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

THE CHEROKEE NATION, THE CHICKASAW NATION, and THE CHOCTAW NATION, Plaintiffs, THE CITIZEN POTAWATOMI NATION, THE MUSCOGEE (CREEK) NATION, THE QUAPAW NATION, THE DELAWARE NATION, THE SEMINOLE NATION, and THE WICHITA AND AFFILIATED TRIBES, Plaintiffs-in-Intervention, v. J. KEVIN STITT, in his official capacity as the Governor of the State of Oklahoma, Defendant/Counterclaimant.	)	No. CIV-19-1198-D

PLAINTIFFS' CHEROKEE NATION, CHICKASAW NATION, AND CHOCTAW NATION AND PLAINTIFFS-IN-INTERVENTION'S CITIZEN POTAWATOMI NATION, DELAWARE NATION, MUSCOGEE (CREEK) NATION, AND QUAPAW NATION RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND BRIEF IN SUPPORT REGARDING PART 15(B) EXPIRATION OF THE COMPACTS AT ISSUE

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INTRODUCTION

Plaintiffs and Plaintiffs-in-Intervention ("Nations") struck a deal with the State of Oklahoma ("State") in their Compacts. The Nations could conduct Class III gaming in Oklahoma, including electronic gaming. The State got a percentage of the Nations' gaming revenue in exchange for promising to limit the electronic gaming that horse racetracks could be permitted to conduct by the State after four tribes' Compacts were in effect. That deal has been good for all Oklahomans, producing jobs, improving government services, and supporting horse industries in the State. The parties also agreed that if horse racetracks – or anyone else – were permitted to conduct electronic gaming on January 1, 2020, the Compacts' initial term would automatically renew on that date. They were, and the Compacts have renewed.

Defendant claims otherwise. He conjures up a "Grand Bargain," under which new compacts must be negotiated, and he would have unlimited leverage, as the Nations "cannot sue to enforce a State's duty to negotiate a compact in good faith." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 797 (2014) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996)). In an attempt to gain that leverage, he repudiated the automatic renewal provision of the Compacts. Federal law protects the parties' agreement from these ploys by making federal law determinative of Compact rights, under which the plain language of the Compacts controls, and the deal the State wisely made remains in effect.

RESPONSE TO DEFENDANT'S UNDISPUTED MATERIAL FACTS

1-3. The Nations do not dispute Defendant's statement of undisputed material facts ("UMF") ¶¶1-3. Def.'s Br. In Supp. Of Mot. For Partial Summ. J., ECF No. 126 at 6 ("Df.Br.").

4. The Nations dispute UMF ¶4, *id.* at 6-7, which asserts that the State-Tribal Gaming Act ("STGA"), Okla. Stat. tit. 3A, §§ 261-282, "mandated the [Oklahoma Horse Racing Commission ("ORHC")] to license organization licensees (racetracks) to conduct electronic gaming," *id*. (emphasis added), and is an unsupported legal conclusion, not a fact. Under the STGA, the OHRC is permitted to license organization licensees to conduct electronic gaming only "[i]f at least four Indian tribes enter into the model [tribal gaming compact set forth in Okla. Stat. tit. 3A, § 281], and such compacts are approved by the Secretary of the Interior," Okla. Stat. tit. 3A, § 262(A). The OHRC determines whether to authorize organization licensees to do so pursuant to the STGA and the OHRC's regulations and procedures.

5. The Nations do not dispute UMF ¶5, Df.Br. 7, but it is not material.

6-8. The Nations do not dispute UMF ¶¶6-8. *Id*.

9. The Nations dispute UMF ¶9, *id.*, for the reasons stated in ¶4 *supra*, except that the Nations do not dispute that the OHRC issued its first electronic gaming license to an organization licensee on August 11, 2005 and has done so every year since then.

10. The Nations do not dispute the assertion in UMF ¶10 that Remington Park and Will Rogers Downs were and continue to be organization licensees, but dispute the assertion in UMF ¶10 that those entities are operated as "commercial affiliate[s] of" the

Chickasaw and Cherokee Nations, *id*. at 8, which is an unsupported legal conclusion, not a material fact. The OHRC has determined that those two Nations own the companies that operate Remington Park and Will Rogers Downs, that their operation is not subject to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, and that they conduct gaming subject to state regulation. Remington Park Order, ECF No. 125-34 & Will Rogers Downs Order, ECF No. 135-1, Conclusions of Law ¶¶17-22, at 15-17.

