in fact he or she lacks the authority to do so undermines the significance of the compact process as a means of providing meaningful state involvement if a state so desires." 104 F.3d at 1556. That significance is confirmed by the IGRA regulations, which provide the "Secretary will not consider a proposed tribal-state compact for approval until it has been 'executed,'" *Connecticut*, 344 F. Supp. 3d at 315 (quoting 25 C.F.R. § 293.8(a)), by "both the tribe and *the State*," 25 C.F.R. § 293.8(a). Nowhere does IGRA allow an individual state official to hijack the IGRA process, use IGRA negotiations to pursue his own independent policy preferences, and bind a State to a compact, without complying with the process that the State has developed to govern its participation in the compacting process. IGRA nowhere requires tribes to surrender their sovereignty to states pursuant to compact provisions that are invalid. *See Navajo Nation v. Dalley*, 896 F.3d 1196, 1206-10 (10th Cir. 2018) (Tribes can only negotiate and agree to state jurisdiction in compacts as authorized by IGRA).

The arbitrariness and capriciousness of the Secretary's decisions is further highlighted by the fact she has bound Oklahoma to Agreements which the Oklahoma Supreme Court has ruled are invalid. These Agreements, like many IGRA compacts, impose regulatory and contractual obligations on the State, *see, e.g.*, Agreements Parts 4.A., 4.C., 4.F.6., 4.F.7., 7.A., 7.B., 7.C., 7.D., 9.A.3., 9.A.6., 13.E., 13.G., 13.H.; 25 U.S.C. § 2710(d)(3)(C)(i)-(ii), and create a dispute resolution process for "disputes . . . arising under" the Agreements, including "compliance with

[46] Assuming only *arguendo* IGRA were not clear, its text should be read to avoid the constitutional problems of the Secretary's approach. *See Clark v. Martinez*, 543 U.S. 371, 381-82 (2005).

the [Agreements]" and "performance required by the [Agreements]," that includes mandatory mediation and waiver of state sovereign immunity from injunctive relief in federal district court, Agreements Part 6.A.-E. If the Secretary could force Oklahoma to take on regulatory and contractual obligations and waive its immunity from actions by the Comanche Nation, Otoe-Missouria Tribes, KTT, and UKB in federal court, she would surely offend state sovereignty. *See Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1296 (D.N.M. 1996), *aff'd*, 104 F.3d 1546 ("The Court questions whether the United States has the power to require a state to affirmatively regulate gaming pursuant to an agreement never consented to by the state."). IGRA could not allow the Secretary to "direct the functioning of the state executive," *see Printz v. United States*, 521 U.S. 898, 933 (1997), by requiring state officers to regulate gaming and submit to judicial proceedings under an agreement that the state Supreme Court held was not validly entered into under state law.

B. The Plaintiff Nations Have A Cause Of Action For Causes Of Action Four To Seven.

The Secretary asserts that Plaintiff Nations lack a cause of action to bring Causes of Action Four to Seven, contending if "certain compact provisions are contrary to IGRA, then, under Plaintiffs' own theory, those provisions were not actually deemed approved. As a result, the Secretary could not have made the allegedly unlawful approvals that form the basis of Counts Four through Seven." DOI Br. 32. 25 U.S.C. § 2710(d)(8)(C) limits the extent to which a compact is lawful, but that does not mean there is no cause of action to challenge the Secretary's decision to allow a compact to go into effect, unlawful provisions and all. As *Amador County*, 640 F.3d at 380, explained:

> To be sure, [25 U.S.C. § 2710(d)(8)(C)] provides that only lawful compacts can become effective, but someone—i.e., the courts—must decide whether those provisions are in fact lawful. . . . Indeed, as we explain below, subsection (d)(8)(C)'s caveat invites judicial review by setting out a clear standard for reviewing courts to apply.

The Secretary argues that *Amador County* does not control here and was limited to cases in which the compact deals with land that is not "Indian lands" under IGRA. DOI Br. 32-33.[47] *Amador County*'s holding is not so limited. There, the Secretary argued that the federal courts could not review his no-action approval of a compact. He asserted that was because the Secretary "may" disapprove a compact if it meets one of the disapproval criteria in 25 U.S.C. § 2710(d)(8)(B)(i)-(iii), and so "he is never obligated to disapprove a compact and thus approval—either affirmative approval pursuant to subsection (d)(8)(A) or, by extension, no-action approval pursuant to subsection (d)(8)(C)—falls solely within his discretion." 640 F.3d at 381. The court rejected this interpretation:

