IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CHEROKEE NATION, a federally recognized Indian tribe, THE CHICKASAW NATION, a federally recognized Indian tribe, and THE CHOCTAW NATION, a federally Recognized Indian tribe,	)	
Plaintiffs/Counterclaim Defendants,	)	
v.	)	Case No. CIV-19-1198-D
J. KEVIN STITT, in his official capacity as the Governor of the State of Oklahoma, and *ex rel.* STATE OF OKLAHOMA, as the real party in interest,	)	
Defendants/Counterclaimants.	)	

ANSWER AND COUNTERCLAIMS

COMES NOW Defendant/Counterclaimant J. Kevin Stitt, in his official capacity as Governor of the State of Oklahoma (the "*Governor*") and *ex rel.* State of Oklahoma (the "*State*") as the real party in interest who hereby adopts and ratifies the allegations, denials and counterclaims asserted herein (hereinafter *Governor* and *State* will be collectively referred to as "*Oklahoma*") and for their Answer to the Complaint [Dkt. No. 1] of Plaintiffs The Cherokee Nation of Oklahoma (the "*Cherokee Nation*" or "*Tribe*"), The Chickasaw Nation (the "*Chickasaw Nation*" or "*Tribe*"), and The Choctaw Nation of Oklahoma (the "*Choctaw Nation*" or "*Tribe*") (hereinafter collectively referred to as the "*Tribes*") hereby states the following:

GENERAL DENIAL

All allegations of the Complaint, whether express or implied, or contained in numbered paragraphs or un-numbered text or headings, are denied, except to the extent such allegations are specifically admitted in this Answer.

1. The opening sentence of Paragraph 1 of the Complaint is a subjective characterization of the above-captioned civil action and relief requested by the Tribes to which no response is required, except the Tribes' allegations regarding Oklahoma's "offer" of the Compact(s), which is denied.[1] The second sentence of Paragraph 1 of the Complaint contains conclusions of law to which no response is required. To the extent that a response is required, the allegations are denied where inconsistent with applicable law.

2. Paragraph 2 of the Complaint contains a characterization of the civil action and conclusions of law to which no response is required. To the extent that a response is required, the allegations are denied. Oklahoma admits, however, that various matters involving gaming compacts have garnered public attention.

3. Paragraph 3 of the Complaint contains a characterization of the civil action to which no response is required. To the extent that a response is required, the allegations are denied. Paragraph 3 also contains a characterization of Part 15.B of the Compact, which

[1] Oklahoma admits that the Compact is codified at 3A O.S. § 281 (2004) as part of the State-Tribal Gaming Act at 3A O.S. §§ 261 *et seq*., which was approved by Oklahoma voters as a ballot referendum on November 2, 2004 (Laws 2004, c. 316, § 2, State Question No. 712, Legislative Referendum No. 335, adopted at election held on Nov. 2, 2004). Oklahoma denies that the materials contained within https://www.sos.ok.gov/documents/questions/712.pdf are a complete copy of the State-Tribal Gaming Act (the "*Act*"), but admits that the complete text of the Act is relevant.

speaks for itself and is the best evidence of its contents. To the extent that the characterization is incomplete or inconsistent with the Compact, the allegations are denied. Finally, the third sentence contains legal conclusions to which no response is required. To the extent that a response is required, the allegations are denied where inconsistent with applicable law.

4. The opening sentence of Paragraph 4 of the Complaint is denied in part and admitted in part. Oklahoma admits that contracting parties should honor their contractual obligations. Oklahoma denies any inference by the Tribes that Oklahoma has not honored its contractual obligations. Oklahoma denies the Tribes' factual recitals, including the allegations regarding Oklahoma's "offer" of the Compact(s) to the Tribes. The second sentence contains a characterization of the above-captioned civil action and relief requested to which no response is required. To the extent a response is required, the allegations are denied where inconsistent with applicable law.

5. Paragraph 5 of the Complaint contains subjective allegations by the Tribes, which are denied, including any allegation that the above-captioned lawsuit was "necessitated" by a misinterpretation of the Compact(s) language by Oklahoma; that Oklahoma's correct interpretation of the Compact(s) is contrary to applicable law; that the Compact(s) automatically renewed on January 1, 2020; that the Compact(s) are currently in effect; and/or that statements of truth by Oklahoma were designed to "directly interfere" with tribal gaming rights, including any rights held by the Tribes.

6. The allegations contained in Paragraph 6 of the Complaint are denied. Paragraph 6 also contains conclusions of law to which no response is required. To the

extent that a response is required, the allegations are denied where inconsistent with applicable law.

7. Paragraph 7 of the Complaint contains a characterization of the above-captioned civil action and relief requested to which no response is required. To the extent that a response is required, the allegations are denied where inconsistent with applicable law.

8. Paragraph 8 of the Complaint contains a characterization of the above-captioned civil action and relief requested to which no response is required. To the extent that a response is required, the allegations are denied where inconsistent with applicable law.

9. Paragraph 9 of the Complaint is admitted.

10. Paragraph 10 of the Complaint is admitted.

11. Paragraph 11 of the Complaint is admitted.

12. Paragraph 12 of the Complaint is admitted insofar as J. Kevin Stitt is the Governor of the State of Oklahoma, who is granted with the sole authority to negotiate gaming compacts with Indian tribes, including the Tribes, under Article 6, Section 8 of the Oklahoma Constitution. For further answer, the State of Oklahoma constitutes the real party in interest. As the real party in interest, the State of Oklahoma hereby ratifies and/or joins the above-captioned civil action pursuant to Rule 17(a)(3), Fed. R. Civ. P.

13. To the extent Paragraph 13 of the Complaint alleges, expressly or implicitly, that the Compact(s) entered into by and between the Tribes and Oklahoma are presently in effect, those allegations are denied by Oklahoma. Oklahoma admits that the Compact(s)

were in effect on December 31, 2019, which is the date the above-captioned civil action was filed by the Tribes. Because the Compact(s) were "in effect" on December 31, 2019, Oklahoma admits that this Court has subject matter jurisdiction pursuant to 25 U.S.C. § 2710(d)(3)(A), providing that a United States District Court shall have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect[.]"[2] Oklahoma admits that jurisdiction is further proper under 28 U.S.C. § 1362[3] in this instance because these Tribes have been recognized by the Secretary of the Interior and the controversy arises under federal law (*i.e.*, IGRA). Should any express or implied allegation by the Tribes set forth in Paragraph 13 of the Complaint be inconsistent herewith, Oklahoma expressly denies the allegation.

14. Oklahoma admits that venue is proper in the United States District Court for the Western District of Oklahoma pursuant to 28 U.S.C. § 1391 *et seq.* because a substantial part of the events or omissions giving rise to the claims asserted herein occurred within this Judicial District. Oklahoma denies that venue is proper for any other reason.

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[2] Essentially, this subsection of the Indian Gaming Regulatory Act ("*IGRA*") confers federal question jurisdiction upon federal district courts under 28 U.S.C. § 1331. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 787-88 at fn. 2, 134 S. Ct. 2024, 2029 (2014) ("The general federal-question statute, 28 U.S.C. § 1331, gives a district court subject matter jurisdiction to decide any claim alleging a violation of IGRA.").

[3] "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

15. The allegations in Paragraph 15 of the Complaint characterize or quote *Navajo Nation v. Dalley*, 896 F.3d 1196, 1200 (10th Cir. 2018), which speaks for itself. To the extent the allegations are incomplete or inconsistent with *Navajo Nation v. Dalley*, the allegations are denied.

16. The allegations in the first sentence of Paragraph 16 of the Complaint characterize or quote *Navajo Nation v. Dalley*, 896 F.3d at 1201, which speaks for itself. To the extent the allegations are incomplete or inconsistent with *Navajo Nation v. Dalley*, the allegations are denied. The second sentence of Paragraph 16 consists of legal conclusions and subjective characterizations, to which no response is required. To the extent a response is required, the allegations are denied where inconsistent with applicable law.

17. The allegations in Paragraph 17 of the Complaint characterize or quote subsections of IGRA (*i.e.*, 25 U.S.C. § 2702(1) and (2)), which speak for themselves. To the extent the allegations are incomplete or inconsistent with IGRA, the allegations are denied.

18. The allegations in Paragraph 18 of the Complaint quote or characterize various subsections of IGRA (*i.e.*, 25 U.S.C. § 2701(1) and (4); 25 U.S.C. § 2702(2); and 25 U.S.C. §§ 2710(b)(2)(B) and (d)(1)(A)(ii)), which speak for themselves. To the extent the allegations are incomplete or inconsistent with IGRA, the allegations are denied.

19. The allegations in Paragraph 19 of the Complaint quote or characterize *Muhammad v. Comanche Nation Casino*, No. 09-CIV-968-D, 2010 WL 4365568, at *9 (W.D. Okla. Oct. 24, 2010) (quoting 25 U.S.C. § 2701(5)), which speaks for itself. To the

extent the allegations are incomplete or inconsistent with *Muhammad v. Comanche Nation Casino*, the allegations are denied.

20. The allegations in Paragraph 20 of the Complaint quote or characterize *Muhammad v. Comanche Nation Casino*, 2010 WL 4365568, at *9, which speaks for itself. To the extent the allegations are incomplete or inconsistent with *Muhammad v. Comanche Nation Casino*, the allegations are denied.

21. The allegations in Paragraph 21 of the Complaint consist of legal conclusions and subjective characterizations, to which no response is required. To the extent a response is required, the allegations are denied.

22. The allegations in Paragraph 22 of the Complaint quote or characterize various subsections of IGRA (*i.e.*, 25 U.S.C. § 2703(6), (7), (8), and *id.* § 2710(a)(1), (a)(2)) and *Navajo Nation v. Dalley*, 896 F.3d at 1201, which speak for themselves. To the extent the allegations are incomplete or inconsistent with IGRA or *Navajo Nation v. Dalley*, the allegations are denied.

