UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT GOVERNOR J. KEVIN STITT'S RULE 12(C) MOTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

REGULATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA) to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Among other things, Congress believed the "establishment of Federal standards for gaming on Indian lands" was "necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." *Id.* § 2702(3). So Congress set up a new, comprehensive framework in IGRA, dividing gaming into three classes and providing for different standards and regulatory authority over each class. For the class of gaming at issue here, Congress required States and Tribes to enter into compacts prescribing the rules and allocating law-enforcement authority between the Tribe and State, but made those compacts subject to federal approval by the Secretary of the Interior.

This case involves four such compacts that the State of Oklahoma entered into with the Comanche Nation, Otoe-Missouria Tribe, United Keetoowah Band of Cherokee Indians (UKB) and Kialegee Tribal Town (KTT). The Governor negotiated those four compacts with the Tribes pursuant to his state statutory authority to "negotiate and enter into cooperative agreements on behalf of this state with federally recognized Indian tribal governments within this state to address issues of mutual interest." Okla. Stat. tit. 74, § 1221(C)(1). And the compacts were submitted to and deemed approved by the Secretary in compliance with IGRA's detailed approval scheme in June 2020 (the Comanche Nation and Otoe-Missouria Tribe) and September 2020 (the UKB and KTT Tribes). The four compacts support those Tribes' congressionally recognized interests in "raising revenues to provide governmental services for the benefit of the tribal communit[ies] and reservation residents [and] promoting public safety as well as law and order on tribal lands." S. Rep. No. 100-446, at 13 (1988).

During the Secretary's consideration of the proposed compacts, the Plaintiffs[1] and others challenged the Governor's authority to enter into the compacts. But the Secretary was not persuaded. As required under IGRA and its implementing regulations, the Governor certified that he had the requisite state-law authority to enter into the compacts; the Secretary did not disapprove the compacts within the statutorily prescribed period of 45 days; the compacts therefore were "considered to have been approved" under IGRA, 25 U.S.C. § 2710(d)(8)(C); the Secretary published the compacts in the Federal Register; and upon publication the compacts "[took] effect," *id*. § 2710(d)(3)(B). Simply put: Congress's comprehensive regulatory framework sets forth detailed procedures that had to be followed by the compacting parties and the Secretary to put a compact into effect, and those procedures were all followed. The four compacts are thus valid and effective as a matter of federal law.

Nevertheless, challenges to the compacts continued in state court, culminating in two Oklahoma Supreme Court decisions that were issued *after* the compacts took effect under IGRA. Those decisions hold that the Governor lacked compacting authority under state law. But neither decision purports to resolve the question of whether the compacts are valid and effective under *federal law*—a question that was definitively answered by the Secretary's approval. In this lawsuit, Plaintiffs now ask this Court for a *federal* declaration that the Secretary should not have approved the compacts. But Plaintiffs' arguments are based on a fundamental misreading of IGRA and its implementing regulations, which set up a detailed and careful scheme for the approval of compacts. The Tribes, Governor, and Secretary observed that process to the letter, and the Secretary's approval decisions are final.

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[1] The Governor was involuntarily named as a defendant in this case, and this brief simply responds by explaining his view of why the four challenged compacts are valid and in effect under applicable law. It is not, and should not be viewed as, any statement about large Tribes or any branch of state government.

As a result, Plaintiffs' claims in Counts I-III of the Complaint fail, because state-law disputes over the Governor's authority to negotiate Tribal-State compacts cannot render invalid a compact that already has taken effect under federal law. IGRA's text and structure confirm that the Secretary followed the correct process to approve and put into effect the compacts, and the Oklahoma Supreme Court's decisions cannot overrule the Secretary's actions. Plaintiffs' challenges to individual provisions of the compacts (Counts IV-VII) similarly fail because none of the challenged provisions violates IGRA. States and Tribes have wide latitude in entering into gaming compacts under IGRA, which provides that a Tribal-State compact may include any provision "related to" any topic enumerated in IGRA, including "any . . . subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(i)-(vii). None of the challenged provisions falls outside the bounds of that authorization. And even if they did, they would be subject to the compacts' severability clauses, which means that only the offending provisions would be invalid, not the compacts in their entirety. Because the compacts remain valid and in effect under federal law, the Court should enter judgment in Governor Stitt's favor on Counts I-VII pursuant to Rule 12(c).[2]

BACKGROUND

A. The Indian Gaming Regulatory Act

In *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 221-222 (1987), the Supreme Court held that States lack authority to regulate gaming on Indian land absent congressional authorization. In response, Congress enacted IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development,

[2] Count VIII is not asserted against the Governor. *See* ECF No. 104 (SAC) ¶¶ 266-268.

self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1), and to give States some role in the regulation of such gaming.

IGRA divides tribal gaming into three classes. Class I gaming consists of traditional tribal gaming and is subject to the exclusive jurisdiction of the Tribes. *Id*. §§ 2703(6), 2710(a)(1). Class II gaming includes bingo, bingo-related games, and certain card games for which the casino does not serve as the "bank," such as poker, and Tribes may offer class II gaming if the State permits others to do so. *Id*. § 2703(7)(A). This case concerns class III gaming, which includes house-banked card and casino games, such as blackjack, baccarat, roulette, craps, and slot machines. *Id*. § 2703(7)(B). Such class III gaming activities are lawful on Indian lands only if they are (i) "authorized by [a tribal] ordinance" that is "approved by the Chairman" of the National Indian Gaming Commission (a new federal commission created by IGRA); (ii) "located in a State that permits such gaming for any purpose by any person, organization, or entity"; and (iii) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect." *Id*. § 2710(d)(1). Tribal-State compacts are negotiated agreements that enable a State and Tribe to decide the conditions under which the Tribe will offer class III gaming on Indian lands. *Id*. § 2710(d)(3)(A). Tribal-State compacts may include provisions "related to" any topic enumerated in IGRA, including any "subjects that are directly related to the operating of gaming activities." *Id*. § 2710(d)(3)(C)(i)-(vii).

In order for a Tribal-State compact to be "in effect," IGRA requires that it be submitted to the Secretary of the Interior for review and approval. *Id*. § 2710(d)(3)(B). The Secretary "is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe." *Id*. § 2710(d)(8)(A). The Secretary may disapprove a compact only if it violates a provision of IGRA, any other provision of federal law, or the trust obligations of the United States to Indians. *Id*. § 2710(d)(8)(B). If the Secretary does

not approve or disapprove the compact within 45 days, "the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with [IGRA]." 25 U.S.C. § 2710(d)(8)(C). IGRA then directs the Secretary to publish notice of the approval of the compact in the Federal Register. *Id.* § 2710(d)(3)(D). Once that happens, the compact "take[s] effect." 25 U.S.C. § 2710(d)(3)(B).

