

American Indian Law Review

Volume 46 | Number 1

2022

The Mess That Has Become Indian Gaming in Oklahoma

Lucas Meacham

Follow this and additional works at: <https://digitalcommons.law.ou.edu/ailr>



Part of the [Indigenous, Indian, and Aboriginal Law Commons](#)

Recommended Citation

Lucas Meacham, *The Mess That Has Become Indian Gaming in Oklahoma*, 46 AM. INDIAN L. REV. 155 (2022),
<https://digitalcommons.law.ou.edu/ailr/vol46/iss1/5>

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

THE MESS THAT HAS BECOME INDIAN GAMING IN OKLAHOMA

*Lucas Meacham**

I. Introduction

Since its enactment in 1988, the Indian Gaming Regulatory Act (IGRA) has permitted American Indian tribes to conduct gaming within the United States.¹ In return, tribes have entered into agreements with state governments for the payment of exclusivity fees under various revenue sharing arrangements, which have provided substantial economic support for non-tribal governments.² In 2014, total outputs stemming from tribal gaming amounted to over \$96.6 billion.³ Gaming generated \$16 billion in federal, state, and local government tax revenues.⁴ Oklahoma, in particular, generated \$2.1 billion in tax revenues from tribal gaming.⁵ Needless to say, tribal gaming provides states, especially Oklahoma, with vital economic benefits. Accordingly, it is important that states and tribes have coherent relationships that govern this critical economic activity.

For over fifteen years, the Oklahoma State Tribal Gaming Act (“STGA”) has governed these relationships in Oklahoma.⁶ The STGA offered “federally recognized” tribes within Oklahoma the ability to enter into a Model Compact under which the tribes could, subject to federal approval, engage in Class III gaming activities.⁷ However, recent action by Oklahoma Governor Kevin Stitt, the Comanche Nation, the Otoe-Missouria Tribe, the United Keetoowah Band of Cherokee Indians (“UKB”), and the Kialegee Tribal Town (“KTT”)⁸ has threatened to upend this fifteen-year

* Third-year student, University of Oklahoma College of Law.

1. 25 U.S.C. §§ 2701-2721.

2. ALAN MEISTER, NATHAN ASSOCS., THE ECONOMIC IMPACT OF TRIBAL GAMING: A STATE-BY-STATE ANALYSIS 17-18 (2017), <https://www.americangaming.org/sites/default/files/Economic%20Impact%20of%20Indian%20Gaming%20in%20the%20U.S.%20September%202017.pdf> (report prepared for the American Gaming Association).

3. *Id.* at 5.

4. *Id.*

5. *Id.*

6. 3A OKLA. STAT. ANN. § 280 (West 2018).

7. *Id.* §§ 280-281.

8. See Press Release, Okla. Governor J. Kevin Stitt, KTT and UKB Tribal Gaming Compacts Deemed Approved by the Department of Interior (Aug. 20, 2020) [hereinafter Press Release, Gaming Compacts Deemed Approved], <https://oklahoma.gov/governor/>

relationship. Following Governor Stitt's public challenge to the renewal of the Model Compacts and resulting litigation over the renewal clause in the Model Compacts, the Comanche Nation, Otoe-Missouria Tribe, UKB, and KTT (the "Defendant Tribes") all entered into new agreements (the "New Compacts") with the state that purported to replace the existing Model Compacts with new agreements.⁹ The New Compacts, entered into on behalf of the state by Governor Stitt, significantly altered the rights of the state and the compacting tribes while negatively impacting the tribes who remained bound by the original compacts and greatly expanding the scope of gaming in Oklahoma.¹⁰ Primarily, the New Compacts altered the fee schedules the tribes are required to pay.¹¹ Additionally, the compacts negotiated by the Comanche Nation and Otoe-Missouria Tribe in particular allowed for sports betting, which is not permissible under Oklahoma law.¹² Importantly, the New Compacts allowed the Defendant Tribes to potentially expand their gaming operations into more favorable metropolitan locations in or near the jurisdictions of other Oklahoma tribes, which was not allowed under the Model Compacts.¹³

These actions have been met with fierce opposition from other tribes within the state as well as members of the state government. As a result, a string of legal actions have been filed. First, following an op-ed by Governor Stitt challenging the renewal clause in the Model Compacts and a failure by the Attorney General to negotiate new compact terms, the Cherokee Nation, the Chickasaw Nation, the Choctaw Nation, and the Citizen Potawatomi Nation (the "Plaintiff Tribes"), filed a federal lawsuit in the District Court for the Western District of Oklahoma against Governor

newsroom/newsroom/2020/august/ktt-and-ukb-tribal-gaming-compacts-deemed-approved-by-the-depart.html; *see also* Press Release, Okla. Governor J. Kevin Stitt, Gov. Stitt Signs Two New Gaming Compacts with the Otoe-Missouria Tribe and Comanche Nation (Apr. 21, 2020) [hereinafter Press Release, Gov. Stitt Signs Two New Gaming Compacts], <https://oklahoma.gov/governor/newsroom/newsroom/2020/april/gov--stitt-signs-two-new-gaming-compacts-with-the-otoe-missouria.html>.

9. *See* Press Release, Gov. Stitt Signs Two New Gaming Compacts, *supra* note 8.

10. *See id.*

11. *Compare* 3A OKLA. STAT. ANN. § 280 (West 2018), with Otoe-Missouria Tribe and State of Oklahoma Gaming Compact (Apr. 18, 2020), <https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/oig/pdf/508%20Compliant%202020.06.29%20Otoe%20Missouria%20Tribe%20Gaming%20Compact.pdf> [https://perma.cc/7YV8-L3T2], and Comanche Nation and State of Oklahoma Gaming Compact (Apr. 18, 2020), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/pdf/508%20Compliant%202020.06.29%20Comanche%20Nation%20Gaming%20Compact.pdf> [https://perma.cc/J639-92GQ].

12. 3A OKLA. STAT. ANN. § 280 (West 2018).

13. *See* Press Release, Gov. Stitt Signs Two New Gaming Compacts, *supra* note 8.

Stitt seeking to enforce a renewal clause embedded in the Model Compacts.¹⁴ The federal judge ruled the renewal clause was enforceable, thus the Model Compacts were automatically renewed for another fifteen years.¹⁵

While the suit in the Western District of Oklahoma was pending, Governor Stitt entered into New Compacts with the Defendant Tribes in what could be construed as an attempt to undermine the efforts of the Plaintiff Tribes in the Western District of Oklahoma.¹⁶ The New Compacts prompted Oklahoma Senate President Pro Tempore, Greg Treat, and Speaker of the House, Charles McCall, to petition the Oklahoma Supreme Court to rule the compacts invalid.¹⁷ The Oklahoma Supreme Court subsequently heard the case and ruled the compacts with the Comanche Nation and the Otoe-Missouria Tribe invalid under Oklahoma law.¹⁸

Undeterred by the ruling of the Oklahoma Supreme Court, the Defendant Tribes sought approval from the Secretary of the Interior of the New Compacts, arguing that the Oklahoma Supreme Court lacked jurisdiction over them and the New Compacts.¹⁹ The Secretary of the Interior took no action on the filings by the Defendant Tribes, resulting in their approval by default.²⁰ The Plaintiff Tribes responded by filing another federal lawsuit challenging the New Compacts and the action of the Secretary of the Interior in approving the New Compacts, which is the focus of this Note.²¹ This latest suit was filed in the federal district court in Washington, D.C., against the Secretary and Assistant Secretary of the United States Department of the Interior, Governor Stitt, and the Defendant Tribes.²²

14. *Cherokee Nation v. Stitt*, 475 F. Supp. 3d 1277 (W.D. Okla. 2020).

