



J. Kevin Stitt
Office of the Governor
State of Oklahoma

Memorandum

To: Director Paula Hart, Office of Indian Gaming, U.S. Department of the Interior

From: Office of the General Counsel, Oklahoma Governor's Office

Date: April 24, 2020

Re: Authority of Governor of Oklahoma to negotiate and execute gaming compacts on behalf of the State with federally recognized Indian Tribes within the State, and the applicability of federal law and state law to such negotiations and execution.

Issue: Does Federal and State Law permit the inclusion of Event Wagering in an Oklahoma Gaming Compact?

Position of the Governor's Office of the State of Oklahoma: Federal and State Law permit the inclusion of Event Wagering in an Oklahoma Gaming Compact.

Factual Background

1. On December 17, 2019, following his withdrawal from representing the State of Oklahoma in compact negotiations with Oklahoma's Indian Tribes, the Oklahoma Attorney General's office released the following statement:

Under Article VI, Section 8 of the Oklahoma Constitution and 74 O.S. Sec. 1221, the governor is given authority to enter into agreements with the federally recognized tribes.

2. On April 18, 2020, the Governor of the State of Oklahoma, the Chairman of the Otoe-Missouria Tribe, and the Chairman of the Comanche Nation executed new gaming compacts. The Compacts authorize "Event Wagering" (a term defined in the new compacts) as one of the types of covered games.

3. On April 21, 2020, the Governor of the State of Oklahoma, the Chairman of the Otoe-Missouria Tribe, and the Chairman of the Comanche Nation conducted a public signing ceremony at the State Capitol. Thereafter, the compacts were made public for the first time.

4. Following the April 21, 2020, signing ceremony, the Oklahoma Attorney General confirmed: “The governor has the authority to negotiate compacts with the tribes on behalf of the state.”

5. On April 22, 2020, the office of the Governor of the State of Oklahoma issued the following statement:

A number of legal experts thoroughly researched and considered the interpretation of federal law for negotiating Event Wagering, and the interpretation of State law regarding the authority and role of the Governor to compact with Tribes. They are confident in the Governor’s authority and the validity of the compacts under both state and federal law, and are focused on the momentum established by the new gaming compacts which usher in a bright future for Oklahoma’s gaming market, leave behind the one-size-fits-all approach to the old Model Gaming compact, and expands opportunities for all parties for generations to come.

6. On April 23, 2020, Speaker of the House Charles A. McCall and President Pro Tempore Greg Treat submitted a letter to Governor Stitt, in which they averred the legislative branch’s position “on actions taken [by the Governor] in negotiating and signing these purported “compacts.” According to the Letter, the actions are “unauthorized by law and void without action by the Oklahoma Legislature.” Such statements reflect fundamental misconceptions regarding the recent Compacts executed between the State and the Comanche Nation and Otoe-Missouria Tribe, respective tribal sovereigns in our State.

7. Subsequently, various tribes adverse to the Governor and the State of Oklahoma have relied on that letter in pleadings filed in the federal litigation.

Legal Analysis

I. The Governor Has Sole Authority to Negotiate and Execute Gaming Compacts in Oklahoma.

The Oklahoma Constitution, the Legislature, and the state Supreme Court have recognized that the Governor has the sole authority to compact with Indian tribes. Moreover, the constitution prohibits the Legislature from approving state-tribal compacts.

1. All three branches recognize the Governor’s power to compact with tribal sovereigns.

Consistent with the April 21, 2020, statement of the Attorney General of Oklahoma, it is undisputed that the Governor has the sole power in Oklahoma to compact with Oklahoma’s tribal sovereigns. In fact, on this point, all three branches concur. Article 2, section 8 of the Oklahoma Constitution states:

“[t]he Governor shall cause the laws of the State to be faithfully executed, and shall conduct in person or **in such manner as may be prescribed by law, all intercourse and business of the State with other states and with the United States**, and he shall be a conservator of the peace throughout the State.” (emphasis added).

The Oklahoma Constitution does not contain an “advice and consent” provision similar to the United States Constitution. Therefore, “any requirement that individual agreements or compacts negotiated by the Governor on behalf of the State with other sovereigns, such as Indian tribes, be approved by the Legislature would violate the principles of separation of powers.” 2004 OK AG 27.