To implement these statutory procedures, in 2008, the Department of the Interior issued regulations setting forth the process by which the Secretary will review Tribal-State compacts and amendments. *See* 25 C.F.R. § 293.3. Those regulations provide that the "Secretary has the authority to approve compacts or amendments 'entered into' by an Indian tribe and a State, as evidenced by the appropriate signature of both parties." *Id.* The rules also specify the documentation parties must submit with a proposed compact: for the tribe, "[a] tribal resolution or other document . . . that certifies that the tribe has approved the compact or amendment in accordance with applicable tribal law"; and for the State, a "[c]ertification from the Governor or other representative of the State that he or she is authorized under State law to enter into the compact or amendment." *Id.* § 293.8.

B. Tribal Gaming In Oklahoma

In the 2004 State-Tribal Gaming Act, the Oklahoma state legislature offered a "model" Tribal-State compact to every federally recognized tribe in the State. Okla. Stat. tit. 3A, § 281 (2020); ECF No. 54-9. The legislature made this offer "through the concurrence of the Governor after considering the executive prerogatives of that office and the power to negotiate the terms of a compact between the state and a tribe." Okla. Stat. tit. 3A, § 280. The Governor's concurrence with the 2004 Gaming Act was needed given that under Oklahoma law, "[t]he Governor is authorized to negotiate and enter into cooperative agreements on behalf of this state with federally recognized Indian tribal governments within this state to address issues of mutual interest." Okla.

Stat. tit. 74, § 1221(C)(1). Although most Oklahoma Tribes have chosen to adopt the model compact, the Gaming Act does not require that all Tribes in Oklahoma must do so, or that all Tribal-State compacts must copy every provision in the model compact. Plaintiffs Cherokee Nation, Chickasaw Nation, and Choctaw Nation are among the Tribes that have compacted with the State under the model compact.

C. The Compacts At Issue

1. In 2019, Plaintiffs Cherokee Nation, Choctaw Nation, and Chickasaw Nation brought suit against the Governor in a dispute over whether their previous compacts automatically renewed. *Cherokee Nation* v. *Stitt*, No. 5:19-cv-01198-D (W.D. Okla. filed Dec. 31, 2019). Plaintiff Potawatomi Nation and Defendants Comanche Nation and Otoe Missouria Tribes intervened in that case to assert similar claims. SAC ¶¶ 69, 74. In 2020, as part of a court-mandated settlement conference, the Comanche Nation and Otoe-Missouria Tribe negotiated for and obtained new compacts from the Governor. *See* ECF Nos. 1-1 (Comanche Nation Compact); 1-2 (Otoe-Missouria Compact). Pursuant to IGRA, the Comanche Nation and Otoe-Missouria Tribe submitted the executed compacts to the Secretary for approval on April 23, 2020. SAC ¶¶ 76, 81. The next day, the Governor submitted a memorandum to the Secretary certifying that (i) the Governor was authorized to negotiate and execute tribal gaming compacts in Oklahoma, (ii) the compacts were validly entered into, and (iii) their terms are consistent with IGRA. SAC ¶ 82; *see* Memorandum from Office of Gen. Counsel, Okla. Governor's Office to Paula Hart, Dir., Office of Indian Gaming, U.S. Dep't of the Interior (Apr. 24, 2020).[3]

Plaintiffs objected to the proposed Comanche and Otoe-Missouria compacts. During the 45-day window for the Secretary's review, Plaintiffs submitted comments setting forth their

[3] *Available at* https://oklahoma.gov/content/dam/ok/en/governor/documents/memorandum-from-general-counsel.pdf.

objections, including comments asserting that the compacts were not valid under Oklahoma law or IGRA. SAC ¶¶ 83-88. One comment submitted by the former Oklahoma Attorney General attached a legal opinion issued by his office asserting that, contrary to the Memorandum submitted by the Governor's counsel with his certification (*see supra* n.3), the Governor lacked legal authority to enter the compacts on behalf of the State. SAC ¶ 89; *see In re Treat*, 2020 WL 2304499 (Okla. A.G. May 5, 2020). As required by IGRA, on June 29, 2020, after the 45-day period ended without the Secretary taking any action, the Assistant Secretary of the Interior published in the Federal Register that the compacts "are considered to have been approved, but only to the extent they are consistent with IGRA." Indian Gaming; Tribal-State Class III Gaming Compacts Taking Effect in the State of Oklahoma, 85 Fed. Reg. 38,919 (June 29, 2020).

2. On July 1, 2020, the Governor signed new Tribal-State compacts with Defendants UKB and KTT, which had not previously engaged in tribal gaming under IGRA. The Tribes then submitted those proposed compacts to the Secretary for approval. SAC ¶ 101; *see* ECF No. 28-1 (UKB Compact); ECF No. 28-2 (KTT Compact). Between July and August 2020, Plaintiffs and other interested parties submitted comments to the Secretary that asserted, like their prior comments, that the compacts violate IGRA and were entered into without legislative approval. SAC ¶ 102. On August 15, 2020, the 45-day period under IGRA ended without any action by the Secretary. SAC ¶ 105. The Secretary published approval of the UKB and KTT compacts in the Federal Register on September 8, 2020, thereby putting the compacts into effect. *See* Indian Gaming; Tribal-State Class III Gaming Compacts Taking Effect in the State of Oklahoma, 85 Fed. Reg. 55,472 (Sept. 8, 2020).

3. Each of the four compacts at issue contains slight variations from the model compact as a result of the parties' good-faith negotiations. Among other things, the new compacts include provisions permitting certain sports betting and house-banked card and table games to the

extent that the State of Oklahoma authorizes such games in the future. *See* Comanche Nation Compact pt. 2.A.7 (approving house-banked games and event wagering "if such game has been approved by the [State Compliance Agency]"), pt. 2.A.13 (permitting wagering "to the extent such wagers are authorized by law"); *see also* Otoe-Missouria Compact pt. 2.A.7, pt. 2.A.13; UKB Compact pt. 2.A.6; KTT Compact pt. 2.A.6.