23. The allegations in the first sentence in Paragraph 23 of the Complaint quote or characterize *Navajo Nation v. Dalley*, 896 F.3d at 1201, which speaks for itself. To the extent the allegations are incomplete or inconsistent with *Navajo Nation v. Dalley*, the allegations are denied. The allegations in the second sentence of Paragraph 23 consist of legal conclusions and subjective characterizations, to which no response is required. To the extent a response is required, the allegations are denied where inconsistent with applicable law.

24. The allegations in Paragraph 24 of the Complaint quote or characterize various subsections of IGRA (*i.e.*, 25 U.S.C. § 2710(b), (d)(1)(A), (d)(1)(B) and (d)(1)(C)) and *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1177 (10th Cir. 1991), which speak for themselves. To the extent the allegations are incomplete or inconsistent with IGRA or *United Keetoowah Band of Cherokee Indians v. Oklahoma*, the allegations are denied.

25. The allegations in Paragraph 25 of the Complaint quote or characterize a subsection of IGRA (*i.e.*, 25 U.S.C. § 2710(d)(2)(C)), which speaks for itself. To the extent the allegations are incomplete or inconsistent with IGRA, the allegations are denied.

26. The allegations in Paragraph 26 of the Complaint consist of legal conclusions and subjective characterizations, to which no response is required. To the extent a response is required, the allegations are denied where inconsistent with applicable law.

27. The allegations set forth in Paragraph 27 of the Complaint are denied to the extent they suggest, or tend to suggest, that the Tribes are lawfully conducting class III electronic gaming pursuant to the expired Compact(s). Oklahoma admits that Compact(s) were entered into with the Tribes for the purpose of conducting and regulating class III tribal gaming. Oklahoma denies that those Compact(s) remain in full force and effect.

28. Oklahoma lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 28 of the Complaint and therefore denies the same.

29. Oklahoma admits that it authorized certain games that qualify as class III games under IGRA pursuant to the Act, 3A O.S. §§ 261 *et seq*., and that organization licensees conduct such games pursuant to the Act. Oklahoma also admits that the Tribes

conduct certain class III gaming in Oklahoma, which became unlawful as of January 1, 2020. Oklahoma lacks knowledge or information sufficient to form a belief about whether all of the class III gaming activities of the Tribes was located in, or are permitted by, Oklahoma when the Compact(s) were in full force and effect.

30. The allegations in Paragraph 30 of the Complaint consistent of subjective legal characterizations or selective quotations from *Sheffer v. Buffalo Run Casino, PTE, Inc., 2013 OK 77, 315 P.3d 359, 361; 3A O.S. §§ 261 et seq.; Okla. State Question 712 (Nov. 4, 2004)*, which speak for themselves. To the extent the allegations are inconsistent with or otherwise not contained in the plain language of *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 3A O.S. §§ 261 *et seq*., Okla. State Question 712 (Nov. 4, 2004), Oklahoma statutes, or IGRA, the allegations are denied.

31. The allegation in Paragraph 31 of the Complaint quotes or characterizes Part 9 of the Model Tribal Gaming Compact (the "*MTGC*"), which speaks for itself. To the extent the allegation is incomplete or inconsistent with Part 9 of the MTGC, or any other applicable law, the allegation is denied.

32. The allegations in Paragraph 32 of the Complaint quote or characterize the MTGC, which speaks for itself. To the extent the allegations are incomplete or inconsistent with the MTGC, or any other applicable law, the allegations are denied.

33. The allegations in Paragraph 33 of the Complaint are denied.

34. Regarding Paragraph 34 of the Complaint, Oklahoma admits that each Tribe individually executed the MTGC, the terms of which were mutually negotiated by Oklahoma and each Tribe, among others, prior to the MTGC's inclusion in the Act.

Oklahoma admits that the Secretary of the Interior expressly approved the Chickasaw Nation and Cherokee Nation Compacts and that the Choctaw Nation Compact was deemed approved by operation of law.

35. The allegations contained in Paragraph 35 of the Complaint include legal conclusions to which no response is required. To the extent that a response is required, the allegations are denied. The allegations also quote or characterize IGRA, which speaks for itself. To the extent the allegations are incomplete or inconsistent with IGRA, they are denied.

36. The allegations in Paragraph 36 of the Complaint quote or characterize *Choctaw Nation of Oklahoma v. Oklahoma*, 724 F. Supp. 2d 1182, 1184 (W.D. Okla. 2010), and *Cherokee Nation v. Oklahoma*, No. CIV-10-979-W, at 2 (W.D. Okla. Nov. 9, 2010), which speak for themselves. To the extent the allegations are incomplete or inconsistent with either *Choctaw Nation of Oklahoma v. Oklahoma* or *Cherokee Nation v. Oklahoma*, the allegations are denied.

37. The allegations in Paragraph 37 of the Complaint quote or characterize Part 15.A of the MTGC, which speaks for itself. To the extent the allegations are incomplete or inconsistent with Part 15.A of the MTGC, or any other applicable law, the allegations are denied.

38. Regarding Paragraph 38 of the Complaint, Oklahoma admits that (i) the Cherokee Nation executed the Compact on November 16, 2004, start-up assessment fees were received on January 19, 2005, and notice of compact approval was published in the Federal Register on January 27, 2005; (ii) the Chickasaw Nation executed the Compact on

November 23, 2004, notice of compact approval was published in the Federal Register on February 8, 2005, and start-up assessment fees were received on February 28, 2005; and (iii) the Choctaw Nation executed the Compact on November 24, 2004, start-up assessment fees were received on January 31, 2005, and notice that the compact was deemed approved was published in the Federal Register on February 9, 2005. To the extent any allegation set forth therein is inconsistent with the foregoing, Oklahoma denies the allegation.

39. The allegations in Paragraph 39 quote or characterize Parts 15.B and 15.C of the MTGC, which speak for themselves. To the extent the allegations are incomplete or inconsistent with the MTGC, or other applicable law, the allegations are denied.

40. The allegations in Paragraph 40 of the Complaint are denied.

41. The allegations in Paragraph 41 of the Complaint state legal conclusions for which no response is required. To the extent that a response is required, the allegations are denied where inconsistent with applicable law. The allegations in Paragraph 41 also quote or characterize Parts 11.A and 11.E of the MTGC, as well as the Act, which speak for themselves. To the extent the allegations are incomplete or inconsistent with the MTGC or the Act, the allegations are denied. Oklahoma admits that, consistent with the Act, the Commission licensed organization licensees to conduct authorized gaming after four (4) tribes—the Absentee Shawnee Tribe of Indians of Oklahoma, Comanche Nation, Miami Tribe of Oklahoma, and the Cherokee Nation of Oklahoma—entered into the Model Compact, the compacts were approved by the Secretary of the Interior, and notice of approval was published in the Federal Register. Oklahoma expressly denies that this act,

or these acts, automatically renewed the Compacts, which have expired under their plain language.

42. The allegations in the first sentence of Paragraph 42 of the Complaint are denied. The allegations in Paragraph 42 also quote or characterize a provision of the Act, which speaks for itself. To the extent the allegations are incomplete or inconsistent with the Act, or other applicable law, the allegations are denied. Oklahoma admits that the Oklahoma Horse Racing Commission (the "*Commission*") promulgated Rules for Racetrack Gaming to implement the Act and has amended those rules after passage of the Act. Oklahoma expressly denies that this act, or these acts, automatically renewed the Compacts, which have expired under their plain language.

43. The allegations in the first sentence of Paragraph 43 of the Complaint are denied. Oklahoma admits that the Commission issued its first gaming licenses under the State Tribal Gaming Act on August 11, 2005, and has issued gaming licenses each ensuing year. Oklahoma also admits that the Commission issued licenses to Remington Park and Will Rogers Downs on October 17, 2019, for the calendar year beginning January 1, 2020. Oklahoma expressly denies that this act, or these acts, automatically renewed the Compacts, which have expired under their plain language.

44. The allegations in Paragraph 44 of the Complaint contain legal conclusions and characterizations to which no response is required. To the extent that a response is required, the allegations are denied where inconsistent with applicable law. Oklahoma admits that, pursuant to 2017 Okla. Sess. Laws § 115, the Act was amended to eliminate certain hour restrictions on electronic gaming authorized under the Act. Oklahoma

expressly denies that this act, or these acts, automatically renewed the Compacts, which have expired under their plain language.

45. The allegations in Paragraph 45 of the Complaint quote or characterize Part 11 of the MTGC, which speaks for itself. To the extent the allegations are incomplete or inconsistent with the MTGC, or other applicable law, the allegations are denied.

46. The allegations in Paragraph 46 of the Complaint quote or characterize Part 11.E of the MTGC, which speaks for itself. To the extent the allegations are incomplete or inconsistent with the MTGC, or other applicable law, the allegations are denied.

47. Oklahoma lacks knowledge or information sufficient to form a belief concerning the truth of the allegations set forth in the opening sentence of Paragraph 47 of the Complaint. Oklahoma admits that the Secretary of the Interior approved, or deemed approved, the revenue sharing provisions in the Compact(s) with the Tribes because Oklahoma made significant or meaningful concessions by limiting electronic gaming authorized under the State Tribal Gaming Act to three (3) racetracks. Oklahoma expressly denies that this act, or these acts, automatically renewed the Compacts, which have expired under their plain language.

48. The allegations in Paragraph 48 of the Complaint quote or characterize a letter sent by the Governor to the Tribes on July 5, 2019, which speaks for itself and constitutes the best evidence of its contents. To the extent the allegations are incomplete or inconsistent with the July 5, 2019, letter to the Tribes, the allegations are denied.