11. The Nations do not dispute UMF ¶11, Df.Br. 8.

12. The Nations dispute the assertion in UMF ¶12 that the State "has not amended the STGA to authorize organization licensees or others to conduct electronic gaming," Df.Br. 8 (emphasis added), which is an unsupported legal conclusion, not a fact. In 2017, the Legislature repealed the STGA's express limitations on the hours per day and per week that organization licensees could conduct electronic gaming. 2017 Okla. Sess. Law Serv. ch. 115, § 1 (West) (codified at Okla. Stat. tit. 3A, § 262(B)). The Nations also dispute the assertion in UMF ¶12 that amendments to the STGA since 2004 are "minor" and did not "authorize[] electronic gaming by organization licensees." *Id.* This assertion is an unsupported legal conclusion, not a fact.

12.a-d. The Nations do not dispute UMF ¶12.a. or ¶12.b., Df.Br. 8, but neither is material. The Nations do not dispute UMF ¶12.c., *id*., except for the characterization of organization licensees (called "Racinos" therein) as "tribal affiliates," which is an unsupported legal conclusion, not a fact. *See* ¶10, *supra*. In addition, the description of H.B. No. 1836 is not complete. The Nations do not dispute the assertions in UMF ¶12.d, Df.Br. 8, that H.B. No. 3375 was passed in 2018, concerned the conduct of "certain non-

electronic gaming by compacting tribes," and did not apply to organization licensees. However, the Nations do dispute the assertion that H.B. No. 3375 itself allowed gaming by compacting tribes, which is also an unsupported legal conclusion, not a fact. The Nations' gaming is authorized by IGRA and their Compacts, not state law.

13. The Nations dispute the assertion in UMF ¶13 that Defendant "invok[ed] Part 15(B) of the Compacts," *id*. at 9, which is an immaterial and unsupported legal conclusion, not a fact. The Nations also dispute that they did not respond to Defendant's invalid attempt to invoke Part 15.B. The Nations do not otherwise dispute UMF ¶13.

14-16. The Nations do not dispute UMF ¶¶14-16, *id*., but they are not material.

ADDITIONAL UNDISPUTED MATERIAL FACTS

1. Defendant has consistently denied that the Nations' Compacts automatically renewed on January 1, 2020 and are in full force and effect. Nations' Br. In Supp. Of Mot. For Partial Summ. J., ECF No. 125-1 ("Nats.Br."), Statement of Undisputed Material Facts ("SOF") ¶¶29-30.

2. The Nations hereby incorporate by reference all their SOFs. *See id.* ¶¶1-30.

I. Federal Law Governs Interpretation Of Compacts And Requires Unambiguous Terms Be Construed In Accord With Their Plain Language.

The Compacts are unambiguous, *see* Answer ¶9 at 20, ECF No. 15, and therefore the court applies "the federal common law," and "determines the parties' intent from the language of the agreement itself," rather than relying on extrinsic evidence. *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1239 (10th Cir. 2018) (citations omitted).

Defendant concedes as much, Df.Br. 1, 10-11,[1] but then backtracks to argue that the Compacts should be interpreted in light of the STGA, other state statutes, state regulations, and extrinsic evidence. Federal law and the Compacts reject this argument.

Under IGRA, state law is used to address only "the narrow question 'whether a state has validly bound itself to a compact,'" which "'necessitates an interpretation of both federal and state law,'" *Citizen Potawatomi*, 881 F.3d at 1239 n.18 (quoting *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1558 (10th Cir. 1997)).[2] The "Compact[s'] validity under state law was predetermined by the [STGA]," *Muhammad v. Comanche Nation Casino*, No. CIV-09-968-D, 2010 WL 4365568, at *7 n.8 (W.D. Okla. Oct. 27, 2010), and thus no such question is posed here. And while the Compacts are derived from the Model Compact, "the interpretation of [the Compacts] presents a question of federal law," *Citizen Potawatomi*, 881 F.3d at 1238-39 (quoting *Cuyler v. Adams*, 449 U.S. 433, 442 (1981),

[1] Defendant also quotes *Texas v. New Mexico*, 482 U.S. 124, 128 (1987), which dealt with the Supreme Court's power to issue relief in disputes between States. By contrast, the remedies available against Indian tribes in IGRA compact disputes are limited by tribal sovereign immunity. *See* Nats.Br. 28 n.12.