The Oklahoma Legislature has recognized the Governor’s constitutional authority to negotiate and enter into compacts with federally recognized Indian tribes. The Legislature codified this authority in 74 O.S. § 1221(C)(1), which states: “The Governor is authorized to negotiate and enter into cooperative agreements on behalf of this state with federally recognized Indian tribal governments.” The Oklahoma Legislature has also specifically recognized the power of the Governor pursuant to the Oklahoma Constitution to compact for Class III gaming activities. It passed 3A O.S. 2011 § 280 (State Tribal Gaming Act) which reads: “The State of Oklahoma through the concurrence of the Governor after considering the executive prerogatives of that office and the power to negotiate the terms of a compact between the state and a tribe.”¹

In 2013, the Oklahoma Supreme Court held that “[t]he Executive Branch of the State of Oklahoma, specifically the Governor, has been and continues to be the party responsible for negotiating compacts with the sovereign nations of this state.” *Sheffer v. Buffalo Run Casino*, 315 P.3d 359, 364 (Okla. 2013). The court then included footnote 18, which cites Okla. Const. art. VI, § 8 (“The Governor shall cause the laws of the State to be faithfully executed, and shall conduct in person or in such manner as may be prescribed by law, all intercourse and business of the State with other states and with the United States. . .”); Okla. Const. art. VI, § 2 (“The Supreme Executive power shall be vested in a Chief Magistrate, who shall be styled ‘The Governor of the State of Oklahoma.’”).

2. The Legislature is constitutionally precluded from approving state-tribal compacts.

The April 23, 2020, letter from Speaker of the House Charles A. McCall and President Pro Tempore Greg Treat (“McCall/Treat Letter” or “Letter”) to Governor Stitt states that the legislative branch’s position is that the negotiation and signing of the compacts were actions “unauthorized by law” and that the compacts are “legally flawed.” The Letter argues that the Governor “cannot unilaterally enter into the type of agreements signed [on April 22, 2020]” and that “the records of the Legislature and the law itself clearly show state-tribal gaming was always intended to be handled jointly, by both the legislative and executive branches of the State of Oklahoma. On this

¹ See also Oklahoma legislative leaders offer differing opinions on gaming compacts dispute, <https://oklahoman.com/article/5649640/legislative-leaders-offer-differing-opinions-on-gaming-compacts-dispute> (“We don’t have any say in the negotiations on the compacts so I’m watching like all of you are.” –Greg Treat) and (“I have full faith in our tribal leaders in the state of Oklahoma and in our governor that they’ll get in there and get the deal put together” – Charles McCall).

matter and many others, the legislative branch sets the policy and the executive branch executes the policy.” These statements, and the conclusions they provoke, are unequivocally wrong.

The McCall/Treat Letter purports to derive its authority for such positions from a 2004 Oklahoma Attorney General Opinion. In selecting only parts of the Opinion, and quoting even those parts incompletely or out of context, the Letter paints an inaccurate picture of the Attorney General’s Opinion. An excerpt from the Attorney General’s Opinion, and its final conclusions, is set forth below:

[A]ny requirement that individual agreements or compacts negotiated by the Governor on behalf of the State with other sovereigns, such as Indian tribes, be approved by the Legislature would violate the principles of separation of powers. Any requirement that individual negotiated agreements have to be approved by the Legislature prior to becoming effective would. . .have the Legislature *carrying out* legislative policy and *applying it to various conditions*. Secondly, the power to approve individual contracts would result in complete control by the Legislature, and. . .result in a vehicle "by which the executive department is being subjected to the coercive influence of the legislative department."

In reaching this conclusion, we note that the Oklahoma Constitution does not contain a Treaty Advice and Consent Clause like Article II, Section 2 of the United States Constitution, which empowers the President to make Treaties "by and with the Advice and Consent of the Senate."

Finally, a requirement that each agreement negotiated by the Governor must be approved by the entire Legislature would place the Legislature not in a cooperative role, but in complete control over the approval process. Such legislative power . . . would violate the Separation of Powers provision of the Oklahoma Constitution.

It is, therefore, the official Opinion of the Attorney General that:

The Separation of Powers provisions in the Oklahoma Constitution, including Article IV, Section 1, are not violated when, without legislative approval of the specific agreements:

- a. the Governor, under the powers vested in the Governor under Article VI, Section 8 of the Oklahoma Constitution, to conduct "all intercourse and business of the State with other states and with the United States," negotiates an agreement with other states or with the United States, or
- b. the Governor, under the authority vested in the Governor at 74 O.S. 2001, § 1221(C)(1), enters into a cooperative agreement (sometimes referred to as a compact) on behalf of the State with a federally recognized Indian Tribal Government within this State.