49. The allegations in Paragraph 49 of the Complaint quote or characterize a letter sent by the Tribes to the Governor, which speaks for itself and constitutes the best

evidence of its contents. To the extent the allegations are incomplete or inconsistent with the letter sent by the Tribes to the Governor, the allegations are denied. Oklahoma expressly denies the legal conclusions set forth in the referenced letter, where inconsistent with applicable law.

50. The allegations in Paragraph 50 of the Complaint quote or characterize an interview with the Governor televised on *Oklahoma News9* on July 25, 2019, which speaks for itself and constitutes the best evidence of its contents. To the extent the allegations are incomplete or inconsistent with the July 25, 2019, interview on *Oklahoma News9*, the allegations are denied.

51. The allegations in Paragraph 51 of the Complaint quote or characterize a letter sent by the Governor to the Tribes on August 13, 2019, which speaks for itself and constitutes the best evidence of its contents. To the extent the allegations are incomplete or inconsistent with that letter, the allegations are denied. Oklahoma admits that the Compact(s) expired as of January 1, 2020, and tribes, including the Tribes, who continue to conduct class III gaming pursuant to the Compacts following December 31, 2019, do so unlawfully. Oklahoma denies that *all* tribal gaming became illegal as of January 1, 2020.

52. The allegations in Paragraph 52 of the Complaint quote or characterize an inter-Tribal resolution dated August 22, 2019, which speaks for itself and constitutes the best evidence of its contents. To the extent the allegations are incomplete or inconsistent with that resolution, the allegations are denied. Oklahoma expressly denies the legal conclusions set forth therein where inconsistent with applicable law.

53. Regarding the allegations in Paragraph 53 of the Complaint, Oklahoma admits that the Governor, using the constitutional authority granted to him by Article 6, Section 8 of the Oklahoma Constitution, delegated to Attorney General Mike Hunter authorization to frame gaming negotiations with compacting tribes, including the Tribes, on behalf of the Governor, by advancing Oklahoma's position that the MTGC would expire on January 1, 2020. Oklahoma also admits that the Governor directed the Attorney General to propose that the State of Oklahoma and the compacting tribes, including the Tribes, resolve this dispute through arbitration, which the Tribes refused to consider.

54. Regarding the allegations in Paragraph 54 of the Complaint, Oklahoma admits that, on October 17, 2019, the Commission issued licenses to Remington Park and Will Rogers Downs to conduct authorized games beginning on January 1, 2020. Oklahoma expressly denies that this act, or these acts, either constituted state action or automatically renewed the Compacts, which have expired under their plain language.

55. The allegations in Paragraph 55 of the Complaint quote or characterize an inter-Tribal letter sent to the Attorney General on November 5, 2019, which speaks for itself and constitutes the best evidence of its contents. To the extent the allegations are incomplete or inconsistent with the plain language of that letter, the allegations are denied. Oklahoma expressly denies the legal conclusions set forth therein where inconsistent with applicable law.

56. The allegations contained in Paragraph 56 of the Complaint quote or characterize a press conference held by the Governor on November 14, 2019, which speaks

for itself and constitutes the best evidence of its contents. To the extent the allegations are incomplete or inconsistent with that press conference, the allegations are denied.

57. Regarding the allegations in Paragraph 57 of the Complaint, Oklahoma admits that the Tribes met with the media, both before and after the Governor's November 14, 2019, press conference. Oklahoma expressly denies the legal conclusions advanced by the Tribes during those meeting(s) where inconsistent with applicable law.

58. The allegations contained in Paragraph 58 of the Complaint quote or characterize a letter sent by the Chickasaw Nation to the Assistant Secretary for Indian Affairs, Tara Sweeney, with a copy to the Attorney General, which speaks for itself and constitutes the best evidence of its contents. To the extent the allegations are incomplete or inconsistent with that letter, the allegations are denied. Oklahoma expressly denies the legal conclusions set forth therein where inconsistent with applicable law.

59. Regarding Paragraph 59 of the Complaint, Oklahoma denies that the Governor ever relinquished exclusive responsibility to the Attorney General to renegotiate new gaming compact with the compacting tribes, including the Tribes. Under Article 6, Section 8 of the Oklahoma Constitution, the Governor has the exclusive authority, *inter alia*, to negotiate gaming compacts with Indian tribes, including the Tribes. To the extent the allegations set forth therein are inconsistent with the foregoing, the allegations are denied. Oklahoma admits that the Governor re-assumed primary negotiating duties granted to him by the Oklahoma Constitution.

60. The allegations contained in Paragraph 60 of the Complaint quote or characterize a press conference held by the Governor on December 17, 2019, which speaks

for itself and constitutes the best evidence of its contents. To the extent the allegations are incomplete or inconsistent with that press conference, the allegations are denied.

61. The allegations contained in Paragraph 61 of the Complaint quote or characterize a December 23, 2019, resignation letter from the Secretary of Native American Affairs, Lisa J. Billy, to the Governor, which speaks for itself and constitutes the best evidence of its contents. To the extent the allegations are inconsistent with or otherwise not contained in that resignation letter, the allegations are denied. Oklahoma expressly denies that the opinions set forth therein by former Secretary Billy are legally or factually sound in all material respects.

62. The allegations in Paragraph 62 of the Complaint are denied.

63. The allegations in Paragraph 63 of the Complaint are denied.

64. The allegations in Paragraph 64 of the Complaint are denied.

65. Oklahoma lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 65 of the Complaint and therefore denies the same.

66. The allegations contained in Paragraph 66 of the Complaint include legal conclusions to which no response is required. To the extent that a response is required, the allegations are denied where inconsistent with applicable law.

67. Oklahoma's responses in the preceding Paragraphs 1-66 of this Answer are incorporated herein by reference.

68. Oklahoma denies the allegations in Paragraph 68 of the Complaint providing that the Tribes have satisfied all requirements for the lawful conduct of class III gaming activities under IGRA. The allegations also quote or characterize 25 U.S.C. § 2710 of

IGRA, which speaks for itself. To the extent the allegations are incomplete or inconsistent with IGRA, the allegations are denied.

69. Regarding Paragraph 69 of the Complaint, Oklahoma admits that the Cherokee Nation's Compact took effect on or about January 27, 2005, but expired on January 1, 2020.

70. Oklahoma denies the allegations in Paragraph 70 of the Complaint but admits that the Chickasaw Nation did execute a Compact with the State, which expired on January 1, 2020.

71. Regarding Paragraph 71 of the Complaint, Oklahoma admits that the Choctaw Nation's Compact took effect on or about February 9, 2005, but expired on January 1, 2020.

72. Oklahoma denies the allegations in Paragraph 72 of the Complaint where inconsistent with applicable law.

73. The allegation in Paragraph 73 of the Complaint quotes or characterizes Part 15.B of the MTGC, which speaks for itself. To the extent the allegation is incomplete or inconsistent with the MTGC, the allegation is denied.

74. The allegation in Paragraph 74 of the Complaint quotes or characterizes Part 15.B of the MTGC, which speaks for itself. To the extent the allegation is incomplete or inconsistent with the MTGC, the allegation is denied.

75. Paragraph 75 of the Complaint is denied.

76. Paragraph 76 of the Complaint consists of legal conclusions and arguments that require no response. To the extent a response is required, the allegations are denied.

77. Paragraph 77 of the Complaint consists of legal conclusions and arguments that require no response. To the extent a response is required, the allegations are denied.

78. Oklahoma denies the allegations contained in Paragraph 78 of the Complaint, and specifically denies that Oklahoma has engaged in any effort, conduct, act or omission which interferes with the Tribes' lawful conduct of gaming activity or violates the Tribes' legal rights or sovereignty. The allegations in Paragraph 78 of the Complaint characterize *Wyandotte National v. Sebelius*, 443 F.3d 1247 (10th Cir. 2006) and *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234 (10th Cir. 2001), which speak for themselves. To the extent the allegations are incomplete or inconsistent with either of these authorities, the allegations are denied.

79. Oklahoma denies the allegations contained in Paragraph 79 of the Complaint, and specifically denies that the Tribes are entitled to any relief, injunctive or otherwise, based on the allegations in the Complaint.

80. Oklahoma denies that the Tribes are entitled to the relief set forth in Paragraph 1 of the Prayer for Relief, including each and every respective sub-part.

81. Oklahoma denies that the Tribes are entitled to equitable relief, or any other relief, as requested in Paragraph 2 of the Prayer for Relief.

OKLAHOMA'S AFFIRMATIVE DEFENSES

1. The Cherokee Nation failed to state a claim upon which relief can be granted.

2. The Chickasaw Nation failed to state a claim upon which relief can be granted.

3. The Choctaw Nation failed to state a claim upon which relief can be granted.

4. The allegations in the Complaint are barred in whole or in part by the doctrine of waiver.

5. The allegations in the Complaint are barred in whole or in part by the doctrine of laches.

6. The allegations in the Complaint are barred in whole or in part by the doctrine of estoppel.

7. Oklahoma is entitled to specific performance of the Compact(s).

8. The allegations in the Complaint are barred in whole or in part by the doctrine of unclean hands.

9. The language of the Compact(s) is plain and unambiguous.

10. The Compact(s) expired on January 1, 2020.

11. The Cherokee Nation is unlawfully conducting class III gaming in the State of Oklahoma.

12. The Chickasaw Nation is unlawfully conducting class III gaming in the State of Oklahoma.

13. The Choctaw Nation is unlawfully conducting class III gaming in the State of Oklahoma.

14. The Cherokee Nation failed to comply with contractual prerequisites prior to filing suit against Oklahoma.

15. The Chickasaw Nation failed to comply with contractual prerequisites prior to filing suit against Oklahoma.

16. The Choctaw Nation failed to comply with contractual prerequisites prior to filing suit against Oklahoma.

17. Failure to join necessary party(ies).

18. The Cherokee Nation is not entitled to the relief prayed for in the Complaint.

19. The Chickasaw Nation is not entitled to the relief prayed for in the Complaint.

20. The Choctaw Nation is not entitled to the relief prayed for in the Complaint.

21. Oklahoma reserves the right to assert additional defenses, including affirmative defenses.

WHEREFORE, having fully answered, Oklahoma prays that the Court take nothing by way of Plaintiffs' Complaint; that Plaintiffs' Complaint be dismissed with prejudice; that Oklahoma be awarded all costs and attorneys' fees incurred in connection herewith; and for any and all further relief deemed just and equitable.