15. *Id.* at 1283.

16. See sources cited *infra* note 166 and accompanying text.

17. *Treat v. Stitt*, 2020 OK 64, ¶ 1, 473 P.3d 43, 44.

18. *Id.* ¶ 8, 473 P.3d at 45.

19. *Id.* ¶ 2, 473 P.3d at 44.

20. *Id.* ¶ 2, 473 P.3d at 44; see also 25 U.S.C. § 2710(d)(8)(C) (providing the authority for a tribal-state compact to be approved by default: “[i]f the Secretary does not approve or disapprove the compact . . . before the date that is 45 days after the date on which the compact is submitted . . . the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of [IGRA]”).

21. *Cherokee Nation v. U.S. Dep’t of the Interior*, No. 1:20-cv-02167 (TJK) (D.D.C. filed Aug. 7, 2020), <https://turtletalk.files.wordpress.com/2020/08/26-amended-complaint.pdf>.

22. Randy Ellis, *Four Oklahoma Tribes Ask Federal Court in Washington D.C. to Void Two Gaming Compacts*, OKLAHOMAN (Aug. 8, 2020), <https://www.oklahoman.com/article/5668636/four-oklahoma-tribes-ask-federal-court-in-washington-dc-to-void-two-gaming-compacts>.

Thus, we arrive at the current state of affairs of Indian Gaming in the State of Oklahoma. Part I of this Note introduces the tribal-state dispute, Part II discusses the history of Indian Gaming in Oklahoma, and Part III discusses the merits of the case brought against Governor Stitt, the Defendant Tribes, and the Secretary of the Interior.

II. Indian Gaming in Oklahoma

A. The Indian Gaming Regulatory Act

Commercial Indian gaming has operated in the United States since the 1970s.²³ During the 1970s, Congress was silent about how states should treat Indian gaming within their borders. However, after the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, which ruled that California state law could not regulate gaming on Indian land within California, Congress decided it needed to find a solution to regulate Indian gaming that would be beneficial to both the tribes and the states.²⁴ The United States Constitution gives Congress the power to "regulate commerce with foreign nations, and among the several states, and with Indian tribes."²⁵ Thus, in 1988, Congress passed the Indian Gaming Regulatory Act (IGRA).²⁶

1. The Breakdown of Tribal Gaming

Congress enacted the IGRA in an effort to create a regulatory scheme for tribal gaming that would "balance state, federal, and tribal interests."²⁷ IGRA sought to provide tribes with a "statutory basis for the operation of gaming"²⁸ as well as to "shield [the Indian tribes] from organized crime and other corrupting influences"²⁹ in order to facilitate the ultimate goal of "promoting tribal economic development, self-sufficiency, and strong tribal governments."³⁰

23. Hicham Raache, *IN FOCUS: Origins of Native American Gaming*, KFOR (July 28, 2020), <https://kfor.com/digital-first/in-focus-origins-of-native-american-gaming/>.

24. 480 U.S. 202 (1987).

25. U.S. CONST. art. 1, § 8, cl. 3.

26. 25 U.S.C. §§ 2701-2721.

27. *Amador Cnty. v. Salazar*, 640 F.3d 373, 376 (D.C. Cir. 2011) (citing 25 U.S.C. §§ 2701-2702).

28. 25 U.S.C. § 2702(1).

29. *Id.* § 2702(2).

30. *Id.* § 2702(1).

IGRA broke tribal gaming down into three distinct classes.³¹ Class I gaming is defined as social gaming “for prizes of minimal value” or traditional games related to traditional Indian ceremonies.³² Class II gaming is bingo and card games played for money that are authorized by the state, not including any banking card games or any electronic game of chance or slot machines.³³ Class III gaming is defined as all gaming that is not covered in Class I and Class II, and includes traditional games that come to mind when thinking of casinos, such as blackjack, roulette, and slot machines.³⁴

IGRA applies to each class differently. “Class I gaming [conducted] on Indian lands is within the exclusive jurisdiction of the Indian tribes” and as such is not primarily regulated by IGRA.³⁵ Governance of gaming under Class II is shared equally between the National Indian Gaming Commission (NIGC) and the tribes.³⁶ Tribes must adopt a gaming ordinance that applies the minimum requirements prescribed in IGRA and the NIGC Chairman must approve the ordinance before any Class II gaming may occur.³⁷

2. Class III Gaming Requirements

Class III gaming is the most complex type of gaming to regulate and, as a result, is dealt with extensively by IGRA. It is primarily governed by § 2710(d) of IGRA.³⁸ Class III gaming has three requirements that must be met before any gaming is commenced.³⁹ The first requirement is that the gaming be “authorized by a tribal ordinance or resolution that has been approved by the National Indian Gaming Commission, a regulatory body created by IGRA with rulemaking and enforcement authority.”⁴⁰ The second requirement mandates that the “Indian lands where the gaming [] take[s] place must be located within a state that permits gaming ‘for any purpose by any person, organization, or entity.’”⁴¹ Lastly, the third

31. *Id.* § 2703.

32. *Id.* § 2703(6).

33. *Id.* § 2703(7).

34. *Amador Cnty. v. Salazar*, 640 F.3d 373, 376 (D.C. Cir. 2011).

35. *Colo. River Indian Tribes v. Nat’l Indian Gaming Comm’n*, 466 F.3d 134, 135 (D.C. Cir. 2006) (quoting 25 U.S.C. § 2710(a)(1)).

36. *Id.* (citing 25 U.S.C. § 2710(a)(2), (b)).

37. *Id.*

38. *Id.* at 136 (citing 25 U.S.C. § 2710(d)).

39. *Amador Cnty.*, 640 F.3d at 376.

40. *Id.* (citing 25 U.S.C. § 2710(d)(1)(a), (2)(C)).