Oklahoma Attorney General Op. No. 2004 OK AG 27 (Aug. 26, 2004) (citations omitted). Accordingly, the legislature does not have a role in approving state-tribal compacts; the Governor has the exclusive authority.

II. The Indian Gaming Regulatory Act (IGRA) Controls the Procedures for Negotiating Gaming Compacts and the Scope of Their Contents.

It is a well-established principle that federal law, not state law, sets the standards for gaming compact negotiations. The McCall/Treat Letter fails to consider the preemptive effects of federal law and the norms that necessarily inform the limited role of Oklahoma law when assessing the legitimacy of gaming compacts negotiated by the Governor. The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et seq.*, not state law, controls the negotiation procedures and the scope of permissible subjects of compacts.

1. IGRA controls the procedures for negotiating gaming compacts.

Congress enacted IGRA in 1988, shortly after the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In *Cabazon*, the Court held that Indian tribes were free to offer gaming on tribal lands subject only to federal regulation. The Court also held that state regulation did not control the scope of tribal gaming.

IGRA was Congress' compromise to the difficult questions involving Indian gaming. IGRA was enacted to provide "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and "to shield [tribal gaming] from organized crime and other corrupting influences to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702(1)–(2). IGRA is an example of "cooperative federalism" in that it clearly outlines the roles of the competing sovereign interests—the federal government, state governments, and Indian tribes.

The federally-mandated design of a state-tribal compact is key to understanding the various roles of the three sovereigns regarding Class III gaming under IGRA. The federal government permits states and Indian tribes to develop joint regulatory schemes through the compacting process, but only pursuant to IGRA standards. *See Keweenaw Bay Indian Community v. U.S.*, 136 F.3d 469, 472 (6th Cir. 1998). Section 11(d)(3)(A) of IGRA describes the process whereby the Indian tribe and the state may commence negotiations leading to a tribal-state compact: the tribe must "request" that the state "enter into negotiations," and, on receiving such request, the state must proceed to "negotiate with the Indian tribe in good faith." 25 U.S.C. § 2710(d)(3)(A). *See Kan. ex rel. Schmidt v. Zinke*, 861 F.3d 1024 (10th Cir. 2017) ("IGRA itself imposes an obligation on the State to negotiate a gaming compact in good faith at the Tribe's request. . . The only condition under the statute triggering this obligation is a tribe's request to enter into such negotiations.").

The McCall/Treat Letter omits this federal requirement to negotiate a compact pursuant to IGRA standards. The Letter states that "[r]egarding state-tribal gaming law, the records of the Legislature and the law itself clearly show state-tribal gaming was always intended to be handled jointly, by both the legislative and executive branches of the State of Oklahoma. On this matter and many others, **the legislative branch sets the policy and the executive branch executes the**

policy.” (emphasis added). This assertion is flatly erroneous. Section 11(d)(1) of IGRA unequivocally declares that “[c]lass III gaming activities” are “lawful. . .only if such activities are. . .conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State.” 25 U.S.C. § 2710(d)(1). Moreover, a compact takes effect *only* when approved by the Secretary of the Interior. 25 U.S.C. § 2710(d)(3)(B). When a compact is negotiated and approved pursuant to the process outlined in the act, IGRA – not the state – legalizes gaming by the tribe.

In sum, IGRA, as mandated by the *Cabazon* court, specifically rejects the notion that state law controls the procedures for authorizing gaming on Indian lands.

2. IGRA defines the scope of appropriate subject matter for Tribal-State compact negotiations.

The McCall/Treat Letter suggests that the subject compacts are not properly negotiated since “Event Wagering”, as defined in the new compacts, is not specifically permitted as a covered game in the Oklahoma gaming statute. This view is also wrong. Instead of adopting state law as the standard for Indian gaming, IGRA adopts an approach that looks to broad classes of gaming that are permitted within the negotiating state. IGRA states that if a type of gaming is permitted within a state, any similar type of gaming is permitted as part of the compact negotiation process. 25 U.S.C. § 2710(d)(1)(B); *see also N. Arapaho Tribe v. State of Wyoming*, 389 F.3d 1308, 1313 (10th Cir. 2004) (holding that a state “ha[s] a duty to negotiate for terms beyond those [state] law expressly permits”). In fact, the Governor’s obligation to negotiate in good faith with the tribes requires meaningful effort to negotiate over subject matters permitted by IGRA and of interest to the tribes. *See N. Arapaho Tribe*, 398 F.3d at 1313 (“When a state refuses to negotiate beyond state law limitations concerning a game that it permits, the state cannot be said to have negotiated in good faith under the IGRA given the plain language of the statute.”).