OKLAHOMA'S COUNTERCLAIMS

COMES NOW Defendant/Counterclaimant Plaintiff J. Kevin Stitt, in his official capacity as Governor of the State of Oklahoma (the "*Governor*") and *ex rel.* State of Oklahoma (the "*State*") as the real party in interest, (hereinafter *Governor* and *State* will be collectively referred to as "*Oklahoma*") and hereby counterclaims against Plaintiffs The Cherokee Nation (the "*Cherokee Nation*" or "*Tribe*"), The Chickasaw Nation (the "*Chickasaw Nation*" or "*Tribe*"), and The Choctaw Nation of Oklahoma (the "*Choctaw Nation*" or "*Tribe*") (collectively referred to as the "*Tribes*") alleging as follows:

I. NATURE OF THE COUNTERCLAIMS

1. Oklahoma seeks a judicial declaration that the Tribes are conducting certain class III gaming activities in violation of the Indian Gaming Regulatory Act ("*IGRA*"), 25 U.S.C. §§ 2701-2721, 18 U.S.C. § 1166, and state law, requiring an injunction to prohibit unlawfully conducting such class III gaming activities until the Tribes negotiate a Tribal-State compact covering such games with the State. Pursuant to 25 U.S.C. § 2710(d), class III gaming is permissible on Indian lands only when, *inter alia*, conducted in conformance with a Tribal-State compact that is in effect.[4]

2. The State-Tribal Gaming Compacts (the "*Gaming Compacts*") between the State of Oklahoma and, individually, each of the Tribes covering the conduct of certain electronic class III gaming activities, other than pari-mutuel gaming, expired on January 1, 2020.[5] Gaming compacts currently in effect do not permit Indian tribes, including the Tribes, to conduct class III gaming activities. The only Tribal-State gaming compacts by and between the State and the Tribes in effect are compacts for interstate common pari-mutuel pool under Off-Track Wagering Compacts (the "*Wagering Compacts*"), which do not permit Indian tribes, including the Tribes, to conduct class III electronic gaming

[4] IGRA defines class III gaming as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). Class I gaming means "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." *Id.* § 2703(6). Class II gaming includes bingo and card games that are authorized under state law. *Id.* § 2703(7).

[5] As used throughout, the term "*class III electronic gaming*" refers to electronic and other class III gaming activities previously authorized under the expired Gaming Compacts. *See* 3A O.S. § 281.

previously permitted under the Gaming Compacts. Accordingly, currently conducting such class III electronic gaming activities is unlawful under federal and state law.

3. Alternatively, Oklahoma seeks a judicial declaration that the Tribes are conducting certain class III gaming activities in violation of Part 15.B of the Gaming Compacts, which requires good faith renegotiation of certain compact terms within 180 days of the expiration or any renewal of the Gaming Compacts, and an injunction enjoining the conduct of such class III gaming activities until the Tribes comply with Part 15.B of the Gaming Compacts.

II. PARTIES

4. Oklahoma adopts by reference and incorporates in full Paragraphs 1-3 above.

5. Oklahoma constitutes the real party in interest. As the real party in interest, the State hereby ratifies and/or joins the above-captioned civil action pursuant to Rule 17(a)(3), Fed. R. Civ. P., including the assertion of these counterclaims. Oklahoma is a State of the United States of America possessing the sovereign powers and rights of a State with federally-recognized and delegated authorities under IGRA. Oklahoma has a direct and substantial interest in ensuring full compliance with IGRA and other applicable federal and state laws and with the terms of any Tribal-State compacts in effect.

6. J. Kevin Stitt is the Governor of the State of Oklahoma, duly elected in 2018, and brings suit in his official capacity and *ex rel.* State of Oklahoma. Governor Stitt is granted the sole authority to negotiate gaming compacts with Indian tribes, including the Tribes, under Article 6, Section 8 of the Oklahoma Constitution.

7. The Cherokee Nation is a federally recognized Indian Tribe, *see* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200, 1201 (Feb. 1, 2019), with a governing body duly recognized by the United States Department of the Interior (the "*DOI*").

8. The Chickasaw Nation is a federally recognized Indian Tribe, *id*. at 1204, with a governing body duly recognized by the DOI.

9. The Choctaw Nation of Oklahoma is a federally recognized Indian Tribe, *id*., with a governing body duly recognized by the DOI.

III. JURISDICTION & VENUE

10. The Gaming Compacts were in effect on December 31, 2019, which is the date the above-captioned civil action was filed by the Tribes. Because the Compact(s) were "in effect" on December 31, 2019, this Court has subject matter jurisdiction pursuant to 25 U.S.C. § 2710(d)(3)(A), providing that a United States District Court shall have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect[.]"[6]

[6] Essentially, this subsection of the Indian Gaming Regulatory Act ("*IGRA*") confers federal question jurisdiction upon federal district courts under 28 U.S.C. § 1331. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 787-88 at fn. 2, 134 S. Ct. 2024, 2029 (2014) ("The general federal-question statute, 28 U.S.C. § 1331, gives a district court subject matter jurisdiction to decide any claim alleging a violation of IGRA."); *see also* 18 U.S.C. § 1166, and 28 U.S.C. § 1367.

11. Jurisdiction is further proper under 28 U.S.C. § 1362[7] in this instance because these Tribes have been recognized by the Secretary of the Interior and the controversy arises under federal law (*i.e.*, IGRA).

12. Venue is proper in the United States District Court for the Western District of Oklahoma pursuant to 28 U.S.C. § 1391 *et seq*. because a substantial part of the events or omissions giving rise to the claims asserted herein occurred within this Judicial District.

IV. FACTUAL BACKGROUND

13. Oklahoma adopts by reference and incorporates in full Paragraphs 1-12 above.

14. In 2000, the Chickasaw Nation and the State executed the Chickasaw Nation/Oklahoma Off-Track Wagering Compact (the "*Chickasaw Nation Wagering Compact*"), authorizing the Chickasaw Nation to conduct class III gaming activities involving pari-mutuel betting on races into an interstate common pari-mutuel pool. The Chickasaw Nation Wagering Compact remains in effect.

15. In 2001, the Choctaw Nation and the State executed the Choctaw Nation/Oklahoma Off-Track Wagering Compact (the "*Choctaw Nation Wagering Compact*"), authorizing the Choctaw Nation to conduct class III gaming activities involving pari-mutuel betting on races into an interstate common pari-mutuel pool. The Choctaw Nation Wagering Compact remains in effect.

[7] "The district courts shall original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

16. In 2010, the Cherokee Nation and the State executed the Cherokee Nation/Oklahoma Off-Track Wagering Compact (the "*Cherokee Nation Wagering Compact*"), authorizing the Cherokee Nation to conduct class III gaming activities involving pari-mutuel betting on races into an interstate common pari-mutuel pool. The Cherokee Nation Wagering Compact remains in effect.

17. Though in effect, the Chickasaw Nation Wagering Compact, Choctaw Nation Wagering Compact, and Cherokee Nation Wagering Compact do not authorize the Tribes to conduct class III electronic gaming activities.

18. In 2003, former Governor Brad Henry led efforts to develop legislation allowing the Tribes to conduct class III electronic gaming activities, as well as authorizing the conducting of such games at three (3) nontribal racetracks. In furtherance of that effort, Governor Henry negotiated the provisions of what became the Model Tribal Gaming Compact (the "*MTGC*") with various Indian tribes, including the Tribes.

19. Under the MTGC, signatory tribes could conduct certain class III or "Covered Games," which the Gaming Compact defined to include electronic amusement games, electronic bonanza-style bingo games, electronic instant bingo games, and nonhouse-banked card games.[8]

[8] As set forth in the Gaming Compact, disagreements existed between tribes and federal regulators as to whether electronic bonanza-style bingo games and electronic instant bingo game were class II games. Accordingly, the Gaming Compact reserved the right for signatory tribes to operate both outside of the Gaming Compact if the games were determined to be class II games.

20. The MTGC also guaranteed tribes the ability to operate Covered Games with limited competition from nontribal entities, which was set forth in accompanying legislation. In exchange for the "substantial exclusivity" that would be provided under the MTGC and the state law, signatory tribes would agree to pay fees to Oklahoma for the term of the MTGC, "so long as the state does not change its laws after the effective date of this Compact to permit the operation of any additional form of gaming by any such organization licensee[9]."

21. The MTGC contained a term of approximately 15 years, depending on the dates of execution, Federal approval, and the payment of start-up assessment fees to the State of Oklahoma. The MTGC also included an automatic renewal, or "evergreen," provision that was triggers only if certain affirmative conditions were met. Part 15.B of the MTGC stated:

> 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 in any form other than pari-mutuel wagering on live horse racing pursuant to any governmental action of the state or court order following the effective date of this Compact, the Compact shall automatically renew for successive additional fifteen-year

[9] "*Organization licensee*" means any person receiving an organization license. 3A O.S. § 200.1(A)(9); *see also* 3A O.S. § 262(A) ("If at least four Indian tribes enter into the model tribal-state compact set forth in Section 281 of this title, and such compacts are approved by the Secretary of the Interior and notice of such approval is published in the Federal Register, the Oklahoma Horse Racing Commission ('Commission') shall license organization licensees which are licensed pursuant to Section 205.2 of this title to conduct authorized gaming as that term is defined by this act pursuant to this act utilizing gaming machines or devices authorized by this act subject to the limitations of subsection C of this section. No fair association or organization licensed pursuant to Section 208.2 of this title or a city, town or municipality incorporated or otherwise, or an instrumentality thereof, may conduct authorized gaming as that term is defined by this act. …").