The compacts also include provisions requiring certification "by Tribal resolution" that a certain amount of revenue generated from the Tribes' gaming facilities be derived from class III gaming and requiring the Tribes to "report at least quarterly . . . the number of . . . class II and class III games" in each facility. Comanche Nation Compact pt. 3.D, pt. 4.K; Otoe-Missouria Compact pt. 3.D, pt. 4K; UKB Compact pt. 3.D, pt. 4.L; KTT Compact pt. 3.D, pt. 4.L. In addition, the compacts provide that the Governor "agrees to concur in any determination by the Secretary of the Interior that [certain lands] . . . should be taken into trust for [g]aming purposes," and they grant the Tribes "substantial exclusivity" over class III gaming activities. Comanche Nation Compact pt. 4.J.2.a, 10.A; Otoe-Missouria Compact pt. 4.J.2.a, 10.A; UKB Compact pt. 4.K, 10.A; KTT Compact pt. 4.K, 10.A. Finally, each compact contains a severability clause, which provides that, should any clause or provision be determined "to be invalid or unenforceable . . . the remainder of this Compact shall not be affected thereby." Comanche Nation Compact pt. 13.B; Otoe-Missouria Compact pt. 13.B; UKB Compact pt. 13.B; KTT Compact pt. 13.B.

D. Legal Challenges To The Compacts

On June 4, 2020, after the Comanche Nation and Otoe-Missouria Tribe's new compacts were submitted to the Secretary for review and approval, an action was filed in the Oklahoma Supreme Court challenging the Governor's authority under state law to enter into the compacts. SAC ¶ 91; *see Treat* v. *Stitt*, 473 P.3d 43 (Okla. 2020) (*Treat I*). As noted above, those compacts were then deemed approved by the Secretary upon the expiration of the 45-day period under

§ 2710(d)(8)(C), and the compacts took effect under IGRA upon publication of notice in the Federal Register on June 29, 2020. After the compacts took effect, on July 21, 2020, a majority of the Oklahoma Supreme Court issued a ruling that the compacts with the Comanche Nation and Otoe-Missouria Tribe were invalid under Oklahoma law, on the ground that the compacts purportedly allow "types of Class III gaming expressly prohibited by the State-Tribal Gaming Act"; namely "house-banked card and table games and event wagering." *Id.* at 45.

The UKB and KTT compacts were challenged in the same manner. On July 14, 2020, another action was filed in the Oklahoma Supreme Court challenging the Governor's authority under state law to enter into those compacts. SAC ¶ 103; *Treat* v. *Stitt*, No. O-118913 (Okla. filed July 14, 2020) (*Treat II*). On January 26, 2021, more than four months after the published notice of the UKB and KTT compacts in the Federal Register on September 8, 2020, a majority of the Oklahoma Supreme Court issued another short ruling that the UKB and KTT compacts were invalid under Oklahoma law, on the ground that the Governor exceeded his authority by negotiating terms "that differ from the Model Compact found in the State-Tribal Gaming Act." *Treat* v. *Stitt*, 481 P.3d 240, 243-244 (Okla. 2021) (*Treat II*).

LEGAL STANDARD

A motion brought pursuant to Federal Rule of Civil Procedure 12(c) empowers the Court to render "a judgment on the merits . . . by looking at the substance of the pleadings and any judicially noted facts." *All. of Artists & Recording Cos., Inc.* v. *Gen. Motors Co.*, 162 F. Supp. 3d 8, 16 (D.D.C. 2016). The moving party must therefore "demonstrate that the law entitles him to win given the undisputed facts that have been alleged in both parties' pleadings." *Murphy* v. *Dep't of Air Force*, 326 F.R.D. 47, 48 (D.D.C. 2018).

ARGUMENT

I. THE SECRETARY'S APPROVAL OF THE COMPACTS DID NOT VIOLATE IGRA

Plaintiffs allege in Counts I-III of the Complaint that the Secretary acted arbitrarily and capriciously by not disapproving the challenged compacts. *See* SAC ¶¶ 232-244. In particular, Plaintiffs contend that, according to an opinion by the Oklahoma Attorney General and two decisions that were issued by the Oklahoma Supreme Court after the compacts took effect under federal law, the Governor actually did not have the authority under state law to enter into the compacts. Plaintiffs seek a declaration from this Court that because the compacts "were not validly 'entered into' under state law," they "were not validly 'entered into' under IGRA and are not 'in effect' under IGRA." *Id.* at 129. As explained below, Plaintiffs' argument fundamentally misunderstands the operation of IGRA. Based on the undisputed allegations in Plaintiffs' complaint, the four challenged compacts are valid and "in effect" under federal law.

A. The Secretary Complied With All Of IGRA's Approval Procedures

1. IGRA provides a specific and controlled process for federal approval of a Tribal-State gaming compact. The Act gives the Secretary the power to approve a "Tribal-State compact entered into between an Indian tribe and a State," and permits the Secretary to disapprove a compact only if it violates IGRA, other federal laws, or the United States' trust obligations. 25 U.S.C. § 2710(d)(8)(A), (B). Once a Tribal-State compact is "submitted to the Secretary for approval," the Act gives the Secretary a 45-day period to decide whether to disapprove the compact, or to approve it (including by taking no further action over the compact). *Id.* § 2710(d)(8)(C). The Secretary must then publish notice of the compact in the Federal Register, *id.* § 2710(d)(8)(D), at which time the approved compact "take[s] effect." *Id.* § 2710(d)(3)(B). Under Plaintiffs' own allegations, these procedures were followed. The compacts were submitted to the Secretary, SAC ¶¶ 81, 101; the compacts were "considered to have been approved" by the

Secretary after the 45-day period elapsed, *id.* ¶¶ 92, 105; and the Secretary published notice of the approved compacts in the Federal Register, *id.* ¶¶ 93, 106. The compacts are thus "in effect" under IGRA. It really is that simple.

2. Plaintiffs attempt to attack the Secretary's approval by contending that the statute separately requires that, to be effective under IGRA, a compact must have been "*validly* entered into under state law." SAC at 129 (internal quotation marks omitted; emphasis added). But that is not what IGRA says. IGRA permits the Secretary to approve a compact "entered into" by a Tribe and a State, and it permits class III gaming in conformance with a compact "entered into" by a Tribe and a State. 25 U.S.C. § 2710(d)(1), (d)(8)(A). And the Secretary has adopted implementing regulations that spell out when a compact has been "entered into" for purposes of IGRA. As explained below, those regulations look to whether the compact has been signed by two parties with apparent authority to compact. The Secretary is not required to go further and delve into state-law questions (under the laws of many different States) about the actual authority of compacting parties.