41. *Id.* (quoting 25 U.S.C. § 2710(d)(1)(B)).

requirement dictates that gaming must conform to a compact between the tribe and the state in which the gaming will occur.⁴²

IGRA mandates various obligations that tribes and states must follow while negotiating compacts. First, the compact must only consider Class III gaming; thus, bargaining for Class I and II gaming in the compact is prohibited.⁴³ Next, IGRA provides permissible subjects that may be negotiated.⁴⁴ These subjects include:

- (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
- (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
- (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
- (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
- (v) remedies of breach of contracts;
- (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
- (vii) any other subjects that are directly related to the operation of gaming activities.⁴⁵

The statute expressly provides that, except assessments necessary to defray regulatory amounts, § 2710(d) does not give the state the authority to “impose any tax, fee, charge, or other assessment upon an Indian tribe.”⁴⁶ Accordingly, the state has no authority to impose such taxation on tribal gaming as the general rule is that “the Indians’ exemption from state taxes [is] lifted only when Congress has made its intention to do so unmistakably

42. 25 U.S.C. § 2710(d)(1)(C).

43. *Id.* § 2710(a)(1), (2).

44. *Id.* § 2710(d)(3)(C).

45. *Id.* § 2710(d)(3)(C)(i)-(vii).

46. *Id.* § 2710(d)(4).

clear.”⁴⁷ However, despite this limitation, courts, as well as the Department of the Interior, have held compacts valid that allow the state to exact fees from tribes where those “fees” are structured as exclusivity fees.⁴⁸ In doing so, those courts placed an emphasis on the word “impose” and will allow for fairly negotiated exclusivity fees with a deemed benefit for the tribe or tribes, as the courts reasoned such fair exchange would not fall under the definition of “impose.”⁴⁹ “Although [a] state [does] not have [the] *authority* to exact [revenue sharing or other payments from tribes relating to their gaming operations], it [can] bargain to receive them in exchange for a quid pro quo benefit conferred in the compact.”⁵⁰ The courts reasoned that if the exclusivity fees sought by the state were accompanied by significant economic benefit conferred to the tribes, then such fees would be permissible.⁵¹

Ultimately, the Secretary of the Interior (the “Secretary”) has the authority to determine the validity and reasonableness of exclusivity fees in a tribal-state compact.⁵² The Secretary has traditionally required that the state confer an economic benefit to the tribe that “the State is not required to negotiate under IGRA” for exclusivity fees to be valid.⁵³ Such economic benefit includes the right to exclusively engage in Class III gaming activities.⁵⁴ Thus, if the tribe and the state enter into significant negotiation where the state confers an “extra” economic benefit on the tribe, exclusivity fees can be permitted.

3. *The Role of the Secretary*

Once the state and tribe have entered into a compact, it is sent to the Secretary for approval.⁵⁵ IGRA requires that for a compact to be operable, it must go into “effect.”⁵⁶ To be effective, the Secretary must approve a

47. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985).

48. *See In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003); *see also Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006).

49. *Indian Gaming*, 331 F.3d at 1111 (citing 25 U.S.C. § 2710(d)(4)).

50. *Shoshone-Bannock Tribes*, 465 F.3d at 1101.

51. *Id.* at 1101–02.

52. 25 U.S.C. § 2710(d)(3)(B).

53. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1039 (9th Cir. 2009).

54. *Id.*

55. *Id.* at 1056.

56. 25 U.S.C. § 2710(d)(1)(C).

legally entered into compact and publish a notice of the approval in the Federal Register.⁵⁷

Title 25 U.S.C. § 2710(d)(8)(A) gives the Secretary the explicit authority to “approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.”⁵⁸ Further, IGRA gives the Secretary explicit disapproval rights.⁵⁹ The Secretary “may disapprove a compact . . . only if [the] compact violates”: any provision of IGRA, any provision of federal law that does not relate to tribal gaming, or the trust obligation the United States owes Indians.⁶⁰ The scope of these disapproval rights were addressed in *Amador County, California v. Salazar*, where the court reasoned that it was “implausible that Congress intended ‘may’ to confer [] complete discretion.”⁶¹ Further, the court determined that “‘may’ is best read to limit the circumstances in which disapproval is allowed.”⁶² The Secretary must, however, disapprove a compact if it would violate any of the three limitations in that subsection⁶³ Thus, the Secretary is obliged to deny any compact that violates § 2710(d)(8)(B).⁶⁴

Regulation under IGRA has added an additional requirement that the compact be “legally entered into by both parties” for the compact to be approved by the Secretary.⁶⁵ Essentially, this is a question of tribal and state law requiring that the tribe and state each possess the requisite legal authority to enter into the compact.

IGRA also places a time requirement on the Secretary.⁶⁶ The Secretary has forty-five days after the compact is submitted to approve or disapprove the compact.⁶⁷ However, if the Secretary fails to make a decision within the forty-five-day window, the compact is deemed automatically approved so long as it is consistent with IGRA.⁶⁸ The obligation of the Secretary to disapprove compacts in violation of the three limitations set out in § 2710(d)(8)(B) is not waived if the Secretary provides approval by

57. *Id.* § 2710(d)(3)(B).

58. *Id.* § 2710(d)(8)(A).

59. *Id.* § 2710(d)(8)(B).

60. *Id.*

61. 640 F.3d 373, 381 (D.C. Cir. 2011).

62. *Id.*

63. *Id.*

64. *See Amador Cnty. v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011).

65. 25 C.F.R. § 293.7 (2009).

66. 25 U.S.C. § 2710(d)(8)(C).

67. *Id.*

68. *Id.*

inaction.⁶⁹ The court in *Amador* reasoned that “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.”⁷⁰

B. Oklahoma Tribal Gaming Before the STGA

Class III gaming did not exist in Oklahoma for many years after the enactment of IGRA.⁷¹ Instead, most Indian gaming revolved around Class II gaming, primarily bingo.⁷² Accordingly, during this period of gaming in Oklahoma, IGRA was not important from a state perspective.⁷³ Gaming was exclusively governed between the tribes and the NIGC, leaving the state on the outside looking in, accruing no revenue from such activity.

The reason most gaming in Oklahoma during this period was focused on Class II is because of the historical unwillingness of Oklahoma governors to enter into negotiations with the Indian tribes of Oklahoma, likely as a result of the fear of political repercussions from advocating for gaming in a traditionally conservative Bible Belt state like Oklahoma.⁷⁴ The only Class III gaming that was allowed before the STGA was pari-mutuel horse racing.⁷⁵

After the Supreme Court ruling in *Seminole Tribe v. Florida*, in which the Supreme Court determined Congress could not abrogate the states’ Eleventh Amendment immunity by allowing tribes to sue a state that refused to negotiate a Class III compact, the good-faith negotiation clause of IGRA was essentially rendered useless.⁷⁶ Thus, the state could continue refusing to negotiate with the tribes, which it did until the early 2000s.⁷⁷

69. *Amador Cnty.*, 640 F.3d at 381.

70. *Id.*

71. D. Michael McBride III, *Indian Gaming Compacts in Oklahoma: Respecting Tribal Jurisdiction and Enforcing Understanding*, INDIAN GAMING, May 2010, at 14, 14, https://turtletalk.files.wordpress.com/2010/05/may10_mcbride-indian-gaming-compacts-in-ok-indian-gaming-ma.pdf.