IGRA provides that gaming activities that may be included in a compact are those types of general categories of games that a state “permits. . .for any purpose by any person, organization, or entity.” 25 U.S.C. § 2710(d)(1)(B). This provision is a form of ‘national treatment’ clause designed to protect tribes from discriminatory treatment in regards to gaming. The plain language of § 2710(d)(1)(B) is best understood as allowing class III gaming compacts in states that permit that kind of gaming for at least one purpose, by at least one person, organization, or entity. *See e.g., American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1067 (D. Ariz. 2001); *Dalton v. Pataki*, 835 N.E.2d 1180, (N.Y. 2005), cert. denied, 546 U.S. 1032 (2005). Under §2710(d)(1)(B), the state may grant a tribe exclusive Class III gaming rights if state law permits *similar* Class III gaming for at least one purpose for at least one person, organization, or entity.

In sum, for an Indian tribe to lawfully operate a particular form of gaming, IGRA only requires that “such gaming” be permitted “for any purpose by any person, organization, or entity.” 25 U.S.C. § 2710(d)(1)(B). And since Congress structured the requirement to provide states and tribes with maximum flexibility to fashion a Class III gaming compact, *see Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1122–23 (E.D. Cal. 2002), if the State of Oklahoma permits even one person to engage in a similar form of gaming, then that form of gaming, in its various iterations, may be made available to the tribe through the compact negotiating process.

III. “Event Wagering” is Already Permitted in Oklahoma.

In Oklahoma, pari-mutuel betting on events where the physical skills of a participant are the subject of betting is already broadly regulated and permitted. The subject compacts define “Event Wagering” as “the placing of a wager on the outcome of a Sport event, including E-Sports, or any other events.” The new compacts further define a “Sport” as the following:

[A] contest (i) having a defined set of rules, (ii) requiring participant skill, (iii) requiring physical skill, (iv) having a broad public appeal, and (v) having achieved institutional stability where social institutions have rules which regulate it, stabilizing it as an important social practice. This shall include, but not be limited to, football, basketball, baseball, golf, tennis, hockey, boxing, mixed martial arts, wrestling, athletic contests recognized by the Olympics, and car racing.

Although all sports, and other events, have not been the subject of gaming in Oklahoma in the past, this kind of gaming has long been specifically authorized in Oklahoma law.

1. Horse racing—a type of event wagering—is widely permitted in Oklahoma.

Speaker McCall and President Pro Tempore Treat ignore the State Tribal Gaming Act, 3A O.S. §§ 261-281, which specifically provides for wagering on such sporting events. The State Tribal Gaming Act states that the “Oklahoma Horse Racing Commission shall approve the transfer of purse money generated for races for Thoroughbred horses, races for Quarter Horses or races for Paint and Appaloosa horses pursuant to this section.” 3A O.S. § 265. Similarly, the State Tribal Gaming Act provides for wagering on horse races not located in Oklahoma. Section 266 states:

Notwithstanding the provisions of Section 205.7 of Title 3A of the Oklahoma Statutes, an organization licensee may conduct, for any year in which the organization licensee meets the requirements to conduct authorized gaming, an unlimited number of out-of-state full card simulcast races for an unlimited number of days during that calendar year. An organization which is licensed under Section 208.2 of Title 3A of the Oklahoma Statutes may also conduct an unlimited number of out-of-state full card simulcast races for an unlimited number of days, provided that such licensee conducts, in such year, no less than four hundred (400) total races, which shall include conducting no fewer than an average of four (4) races per day for Thoroughbred horses.

3A O.S. § 266. In addition, the Oklahoma Horse Racing Act, 3A O.S. §§ 200–282, provides for a full authorized system of pari-mutuel wagering. *See* 3A O.S. § 205.6.

2. To the extent state law is construed to override IGRA, such law is preempted.

The Tenth Circuit has specifically rejected arguments like those advanced in the McCall/Treat Letter. These arguments seek to entrench state law as the dominant framework for the negotiating scope of tribal compacts.

In *N. Arapaho Tribe*, 389 F.3d at 1311-12, the court stated:

The state argues that the district court erred in concluding that IGRA requires the state to negotiate with the Tribe. . .without regard to the limitations of Wyoming law. If the state's approach were correct, however, "the compact process that Congress established as the centerpiece of the IGRA's regulation of Class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible." *Mashantucket Pequot Tribe*, 913 F.2d at 1031.