> terms; provided that, within one hundred eighty (180) days of the expiration of this Compact or any renewal thereof, either the tribe or the state, acting through its Governor, may request to renegotiate the terms of subsections A and E of Part 11 of this Compact.

22. Offering "substantial exclusivity" in exchange for the payment of certain fees by the compacting tribes, including the Tribes, during the 15-year term of the MTGC was of central importance. Part 11.E provided that the state agrees that it will not, during the term of this Compact, permit the nontribal operation of any machines or devices to play covered games or electronic or mechanical gaming devices . . . in excess of the number and outside of the designated locations authorized by the State-Tribal Gaming Act," and included a liquidated damages provision in the event of a breach by the State of Oklahoma.

23. After the provisions of the MTGC were fully negotiated, the MTGC was incorporated into legislation that became the State-Tribal Gaming Act (the "*Act*"), 3A O.S. § 261 *et seq*. *See also* 3A O.S. § 281, Part 3(5) ("*Compact*" defined to mean "this Tribal Gaming Compact between the state and the tribe, entered into pursuant to Section 280 of this title[.]"). In additional to class III tribal gaming, the Act permitted non-tribal class III gaming by allowing the licensure of organization licensees to conduct "authorized games" at certain horse racing tracks and in limited numbers. The Act defined "authorized games" as electronic amusement games, electronic bonanza-style bingo games, electronic instant bingo games, and gaming machines or devices Oklahoma tribes are authorized to use under the MTGC.

24. The Act required the Oklahoma Horse Racing Commission (the "*Commission*") to license "organization licensees . . . to conduct authorized gaming as that

term is defined by this act pursuant to this act utilizing gaming machines or devices authorized by this act" if at least four (4) Indian tribes entered into the MTGC. The Act directed the Commission to promulgate rules to regulate, implement, and enforce the provisions of the Act with regard to the conduct of authorized gaming by organization licensees.

25. The Oklahoma Legislature approved the Act in May of 2004, sending it to a vote of the people as "State Question 712," which passed on November 2, 2004.

26. The Absentee Shawnee Tribe of Indians of Oklahoma, Comanche Nation, Miami Tribe of Oklahoma, and Cherokee Nation were the first four (4) tribes to execute gaming compacts with the State of Oklahoma pursuant to the Act.

27. The Absentee Shawnee Tribe executed the Gaming Compact on November 2, 2004—the date of the referendum—and subsequently submitted it to the Secretary of the DOI. By letter dated November 19, 2004, the DOI requested clarification of various provisions of the Absentee Shawnee Compact, including Part 11 concerning exclusivity payments.

28. On December 14, 2004, Governor Henry responded with a letter and an economic analysis provided by the Absentee Shawnee Tribe, explaining:

> [A]s you are aware, the Compact confers upon the Tribe ***a fifteen year*** exclusive right to operate card games, in addition to limiting the locations, hours of operations, and numbers of machine games at horse racing tracks, ***while also prohibiting the future authorization of all other non-Indian gaming***. The elimination of games at the nearest horse racing track allows the Tribe to capture additional gaming revenue, resulting in a

> substantial economic benefit to the Tribe over the course of the initial Compact term.

(emphasis added).

29. DOI approved the Absentee Shawnee Gaming Compact on December 17, 2004, stating that "[t]he economic analysis concludes that the limitations on electronic games at the nearest horseracing track will help the Tribe generate an estimated additional $3.75 million over the fifteen-year life of the Compact" and that "the analysis concludes that the prohibition on non-tribal (charitable) gaming will help the Tribe generate an estimated additional $60 million over the fifteen-year course of the Compact."

30. The Comanche Nation executed the Gaming Compact on November 6, 2004. DOI deemed the Comanche Nation Gaming Compact approved on December 23, 2004.

31. The Miami Tribe of Oklahoma executed the Gaming Compact on November 9, 2004. DOI approved the Miami Gaming Compact on December 28, 2004, stating that "the economic analysis provided by the Tribe shows that the limitation on electronic games at three established racetracks and limitations on non-tribal (charitable) gaming will help the Tribe generate significant additional revenues over the fifteen-year course of the Compact."

32. The Cherokee Nation executed the Gaming Compact on November 16, 2004. DOI approved the Cherokee Nation Gaming Compact on December 28, 2004, stating "we believe that the economic analysis provided by the Tribe shows that the limitations on electronic games at three established racetracks and the limitations on non-tribal (charitable) gaming will help the Tribe generate significant additional revenues over the

fifteen-year course of the Compact." *See Exhibit 1*, DOI Approval of Cherokee Nation Gaming Compact.

33. The Secretary for DOI published notice of the Absentee Shawnee, Comanche, Miami, and Cherokee Nation Compacts in the Federal Register on January 27, 2005, triggering the Commission's statutory obligation to license organization licensees to conduct authorized gaming under the Act.

34. The Chickasaw Nation executed the Gaming Compact on November 23, 2004. DOI approved the Chickasaw Nation Gaming Compact on January 12, 2005, stating that the economic analysis provided by the Chickasaw Nation "concludes that the limitations on electronic games at the nearest horseracing track will help the Nation generate an estimated additional $3.75 million over the fifteen-year life of the Compact" and "the prohibition on non-tribal (charitable) gaming will help the Nation generate an estimated additional $60 million over the fifteen-year course of the Compact." *See Exhibit 2*, DOI Approval of Chickasaw Nation Gaming Compact.

35. The Choctaw Nation executed the Gaming Compact on November 24, 2004. DOI deemed the Choctaw Nation Gaming Compact approved on March 8, 2005. *See Exhibit 3*, DOI Approval of Choctaw Nation Gaming Compact.

36. By way of letter dated July 5, 2019, Governor Stitt reminded the Tribes that "the [Gaming] Compact shall expire on January 1, 2020. For that reason, "it [was] necessary, prudent, and in the best interests of the State of Oklahoma and the [Tribes] to begin negotiating the terms of a new gaming compact as soon as reasonably practicable." Finally, the Governor requested that the parties "renegotiate not only the terms of

Subsections A and E of Part 11 of the Compact, but the rest of the terms of the Compact as well." Furthermore, the referenced letter constituted notice to the compacting tribes, including notice to the Tribes, that no state action would be taken to extend the gaming compacts.

37. On July 8, 2019, the Governor published an editorial in the *Tulsa World* stating that the Compacts were set to expire on January 1, 2020, and reaffirming his commitment "to reaching new agreements with our tribal partners that recognize their historic and significant economic contributions to Oklahoma and provide a framework for them to have even more continued economic growth in the years ahead" and representing the citizens "in a manner that reflects the current fair-market contribution to the growth of the gaming industry."

38. On July 12, 2019, the Tribes passed a resolution stating, in pertinent part, that by requesting renegotiation, the Governor had "declar[ed] his repudiation of the [Gaming] Compact," and "if implemented, would violate the [Gaming] Compact's express terms authorizing parties' rights to request renegotiation of only select provisions, i.e., subsections A and E of Part 11." The Resolution also stated that "the [Gaming] Compacts will automatically renew on January 1, 2020, barring any attempted bad faith interference arising from Governor Stitt's declarations."

39. By way of letter dated August 13, 2019, the Governor invited compacting tribes, including the Tribes, to attend a meeting on September 3, 2019, for the purpose of compact renegotiations, stating he was "eager to begin negotiation that refines and improves our gaming compact." Attorney General Mike Hunter was temporarily

designated by the Governor to frame negotiations on behalf of Oklahoma. Recognizing a potential impasse, the Governor proposed that the parties "table the issue of the renewal or termination date of the existing compact, and use our time more productively by focusing on coming to a shared vision of gaming in Oklahoma for the future."

40. On August 28, 2019, the Tribes, through a joint letter with other compacting tribes, reiterated a flawed belief that the provisions of the Compact "provide for its automatic renewal upon satisfaction of specified conditions," but correctly acknowledging that the Compact allowed "State or Tribal governments to request a Part 11 renegotiation." The Tribes continued: "We continue to look forward to a substantive proposal from the State regarding that part of the compact which may be renegotiated. We will consider such a proposal, however, only when the State of Oklahoma affirms the automatic renewal of the [Compact]."

41. No meeting was held on September 3, 2019.

42. By way of letter dated September 19, 2019, the Attorney General on behalf of the Governor proposed four (4) topics to discuss to improve the gaming compacts: (i) Expanding the Scope of Authorized Gaming; (ii) Joint Tribal-State Economic Development; (iii) Other Compact Improvements; and (iv) Payments for Benefits of Exclusivity "to recognize any additional benefits to the tribes resulting from changes to the compacts, including expanded gaming, exclusivity that mitigates competition, and other economic benefits." At the Governor's direction, the Attorney General also invited the Tribes to provide "any substantive ideas your tribe would like to propose in order to improve the gaming compacts."

43. In a letter dated October 2, 2019, the Tribes criticized the written proposal for allegedly not containing a substantive proposal or acknowledging the (disputed) validity of their position concerning renewal.

44. On October 3, 2019, the Attorney General on behalf of the Governor encouraged the Tribes to attend an in-person meeting on October 19, 2019, with Oklahoma in light of the "dynamic and delicate nature of these discussions."

45. On October 15, 2019, the Tribes, through a joint letter with other compacting tribes, stated that "the apparent impasse on [the issue of how gaming compacts must be renewed] continues to bar any hope for what may otherwise be a productive intergovernmental discussion." Nonetheless, the Tribes invited the Attorney General to personally meet on October 28, 2019, giving him an opportunity to "lay out the State's position" so the parties could determine, "first, whether there truly is a dispute and, second, what is our best path forward."