72. *Id.*

73. *Id.*

74. W. Dale Mason, *Gaming, Indian*, in THE ENCYCLOPEDIA OF OKLAHOMA HISTORY AND CULTURE (Okla. Hist. Soc’y, 2009), <https://www.okhistory.org/publications/enc/entry.php?entry=GA007> (online version of two-volume print edition).

75. *Id.*

76. 517 U.S. 44 (1996).

77. Mason, *supra* note 74.

Before the STGA, tribes “were effectively shut out of [Class III] gaming” in Oklahoma.⁷⁸

Because of the state’s stance on Class III gaming, the tribes’ Class II gaming became even more contentious with the NIGC as the tribes’ “bingo” gaming machines began to look and act more and more like Class III slot machines.⁷⁹ The tribes sought to maximize the revenue from their Class II gaming operations by developing innovative Class II gaming technologies.⁸⁰ Primarily, the tribes added digitalized, network bingo that increased the number of players eligible to play.⁸¹ However, these innovations in Class II gaming were met with strong opposition by the NIGC in many instances.⁸² As a result, legal battles arose around the distinction between Class II and Class III gaming.⁸³ This was a tumultuous period for tribal gaming in Oklahoma; gaming revenues were low and there was friction between the Oklahoma Government, the NIGC, and the tribes of Oklahoma.⁸⁴ However, the state’s reluctance to accept Class III gaming did not dissuade the tribes as they negotiated with the state for a Class III compact.⁸⁵ Finally, in 2004, the tribes’ hard work paid off.

In 2004, new negotiations began between the tribes and recently elected Governor Brad Henry.⁸⁶ Governor Henry, unlike most prior Oklahoma governors, was vocal about his willingness to engage in tribal gaming negotiations.⁸⁷ With his support and encouragement, Senate Bill 1252, containing the Model Compact, which he had negotiated with the tribes, was passed by the Oklahoma state legislature and submitted to the voters as a state question.⁸⁸ This legislation significantly expanded the scope of Class III gaming in Oklahoma beyond just horse racing and is better known now as the State-Tribal Gaming Act, or the STGA.⁸⁹ The legislation was placed on the ballot in Oklahoma as State Question 712 and was officially enacted after substantial support from Oklahoma voters.⁹⁰

78. *Id.*

79. McBride, *supra* note 71, at 14.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *See* Mason, *supra* note 74.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

C. Oklahoma Tribal Gaming After the STGA

The STGA significantly impacted both state and tribal economic activity in Oklahoma almost immediately.⁹¹ Within the first year, the state collected around \$2.3 million in exclusivity fees from the tribes.⁹² The fees have continued to grow substantially almost every year since, as a result of increased gaming activity by the compacting tribes.⁹³ In 2019, the state collected over \$148 million in exclusivity fees from tribes engaged in Class III gaming.⁹⁴ The \$148 million in exclusivity fees were collected on over \$2.44 billion of Class III gaming revenue generated by the tribes.⁹⁵ As of 2018, thirty-one different tribes were operating 131 facilities offering Class III gaming throughout Oklahoma.⁹⁶

The STGA allows tribes to conduct Class III gaming activities, which includes electronic gaming and non-house banked card games, and also allows horse racetracks to conduct limited electronic gaming.⁹⁷ The STGA offered federally recognized tribes in Oklahoma a model compact permitting tribes to “engage in Class III gaming on tribal lands under the terms and conditions of the proposed compact.”⁹⁸ The state extended this offer through a statutory “Model Compact” that set uniform terms, which are offered to each federally recognized tribe.⁹⁹ If the individual tribe decided to enter into a compact, the compact would be sent to the Secretary of the Interior and go into effect pending approval pursuant to IGRA § 2710(d)(8)(a).¹⁰⁰ Initially, in 2005, twenty-nine tribes entered into compacts with the state.¹⁰¹ Currently, thirty-five tribes are compacted with the state to conduct Class III gaming.¹⁰²

91. OKLA. GAMING COMPLIANCE UNIT, OKLA. OFF. OF MGMT. & ENTER. SERVS., ANNUAL REPORT: FISCAL YEAR 2019, at 1 (n.d.) [hereinafter 2019 ANNUAL REPORT], <https://oklahoma.gov/content/dam/ok/en/omes/documents/GameCompAnnReport19-FINAL.pdf>.

92. *Id.* at 2.

93. *Id.* at 1.

94. *Id.*

95. *Id.*

96. *Id.* at 6.

97. 3A OKLA. STAT. ANN. §§ 261-282 (West 2018).

98. *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 361 (Okla. 2013).

99. 3A OKLA. STAT. ANN. § 281(2)(2).

100. *Id.*

101. *See Compacted Tribes*, OKLA. OFF. OF MGMT. & ENTER. SERVS., <https://oklahoma.gov/omes/gaming-compliance-unit/compacted-tribes.html> (last visited Oct. 24, 2021).

102. *See id.*

Each tribe pays the state fees based on revenues derived under the compact.¹⁰³ The fees were attributed to the “substantial exclusivity” afforded to the tribes by the state and the “special opportunities for tribal economic opportunity through gaming within the external boundaries of Oklahoma in respect to the covered games.”¹⁰⁴ The fees were set at:

a. four percent (4%) of the first Ten Million Dollars (\$10,000,000.00) of adjusted gross revenues received by a tribe in a calendar year from the play of electronic amusement games, electronic bonanza-style bingo games and electronic instant bingo games,

b. five percent (5%) of the next Ten Million Dollars (\$10,000,000.00) of adjusted gross revenues received by a tribe in a calendar year from the play of electronic amusement games, electronic bonanza-style bingo games and electronic instant bingo games,

c. six percent (6%) of all subsequent adjusted gross revenues received by a tribe in a calendar year from the play of electronic amusement games, electronic bonanza-style bingo games and electronic instant bingo games, and

d. ten percent (10%) of the monthly net win of the common pool(s) or pot(s) from which prizes are paid for nonhouse-banked card games. The tribe is entitled to keep an amount equal to state payments from the common pool(s) or pot(s) as part of its cost of operating the games.¹⁰⁵

Subject to this fee schedule, compacted tribes have paid upwards of \$1.5 billion in exclusivity fees to the state since 2006.¹⁰⁶ While approving the Compacts, the Secretary was required to determine the validity of the exclusivity fees.¹⁰⁷ Accordingly, with his approval, the Secretary deemed that the state conferred an extra benefit on the tribes by providing the exclusive right to conduct Class III gaming within the state.

The Model Compacts set out an initial term of fifteen years, which was set to expire on January 1, 2020.¹⁰⁸ However, the agreement included an

103. 3A OKLA. STAT. ANN. § 281(11)(A)(1).

104. *Id.* § 281(11)(A).

105. *Id.* § 281(11)(A)(2)(a)-(d).

106. 2019 ANNUAL REPORT, *supra* note 91, at 2.

107. 25 U.S.C. § 2710(d)(3)(B).