Moreover, the court in *Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1152–53 (D. Or. 2005), stated:

An argument similar to plaintiffs was raised recently in *Dalton v. Pataki*, 5 N.Y.3d 243, 835 N.E.2d 1180, 802 N.Y.S.2d 72 (N.Y. 2005). There, the New York Court of Appeals addressed the issue of whether the state could allow the governor to enter into tribal-state gaming compacts when the state constitution prohibited commercial gambling generally. *Id.* at 1186. The court rejected the plaintiffs' argument that the state constitution prohibition against commercial gaming rendered class III gaming on Indian lands unlawful, finding that "IGRA does not allow the state to consider the purpose behind the gaming." *Id.* at 1189. Noting that the statutory language makes clear that class III gaming is permitted on Indian lands "when located in a state that permits such gaming for any purpose by any person," the court held that "**since New York allows some forms of class III gaming – for charitable purposes – such gaming may lawfully be conducted on Indian lands provided it is authorized by tribal ordinance and is carried out pursuant to a tribal-state compact.**"

Id. at 1152–53 (emphasis added).

If a type of game is regulated by the state and not otherwise prohibited, it is appropriate for compact negotiations. As stated in *U.S. v. Sisseton-Wahpeton Sioux Tribe*, "the legislative history [of IGRA] reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity." 897 F.2d 358, 365 (8th Cir. 1990).

3. The Oklahoma Legislature has authorized certain sports betting.

Speaker McCall and President Pro Tempore Treat assert unequivocally that "the Legislature has not yet authorized sports betting in Oklahoma." This is an incomplete representation of the legal state of affairs in Oklahoma. To be sure, the United States Department of the Interior has long recognized that a state is not required to negotiate over a type of game if all forms of that game are prohibited by state law. For example, the "Secretarial Procedures" regulations stated:

IGRA thus makes it unlawful for Tribes to operate particular Class III games that State law completely and affirmatively prohibits. . .In other words, if a State prohibits **an entire class** of traditional games, it need not negotiate over the particular games within that category. Consequently, such gaming would not be permitted under Secretarial procedures.

63 Fed. Reg. 3289, 3292–93 (Jan. 22, 1998) (emphasis added).

However, Oklahoma has not prohibited the entire class of “Event Wagering.” The National Indian Gaming Commission (NIGC) has long recognized “Event Wagering” as an appropriate form of gaming in Oklahoma because event wagering is generally only **regulated**, not prohibited, by Oklahoma law. Almost all tribes in Oklahoma play versions of tournaments as Class III games. As a result, the NIGC has issued several opinion letters stating that under Oklahoma law, tournament play is legal and within the scope of compact negotiations since they are not prohibited by Oklahoma law. The NIGC observes that gambling tournament play is not prohibited in Oklahoma because Oklahoma specifically exempts tournaments from criminal gaming statutes by virtue of 21 O.S. § 981. Further, the NIGC has stated that although tournaments clearly involve gambling that would otherwise constitute prohibited gaming in Oklahoma, since it is an exempted area in Oklahoma for participant betting, it also is an appropriate subject for tribal gaming. In short, because Oklahoma has chosen to exempt tournaments – which may require an entry fee and award a pool prize to individual participants – from the definition of betting under state law, tournaments may be properly authorized for Class III gaming.

4. Athletic events are proper subjects of compact negotiations.

Oklahoma law not only exempts betting on tournaments but also betting on athletic events if done in a pool betting format. 21 O.S. § 981. Participants are allowed to bet on athletic events through pool wagering. Oklahoma’s prohibition on betting is not a complete ban but merely a form of strict regulation. The exemptions demonstrate that betting on athletic events is not fully prohibited in Oklahoma. Section 981 states:

A “bet” is a bargain in which the parties agree that, dependent upon chance, or in which one of the parties to the transaction has valid reason to believe that it is dependent upon chance, one stands to win or lose something of value specified in the agreement. **A bet does not include. . .**

c. offers of purses, prizes or premiums to the actual participants in public and semipublic events, as follows, to wit: **Rodeos**, animal shows, hunting, fishing or shooting competitions, expositions, fairs, **athletic events**, tournaments and other shows and contests where the participants qualify for a monetary prize or other recognition. This subparagraph further excepts an entry fee from the definition of “a bet” as applied to enumerated public and semipublic events.