Under 25 C.F.R. § 293, which sets forth the *federal* procedural requirements for submitting compacts for the Secretary's approval, a compact is "entered into" when it bears the "appropriate signature of both parties." *Id.* § 293.3. As an additional step, the regulations also require the "Governor or other representative of the State" to certify "that he or she is authorized under State law to enter into the compact." *Id.* § 293.8(c). Together, these regulations provide that a compact is entered into when it bears *facial indicia* of state-law authority, and a Governor can credibly represent apparent authority to bind the State. The Secretary may request "other documentation" to decide whether to approve or disapprove a compact, *id.* § 293.8(d), and ultimately may conclude that a signature is inappropriate, or that a Governor's certification is not credible. But if in her

reasoned consideration the Secretary is satisfied by the federally required submissions and approves the compact, then the agreement has been "entered into" for purposes of IGRA.

All of those procedures were followed here. Plaintiffs do not allege (nor could they) that the compacts lacked the signatures of the Governor or the relevant Chairmen. Nor do they allege that the compacts were not submitted with the required certifications, including the Governor's certifications "that he or she [was] authorized under State law to enter into the compact." 25 C.F.R. § 293.8. Those certifications were consistent with the Oklahoma statute stating that "[t]he Governor is authorized to negotiate and enter into cooperative agreements on behalf of this state with federally recognized Indian tribal governments." Okla. Stat. tit. 74, § 1221(C)(1). But in any event, the Governor's submission (and the Secretary's approval) satisfied IGRA's requirement that the compact be "entered into" by the State and the Tribes. Plaintiffs contend that the Secretary should have found the Governor's submission facially invalid on the basis of the Oklahoma Attorney General's opinion in *In re Treat*, which was submitted as a comment while the first two compacts were under review. But then-Secretary Bernhardt also had the Governor's competing certification in front of him, and made the reasonable decision to accept the Governor's view rather than the Attorney General's. Plaintiffs can point to nothing in IGRA or the Secretary's implementing regulations that required otherwise.

3. Plaintiffs' contrary reading of the statute commits two interpretive errors. *First*, Plaintiffs impermissibly seek to "supply words" to the statute that they claim "have been omitted." Antonin Scalia & Bryan A. Garner, *Reading Law*, 93 (2012); *see Bates* v. *United States*, 522 U.S. 23, 29 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."). The statute provides that a compact must have been "entered into." Nothing about the term "entered into" in a federal statute implies an inquiry into the compacting parties' authority under state law. In fact, in other contexts courts have "reject[ed a party's] facile attempt to equate

a federal statute's requirement of 'entered into' with 'became a party to under state contract law.'" *Bank of New York* v. *FDIC*, 453 F. Supp. 2d 82, 94 (D.D.C. 2006), *aff'd*, 508 F.3d 1 (D.C. Cir. 2007). "By introducing a limitation not found in the statute," Plaintiffs "alter, rather than . . . interpret" IGRA. *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2381 (2020).

Plaintiffs contend that a different implementing regulation, 25 C.F.R. § 293.7, adds the words the statute purportedly left out. That regulation says: "When should the Indian Tribe or State submit a compact or amendment for review and approval? The Indian tribe or State should submit the compact or amendment for approval after it has been legally entered into by both parties." 25 C.F.R. § 293.7. Plaintiffs appear to read the word "legally" to inject an additional requirement to ensure state-law validity, but that is a misreading of the rule. It is hardly plausible that the Department would bury such a significant substantive requirement in a regulation about the *timing* of submitting a compact. Instead, the rule merely reflects that, when the parties submit compacts for approval, they must be able to assert a basis for their authority to compact in the certifications required under 25 C.F.R. § 293.8. Department regulations themselves confirm as much, explaining that the subject of submitting a compact "after it has been 'legally entered into'" is "addressed . . . at 293.8," which "requires documentation from both the tribe and the State certifying that their respective representatives were authorized to execute the proposed compact or amendment." *See* 73 Fed. Reg. 74,004, 74,005 (Dec. 5, 2008). In other words, the Secretary determined that the required certifications were all the evidence needed to determine whether the compacts had been "entered into" for IGRA purposes.

Second, Plaintiffs' interpretation of IGRA ignores the rule that "in the absence of a plain indication to the contrary," Congress does not "mak[e] the application of the federal act dependent on state law." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989) (citation

omitted). Following that principle, courts must identify a "'plain indication' that Congress intended to make the [federal statute] dependent on state law." *Booth* v. *Bowser*, 2022 WL 823068, at *11 (D.D.C. Mar. 18, 2022). No such indication (much less a plain one) exists here. On the contrary, IGRA "neither defines 'entered into' nor provides any indication that Congress intended the meaning of that term to depend on state law." *Bank of New York*, 453 F. Supp. 2d at 94.

When Congress wanted to make an aspect of IGRA dependent on state law, it knew how to do so. For example, in the definitional provision of IGRA, Congress defined "Class II gaming" to include certain gaming in Wisconsin for a one-year period, but provided that "[i]f, during [that time], there is a final judicial determination that the gaming described . . . is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision." 25 U.S.C. § 2703(7)(E), (F). In other words, when Congress has given state courts a voice in the IGRA regulatory framework, it has done so expressly. It chose not to do so in the class III gaming approval framework.

4. Plaintiffs' reading of IGRA suffers from the additional flaw that it would undermine Congress's core purposes in enacting the statute. Under Plaintiffs' view, state legislatures and courts effectively can exercise indefinite veto power over Indian gaming, regardless of whether or when an approved compact goes into effect under federal law. And they can do so without any participation by the contracting Tribe or the Governor. Allowing this kind of collateral attack on class III gaming agreements would undermine Congress's purpose in IGRA by creating serious finality problems and disrupt the reliance interests of Tribes and others.

As addressed above, IGRA's tightly controlled compacting scheme promotes finality. Congress set a mandatory 45-period for the Secretary to review compacts, and gave the Secretary no flexibility to extend that deadline. Absent disapproval of the compact, IGRA directs that the Secretary "shall" publish the compact in the Federal Register after those 45 days have elapsed, *id.*

§ 2710(d)(8)(D), at which time the compact "take[s] effect," *id.* § 2710(d)(3)(B). As those provisions confirm, Congress was focused on the expedient, final resolution of compact decisions. *See Langley* v. *Edwards*, 872 F. Supp. 1531, 1535 (W.D. La. 1995) ("IGRA expresses a congressional policy of putting compacts into force quickly.").