108. 3A OKLA. STAT. ANN. § 281(15)(B) (West 2018).

automatic renewal provision.¹⁰⁹ Section 15(B) provides, “This Compact shall have a term which will expire on January 1, 2020, and at that time, if organization licensees or others are authorized to conduct electronic gaming . . . pursuant to any governmental action . . . , the Compact shall automatically renew for successive additional fifteen-year terms”¹¹⁰ The section includes a renegotiation provision in which either the tribe or the state, through its governor, may request to renegotiate terms related to the scope of gaming under the compact and the exclusivity fees within 180 days of the expiration or renewal of the Compact.¹¹¹

III. The Case: Cherokee Nation v. United States Department of the Interior

A. Statement of Facts

On September 14, 2020, the Cherokee Nation, the Chickasaw Nation, the Choctaw Nation, and the Citizen Potawatomi Nation (the “Plaintiff Tribes”) filed suit in the United States District Court for the District of Columbia against the United States Department of Interior, the Secretary of the Interior, the Assistant Secretary of the Interior, the Comanche Nation, the Otoe-Missouria Tribe, the UKB, and the KTT.¹¹² The action seeks reversal of the Secretary’s “arbitrary, capricious, and unlawful ‘no action’ approvals under the [IGRA].”¹¹³ This lawsuit arises from several events that took place in Oklahoma from the middle of 2019 through 2020.

On July 8, 2019, Oklahoma Governor Kevin Stitt wrote an op-ed in the *Tulsa World* expressing his view that the state needed to renegotiate the original compacts with the tribes and that the Model Compacts did not automatically renew.¹¹⁴ The article suggested that the Model Compacts were outdated and needed to be renegotiated to “reflect[] market conditions for the gaming industry seen around the nation today.”¹¹⁵ Governor Stitt incorrectly noted that the exclusivity fees provided for in the original

109. *Id.*

110. *Id.*

111. *Id.*

112. First Amended & Supplemented Complaint at 1-2, *Cherokee Nation v. U.S. Dep’t of the Interior*, No. 1:20-cv-02167 (TJK) (D.D.C. filed Aug. 7, 2020), <https://turtletalk.files.wordpress.com/2020/08/26-amended-complaint.pdf>.

113. *Id.* at 3 (quoting 25 U.S.C. § 2710(d)(8)(C)).

114. Kevin Stitt, Opinion, *Gov. Kevin Stitt: New Gaming Compacts Must Protect the Interests of the Tribes and the State*, *TULSA WORLD* (July 8, 2020), https://tulsaworld.com/opinion/columnists/gov-kevin-stitt-new-gaming-compacts-must-protect-the-interests/article_ae5596f7-e9e5-5613-9bbb-c6341af9259f.html.

115. *Id.*

compacts are the lowest in the nation and took the position that those expired at the end of 2019.¹¹⁶

The op-ed was met with frustration from the tribes and marked the start of the current controversy.¹¹⁷ The tribes asserted that the Model Compacts were subject to automatic renewal and that only the exclusivity fees were subject to renegotiation.¹¹⁸ Chief Gary Batton, of the Choctaw Nation, stated that “[t]he governor’s op-ed was factually inaccurate in stating our compact does not renew, which does not hold up on legal review, and he seems to be unaware of just how beneficial tribes are to the state.”¹¹⁹

As a result of this friction, on December 31, 2019, the Cherokee, Chickasaw, and Choctaw nations filed a federal suit in the Western District of Oklahoma seeking declaratory judgement that the Model Compacts were set to automatically renew on January 1, 2020.¹²⁰ Shortly after, the Citizen Potawatomie Nation, the Comanche Nation, and the Otoe-Missouria Tribe, among others, joined the case.¹²¹

The federal judge in the case initially sent the parties to mediation in order to attempt to work out a resolution.¹²² During this time, the state finalized terms for new gaming compacts with the Comanche Nation and the Otoe-Missouria Tribe.¹²³ As a result, the two tribes filed motions to dismiss their claims against Governor Stitt.¹²⁴

116. *Id.*

117. Sean Murphy, *Oklahoma Governor, Tribes Clash over Casino Gaming Revenue*, AP NEWS (July 10, 2019), <https://apnews.com/article/4cdc21f7e721487e84d86b11898f3e56>.

118. *Id.*

119. Gary Batton, *Stitt Should Rethink Tribal Negotiations*, CHOCTAW NATION (Aug. 10, 2021), <https://www.choctawnation.com/news-events/press-media/stitt-should-rethink-tribal-negotiations>.

120. Sean Murphy, *3 Tribes in Oklahoma Sue Governor over Casino Gambling*, AP NEWS (Dec. 31, 2019), <https://apnews.com/article/18071c71ccdd085c545c842a80b47551>.

121. Curtis Killman, *Five More Tribes Ask to Join Lawsuit Against State over Gaming Compact Status*, TULSA WORLD (Feb. 14, 2020), https://tulsaworld.com/news/local/crime-and-courts/five-more-tribes-ask-to-join-lawsuit-against-state-over/article_33041fe2-6c2c-5311-bb00-3efb2d400e2b.html.

122. Barbara Hoberock, *Judge Orders Mediation Between Stitt, Tribes over Gaming Compacts*, TULSA WORLD (Feb. 11, 2020), https://tulsaworld.com/news/judge-orders-mediation-between-stitt-tribes-over-gaming-compacts/article_93c56995-da22-5658-a6b4-7015a03d2b7c.html.

123. Lenzy Krehbiel-burton, *Two Oklahoma Tribes Pull Out of Compact Lawsuit*, SW LEDGER (Lawton, Okla.) (Apr. 28, 2020), <https://www.southwestledger.news/news/two-oklahoma-tribes-pull-out-compact-lawsuit>.

124. *Id.*

Ultimately, the federal judge ruled in favor of the tribes, stating that the Model Compacts automatically renewed on January 1, 2020 under the terms of the automatic renewal provisions.¹²⁵ In reaching this conclusion, the court reasoned that a common law reading of the renewal clause in the STGA required that the term “governmental action” be read consistently with the common understanding of the term.¹²⁶ Accordingly, the court reasoned, when the state authorized an executive agency to grant organizational licenses and the agency subsequently granted such licenses, “governmental action” was taken to authorize electronic gaming.¹²⁷ Thus, when the tribes were granted updated licenses by the Oklahoma Horse Racing Commission, a governmental agency, governmental action was taken. As a result, the automatic renewal clause was triggered and the Model Compacts were renewed for a subsequent fifteen-year term.

On April 21, 2020, after the federal judge had ordered the parties to mediation in an attempt to resolve the tribes’ declaratory judgment action, Governor Stitt announced the state had entered into two new gaming compacts with the Comanche Nation and Otoe-Missouria Tribe.¹²⁸ The compacts were then submitted to the Department of the Interior and subsequently approved through inaction by the Secretary pursuant to IGRA § 2710(d)(8)(C).¹²⁹ Soon after approval, the leaders of the Oklahoma legislature petitioned the Oklahoma Supreme Court to invalidate these compacts, claiming Governor Stitt lacked the authority to bind the state in such compacts.¹³⁰

These compacts allowed the compacting tribes to establish new gaming operations outside of their traditional jurisdiction and within the jurisdictions of other tribes located in the metropolitan areas of Oklahoma.¹³¹ They also sought to permit certain forms of Class III gaming that the state had yet to authorize, including house-banked card and table games and event wagering.¹³² On July 21, 2020, the court ruled that because the legislature had yet to authorize this type of Class III gaming, as required by the STGA, the compacts were invalid.¹³³

125. Cherokee Nation v. Stitt, 475 F. Supp. 3d 1277, 1283 (W.D. Okla. 2020).

126. *Id.* at 1282.