21 O.S. §981 (emphasis added).

Under established IGRA precedent and Oklahoma law, it is clear that athletic events are proper matters for compact negotiations should the Tribes and State choose to negotiate such matters. The arguments presented by Speaker McCall and President Pro Tempore Treat are factually incorrect and legally infirm. The Oklahoma Governor is compelled, pursuant to his obligation to deal with the Tribes in good faith, to negotiate “Event Wagering” issues at the Tribes’ request, as was the case in these compacts. It is an unmistakable error to state so unambiguously, as the McCall/Treat Letter purports to do, that “Event Wagering” is not a proper subject for compact negotiation.

IV. The Compacts Were Flexibly Drafted to Withstand Challenges and Should Be Forwarded to the Secretary of the Interior for Approval.

Had Speaker McCall and President Pro Tempore carefully reviewed the terms of the compacts prior to issuing their respective missives, they might have been assured by the fact that the compacts **on their face** address any concerns about the legality of event wagering. The compacts define “Event Wagering” as “the placing of a wager on the outcome of a Sport event, including E-Sports and daily fantasy sports, or any other events, **to the extent such wagers are authorized by applicable State law.**” (emphasis added). If certain event wagering activities are not authorized by applicable State law as Speaker McCall and President Pro Tempore argue, the compacts have anticipated this question. To the degree State law would operate to the contrary, such operation would narrow, not wholly eliminate, the event wagering recognized by the compact.

Moreover, the compacts include severability clauses which allow for the Secretary of the Interior to sever portions of the compact deemed incompatible with IGRA or relevant state law. Part 13.B of each compact states:

Entire Agreement; Severability. This Compact constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous oral and written negotiations. If any clause or provision of this Compact is subsequently determined by any federal court to be invalid or unenforceable under any present or future law, including but not limited to the scope of Covered Games, the remainder of this Compact shall not be affected thereby. It is the intention of the Parties that if any such provision is held to be illegal, invalid or unenforceable, there will be added in lieu thereof a provision as similar to such provision as is possible to be legal, valid and enforceable.

In other words, in the unlikely event of a judicial holding that sports betting is per se outside the permissible negotiating scope of Oklahoma tribal-state compacts, such a decision would have no effect on the efficacy of the compacts. The Department of the Interior honored such severability clauses with the original Tribal Gaming Compact. Part 15(D) of the original Compact outlined a termination procedure. Part 15(D) also included a severability provision which read:

The state hereby agrees that this subsection is severable from this Compact and shall automatically be severed from this Compact in the event that the United States

Department of the Interior determines that these provisions exceed the states authority under IGRA.

Upon review by the Department of the Interior, the termination provision was deemed improper and, pursuant to the severability clause, independently severed from the Compact. Part 13.D of these compacts mirrors this construction. Accordingly, these compacts were flexibly drafted to accommodate potential challenges.

Therefore, the compacts between the State of Oklahoma and the Otoe-Missouria Tribe, and between the State of Oklahoma and the Comanche Nation, are legally enforceable compacts subject only to the approval of the Secretary of the Interior prior to taking effect. A careful reading of the express terms in the two compacts may have avoided the unfortunately misleading communication from Speaker McCall and President Pro Tempore Treat.

The compacts are valid, with or without the event wagering clause, and the obligations therein are binding to both the State and the Tribes who each must perform their respective contractual obligations.

Conclusion

The right to game on tribal land is a matter of federal law, and a state statute cannot control the scope of compact negotiations. Compact negotiations are both encouraged and mandated on any class of games that are permitted to anyone in the State of Oklahoma. Event Wagering is permitted in the form of horse racing, tournaments, and sporting events in Oklahoma by both individual participants and large groups of gamblers. Such event wagering on local, national, and international events is permitted by Oklahoma law. Denying Tribes the opportunity to engage in event wagering for sports, particularly when certain sports are already the subject of gaming, flies in the face of IGRA and undermines the objectives for which gaming relations have become a central pillar of tribal-state relations.

These compacts between the State and the Otoe-Missouria Tribe and between the State and the Comanche Nation are undeniably a legitimate expression of sovereign-to-sovereign negotiations governed by federal law and concluded pursuant to the prerogative established in the Oklahoma Constitution, which vests the Governor with the sole authority to negotiate with Indian Tribes. Specifically, Article VI, Section 8 of the Oklahoma Constitution empowers the Governor:

The Governor shall cause the laws of the State to be faithfully executed, and **shall conduct in person or in such manner as may be prescribed by law, all intercourse and business of the State with other states** and with the United States, and he shall be a conservator of the peace throughout the State.

Id. (emphasis added). Promoting the “business of the State” with other sovereigns and serving as “a conservator of the peace” is exactly what these compacts have done.