46. Representatives of Oklahoma, including the Attorney General, met with the Tribes, and other compacting tribes, on October 28, 2019. Before allowing Oklahoma to complete its presentation, the compacting tribes, including the Tribes, collectively asked the State's representatives to leave the room. After approximately 1.5 hours, Oklahoma's representatives were told that nothing would be resolved on that day and the meeting would not reconvene.

47. On November 5, 2019, the Tribes, through another joint letter with other compacting tribes, acknowledged that the State had communicated its understanding of the

disputed provision, but responded that "[t]he State's argument against renewal is not supported by any facts or law and arbitration is not presently justified."

48. On December 18, 2019, the Governor offered all tribes "an extension to all current gaming compacts between tribes and the State in order to allow us the necessary time to negotiate." The Governor offered the extension also to "alleviate any questions or concerns that lenders, employees, entertainers, vendors, and patrons have concerning whether [c]lass III gaming activities at the casinos are legal as of January 1, 2020."

49. The Tribes refused Oklahoma's offer of an extension.

50. On December 31, 2019, the Tribes filed suit, alleging that the Governor's statements regarding the expiration of the Gaming Compacts and ongoing gaming "are contrary to Federal law and directly interfere with the Tribes' Federal rights to conduct gaming under their renewing Compacts" and seeking a declaratory judgment "of the legal effect of the 'shall automatically renew' clause of Part 15.B of the Compacts. *See* Complaint at ¶¶ 1 and 5.

51. Oklahoma never took governmental action "to permit the operation of any additional form of gaming by any such organization licensee" after Oklahoma voters approved State Question 712 on November 2, 2004, or after the effective date of the Tribes' Gaming Compacts.

52. The condition for automatic renewal of the Gaming Compacts in Part 15.B—"if organization licensees or others are authorized to conduct electronic gaming in any form other than pari-mutuel wagering on live horse racing pursuant to any governmental action of the state or court order following the effective date of this Compact"—has not been met.

53. On January 1, 2020, the Compacts expired pursuant to Part 15.B.

54. The Tribes continue to conduct class III electronic gaming activities on Indian lands without valid gaming compacts, in violation of federal and state law.

V. CLAIMS FOR RELIEF
(Federal Common-law, IGRA, 18 U.S.C. § 1166, and State Law)

55. Oklahoma adopts by reference and incorporates in full Paragraphs 1-54 above.

56. Under IGRA, class III gaming activities on Indian lands within a State are lawful only if such activities are "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under [§ 2710(d)(3)] that is in effect." 25 U.S.C. § 2710(d)(1)(C).

57. IGRA states that "United States district courts shall have jurisdiction over any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect." 25 U.S.C. § 2710(d)(7)(ii).

58. Each of the Tribes have executed a Wagering Compact with Oklahoma, and each of the Wagering Compacts is in effect.

59. None of the Wagering Compacts permit the Tribes to conduct class III electronic gaming activities.

60. Each of the Tribes' Compacts state that the Gaming Compact "shall have a term which will expire on January 1, 2020."

61. The Tribes' Gaming Compacts automatically renew only "if organization licensees or others are authorized to conduct electronic gaming in any form other than pari-mutuel wagering on live horse racing pursuant to any governmental action of the state or or court order following the effective date of this Compact."

62. The organization licensees that conducted electronic gaming on January 1, 2020, were authorized to do so by Oklahoma voters pursuant to State Question 712, approving the Act in 2004.

63. Neither the State nor a court has authorized organization licensees or others to "conduct electronic gaming in any form other than pari-mutuel wagering on live horse racing" following the effective date of any of the Gaming Compacts.

64. Because the condition precedent for automatic renewal has not been met, the Tribes' Gaming Compacts expired on January 1, 2020.

65. Oklahoma is entitled to a judicial declaration that the Gaming Compacts expired on January 1, 2020.

66. The Tribes have continued to conduct class III electronic gaming activities after the expiration of their Gaming Compacts, which is unlawful and causes irreparable harm to Oklahoma.

67. By continuing to conduct class III gaming in absence of valid gaming compacts, the Tribes are in violation of 25 U.S.C. § 2710(d)(1)(C), which states that class III gaming activities must "be conducted in conformance with a Tribal-State compact . . . that is in effect" to be lawful; and 25 U.S.C. § 2710(d)(3)(A), which requires tribes conducting or planning to conduct class III gaming to request the State "to enter into

negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities."

68. In addition, "all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." 18 U.S.C. § 1166(a). Accordingly, Oklahoma's laws pertaining to the licensing, regulation, or prohibition of gambling set forth at 21 O.S. §§ 941-988 apply in Indian country.

69. The Tribes' continuing conduct of class III electronic gaming activities violates 21 O.S. §§ 941-988.

70. Continuing to conduct class III electronic gaming in the absence of valid Gaming Compacts with Oklahoma has resulted, is resulting, and will continue to result, in unjust enrichment to the Tribes. Unjust enrichment will continue unless and until a new gaming compact is entered into by and between the Tribes and Oklahoma.

71. The Tribes' conduct of class III electronic gaming activities constitutes an ongoing injury to the sovereign interests of Oklahoma and Oklahoma's rights under federal and state law.

72. Oklahoma is entitled to a judicial declaration that the Tribes' conduct of ongoing class III electronic gaming after expiration of their Gaming Compacts is unlawful under both federal and state law, additionally requiring an injunction prohibiting the Tribes from conducting class III electronic gaming activities until the Tribes and Oklahoma execute a compact authorizing such gaming.

73. Without an injunction, Oklahoma, as a State of the United States of Oklahoma, will suffer irreparable harm because its sovereignty is not being recognized by the Tribes, who continue to unlawfully conduct class III gaming in the absence of valid and existing gaming compacts.

VI. OKLAHOMA'S PRAYER FOR RELIEF

WHEREFORE, Oklahoma respectfully requests that the Court:

74. Declare that the Tribes' Gaming Compacts did not automatically renew on January 1, 2020;

75. Declare that the Tribes' continued conduct of class III electronic gaming activities violates federal and state law, as alleged herein;

76. Enter an injunction prohibiting the Tribes from conducting class III electronic gaming unless and until new gaming compacts are negotiated and entered into with the State of Oklahoma, by and through the Governor, and such new gaming compacts are approved or deemed approved by the Secretary of the Interior and published in the Federal Register;

77. Impress a constructive trust upon class III electronic gaming revenue earned by the Tribes from and after January 1, 2020, in order to prevent the Tribes from being unjustly enriched in the absence of an effective gaming compact by and between the Tribes and Oklahoma;

78. Award all costs and attorneys' fees incurred in connection herewith to Oklahoma; and

79. Any and all further relief deemed just and equitable by the Court.

Respectfully submitted by:

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ATTORNEYS FOR J. KEVIN STITT, AS GOVERNOR OF THE STATE OF OKLAHOMA, AND *EX REL.* THE STATE OF OKLAHOMA

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2020, I filed the attached document with the Clerk of Court and using the ECF System for filing. Based on the records currently on file in this case, the Clerk of Court will transmit a of a Notice of Electronic Filing to the following ECF registrants:

Robert H. Henry – rh@rhhenrylaw.com
Stephen Greetham – stephen.greetham@chickasaw.net
Sara Hill – sara-hill@cherokee.org
Bradley Mallett – bmallett@choctawnation.com
Frank S. Holleman – fholleman@sonosky.com

I hereby certify that on January 22, 2020, I filed the attached document with the Clerk of Court and served the attached document by email transmission on the following, who are not registered participants of the ECF system:

Douglas B. L. Endreson – dendreson@sonosky.com

s/Phillip G. Whaley
Phillip G. Whaley

EXHIBIT 1

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

Honorable Chad Smith
Principal Chief, Cherokee Nation
P.O. Box 948
Tahlequah, Oklahoma 74465-0948

DEC 2 8 2004

Dear Chief Smith:

On November 19, 2004, we received the Tribal Gaming Compact between the Cherokee Nation (Tribe) and the State of Oklahoma (State), executed by the Tribe on November 16, 2004 (Compact).

We have completed our review of the Compact, along with the submission of additional documentation submitted by the parties, and conclude that the Compact, with the exception of Part 15D, does not violate the Indian Gaming Regulatory Act of 1988 (IGRA), any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands or the trust obligations of the United States to Indians. Therefore, pursuant to delegated authority and Section 11 of the IGRA, based on a full review of the record and the law, we approve the Compact, except for Part 15D. The Compact will take effect when notice of our approval, pursuant to 25 U.S.C. 2710(d)(3)(B), is published in the Federal Register.

As part of the Department's review of the Compact, we sent a letter to the parties seeking clarification of various provisions of the Compact. The responses of the State and the Tribe, and the Tribe's Market Study and Impact Analysis, have resolved our questions, as explained below.

Revenue Sharing

The Compact is authorized by recent legislation enacted by the State of Oklahoma. Prior to this legislation, Indian tribes in the State of Oklahoma could only operate Class II gaming machines and engage in pari-mutuel wagering. The legislation authorizes Indian tribes to engage in certain Class III gaming activities, provides for certain geographic exclusivity, limits the number of gaming machines at existing racetracks[1], and prohibits non-tribal operation of certain machines and covered games.[2] As consideration for these concessions made by the State in enacting this law, the Tribe agrees to pay annually to the state 4% of the first $10 million, 5% of the next $10 million, and 6% of any subsequent amount of adjusted gross revenues received by the Tribe from its electronic amusement games, electronic bonanza-style bingo games, and electronic instant bingo games, as well as a monthly 10% payment of net win from the "common pool(s) or pot(s)" of the non-house-banked card games.

[1] The State-Tribal Gaming Act authorizes no more than three (3) existing horse racetracks to operate no more than 750 machines.

[2] The term "covered game" is defined in Part 3(5) of the Compact to include an electronic bonanza-style bingo game, an electronic amusement game, an electronic instant bingo game, non-house-banked card games, and any other game under certain conditions.