127. *Id.* at 1283.

128. Press Release, Gov. Stitt Signs Two New Gaming Compacts, *supra* note 8.

129. Treat v. Stitt, 2020 OK 64, ¶ 3, 473 P.3d 43, 44.

130. *Id.*

131. *Id.*

132. *Id.* ¶ 7, 473 P.3d at 45.

133. *Id.*

Despite the Oklahoma Supreme Court ruling, the two tribes continued to operate under the compacts.¹³⁴ The tribes assert that the court did not have jurisdiction over either of the tribes and, accordingly, the compacts are valid.¹³⁵

Then, on August, 20, 2020, Governor Stitt announced that the state entered into two new compacts with the UKB and KTT tribes (collectively with the Comanche and Otoe-Missouria Compacts, the “New Compacts”).¹³⁶ The terms of these compacts were similar to the previous compacts entered into with the Comanche Nation and the Otoe-Missouria Tribe; however, they excluded the provision allowing the tribes to conduct event wagering and house-banked table and card games.¹³⁷

This latest lawsuit is a result of the tribes proceeding under the New Compacts. The Plaintiff Tribes are seeking a declaratory judgement that the New Compacts have no legal effect because Governor Stitt improperly entered into them under state law; that the agreements are, therefore, void and legally unenforceable; and that the Secretary improperly approved them.¹³⁸

B. The Allegations

The Plaintiff Tribes argue the New Compacts are not valid because IGRA § 2710(d)(1)(C), (d)(2)(C) dictates that for a compact to be enforceable it must be legally entered into by both sides.¹³⁹ They allege that the New Compacts present no source of Governor Stitt’s authority to bind the state beyond his own claims.¹⁴⁰ Further, the Plaintiff Tribes allege that Governor Stitt’s claim to such authority is patently false because of the Oklahoma Supreme Court ruling in *Treat v. Stitt*.¹⁴¹

134. Randy Ellis, *Comanche Nation, Otoe-Missouria Tribe to Continue Operating Under Compacts Deemed Invalid*, TULSA WORLD (Nov. 4, 2020), https://tulsa-world.com/comanche-nation-otoe-missouria-tribe-to-continue-operating-under-compacts-deemed-invalid/article_014c3a9e-0191-11eb-bb6a-4fea29c36f44.html.

135. *Id.*

136. Press Release, Gaming Compacts Deemed Approved, *supra* note 8.

137. *Two Recent Oklahoma Tribal Gaming Compacts Deemed Approved by Department of Interior, Stitt Says*, KOCO NEWS (Aug. 20, 2020), <https://www.koco.com/article/two-recent-oklahoma-tribal-gaming-compacts-deemed-approved-by-department-of-interior-stitt-says/33659397>.

138. First Amended & Supplemented Complaint, *supra* note 112, at 7.

139. *Id.* (citing 25 U.S.C. § 2710(d)(1)(C), (d)(2)(C)).

140. *Id.* at 4.

141. *Id.* (citing *Treat v. Stitt*, 2020 OK 64, 473 P.3d 43).

The Plaintiff Tribes then argue that because IGRA requires the compacts be legally entered into before going into effect, the Secretary was required to disapprove the New Compacts.¹⁴² They allege that the Secretary's decision was "arbitrary, capricious, and contrary to law."¹⁴³ Accordingly, the Plaintiff Tribes claim that the Secretary's approval did not cure the invalidity of the New Compacts because the Secretary is only authorized to approve a compact that has been legally entered into,¹⁴⁴ and a compact "deemed approved" by the Secretary is only considered approved to the extent it is consistent with IGRA.¹⁴⁵

Additionally, the Plaintiff Tribes argue that the Secretary was required by IGRA to disapprove the New Compacts because they contain several provisions that are inconsistent with IGRA.¹⁴⁶ The Plaintiff Tribes allege that the Comanche and Otoe-Missouria compacts were invalid under IGRA § 2710(d)(1)(B), which requires that the games allowed in the compacts be permitted in the state which the compact will go into effect.¹⁴⁷ The two agreements permit the tribes to conduct event wagering, house-banked table and card games, and any other new games Governor Stitt approves at any time in his discretion.¹⁴⁸ These forms of gaming, the Plaintiff Tribes allege, are not allowed under Oklahoma law and thus violate IGRA.¹⁴⁹

The Plaintiff Tribes also contend that the exclusivity payment provisions of all four New Compacts are invalid as the state did not give any meaningful concessions of economic benefit to the tribes in return for the additional revenue.¹⁵⁰ The Plaintiff Tribes argue that the Secretary has consistently required that the state give up a meaningful concession of economic benefit and that by gaining increased profit-sharing percentages without any additional economic benefits conferred onto the tribes, the new exclusivity payment provisions should be ruled invalid.¹⁵¹

Finally, the Plaintiff Tribes argue that all four of the New Compacts violate IGRA by requiring the Governor of Oklahoma to commit to future off-reservation trust land acquisitions for gaming purposes.¹⁵² The Plaintiff

142. *Id.*

143. *Id.*

144. *Id.* (citing 25 U.S.C. §§ 2710(d)(8)(A), (d)(8)(C)).

145. *Id.* (citing 25 U.S.C. § 2710(d)(8)(C)).

146. *Id.* at 5–6.

147. *Id.* at 5 (citing 25 U.S.C. § 2710(d)(1)(B)).

148. *Id.*

149. *Id.*

150. *Id.* at 5–6.

151. *Id.*

152. *Id.* at 6.

Tribes allege that commitments in the Comanche, Otoe-Missouria, and KTT agreements apply to off-reservation trust land acquisitions by the three tribes within Chickasaw and Potawatomi Nation's territory.¹⁵³ Because of this, the complaint contends that the agreements "threaten[] the Chickasaw Nation's and Citizen Potawatomi Nation's jurisdictional integrity and sovereignty, and jeopardizes their ability to generate gaming revenue within their own territory."¹⁵⁴

IV. The Court Should Declare the New Compacts Invalid

The district court should rule the New Compacts invalid because each compact was entered into invalidly under Oklahoma law and in violation of IGRA. Accordingly, the Secretary was required by law to rule them invalid.¹⁵⁵ The Secretary's no-action ruling is subject to judicial review and should be reversed under the Administrative Procedure Act because the challenged action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁵⁶ Further, in *Amador*, the court determined that when "a plaintiff alleges that a compact violates IGRA, thus requiring the Secretary to disapprove the compact, nothing in the APA precludes judicial review of a subsection (d)(8)(C) no-action approval."¹⁵⁷ Accordingly, the Plaintiff Tribes' allegations may be heard by the court.