> subsection (d)(8)(B)'s use of 'may' is best read to limit the circumstances in which disapproval is allowed. The Secretary must, however, disapprove a compact if it would violate any of the three limitations in that subsection, and those limitations provide the 'law to apply.'
>
> . . . .
>
> [S]ubsection (d)(8)(C), which governs approval by inaction, includes no exemption from this obligation to disapprove illegal compacts. Like subsection (d)(8)(B)'s list of conditions that require disapproval, subsection (d)(8)(C)'s caveat—that the compact is deemed approved "but only to the extent the compact is consistent with the provisions of [IGRA]"—provides "law to apply." And just as the Secretary has no authority to affirmatively approve a compact that violates any of subsection (d)(8)(B)'s criteria for disapproval, he may not allow a compact that violates subsection (d)(8)(C)'s caveat to go into effect by operation of law.

Id. (second alteration in original). That reasoning clearly applies to Plaintiff Nations' claims, since a portion of a proposed compact could "violate[] any of subsection (d)(8)(B)'s criteria for disapproval," and the Secretary would be obligated to prevent that section from going into effect

[47] The KTT and UKB Agreements do not deal with "Indian lands" at all, *see supra* at n.29, and none of the future concurrence provisions do so; accordingly, even if Federal Defendants were correct, that would not justify dismissal of claims as to those Agreements and provisions.

by disapproving it.[48] That *Amador County* controls here is also confirmed by subsequent decisions, interpreting it to have found that IGRA places mandatory obligations on the Secretary, without the Secretary's imagined limitations. *DTCC Data Repository (U.S.) LLC v. U.S. CFTC*, 25 F. Supp. 3d 9, 16-18 (D.D.C. 2014); *Stand Up for Cal.! v. U.S. Dep't of Interior*, 71 F. Supp. 3d 109, 120 (D.D.C. 2014); *see Menominee Indian Tribe of Wis. v. EPA*, 947 F.3d 1065, 1073 (7th Cir. 2020); *Delta Air Lines, Inc. v. Exp.-Imp. Bank*, 718 F.3d 974, 977 (D.C. Cir. 2013).[49]

The *Amador County* court acknowledged that "even if disapproval were otherwise discretionary, subsection (d)(8)(A) authorizes approval only of compacts 'governing gaming on *Indian lands*,' suggesting that disapproval is obligatory where that particular requirement is unsatisfied." 640 F.3d at 381. The Secretary reads this as limiting the holding to situations not present here, but that is wrong twice over. First, the court there concluded that IGRA requires the Secretary to disapprove a compact that does not meet the necessary conditions of IGRA, of which the "Indian lands" requirement is simply one. Second, the Agreements concern land that is not "Indian lands." *See* supra at 32-33.

The Secretary argues that the Fourth Cause of Action allegations that the Agreements authorize otherwise-illegal gaming by the signatory Tribes, Compl. ¶ 247, also fails to state a claim because "[h]aving an approved tribal-state compact under (d)(1)(C) does not authorize a tribe to conduct gaming activities that would otherwise be contrary to the limitations of (d)(1)(B)." DOI Br. 33. Precisely. The Agreements purport to provide such authorization, which cannot be the

[48] The Secretary might erroneously fail to invalidate an offending provision of a Compact and allow it to go into effect by inaction, in which case (d)(8)(C) empowers a federal court to determine the provision is invalid. *See Amador Cnty.*, 640 F.3d at 380; 5 U.S.C. § 702(2)(A), (C).

[49] Even if *Amador County*'s conclusions were dicta, they were well considered by the Circuit and should be followed. *Raney v. District of Columbia*, 892 F. Supp. 283, 286 (D.D.C. 1995); *see Cross v. Harris*, 418 F.2d 1095, 1104 n.60 (D.C. Cir. 1969); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 459 (1st Cir. 1992).

subject of a compact. Compl. ¶¶ 135-140, 144-150. They therefore include invalid terms, and the Secretary should have disapproved them. Moreover, as Plaintiff Nations further allege in the Fourth Cause of Action, the Agreements violate IGRA because they purport to authorize the State to engage in iLottery and Event Wagering, and a state's conduct of gaming is not a legal subject of compact negotiations. *See* 25 U.S.C. § 2710(d)(3)(C); Compl. ¶¶ 141-143, 184, 248. The Secretary does not address the Agreements' purported authorization of gaming by the State, which independently supports the Fourth Cause of Action. So, the Court cannot dismiss that count.

