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May 29, 2020

Paula Hart, Director
Bureau of Indian Affairs Office of Indian Gaming
U.S. Department of the Interior
1849 C Street N.W.
MS-3543-MIB
Washington, D.C. 20240

Dear Director Hart:

On May 1, 2020, Governor Bill Anoatubby called on the Department to reject agreements Oklahoma Governor Stitt purported to enter with the Comanche Nation and Otoe-Missouria Tribe under the Indian Gaming Regulatory Act (IGRA).[1] Please accept this letter as supplemental comment in support of the Chickasaw Nation's position on this matter.

Governor Stitt has argued he has a robust and unilateral authority to bind Oklahoma to purported IGRA compacts.[2] The Oklahoma Attorney General, the Oklahoma President *Pro Tempore* of the Senate, the Oklahoma Speaker of the House, and several Tribes have argued against this point, and to those arguments,[3] we now add that Governor Stitt has in the past week, *one*, conceded his executive authority is inherently limited and, *two*, admitted to insecurity in his position by seeking judicial "clarification" on the question. Governor Stitt's concession and request for "clarification" confirm our position that administrative approval of or accession to the agreements he tendered would be arbitrary, capricious, and inconsistent with law.

With respect to his concession, Governor Stitt last week briefed his summary judgment argument in the ongoing compact litigation.[4] Therein, he argues that "[p]ursuant to the fundamental separation of powers found in Oklahoma's Constitution, the State authorizes certain conduct such as gambling through *legislative enactments*" and that "the executive branch administers that authority."[5] He goes on to argue that legalization of gambling in Oklahoma "is

[1] *See generally* Letter to Secretary Bernhardt from Governor Bill Anoatubby (May 1, 2020) with attached Memorandum to Governor Bill Anoatubby from Undersecretary Stephen Greetham (Apr. 30, 2020).

[2] *E.g.*, Memorandum to Director Paula Hart from Office of the General Counsel (Apr. 24, 2020).

[3] *E.g. generally*, *supra*., n.1 at pp.6-13.

[4] *Cherokee Nation, et al., v. Stitt*, Civ. No. 19-1198 (W.D. Okla.) (Doc. No. 126), attached.

[5] *Id*. at 24 (emphasis added).

clearly a *legislative function*,"[6] and that by statute, "[t]he legislature empowered the executive branch . . . to administer and implement" Oklahoma's codified gaming policies.[7] He then argues that since "'authorizing' electronic gaming by organization licensees is a *legislative function*," gaming may be authorized only by "*legislative enactment*."[8] While he may see this argument as convenient to his position in the ongoing litigation, it flies in the face of his contentions to the Department—namely, that he *alone* has the power to bind Oklahoma to gaming policies that *he* codifies by Tribal-State agreement.

With respect to his manifest admission of insecurity in the position he has argued to the Department, last evening Governor Stitt started Federal court litigation over his authority to bind Oklahoma to the very agreements now before you. By motion in the ongoing litigation, Governor Stitt argues "*clarification is needed* as to the Governor's authority to bind the State to compact provisions related to exclusivity, rates, covered games, and other significant subjects that differ from or are not found in the Model Compact."[9] To be clear, the question Governor Stitt's actions present has never been whether he has the authority to *negotiate*; the question instead turns on whether he can unilaterally *bind the State* to the product of his negotiations.[10] By his own hand, that question is now in litigation.

In sum, Governor Stitt has vitiated his position before the Department by, *one*, conceding inherent constitutional limitations on his authority and, *two*, submitting review of his authority to the court. Accordingly, while he continues to stand alone among Oklahoma's constitutional officers in a radical belief that he has some unchecked executive power to enact by compact a new, durable, and lawful Oklahoma gaming paradigm, a court will now address what authority he has in real life. In this posture, the Department's allowing the agreements to take effect under IGRA would be arbitrary, capricious, and inconsistent with law. Furthermore, administrative accession to these defective agreements would unnecessarily waste resources of the State of Oklahoma and multiple Tribal sovereigns during an already strained period.

The Chickasaw Nation accordingly and emphatically renews and supplements its call for the Department to reject Governor Stitt's agreements as improvidently submitted for review.

Sincerely,

Stephen Greetham,
Senior Counsel

[6] *Id*. at 25 (emphasis in original).

[7] *Id*. at 26.

[8] *Id*. at 27 (emphasis added).

[9] *Cherokee Nation, et al., v. Stitt*, Civ. No. 19-1198 (W.D. Okla.) (Doc. No. 131) at 12 (emphasis added), attached.

[10] *Supra*., n.2 at attachment p.8-9.