Congress had good reason to require finality. Implementing gaming on Indian lands can be costly and time-consuming. Tribes would hardly be willing to undertake the expense of building and operating class III gaming facilities if they knew that federal approval for gaming under IGRA could be pulled out from under them at any time. Yet Plaintiffs' view would undermine Congress's scheme by giving States the ability to disavow their side of the agreement at any time. Notably, this would apply equally to Tribes *already* involved in developing and running class III gaming, which may have been operating for years under federal approval. That is certainly true for the compacts at issue here, as Plaintiffs acknowledge that Defendant Tribes have already implemented the terms of the compacts, started operating class III gaming, and are planning for the development of a new casino site. *See* SAC ¶¶ 231.j-231.o.[4]

5. Plaintiffs rely heavily on *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546, 1555 (10th Cir. 1997), which held that "the 'entered into' language imposes an independent requirement [that] the compact must be validly entered into by a state before it can go into effect." *See, e.g.*, ECF No. 114 at 46. But *Pueblo of Santa Ana* misread the statute. The Tenth Circuit panel started from the premise that IGRA "does not define what is necessary for a tribe and state to 'enter into[]'

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[4] The Defendant Tribes here are thus situated far differently from those before the Tenth Circuit in *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546 (10th Cir. 1997), addressed below. That court acknowledged the "enormous costs, both economic and human, which the Tribes will incur if they must now close gaming facilities they currently operate under these compacts." *Id.* at 1556. But it discounted the tribes' reliance interest there because most had "commenced gaming well before these compacts were signed." *Id.* Here, there is no allegation that the Defendant Tribes commenced gaming before compacts were signed, so their reliance on the finality of the Secretary's approval under IGRA was entirely justified.

a compact." *Id.* at 1553. The court wrongly perceived a statutory gap, then filled that supposed gap by looking to legislative history evincing some congressional concern for state interests. *Id.* at 1554. Based on that legislative history, the court concluded that "entered into" silently imported a strict requirement that the compact was validly entered into under state law. Even setting aside the court's reliance on legislative history rather than statutory text, the court did not have the benefit of the Secretary's 2008 regulations interpreting IGRA and specifying the federal procedures for "enter[ing] into" a compact under IGRA. Those regulations do not suggest that state law determines whether a compact has been entered into. 73 Fed. Reg. 74,004.

The same is true of *Kickapoo Tribe of Indians* v. *Babbitt*, 827 F. Supp. 37 (D.D.C. 1993). *See* ECF No. 135-1 at 35-39. That decision, which was reversed on other grounds on appeal, *see* 43 F.3d 1491 (D.C. Cir. 1995), likewise fails to grapple with the statutory text and predates the implementing regulations. And perhaps for those reasons, courts from this District have implicitly rejected its interpretation. *See Detroit Int'l Bridge Co.* v. *Government of Canada*, 192 F. Supp. 3d 54 (D.D.C. 2016). In *Detroit Int'l Bridge Co.*, the court rejected an argument that a bridge agreement approved by the Secretary of State pursuant to the International Bridge Act was invalid because Michigan's governor lacked authority to enter into the agreement. Reasoning by analogy to IGRA, the court concluded that "[c]ompact approval by the Secretary cannot be invalidated on the basis of a governor's *ultra vires* action, because a contrary rule would compel the Secretary to consider state law before approving any compact." *Id.* at 76-77 (citing *Langley*, 872 F. Supp. at 1535). For that same reason, the court rejected a parallel claim to the one Plaintiffs raise here—that the Secretary's decision was arbitrary and capricious under the APA. The court instead concluded that the Department "did not exceed its authority when it approved" the relevant agreement, and the challengers "lack[ed] a substantive right . . . to challenge the approval on the

basis of alleged state law irregularities." *Id.* at 77. *Detroit Int'l Bridge*, not *Kickapoo*, reflects the correct interpretation of IGRA.

B. The Secretary's Approval Cannot Be Unwound By State-Law Decisions

Plaintiffs contend that even if there were no state-law defect in the compacts at the time of the Secretary's review, the Oklahoma Supreme Court's later decisions in "*Treat I* and *II* establish conclusively that the State did not 'enter into' the Agreements.'" ECF No. 135-1 at 33. That is incorrect. State-law decisions—and at a minimum decisions like the *Treat* opinions that postdate the Secretary's approval—are not a basis for a court to unwind compacts that are in effect under IGRA. Those decisions have no relevance to the question whether these compacts remain "in effect" under 25 U.S.C. § 2710(d)(1) as a matter of *federal law*.

1. Indian gaming compacts are creatures of federal law. In *Cabazon Band of Mission Indians*, the Supreme Court held that States lack the authority to regulate gaming on Indian lands within their borders. 480 U.S. at 221-222. In response to that holding, Congress enacted IGRA to "grant[] the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands." *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 58 (1996); *see Michigan* v. *Bay Mills Indian Community*, 572 U.S. 782, 794-795 (2014). To be sure, the Court has recently affirmed that "State sovereignty does not end at a reservation's border," and recognized the State's inherent criminal authority in Indian country. *Oklahoma* v. *Castro-Huerta*, 142 S. Ct. 2486 (2022) (citation omitted). But the Court has never reconsidered its conclusion that IGRA alone is the source of State regulatory "authority over gaming on Indian lands." *See Seminole Tribe of Florida*, 517 U.S. at 58.

When it passed IGRA, Congress "intended to expressly preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 100-446. As discussed above, IGRA and its implementing regulations establish a clear process for State officials to certify their compacting

authority, and for the Secretary to review that certification. Once the Secretary has done so and approved a compact, "[n]o substantive right exists to challenge the approval on the basis of alleged state law irregularities." *Langley*, 872 F. Supp. at 1535; *Detroit Int'l Bridge Co.*, 192 F. Supp. 3d at 77. Subsequent state-law decisions about the compact's validity thus do not present a basis for attacking the Secretary's approval.

At the very least, even if Plaintiffs were right that a Secretary's approval of a compact could be deemed arbitrary and capricious if one of the compacting parties actually lacked authority under state law to enter into it, *subsequent* state-law decisions issued *after* the approval of the compact certainly could not provide a basis for such a finding. By definition, the Secretary could not have considered such a decision during the 45-day period, so it cannot render her approval arbitrary or capricious. And once the compact is in effect for purposes of IGRA, subsequent state decisions must yield to that federal action. Plaintiffs attempt to avoid this basic principle by arguing that in cases of Secretarial inaction, the compact's approval carries forward "only to the extent the compact is consistent with" IGRA. 25 U.S.C. § 2710(d)(8)(C). But that assumes the premise that IGRA has something to say about state-court decisions. As explained above, it does not. *See* Section I.A, *supra*. An after-the-fact state-law decision like the *Treat* cases cannot unwind an approved compact that has gone into effect under federal law.