Finally, the Secretary argues that the Seventh Cause of Action should also be dismissed because the Secretary did not violate the trust responsibility to Plaintiff Nations, which is one alleged violation in that cause of action. DOI Br. 33-34. That, she claims, is because IGRA does not establish a special trust responsibility to Plaintiff Nations. *Id.* The Secretary elides the fact that IGRA, as a matter of statute, requires the Secretary to disapprove proposed compacts that "violate[] . . . the trust obligations of the United States to Indians." 25 U.S.C. § 2710(d)(8)(B)(iii). Federal agencies' trust responsibility to Indian tribes "is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 144 (D.D.C. 2017). By allowing the Agreements to go into effect in violation of federal law, she violated her general trust responsibilities, committing an additional violation of IGRA, which establishes an APA claim.

CONCLUSION

For the foregoing reasons, the Defendants' Motions to Dismiss should be denied.

Respectfully submitted,

Dated: November 22, 2021

By: */s/ Frank S. Holleman*
Frank S. Holleman, D.C. Bar # 1011376
Sonosky, Chambers, Sachse,
Endreson & Perry, LLP

1425 K Street, NW, Suite 600
Washington DC 20005
Phone no.: 202-682-0240
Fax no.: 202-682-0249
E-mail: fholleman@sonosky.com

Colin Cloud Hampson, D.C. Bar # 448481
Sonosky, Chambers, Sachse,
Endreson & Perry, LLP
145 Willow Road, Suite 200
Bonita, CA 91902
Phone no.: 619-267-1306
Fax no.: 619-267-1388
E-mail: champson@sonoskysd.com

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

Sara Hill, OK Bar # 20072, *pro hac vice*
P.O. Box 1533
Tahlequah, OK 74465
Counsel for Cherokee Nation
Phone no.: 918-207-3836
Fax no.: 918-458-6142
E-mail: sara-hill@cherokee.org

Stephen Greetham, OK Bar # 21510, *pro hac vice*
4001 N. Lincoln Blvd
Oklahoma City, OK 73105
Counsel for Chickasaw Nation
Phone no. 580-272-5236
E-mail: stephen.greetham@chickasaw.net

Brian Danker, OK Bar # 16638 (application for admission *pro hac vice* forthcoming)
P.O. Box 1210
Durant, OK 74702
Counsel for Choctaw Nation
Phone no.: 580-380-3024
E-mail: il: bdanker@choctawnation.com

Gregory M. Quinlan, NM Bar # 4450, CO Bar # 21605, *pro hac vice*
George J Wright, OK Bar # 21873, *pro hac vice*
1601 S Cooper Dr
Shawnee, OK 74801
Counsel for Citizen Potawatomi Nation

Phone no. 405-275-3121
Email: george.wright@potawatomi.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2021, I electronically filed the above and foregoing document and attachments with the Clerk of Court via the ECF System for filing.

/s/ Frank S. Holleman
Frank S. Holleman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

[PROPOSED] ORDER DENYING MOTIONS TO DISMISS

This matter comes before the Court through Federal Defendants' and Defendant Mark Woommavovah's Motions to Dismiss Plaintiff Nations' Second Amended and Supplemented Complaint.

Good cause being shown, IT IS HEREBY ORDERED that Federal Defendants' and Defendant Chairman Woommavovah's Motions to Dismiss are DENIED.

DATE: _____ By _____
TIMOTHY J. KELLY
United States District Judge

ATTORNEYS ENTITLED TO BE NOTICED

Colin Cloud Hampson
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
145 Willow Street, Suite 200
Bonita, CA 91902-1349
Tel: 619-267-1306
Fax: 619-267-1388
Email: champson@sonoskysd.com

Attorney for Plaintiffs CHEROKEE NATION, CHICKASAW NATION, CHOCTAW NATION, CITIZEN POTAWATOMI NATION

Frank Sharp Holleman, IV
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, NW, Suite 600
Washington, DC 20005
Tel: 202-682-0240
Fax: 202-682-0249
Email: fholleman@sonosky.com

Attorney for Plaintiffs CHEROKEE NATION, CHICKASAW NATION, CHOCTAW NATION, CITIZEN POTAWATOMI NATION

Sara Hill
CHEROKEE NATION
ATTORNEY GENERAL OFFICE
P.O. Box 1533
Tahlequah, OK 74465
Tel: 918-207-3836
Fax: 918-458-6142
Email: sara-hill@cherokee.org

Attorney for CHEROKEE NATION

Stephen H. Greetham
CHICKASAW NATION
Office of Senior Counsel
Chickasaw Nation OKC Regional Offices
4001 N. Lincoln Blvd., Ste. 2nd Floor
Oklahoma City, OK 73105
Tel: 580-272-5236
Email: stephen.greetham@chickasaw.net