A. Governor Stitt Lacked the Authority to Bind the State to Compacts Inconsistent with the State-Tribal Gaming Act

1. The Comanche and Otoe-Missouria Compacts Were Not Legally Entered Into by Both Parties

There are two requirements for a compact to be valid: the compact must be "validly 'entered into' under applicable state law" and the compact "must be 'in effect' pursuant to Secretarial approval and notice."¹⁵⁸ In *Pueblo of Santa Ana v. Kelly*, a case strikingly similar to the one at hand, the Tenth Circuit determined that a state-tribal compact was never validly entered into, despite the compact having Secretarial approval, after the New Mexico Supreme Court ruled that the New Mexico Governor lacked the

153. *Id.*

154. *Id.*

155. *See* 25 U.S.C. § 2710(d)(8).

156. *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 244 (D.D.C. 2016), *aff'd*, 879 F.3d 1177 (D.C. Cir. 2018) (quoting 5 U.S.C. § 706(2)(A)).

157. *Amador Cnty. v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011).

158. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1553 (10th Cir. 1997).

authority to enter into the compacts.¹⁵⁹ Accordingly, the court held that the compact could not go into effect because the compact did not satisfy one of the aforementioned requirements for a valid compact.¹⁶⁰ In coming to this conclusion the court reasoned that state law, not federal, determines “the procedures by which a state may validly enter into a compact.”¹⁶¹

Much like the circumstances in *Kelly*, the Supreme Court of Oklahoma ruled in *Treat v. Stitt* that Governor Stitt lacked the authority to enter into the Comanche and Otoe-Missouria Compacts because they purported to allow the two tribes to conduct “house-banked card and table games and event-wagering,” which is not permitted under the STGA.¹⁶² As a result of that ruling, and following the analysis in *Kelly*, the Comanche and Otoe-Missouria Compacts are not valid because they were not “validly entered into” under applicable state law.¹⁶³ The New Compacts are required to follow the guidelines of the STGA because the *state* determined that they govern the “procedures” for entering into a valid compact. In *Treat*, the court reasoned that the STGA “sets forth the terms and conditions under which the State’s federally recognized tribes can engage in Class III gaming.”¹⁶⁴ Thus, any inconsistencies between the STGA and the Compacts make the Compacts fall short of satisfying the *Kelly* requirements.

2. All Four Compacts Are Invalid Because Governor Stitt Was Not Authorized by the Legislature to Negotiate the Compacts

State law determines the process by which the state, through its governor, may negotiate and enter into tribal gaming compacts.¹⁶⁵ Thus, determining whether a state governor has the authority to enter into a compact with a tribe depends solely on the authority vested in the governor by the laws of the state. In 2004, a question was submitted to the Attorney General of Oklahoma asking whether the Governor can compact with tribes, and in so doing, bind the state to each compact without legislative approval.¹⁶⁶ The answer was yes.¹⁶⁷ Oklahoma law gives the Governor the authorization to negotiate and enter into “cooperative agreements on behalf

159. *Id.*

160. *Id.*

161. *Id.*

162. 2020 OK 64, ¶ 5, 473 P.3d 43, 44.

163. 104 F.3d at 1553.

164. 473 P.3d at 44.

165. *See Kelly*, 104 F.3d at 1553.

166. Op. Okla. Att’y Gen. No. 2004-27 (Aug. 26, 2004), 2004 WL 2002612.

167. *Id.* at 7.

of this state with federally recognized Indian tribal governments within th[e] state.”¹⁶⁸ Further, the Attorney General determined that requiring legislative approval for such agreements would violate the separation of powers clause in the Oklahoma Constitution.¹⁶⁹ However, there was a caveat included in this decision. The Attorney General noted that any agreement the Governor negotiated must conform to the public policy enacted by the legislature.¹⁷⁰ In the words of Attorney General Mike Hunter: “This Office’s longstanding analysis of state law endures: the Governor has the authority to negotiate compacts with Indian tribes but he cannot bind the state to any such compact if doing so authorizes activity prohibited by state law or would otherwise be contrary to state law.”¹⁷¹ Governor Stitt only has the authority to compact with tribes in a manner consistent with Oklahoma law—here, the STGA.

The Oklahoma Supreme Court established the precise bounds of the Governor’s authority in *Treat* by declaring that “[t]he Governor has the statutory authority to negotiate gaming compacts with Indian tribes to assure the State receives its share of revenue.”¹⁷² This declaration of gubernatorial power comes directly from the STGA.¹⁷³ Part 15(B) of the Model Compact, enacted by the Oklahoma legislature as the exclusive means to govern tribal gaming, permits the Governor to seek to renegotiate the exclusivity rates of a compact if requested within 180 days of expiration.¹⁷⁴ Therefore, the Governor’s authority is limited to negotiating for changes in exclusivity fees if such negotiations are requested within the temporal limits prescribed.

Governor Stitt lacked the authority to bind the state to the New Compacts because he exceeded the scope of his authority by including in each New Compact terms that are not consistent with the STGA or the Model Compacts. As mentioned above, the Comanche and Otoe-Missouria Compacts included Class III games in Covered Gaming that are not permitted by Oklahoma law or the STGA. Further, all four New Compacts included changes in how the compact would regulate each tribe’s gaming, including an illusory promise for future off-reservation trust land agreements by future governors that is absent in the Model Compact, an

168. 74 OKLA. STAT. § 1221(C)(1) (2011).

169. Op. Okla. Att’y Gen. No. 2004-27, at 3 (quoting OKLA. CONST. art. 4, § 1).

170. *Id.* at 7 n.3.

171. Op. Okla. Att’y Gen. No. 2020-8, at 7 (May 5, 2020), 2020 WL 2304499.

172. *Treat v. Stitt*, 2020 OK 64, ¶ 3, 473 P.3d 43, 44.

173. 3A OKLA. STAT. ANN. § 281 (West 2018).

174. *Id.*

attempt to alter the requirements for disputes and tort claims of the Model Compact, as well as purported changes to various other provisions throughout the document.¹⁷⁵ This is not to say that the terms included in the New Compact are better or worse; rather, the legislative process is the only way these changes can be legally made. Therefore, Governor Stitt exceeded his authority and the New Compacts are not binding on the state.