2. IGRA is hardly anomalous in this respect. In other contexts, a framework for federally approved agreements cannot be unilaterally terminated by subsequent state-court determinations of invalidity under state law. IGRA's scheme is consistent with the frameworks of at least two particularly analogous contexts: cases involving jurisdictional retrocession and cases involving interstate compacting.

a. In cases involving an Indian-law concept called "jurisdictional retrocession," federal courts have found that certain agreements remain valid under federal law even if the

agreement is later found to violate state law. Jurisdictional retrocession is a process created by two federal statutes. In 1953, Congress enacted Public Law 280, granting some States jurisdiction over certain criminal and civil matters in Indian country. Pub. L. No. 83-280, 67 Stat. 588. Congress later passed a statute providing that States could retrocede such jurisdiction back to the Federal Government. Pub. L. No. 90-284, § 403, 82 Stat. 73, 79 (1968) (codified at 25 U.S.C. § 1323). A line of retrocession cases emerged following the same basic fact pattern: (1) a State, through its Governor, ceded state jurisdiction over certain areas of Indian country back to the Federal Government; (2) the Secretary of the Interior accepted the retrocession agreement and published it in the Federal Register; and then (3) the State determined that its agreement was not validly entered into under state law and brought suit.

Federal courts consistently dismissed those post-hoc challenges by concluding that the subsequent state-law decisions were irrelevant: "[t]he acceptance of the retrocession by the Secretary . . . ma[kes] the retrocession effective, whether or not the Governor's proclamation was valid under [state] law." *United States* v. *Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979) (quoting *Oliphant* v. *Schlie*, 544 F.2d 1007, 1012 (9th Cir. 1976), *rev'd on other grounds sub nom. Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)); *see United States* v. *Brown*, 334 F. Supp. 536, 540 (D. Neb. 1971) (finding a retrocession agreement effective despite the fact that the state resolution approving retrocession was later determined to be in violation of state law); *see also Omaha Tribe of Neb.* v. *Village of Walthill*, 334 F. Supp. 823, 832 (D. Neb. 1971) (concluding that "once the Secretary received from the state officials what appeared to be an official act of the state offering a retrocession, he was entitled to rely thereon for purposes of the acceptance authorized by the federal statute"), *aff'd*, 460 F.2d 1327 (8th Cir. 1972). As these courts explained, "[t]he federal government . . . had the power to so define and construe the word 'retrocession' as to

remove from the determination of federal assumption of jurisdiction any question of the procedural validity or invalidity of the state's act of retrocession." *Oliphant*, 544 F.2d at 1012.

b. IGRA's scheme is also consistent with the context of interstate compacts, which courts have similarly held are not subject to invalidation based on a later state-law determination. After congressional approval, an interstate compact becomes a creature of federal law. While the Constitution forbids states from entering "into any Treaty, Alliance, or Confederation," a State may "enter into any . . . Compact with another State" with "the Consent of the Congress." U.S. Const. art. I, § 10. "[W]here Congress has authorized the States to enter into a cooperative agreement and the subject matter of that agreement is an appropriate subject for congressional legislation," congressional consent "transforms the States' agreement into federal law." *Cuyler* v. *Adams*, 449 U.S. 433, 440 (1981). When federal law of this kind is at issue, "a federal court's equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Kansas* v. *Nebraska*, 574 U.S. 445, 456 (2015) (internal quotation marks omitted).

In *State ex rel. Dyer* v. *Sims*, 341 U.S. 22 (1951), the Supreme Court held that an interstate compact could not be invalidated on the basis of a State's later determination that the compact violated state law. After eight States had entered into a congressionally approved compact, West Virginia's Supreme Court ruled that the legislative act approving the State's adherence to the compact was *ultra vires*. Based on that decision, West Virginia argued that the entire compact was invalid. *Id*. at 24-26. The Supreme Court rejected West Virginia's argument. Although federal courts may show deference to the law and policy of a State, the Court held that courts may not "submi[t] to a State's own determination of whether it has undertaken an obligation." *Id*. at 28. In his concurrence, Justice Jackson concluded that West Virginia officials "should be estopped

from repudiating [their] act" based on "[w]hatever [West Virginia] now says her Constitution means." *Id*. at 35-36.

These same principles apply to an IGRA compact after a State attempts to repudiate its actions on state-law grounds. Like an interstate compact, an IGRA compact, once approved, becomes a creature of federal law. It cannot thereafter be undone by a State's attempt to disavow its obligations under that agreement.

II. THE CHALLENGED PROVISIONS OF THE COMPACTS DO NOT VIOLATE IGRA

Plaintiffs allege in Counts IV-VII that the Secretary's approvals of the compacts were arbitrary and capricious because the compacts are invalid under IGRA. Specifically, Plaintiffs claim that the compacts violate IGRA insofar as they:

- authorize class III gaming activities that are not currently permitted under Oklahoma law, SAC ¶¶ 131-153, 245-250 (Count IV);
- contain revenue sharing provisions without a meaningful concession from the State, *id*. ¶¶ 154-188, 251-256 (Count V);
- impose impermissible regulations on class II gaming activities, *id*. ¶¶ 189-200, 257-261 (Count VI); and
- provide for the Governor's concurrence in future off-reservation trust land acquisitions, *id*. ¶¶ 201-228, 262-265 (Count VII).

None of the challenged provisions violates IGRA, let alone renders the Secretary's actions arbitrary, capricious, or contrary to law. And even if Plaintiffs were correct that any of these compact provisions is inconsistent with IGRA, the appropriate remedy would be to sever the invalid provision, not to invalidate the compacts in their entirety.

A. The Compacts Do Not Authorize Class III Gaming Activities That Are Not Currently Permitted Under Oklahoma Law

Plaintiffs contend that the compacts violate IGRA by purporting to authorize class III gaming activities that are not currently permitted under Oklahoma law "for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). This argument rests on a misreading

of the relevant compact language. Each of the compacts *refers to* forms of gaming that are not currently permitted under Oklahoma law, such as event wagering, house-banked card games, and house-banked table games. *E.g.*, Comanche Nation Compact pt. 2.A.7; Otoe-Missouria Compact pt. 2.A.6; UKB Compact pt. 2.A.6; KTT Compact pt. 2.A.6. But the compacts do not *authorize* any of those things. Instead, the compacts allow the Tribes to offer such gaming activities *only* "if such game has been approved by the [State Compliance Agency]," or "to the extent . . . authorized by law." *E.g.*, Comanche Nation Compact pts. 2.A.7, 2.A.13. Put the other way: if Oklahoma law does *not* allow others to engage in event wagering, house-banked card games, or house-banked table games, then the Tribes cannot offer those activities either. That precisely mirrors Section 2710(d)(1)(B).