To date, the Department has approved more than 200 tribal-state compacts. Only a few states have negotiated tribal payments other than for direct expenses to defray the costs of regulating a gaming activity under the compact. This is because IGRA does not authorize states to impose a tax, fee, charge, or other assessment on Indian tribes to engage in class III gaming. *See* 25 U.S.C. 2710(d)(4). This section provides that "nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge or other assessment upon an Indian tribe . . . to engage in Class III gaming activity."

To enforce this statutory prohibition, the Department has sharply limited the circumstances under which Indian tribes can make direct payments to a state for purposes other than defraying the costs of regulating Class III gaming activities. To determine whether a revenue-sharing provision is permissible under IGRA, we have required the state to offer significant or meaningful concessions over which it is not required to negotiate in good faith, resulting in substantial and quantifiable economic benefits to the Indian tribe. In addition, the payment to the state must be appropriate in light of the value of the economic benefits conferred on the tribe.

Under the first prong of our analysis -- significant or meaningful concessions -- we believe that the State has made such concessions. It has authorized Class III gaming for Indian tribes, provided for a zone of exclusivity, and limited non-tribal gaming. Under the second prong of our analysis – substantial and quantifiable economic benefits -- we believe that the economic analysis provided by the Tribe shows that the limitations on electronic games at three established racetracks and the limitations on non-tribal (charitable) gaming will help the Tribe generate significant additional revenues over the fifteen-year course of the Compact. Thus, we conclude that broader access to Class III electronic games, meaningful restrictions on the number of non-Indian facilities with access to Class III gaming devices, as well as meaningful limits on the number of such devices and exclusive rights over Class III card games are significant concessions by the State which offer the Tribe substantial economic benefits. As a result, the revenue-sharing payment to the State cannot be characterized as a prohibited imposition of a tax, fee, charge, or other assessment pursuant to 25 U.S.C. 27109(d)(4).

We note that Part 11 also provides for a payment from the State to eligible tribes in the amount of 50% of any increase in the non-tribal entities' adjusted gross revenues following the addition of machines in excess of the statutory limit to a non-tribal operation, and both the Tribe and State agree that it provides for the cessation of revenue-sharing payments to the State should the exclusive rights of compacting tribes to operate covered games be diminished.

Scope of Gaming

It is our view that Class III gaming compacts can only regulate Class III games, and cannot regulate Class II games under the IGRA. We have asked the National Indian Gaming Commission (NIGC) for its views on whether the games described in Part 3(5) of the Compact are all Class III games. The NIGC's Office of General counsel has informed us that, in their view, the electronic bonanza-style bingo game, the electronic amusement game, the electronic

instant bingo game, and the non-house banked card games referenced in Part 3(5) are all Class III games. However, the Compact contemplates the inclusion of Class II games in the last clause of Part 3(5) which authorizes "upon election by the Tribe by written supplement to this Compact, any Class II game in use by the Tribe, provided that no exclusivity payments shall be required for the operation of such Class II game." To avoid this problem, the Tribe has agreed to strike this provision from the Compact it submitted to the Department for approval. Since this provision is only triggered at the option of the Tribe, we believe that the Tribe can elect to forego its exercise by striking it from its submitted compact, thus avoiding the issue.

Part 3(5) provides that the definition of "covered game" includes "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. Although the Compact does not indicate whether the addition any other Class III game under this provision would require review and approval of the Secretary of the Interior under the IGRA, it is our position that such Secretarial approval is required because the inclusion of additional Class III games is a substantial modification of the terms of the Compact. It is our view that a substantive modification is one that potentially implicates any of the three statutory reasons available to the secretary to disapprove a compact in the first instance, *i.e.*, whether the provision violates the IGRA, any other applicable provision of federal law, or the trust obligation of the United States to Indians. *See* 25 U.S.C. 2710(d)(8)(B).

Compact Termination

Part 15D of the Compact provides, *inter alia*, for termination by the State in the event of a material breach by the Tribe of the terms of a tobacco compact. 25 U.S.C. 2710(d)(3), however, limits the proper topics for compact negotiations to those that bear a direct relationship to the operation of gaming activities. Moreover, the legislative history of the IGRA makes clear that Congress intended to prevent compacts from being used as subterfuge for imposing state jurisdiction on tribes concerning issues unrelated to gaming. *See* S.REP.NO. 100-446, at 14 (1988). Part 15D provides, however, that the State agrees that this subsection is severable from the compact and will be automatically severable in the event the Department determines that these provisions exceed the State's authority under IGRA. Accordingly, we believe that, Part 15D is not an appropriate term for inclusion within this compact. Therefore, this provision is hereby severed from the Compact.

We wish the Tribe and the State success in their economic venture.

Sincerely,

Principal Deputy Assistant Secretary- Indian Affairs

Identical Letter Sent to: Honorable Brad Henry
Governor, State of Oklahoma

EXHIBIT 2

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JAN 12 2005

Honorable Bill Anoatubby
Governor, Chickasaw Nation
Arlington at Mississippi
Box 1548
Ada, Oklahoma 74821-1548

Dear Governor Anoatubby:

On November 29, 2004, we received the Tribal Gaming Compact between the Chickasaw Nation of Oklahoma (Nation) and the State of Oklahoma (State), executed by the Tribe on November 23, 2004 (Compact).

We have completed our review of the Compact, along with the submission of additional documentation submitted by the parties, and conclude that the Compact, with the exception of Part 15D, does not violate the Indian Gaming Regulatory Act of 1988 (IGRA), any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands or the trust obligations of the United States to Indians. Therefore, pursuant to delegated authority and Section 11 of the IGRA, based on a full review of the record and the law, we approve the Compact, except for Part 15D. The Compact will take effect when notice of our approval, pursuant to 25 U.S.C. 2710(d)(3)(B), is published in the *Federal Register*.

As part of the Department's review of the Compact, on December 3, 2004, we sent a letter to the parties seeking clarification of various provisions of the Compact. The responses of the State and the Nation, dated December 10, 2004, and December 21, 2004, respectively have resolved our questions, as explained below.

Revenue Sharing

This compact is authorized by recent legislation enacted by the State of Oklahoma. Prior to this legislation, tribes in the State of Oklahoma could only operate Class II machines and engage in pari-mutuel wagering. The legislation authorizes tribes to engage in Class III gaming, provides for certain geographic exclusivity, limits the number of machines at existing racetracks[1], and

[1] The State-Tribal Gaming Act authorizes no more than three (3) existing horse racetracks to operate no more than 750 machines.

prohibits non-tribal operation of certain machines and covered games.[2] As consideration for these concessions made by the State in enacting this law, the Nation agrees to pay annually to the state 4% of the first $10 million, 5% of the next $10 million, and 6% of any subsequent amount of adjusted gross revenues received by the Nation from its electronic amusement games, electronic bonanza-style bingo games, and electronic instant bingo games, as well as a monthly 10% payment of net win from the "common pool(s) or pot(s)" of the non-house-banked card games.

Our analysis of this revenue sharing agreement begins with section 25 U.S.C. 2710(d)(4). This section provides that "nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge or other assessment upon an Indian tribe . . . to engage in Class III gaming activity." As a result, the Department of the Interior has sharply limited the circumstances under which Indian tribes can make direct payments to a state for purposes other than defraying the costs of regulating Class III gaming activities.

As our previous compact decision letters have stated, in order to determine whether revenue sharing violates 25 USC 2710(d)(4), we first look to whether the State has offered meaningful concessions. We have traditionally viewed this concept as one where the State concedes something that it was otherwise not required to negotiate that provides a benefit to the Nation, i.e. exclusivity or some other benefit. In other words, we examine whether the State has made meaningful and significant concessions in exchange for receiving revenue sharing.

The next step in our analysis is to determine whether these concessions result in a substantial economic benefit to the Nation. The payment to the state must be appropriate in light of the value of the economic benefit conferred on the Nation. This analysis (meaningful concessions by the State and substantial economic benefit conferred on the tribe) allows us to ascertain that revenue-sharing payments are the product of arms-length negotiations, and not tantamount to the imposition of a tax, fee, charge or other assessment prohibited under 25 U.S.C. 2710(d)(4).

Under the first prong of our analysis, we believe that the State has made meaningful concessions. It has authorized Class III gaming for tribes, provided for a zone of exclusivity, and limited non-tribal gaming. Under the second prong of our analysis, we believe that these concessions provide a substantial economic benefit to the tribe. The economic analysis concludes that the limitations on electronic games at the nearest horseracing track will help the Nation generate an estimated additional $3.75 million over the fifteen-year life of the Compact. Alternatively, the analysis concludes that the prohibition on non-tribal (charitable) gaming will help the Nation generate an estimated additional $60 million over the fifteen-year course of the Compact. Thus, we conclude that broader access to Class III electronic games, meaningful restrictions on the number of non-Indian facilities with access to Class III gaming devices, as well as meaningful limits on the number of such devices and exclusive rights over Class III card games are significant concessions by the State which offer the Nation substantial economic benefits.

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[2] The term "covered game" is defined in Part 3(5) of the Compact to include an electronic bonanza-style bingo game, an electronic amusement game, an electronic instant bingo game, non-house-banked card games, and any other game under certain conditions.

We note that Part 11 also provides for a payment from the State to eligible tribes in the amount of 50% of any increase in the non-tribal entities' adjusted gross revenues following the addition of machines in excess of the statutory limit to a non-tribal operation, and both the Nation and State agree that it provides for the cessation of revenue-sharing payments to the State should the exclusive rights of compacting tribes to operate covered games be diminished.

Finally, we are not concerned in this instance with the payment to a certain racetrack facility required under Part 11F, because it does not apply to the Nation.