Attorney for CHICKASAW NATION

Brian Danker
CHOCTAW NATION OF OKLAHOMA
1802 Chukka Hina Drive
Durant, OK 74701
Tel: 580-924-8280
Email: bdanker@choctawnation.com

Attorney for CHOCTAW NATION OF OKLAHOMA

Gregory M. Quinlan
George J. Wright
1601 S Cooper Dr.
Shawnee, OK 74801
Tel: 405-275-3121
Email: gquinlan@potawatomi.org
george.wright@potawatomi.org

Attorney for CITIZEN POTAWATOMI NATION

Kristofor R. Swanson
Natural Resources Section
Envt. & Natural Resources Div.
U.S. Department Of Justice
P.O. Box 7611
Washington, DC 20044-7611
Tel: 202-305-0248
Email: kristofor.swanson@usdoj.gov

Attorney for UNITED STATES DEPARTMENT OF INTERIOR, DAVID BERNHARDT, TARA KATUK MACLEAN SWEENEY

Matthew M. Marinelli
Natural Resources Section
Envt. & Natural Resources Div.
U.S. Department Of Justice
P.O. Box 7611
Washington, DC 20044-7611
Tel: 202-305-0293
Email: matthew.marinelli@usdoj.gov

Attorney for UNITED STATES DEPARTMENT OF INTERIOR, DAVID BERNHARDT, TARA KATUK MACLEAN SWEENEY

Vernle Charles Durocher, Jr.
DORSEY & WHITNEY LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402
Tel: 612-340-2600
Email: durocher.skip@dorsey.com

Attorneys for MARK WOOMMAVOVAH

Forrest Tahdooahnippah
DORSEY & WHITNEY LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402
Tel: 612-340-2600
Email: forrest@dorsey.com

Attorneys for MARK WOOMMAVOVAH

Robert A. Rosette
Saba Bazzazieh
Brett Stavin
Wyatt Rosette
ROSETTE, LLP
1100 H Street, NW, Suite 820
Washington, DC 20005
Telephone: 202-525-5261
Email: rosette@rosettelaw.com
sbazzazieh@rosettelaw.com
bstavin@rosettelaw.com
wrosette@rosettelaw.com

Attorneys for JOHN R. SHOTTON

Jeffrey C. Nelson
MAGLIO CHRISTOPHER & TOALE, P.A.
1015 15th Street, N.W., Suite 1125
Washington, DC 20005
Tel: 888-952-5242
Email: jnelson@mctlaw.com
ebanfelder@mctlaw.com

Attorney for JOE BUNCH, BRIAN GIVENS

Klint Cowan
FELLERS SNIDER
100 N. Broadway, Suite 1700
Oklahoma City, OK 73102-9211
Tel: 405-232-0621
Fax: 405-232-9659
Email: kcowan@fellerssnider.com

Attorney for JOE BUNCH, BRIAN GIVENS

Altom M. Maglio
Kehl Van Winkle
MAGLIO CHRISTOPHER & TOALE, PA
1605 Main Street, Suite 710
Sarasota, FL 34236
Tel: 888-952-5242
Email: amm@mctlaw.com
kvanwinkle@mctlaw.com

Attorney for JOE BUNCH, BRIAN GIVENS

Phillip G. Whaley
Daniel G. Webber, Jr.
Patrick R. Pearce, Jr.
Matthew C. Kane
Ryan Whaley
400 N. Walnut Ave.
Oklahoma City, OK 73104
Tel: 405-239-6040
Email: pwhaley@ryanwhaley.com
dwebber@ryanwhaley.com
rpearce@ryanwhaley.com
mkane@ryanwhaley.com

Attorneys for J. Kevin Stitt

S. Mohsin Reza
Troutman Pepper Hamilton Sanders LLP
401 9th Street, NW, Suite 1000
Washington, DC 20004
Tel: 202-274-1927
Fax: 703-448-6510
Email: mohsin.reza@troutman.com

Attorney for J. Kevin Stitt

David N. Anthony
Troutman Pepper Hamilton Sanders LLP
1001 Haxall Point, Suite 1500
Richmond, VA 23219
Tel: 804-697-5410
Fax: 804-698-5118
Email: david.anthony@troutman.com

Attorney for J. Kevin Stitt

John Reese
State of Oklahoma, Office of the Governor
2300 N. Lincoln Boulevard, Suite 212
Oklahoma City, OK 73105
Tel: 405-521-2342
Email: Jason.Reese@gov.ok.gov

Attorney for J. Kevin Stitt