Plaintiffs instead appear to object to any reference in the compacts to not-yet-authorized forms of gaming. But that is perfectly consistent with IGRA, which broadly provides that a compact may include provisions related to "any . . . subjects that are directly related to the operation of [class III] gaming." *See* 25 U.S.C. § 2710(d)(3)(C)(vii). Allowing for future offerings of event wagering, house-banked card games, and house-banked table games—to the extent those activities become authorized for others under Oklahoma law—falls well within that wide ambit. That is why the Secretary permitted a 2014 compact between the Commonwealth of Massachusetts and the Mashpee-Wampanoag Tribe that included provisions related to "[i]nternet [g]aming" to go into effect even though internet gaming had not been authorized under Massachusetts law. *See* Compact Between the Mashpee-Wampanoag Tribe and the Commonwealth of Massachusetts § 4.3.2 (deemed approved Jan. 6, 2014).[5] In short, nothing in IGRA prevents a State from addressing, or the Secretary from considering, whether and how

[5] *Available at* https://www.bia.gov/gaming-compact/mashpee-wampanoag-tribe-tribal-state-gaming-compact.

activities will be offered by Tribes in the event that such activities are approved more generally under state law. And addressing those contingencies avoids the need to amend the compact and return to the Secretary whenever state law changes.

B. The Revenue and Reporting Requirements Address Permissible Topics

Plaintiffs next contend that the compacts violate IGRA because they contain provisions that do not fall within any of the topics enumerated in 25 U.S.C. § 2710(d)(3)(C)(i)-(vii). SAC ¶¶ 189-200, 257-261. Specifically, Plaintiffs claim that the compacts impermissibly regulate class II gaming because they require the Tribes to obtain a certain amount of their revenue from class III games, *e.g.*, Otoe-Missouria Compact pt. 3.D, and to report the total number of gaming devices in each gaming facility, *e.g.*, *id.* pt. 4.K.

Contrary to Plaintiffs' assertions, these provisions plainly are permissible subjects for an IGRA compact, because they address "subjects that are directly related to the operation of [class III] gaming." *See* 25 U.S.C. § 2710(d)(3)(C)(vii). Take the revenue provisions, which require the Tribes to "certify by Tribal resolution that [variously between 45% and 80%] of revenues from all Facilities is derived from [class III] Games." *E.g.*, Comanche Nation Compact pt. 3.D. The amount of revenue that a Tribe derives from class III games certainly is "directly related" to the operation of class III gaming activities. Similarly, the reporting provisions, which require the Tribes to "report at least quarterly . . . the number of . . . class II and class III games" in each facility, *e.g.*, Otoe-Missouria Compact pt. 4.K, plainly relate to the "maintenance of the gaming facility," 25 U.S.C. § 2710(d)(3)(C)(vi).

Plaintiffs nevertheless argue that the revenue and reporting provisions are invalid because they affect class II gaming *indirectly*. But that is not the applicable standard. Under Section 2710(d)(3)(C), a Tribal-State compact may include provisions related to the "maintenance of the gaming facility" or "other subjects that are directly related to the operation of gaming

activities," even if those provisions have some effect on class II gaming. For example, in 2021, the Secretary approved a compact between the State of Arizona and the Ak-Chin Indian Community that indirectly regulated class II gaming by limiting the total number gaming devices that each Tribe could operate (including class II devices). *See* Compact Between the Ak-Chin Indian Community and the State of Arizona § 3(c) (approved May 21, 2021).[6] The Secretary's approval reflected, implicitly, the conclusion that the compact did not violate IGRA because the relevant provision was "directly related to the operation of [class III] gaming," despite its supposed indirect impacts on class II gaming. The same conclusion applies here. And were there any doubt about the matter, each of the four compacts at issue expressly provides that "nothing in this Compact shall limit the Tribe's right to operate any game that is Class II under IGRA." Comanche Nation Compact pt. 3.A; Otoe-Missouria Compact pt. 3.A; UKB Compact pt. 3.A; KTT Compact pt. 3.A. There is accordingly no basis for Plaintiffs' contention that the compacts impermissibly regulate class II gaming.

C. The Concurrence Provisions Also Address Permissible Topics And Do Not Violate The Federal Trust Obligation

Nor do the compacts violate IGRA by providing that the Governor will concur in future off-reservation trust acquisitions. Under 25 U.S.C. § 2719(a) and (b), a Tribe cannot engage in gaming activities on lands acquired by the Secretary in trust after October 17, 1988 without the Governor's concurrence "that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members." Each of the four compacts at issue here provides that the Governor "agrees to concur in any determination by the Secretary of the Interior that [certain] land[] . . . should be taken into trust for Gaming purposes." Comanche Nation Compact

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[6] *Available at* https://www.bia.gov/gaming-compact/ak-chin-indian-community-tribal-state-gaming-compact-2.

pt. 4.J.2.a; Otoe-Missouria Compact pt. 4.J.2.a; UKB Compact pt. 4.K; KTT Compact pt. 4.K. Again, contrary to Plaintiffs' contention that these concurrence provisions are not proper subjects of negotiation under IGRA, the locations where gaming activities may be conducted "directly relate[] to the operation of [class III] gaming," and thus may be included in IGRA compacts. 25 U.S.C. § 2710(d)(3)(C)(vii); *see* Compact Between the Confederated Tribes of the Warm Springs Reservation of Oregon and the State of Oregon art. II.I (deemed approved Mar. 1, 2011) ("[T]he Governor will concur in taking the Cascade Locks Land into trust.")[7]; Compact Between the Fort Mojave Indian Tribe and the State of California pmbl. (approved Nov. 5, 2004) (providing that "the Governor intends to grant his concurrence" to a future off-reservation trust acquisition).[8]

Plaintiffs alternatively contend that the concurrence provisions violate the federal trust obligation. SAC ¶¶ 221-231, 262-265; *see generally United States* v. *Mitchell*, 463 U.S. 206, 225 (1983). But Plaintiffs do not identify any "specific trust duties in a statute, regulation, or treaty" that are violated by the concurrence provisions, as they must to show a violation of the federal trust obligation. *El Paso Nat. Gas Co.* v. *United States*, 750 F.3d 863, 892 (D.C. Cir. 2014). IGRA itself "does not create a fiduciary duty; it is a regulatory scheme that balances the competing interests of the states, the federal government and Indian tribes," *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis.* v. *United States*, 259 F. Supp. 2d 783, 790 (W.D. Wis. 2003), and Plaintiffs do not point to any other statute that supposedly creates a trust obligation. Because Plaintiffs cannot show that the concurrence provisions violate IGRA or the federal trust obligation, the concurrence provisions are not invalid.