[2] The *Citizen Potawatomi* court also dismissed the relevance of state law "[e]ven if" *Kelly* "could plausibly be read for the proposition that Oklahoma law plays some part in the interpretation of the Compact," because Oklahoma law on the admissibility of extrinsic evidence to interpret a contract "mirrors the federal common law." 881 F.3d at 1239 n.19; *cf.* Df.Br. 11. Defendant also cites *Cachil Dehe Band v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010) and *United States v. Turley*, 878 F.3d 953, 956–57 (10th Cir. 2017). Df.Br. 11. But *Cachil Dehe Band* held that "[g]eneral principles of federal contract law govern" IGRA, and only relied on both state and federal contract law because there was no difference between them. 618 F.3d at 1073. And *Turley* interpreted a postal service lease, which did not "implicate clear and substantial interests of the National Government." 878 F.3d at 957 (quoting *USPS v. Ester*, 836 F.3d 1189, 1195 (9th Cir. 2016)). The Tenth Circuit law on IGRA is different and controls here.

and citing *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996)). As *Citizen Potawatomi* is controlling here, Defendant's reliance on *Barseback Kraft AB v. United States*, 121 F.3d 1475 (Fed. Cir. 1997) and *Franconia Assocs. v. United States*, 61 Fed. Cl. 718 (2004), Df.Br. 11, is misplaced.[3]

Defendant also argues that the Compacts implicitly incorporate other provisions of IGRA, the STGA, other state statutes, and "pertinent administrative regulations." Df.Br. 11-12. As described below, IGRA and its regulations are federal laws that apply of their own force, and make state law and regulations inapplicable to the Compacts, which confirm that as well.

First, IGRA allows tribes and states to negotiate for only the application of state laws that are "directly related to, and necessary for, the licensing and regulation of [gaming] activity," and only for the application of state jurisdiction that is "necessary for the enforcement of such laws and regulations." 25 U.S.C. § 2710(d)(3)(C)(i)-(ii). The Nations did not agree in the Compacts to adopt the STGA, other state statutes, or state regulations. They agreed only to comply with "subsection K of Section 4 of the [STGA]," in circumstances not present here. Part 11.F.[4] Furthermore, the Compacts expressly provide

[3] In these cases, neither of which interpreted an IGRA Compact, the federal laws that authorized the contracts were considered to determine the effect of amendments to those laws on the contracts. *Barseback Kraft*, 121 F.3d at 1477-78, 1481; *Franconia Assocs.*, 61 Fed. Cl. at 722, 728, 731-32.

[4] The STGA itself states that "regulation and oversight of games covered by a compact and operated by an Indian tribe shall be conducted solely pursuant to the requirements of the compact." Okla. Stat. tit. 3A, § 262(F).

that they "shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction." Part 9.

Thus, Defendant's reliance on *Walker v. BuildDirect.com Technologies, Inc.*, to establish incorporation by reference to state law is futile. Df.Br. 12 (quoting 2015 OK 30, ¶11, 349 P.3d 549). And Tenth Circuit law applying *Walker* in a diversity action shows it does not help Defendant anyway. *See Bass Trustee v. Tour 18 at Rose Creek, LP*, 795 F. App'x 613, 620-21 (10th Cir. 2020) (quoting *Walker*, 2015 OK 30, ¶¶13-14) (contract lacking "words of express incorporation" did not incorporate by reference).

Second, to incorporate a document parties must intend to do so and make clear reference to it in the contract. *See* 11 Williston on Contracts § 30:25 (4th ed. May 2020 update). The Compacts do so in only Part 13.D., which provides the parties "hereby incorporate[] in this Compact" "[t]he standards for electronic . . . games established in the [STGA]," and "at the election of the tribe, any standards contained in the [OHRC] rules issued pursuant to subsection B of Section 9 of the [STGA]." Part 13.D. has nothing to do with the issues in this case, however, and Part 15.B. contains no such language.

Defendant's assertion that Secretarial approval letters are part of the Compacts fails because such letters are not a part of the negotiation, drafting, and signing of the Compact, which is finalized *before* Secretarial review. 25 U.S.C. § 2710(d)(3)(A)-(B); *see Kelly*, 104 F.3d at 1555 (valid entry into a compact precedes Secretarial approval); 25 C.F.R. § 293.2(b)(2) (a compact is an "intergovernmental agreement executed" by the Tribe and State). Secretarial approval letters instead conclude the administrative review

process. *See* 25 U.S.C. § 2710(d)(8); 25 C.F.R. § 293.10(b). Defendant's reliance on the severance of Part 15.D. from the Compact fails for the same reasons.[5]

II. Whether The Compacts Are Perpetual Or Indefinite Is Not Before This Court And Would Not Change The Result In This Case.

Defendant tries to sidestep the clear language of Part 15.B. by arguing that the Compacts would impose a perpetual obligation if they renew for even one term, and would be terminable at-will if they did not expire on January 1, 2020 because they are indefinite. Df.Br. 13-17, 18-19.[6] Defendant lacks standing to make these arguments, which are neither ripe nor right.