Scope of Gaming

It is our view that Class III gaming compacts can only regulate Class III games, and cannot regulate Class II games under the IGRA. We have asked the National Indian Gaming Commission (NIGC) for its views on whether the games described in Part 3(5) of the Compact are all Class III games. The NIGC's Office of General counsel has informed us that, in their view, the electronic bonanza-style bingo game, the electronic amusement game, the electronic instant bingo game, and the non-house banked card games referenced in Part 3(5) are all Class III games. However, the Compact contemplates the inclusion of Class II games in the last clause of Part 3(5) which authorizes "upon election by the Nation by written supplement to this Compact, any Class II game in use by the Nation, provided that no exclusivity payments shall be required for the operation of such Class II game." To avoid this problem, the Nation has agreed to strike "Class II" from this provision of the Compact it submitted to the Department for approval. Since this provision is only triggered at the option of the Nation, we believe that the Nation can elect to forego its exercise by striking "Class II" from its submitted compact, thus avoiding the issue.

Part 3(5) provides that the definition of "covered game" includes "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. Although the Compact does not indicate whether the addition any other Class III game under this provision would require review and approval of the Secretary of the Interior under the IGRA, it is our position that such Secretarial approval is required because the inclusion of additional Class III games is a substantial modification of the terms of the Compact. It is our view that a substantive modification is one that potentially implicates any of the three statutory reasons available to the secretary to disapprove a compact in the first instance, *i.e.*, whether the provision violates the IGRA, any other applicable provision of federal law, or the trust obligation of the United States to Indians. *See* 25 U.S.C. 2710(d)(8)(B).

Compact Termination

Part 15D of the Compact provides, *inter alia*, for termination by the State in the event of a material breach by the Nation of the terms of a tobacco compact. 25 U.S.C. 2710(d)(3), however, limits the proper topics for compact negotiations to those that bear a direct relationship to the operation of gaming activities. Moreover, the legislative history of the IGRA makes clear that Congress intended to prevent compacts from being used as subterfuge for imposing state jurisdiction on tribes concerning issues unrelated to gaming. *See* S.REP.NO. 100-446, at 14

(1988). Part 15D provides, however, that the State agrees that this subsection is severable from the compact and will be automatically severable in the event the Department determines that these provisions exceed the State's authority under IGRA. Accordingly, we believe that, Part 15D is not an appropriate term for inclusion within this compact. Therefore, this provision is hereby severed from the Compact.

We wish the Nation and the State success in their economic venture.

Sincerely,

Principal Deputy Assistant Secretary- Indian Affairs

Identical Letter Sent to: Honorable Brad Henry
Governor, State of Oklahoma

EXHIBIT 3

United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240

MAR - 8 2005

TAKE PRIDE IN AMERICA

Honorable Gregory E. Pyle
Chief, Choctaw Nation of Oklahoma
Drawer 1210
Durant, Oklahoma 74702

Dear Chief Pyle:

On November 19, 2004, we received the Tribal-State Gaming Compact between the Choctaw Nation of Oklahoma (Tribe) and the State of Oklahoma (State), executed by the Tribe on November 24, 2004 (Compact).

Under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(8)(C), the Secretary may approve or disapprove the Compact within forty-five days of its submission. If the Secretary does not approve or disapprove the Compact within forty-five days, IGRA states that the Compact is considered to have been approved by the Secretary, "but only to the extent the compact is consistent with the provisions of [IGRA]." IGRA requires the Department to determine whether the Compact violates IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians.

We have completed our review of the Compact, along with the submission of additional documentation submitted by the parties. As part of the Department's review of the Compact, we sent a letter to the parties seeking clarification of various provisions of the Compact. The responses of the State and the Tribe have resolved most issues, but do not include an economic analysis of the value of the State's concessions in exchange for revenue-sharing payments, which was requested. Therefore, pursuant to Section 11 of IGRA, the Compact will take effect without Secretarial action, as explained below.

Revenue Sharing

The Compact is authorized by recent legislation enacted by the State of Oklahoma. Prior to this legislation, Indian tribes in the State of Oklahoma could only operate Class II gaming machines and engage in pari-mutuel wagering. The legislation authorizes Indian tribes to engage in certain Class III gaming activities, provides for certain geographic exclusivity, limits the number of gaming machines at existing racetracks[1], and prohibits non-tribal operation of certain machines

[1] The State-Tribal Gaming Act authorizes no more than three (3) existing horse racetracks to operate no more than 750 machines.

and covered games.[2] As consideration for these concessions made by the State in enacting this law, the Tribe agrees to pay annually to the state 4% of the first $10 million, 5% of the next $10 million, and 6% of any subsequent amount of adjusted gross revenues received by the Tribe from its electronic amusement games, electronic bonanza-style bingo games, and electronic instant bingo games, as well as a monthly 10% payment of net win from the "common pool(s) or pot(s)" of the non-house-banked card games.

The Department has approved more than 200 tribal-state compacts. Any compact providing for tribal payments other than for direct expenses to defray the costs of regulating the gaming activity under the compact has been carefully scrutinized. This is because IGRA does not authorize states to impose a tax, fee, charge, or other assessment on Indian tribes to engage in class III gaming. *See* 25 U.S.C. 2710(d)(4). This section provides that "nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge or other assessment upon an Indian tribe . . . to engage in Class III gaming activity."

To enforce this statutory prohibition, the Department must determine whether a revenue-sharing provision is permissible under IGRA. Thus, we have examined whether, in exchange for the payment, a state offers significant or meaningful concessions over which it is not required to negotiate in good faith, resulting in substantial and quantifiable economic benefits to the Indian tribe. In addition, the payment to a state must be appropriate in light of the value of the economic benefits conferred on the tribe.

Under the first prong of our analysis -- significant or meaningful concessions – we believe that the State has made such concessions. The State has authorized Class III gaming for Indian tribes, provided for a zone of exclusivity, and limited non-tribal gaming. We also note that Part 11 also provides for a payment from the State to eligible tribes in the amount of 50% of any increase in the non-tribal entities' adjusted gross revenues following the addition of machines in excess of the statutory limit on a non-tribal operation. Both the Tribe and State agree that the Compact provides for the cessation of revenue-sharing payments to the State should the exclusive rights of compacting tribes to operate covered games be diminished.

Under the second prong of our analysis -- substantial and quantifiable economic benefits -- the Tribe has not provided the economic analysis that we requested, and thus, we are unable to determine whether the State's concessions will, in fact, result in substantial and quantifiable economic benefits to the Tribe. Nevertheless, we have elected not to disapprove the compact, but let it go into effect by operation of law because many Oklahoma Indian tribes have argued that although economic benefits resulting from the compact may not be significant, failure to enter into the compact could place tribes at a significant competitive disadvantage vis-à-vis those tribes that will be authorized to offer class III games under their new compacts.

[2] The term "covered game" is defined in Part 3(5) of the Compact to include an electronic bonanza-style bingo game, an electronic amusement game, an electronic instant bingo game, non-house-banked card games, and any other game under certain conditions.

Scope of Gaming

It is our view that Class III gaming compacts can only regulate Class III games, and cannot regulate Class II games under the IGRA. We have asked the National Indian Gaming Commission (NIGC) for its views on whether the games described in Part 3(5) of the Compact are all Class III games. The NIGC's Office of General Counsel has informed us that, in their view, the electronic bonanza-style bingo game, the electronic amusement game, the electronic instant bingo game, and the non-house banked card games referenced in Part 3(5) are all Class III games. However, the Compact contemplates the inclusion of Class II games in the last clause of Part 3(5) which authorizes "upon election by the Tribe by written supplement to this Compact, any Class II game in use by the Tribe, provided that no exclusivity payments shall be required for the operation of such Class II game." To avoid this problem, the Tribe has agreed to strike this provision from the Compact it submitted to the Department for approval. Since this provision is only triggered at the option of the Tribe, we believe that the Tribe can elect to forego its exercise by striking it from its submitted compact, thus avoiding the issue.

Part 3(5) provides that the definition of "covered game" includes "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. Although the Compact does not indicate whether the addition any other Class III game under this provision would require review and approval of the Secretary of the Interior under the IGRA, it is our position that such Secretarial approval is required because the inclusion of additional Class III games is a substantial modification of the terms of the Compact. It is our view that a substantive modification is one that potentially implicates any of the three statutory reasons available to the Secretary to disapprove a compact in the first instance, *i.e.*, whether the provision violates the IGRA, any other applicable provision of federal law, or the trust obligation of the United States to Indians. *See* 25 U.S.C. 2710(d)(8)(B).

Compact Termination

Part 15D of the Compact provides, *inter alia*, for termination by the State in the event of a material breach by the Tribe of the terms of a tobacco compact. 25 U.S.C. 2710(d)(3), however, restricts the proper topics for compact negotiations to those that bear a direct relationship to the operation of gaming activities. Moreover, the legislative history of the IGRA makes clear that Congress intended to prevent compacts from being used as subterfuge for imposing state jurisdiction on tribes concerning issues unrelated to gaming. *See* S.REP.NO. 100-446, at 14 (1988). Part 15D provides, however, that the State agrees that this subsection is severable from the compact and will be automatically severable in the event the Department determines that these provisions exceed the State's authority under IGRA. We believe that Part 15D is an inappropriate term for inclusion within this Compact, and we have severed it from other compacts that we have affirmatively approved. We cannot affirmatively sever it from this Compact because this Compact took effect without Secretarial action. We maintain, however, that this provision is inconsistent with IGRA.

Since we did not approve or disapprove the Compact within 45 days, the Compact is considered to have been approved, "but only to the extent the compact is consistent with the provisions of [IGRA]." The Compact takes effect when notice is published in the *Federal Register* pursuant to Section 11(d)(3)(B) of IGRA, 25 U.S.C. §2710(d)(3)(B).

Sincerely,

Acting Deputy Assistant Secretary-
Policy and Economic Development

Identical Letter Sent to: Honorable Brad Henry
Governor, State of Oklahoma