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[7] *Available at* https://www.bia.gov/gaming-compact/confederated-tribes-warm-springs-reservation-tribal-state-gaming-compact-13.

[8] *Available at* https://www.bia.gov/gaming-compact/fort-mojave-indian-tribe-tribal-state-gaming-compact-0.

D. The State Provided Meaningful Concessions For The Revenue-Sharing Provisions That Result In Substantial Economic Benefits To The Tribes

Plaintiffs contend that the revenue-sharing provisions of the compacts are impermissible taxes under 25 U.S.C. § 2710(d)(4). Although IGRA does not "confer[] upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in a Class III activity," 25 U.S.C. § 2710(d)(4), it does not preclude a State and a Tribe from agreeing to revenue-sharing provisions in a compact. *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1112 (9th Cir. 2003) ("Where, as here, however, a State offers meaningful concessions in return for fee demands, it does not exercise 'authority to impose' anything. Instead, it exercises its authority to negotiate, which IGRA clearly permits."); *see Idaho* v. *Shoshone-Bannock Tribes*, 465 F.3d 1095, 1101 (9th Cir. 2006) ("Although the state did not have *authority* to exact such payments, it could bargain to receive them in exchange for a quid pro quo conferred in the compact."); S. Rep. No. 100-446, at 13 ("A State's governmental interests with respect to class III gaming on Indian lands include . . . its economic interest in raising revenues to provide governmental services for its citizens."). Oklahoma provided several meaningful concessions to the Tribes in the compacts, any one of which justifies the agreed-upon revenue sharing. *See* Letter from Larry Echo Hawk (Assistant Secretary of Indian Affairs) to Tiger Hobia (Mekko of Kialegee Tribal Town) (July 8, 2011) (defining a "meaningful concession" as "the State conced[ing] something it was not otherwise required to negotiate, such as granting exclusive rights to operate Class III gaming or other benefits sharing a gaming-related nexus").[9]

First, the parties agreed that the Tribes would have "substantial exclusivity over Class III Covered Gaming consistent with the goals of IGRA." Comanche Nation Compact pt. 10.A;

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[9] *Available at* https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/pdf/508%20Compliant%202011.07.09%20Kialegee%20Tribal%20Town%20Tribal%20State%20Gaming%20Compact.pdf.

Otoe-Missouria Compact pt. 10.A; UKB Compact pt. 10.A; KTT Compact pt. 10.A. Substantial exclusivity is a well-recognized concession that can support a revenue-sharing agreement. *See, e.g.*, Letter from Aurene M. Martin, Deputy Assistant Secretary—Indian Affairs, to Ernie Jones, Sr., President of the Yavapai-Prescott Tribe 2 (Aug. 11, 2003) (describing substantial exclusivity as "where a compact provides a tribe with substantial economic benefits in the form of a right to conduct Class III gaming activities that are on more favorable terms than any rights of non-Indians to conduct similar gaming activities in the State").[10]

Second, the compacts provide other meaningful concessions, such as provisions that address not-yet-authorized forms of class III gaming and concurrences in future off-reservation trust acquisitions. *E.g.*, Comanche Nation Compact pt. 4.J.2.a (acknowledging that the concurrence provisions "provide a meaningful concession to the Tribe"); Otoe-Missouria Compact pt. 4.J.2.a; UKB Compact pt. 4.K; KTT Compact pt. 4.K. Indeed, in their own words, Plaintiffs brought this suit because the compacts provide the Tribes with meaningful concessions that will result in substantial economic benefits. Plaintiffs repeatedly allege that the compacts will confer "significant competitive advantage[s]" on the Tribes, SAC ¶¶ 5, 129, 151. Plaintiffs also contend that the Tribes will "have a competitive advantage over [Plaintiffs] . . . because they pay less to the State under the [compacts]." ECF No. 114 at 27. As Plaintiffs themselves effectively recognize, the revenue-sharing provisions are not taxes, but negotiated terms that provide the Tribes with meaningful and substantial economic benefits.

[10] *Available at* https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/pdf/508_compliant_2003.08.21_yavapai-prescott_tribe_tribal_state_gaming_compact.pdf.

E. Each Of The Compacts Contains A Severability Clause

Finally, to the extent Plaintiffs could demonstrate that any of the challenged provisions is invalid, the proper remedy would be to sever any such provision from the compacts, not to invalidate the compacts in their entirety. Each of the compacts contains a severability clause:

> If any clause or provision of this Compact is subsequently determined by any federal court to be invalid or unenforceable under any present or future law, including but not limited to the scope of Covered Games, the remainder of this Compact shall not be affected thereby.

Comanche Nation Compact pt. 13.B; Otoe-Missouria Compact pt. 13.B; UKB Compact pt. 13.B; KTT Compact pt. 13.B. Moreover, IGRA itself explicitly contemplates severing invalid provisions from compacts, *see* 25 U.S.C. § 2710(d)(8)(C) (providing that, for no-action approvals, "the compact shall be considered to have been approved . . . but only to the extent the compact is consistent with the provisions of this chapter"), and both courts and the Secretary have endorsed this practice, *see Citizen Potawatomi Nation* v. *Oklahoma*, 881 F.3d 1226, 1240-1241 (10th Cir. 2018) (severing an invalid arbitration clause in an IGRA compact); Letter from Michael D. Olson (Principal Deputy Assistant Secretary—Indian Affairs) to Bill Anoatubby (Governor of the Chickasaw Nation) (Jan. 12, 2005) (severing an invalid provision from a compact).[11]

CONCLUSION

For the foregoing reasons, Defendant Governor Stitt respectfully requests that the Court grant judgment in his favor on Counts I-VII of the Complaint.

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[11] *Available at* https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/pdf/508%20Compliant%202005.02.08%20Chickasaw%20Nation%20Tribal%20State%20Gaming%20Compact.pdf.

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