B. The Compacts Violate IGRA, Thus Requiring Secretarial Disapproval

1. The Comanche and Otoe-Missouria Compacts Purported to Allow Gaming That Is Not Permitted Within Oklahoma

The Comanche and Otoe-Missouria Compacts should be held invalid because they violate § 2710(d)(1)(B) by allowing the tribes to conduct “house-banked table and cards games” and “event-wagering,” which are not permitted in Oklahoma “for any purpose by any person, organization, or entity.”¹⁷⁶ As established above, the STGA is the sole guide as to how tribal gaming in Oklahoma may be lawfully carried out. The STGA provides for which types of games may be conducted by tribes. It does so in the “covered game” definition of the Model Compact, which permits the following:

an electronic bonanza-style bingo game, an electronic amusement game, an electronic instant bingo game, nonhouse-banked card games; 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 State-Tribal Gaming Act; and upon election by the tribe by written supplement to this Compact, any Class II

175. See generally Kialegee Tribal Town and State of Oklahoma Gaming Compact (July 1, 2020), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/pdf/508%20Compliant%202020.09.08%20Kialegee%20Tribal%20Town%20State%20of%20Oklahoma%20Gaming%20Compact_1.pdf [<https://perma.cc/GN5K-Z4GF>]; Otoe-Missouria Tribe and State of Oklahoma Gaming Compact, *supra* note 11; United Keetoowah Band of Cherokee Indians and State of Oklahoma Gaming Compact (July 1, 2020), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/pdf/508%20Compliant%20%20United%20Keetoowah%20Band%20Compact%20July%201%2C%202020.pdf> [<https://perma.cc/4A7F-2DNT>]; Comanche Nation and State of Oklahoma Gaming Compact, *supra* note 11.

176. 25 U.S.C. § 2710(d)(1)(B).

game in use by the tribe, provided that no exclusivity payments shall be required for the operation of such Class II game¹⁷⁷

In 2018, this definition was amended, through the legislative process, to further include “non-house-banked table games.”¹⁷⁸ There has yet to be an amendment that includes “event-wagering” or “house-banked table and card games.” Accordingly, those types of games were not, and are not, permitted under Oklahoma law. Due to the games’ illegality under state law, their inclusion necessarily violates § 2710(d)(1)(B).

2. All Four New Compacts Violate IGRA by Purporting to Promise Future Governors to Concur in Future Off-Reservation Trust Land Acquisitions by the Tribes

All four New Compacts should be held invalid because they include provisions regarding future off-reservation trust land acquisitions, which is outside the scope of permissible compact provisions under IGRA.¹⁷⁹ Each compact included a provision entitled “Section 20 Concurrence” in which Governor Stitt agreed all future governor or governors of Oklahoma would consent to any determination by the Secretary as to specified future lands being taken into trust for gaming purposes.¹⁸⁰ Oklahoma law does not permit a current governor to bind future governors in the exercise of their executive discretion and authority.¹⁸¹

Additionally, § 2710(d)(3)(C) establishes seven permissible provisions that may be included in tribal-state gaming compacts.¹⁸² Notably, the sixth and seventh provisions include a “catch-all.”¹⁸³ Courts have interpreted the catch-all to allow for any other term that is either a standard for operation of a gaming activity or is directly related to the operation of gaming activities to be included in a compact.¹⁸⁴ The Supreme Court, in *Michigan v. Bay Mills Indian Community*, a case where the Court determined the scope of an IGRA cause of action, construed Class III gaming activity as “just what it sounds like—the stuff involved in playing class III games.”¹⁸⁵

177. 3A OKLA. STAT. ANN. § 281 (West 2018).

178. *Id.* § 280.1.

179. *See* 25 U.S.C. § 2710(d)(3)(C).

180. *See* sources cited *supra* note 175.

181. *See* 3A OKLA. STAT. ANN. § 281 (West 2018).

182. 25 U.S.C. § 2710(d)(3)(C).

183. *Id.* § 2710(d)(3)(C)(6)-(7).

184. *See, e.g., Chemehuevi Indian Tribe v. Newsom*, 919 F.3d 1148 (9th Cir. 2019).

185. *Id.* at 1153 (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 792 (2014)).

The question then becomes whether future off-reservation trust land provisions should be considered as a standard for operation of a gaming activity or considered to be directly related to the operation of gaming activities. The obvious answer is no. First, future land acquisitions have no effect in the standards for operation of any gaming activity or the maintenance of any gaming facility. A promise by the Governor to assent to the potential Secretarial approval of acquiring off-reservation trust land does not in any way relate to the standards of operation for gaming activities or the maintenance of gaming facilities. Following the definition in *Bay Mills*, the standards of operations and maintenance must be for the actual games being conducted, not the future promise of potential land. Second, future land acquisitions are not directly related to the operation of gaming activities. Similar to the first catch-all provision, land acquisitions—regardless of the ultimate intent—do not impact how gaming is operated by the tribes. Because these provisions do not fall into either of the catch-all provisions, or any of the other § 2710(d)(3)(C) provisions, they are outside the scope of permissible compact terms under IGRA and should have been ruled invalid by the Secretary.

3. The Secretary Was Required by Law to Disapprove of the Compacts

Section 2710(d)(8) details the manner in which the Secretary may approve or disapprove compacts submitted for approval.¹⁸⁶ Section 2710(d)(8)(B) establishes that the compact may be disapproved if it violates: any provision of IGRA, any other provision of federal law, or the trust obligations of the United States to Indians.¹⁸⁷ Courts have interpreted this provision to limit the circumstances where disapproval is allowed, but maintain that the Secretary is required to disapprove any compact that violates any of the limitations provided.¹⁸⁸ Section 2710(d)(8)(C) sets out that if the Secretary does not approve or disapprove a compact within forty-five days of receiving the application, the compact shall be considered to be approved, but only to the extent the provisions are consistent with IGRA.¹⁸⁹ Courts have held that this provision does not excuse the Secretary's obligation to disapprove illegal compacts.¹⁹⁰ In *Amador*, the court reasoned that “just as the Secretary has no authority to affirmatively approve a compact that violates any of subsection (d)(8)(B)'s criteria for disapproval,

186. 25 U.S.C. § 2710(d)(8).

187. *Id.* § 2710(d)(8)(B).

188. *See, e.g., Amador Cnty. v. Salazar*, 640 F.3d 373, 381 (D.C. Cir. 2011).

189. 25 U.S.C. § 2710(d)(8)(C).

190. *See, e.g., Amador Cnty.*, 640 F.3d at 381.

he may not allow a compact that violates subsection (d)(8)(C)'s caveat to go into effect by operation of law."¹⁹¹ The courts are clear that no IGRA provision provides the Secretary protection for letting illegal compacts go into effect. Thus, the court should hold the Secretary accountable for failing to disapprove illegal compacts and allowing them to go into effect by operation of law.

V. Potential Implications

Tribal gaming in the State of Oklahoma, and across the country, faces potentially significant adverse consequences as a result of this dispute. Although there are several technical issues involved, the primary issues have to do with how much power a governor has in state-tribal negotiations and the duty of the Secretary to uphold the clear statutory standards of IGRA. Depending on how the court rules, state governors can potentially gain significant power to dictate how tribal gaming operates in their states without regard to legislative authority or even the mandates of IGRA. This would represent a significant shift from Congress' intended balance of power between the tribes and the states' governors. Is the governor to be bound by the state legislature regarding agreements with tribes, or is the governor to be given inherent authority to unilaterally negotiate on behalf of the state without regard to IGRA? The State of Oklahoma has determined its stance, but will the federal court agree?

191. *Id.*