Defendant lacks standing because he claims the Compacts have expired, which must be assumed to be correct to determine standing, *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1092-93 (10th Cir. 2006), in which case Defendant could not suffer any injury-in-fact from the Compacts' renewal. *See Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1255 (10th Cir. 2004) (describing elements of standing). Defendant's arguments are not ripe because the only issue before the Court is whether the Compacts renewed for another fifteen-year term on January 1, 2020. And the renewed Compacts will be in effect until January 1, 2035 regardless of how Defendant's perpetuity

[5] Defendant also wrongly points to: *New Moon Shipping Co. v. MAN B & W Diesel AG*, 121 F.3d 24, 30 (2d Cir. 1997), which dealt with a contract "too ambiguous" to incorporate another document, *id.* at 30-31; *Astro-Space Laboratories, Inc. v. United States*, 470 F.2d 1003, 1009 (Ct. Cl. 1972), which interpreted an arcane term in a procurement contract, *id.* at 1009; and Okla. Stat. tit. 15, § 161, a state statute not even mentioned in the Compacts. Df.Br. 12.

[6] Yet, Defendant recently signed other perpetual gaming agreements. Nats.Br. 34 n.15.

and indefiniteness arguments are resolved, so the adjudication of those arguments would have no effect on Defendant now. Nats.Br. 33 (citing *Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1093 (10th Cir. 2004)). And in any case, these arguments are wrong.

A. Interpretive Principles Regarding Ambiguous Perpetual Agreements Would Not Prevent Enforcement of the Compacts.

The Compacts had a definite term which ended and automatically renewed under Part 15.B. for at least another fifteen-year term on January 1, 2020. Nats.Br. 33-34. The State could have avoided renewal by not authorizing organization licensees or others to conduct electronic gaming on January 1, 2020, *see* Part 15.B., or by negotiating a mutual termination with the signatory Tribes, *see* Part 15.C., under which the State still retains a "means to exit the Compact[s]," Df.Br. 14.[7]

The Compacts are not "perpetual" for these reasons, but even if they were, they would be enforceable. The Compacts are governed by federal law. *Citizen Potawatomi*, 881 F.3d at 1239.[8] "IGRA preempts the field of governance of gaming activities on tribal

[7] Defendant wrongly argues Part 15.C. does not allow mutual termination after January 1, 2020. Def.Br. 14 n.9. Part 15.C. says the Compacts "shall remain in full force and effect until the sooner of expiration of the term or until the Compact is terminated by mutual consent of the parties." (emphasis added). So, the Compacts remain in effect until the term expires or until the Compacts are mutually terminated, whichever is "sooner" – neither of which has occurred.

[8] Defendant's reliance on state law to argue the contrary is misguided. *See* Df.Br. 17 (citing *Preferred Physicians Mut. Mgmt. Grp, Inc. v. Preferred Physicians Mut. Risk Retention Grp., Inc.*, 961 S.W.2d 100, 103-04 (Mo. Ct. App. 1998), and *H&R Block Tax Servs. LLC v. Franklin*, 691 F.3d 941, 945 (8th Cir. 2012) (diversity action)).

lands," *Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226, 1232 (10th Cir. 2017), and permits parties to negotiate the duration of a compact, *see Chemehuevi Indian Tribe v. Newsom*, 919 F.3d 1148, 1152-54 (9th Cir. 2019), as they did here. Many Tribes and States have entered into perpetual IGRA compacts,[9] which is consistent with IGRA's goals, *see* 25 U.S.C. § 2702(1), and guarantees steady payment of any agreed-upon revenue sharing payments to states. Defendant never actually argues that IGRA forbids such agreements. In addition, a tribal-state "gaming compact is similar to a 'congressionally sanctioned interstate compact,'" *Citizen Potawatomi*, 881 F.3d at 1236 (quoting *Cuyler*, 449 U.S. at 442); *Muhammad v. Comanche Nation Casino*, 742 F. Supp. 2d 1268, 1276 n.7 (W.D. Okla. 2010), and Oklahoma has entered into a number of perpetual interstate compacts, *see* Nats.Br. 35 & n.16. Furthermore, federal courts have long recognized that an agreement can be perpetually enforceable when its language requires that result. *See, e.g.*, *Grant Cty. Black Sands Irr. Dist. v. U.S. Bureau of Reclamation*, 579 F.3d 1345, 1355 (Fed. Cir. 2009); *Town of Readsboro v. Hoosac Tunnel & Wilmington R.R.*, 6 F.2d 733, 735 (2d Cir. 1925) ("Had the parties expressed the intention to make a promise for perpetual maintenance, we should, of course, have nothing to say; their words would be conclusive"); *McKell v.*

[9] *See, e.g.*, Gaming Compact Between Miss. Band of Choctaw Indians & Mississippi, § 15.2, https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc-038317.pdf; Gaming Compact Between Coeur d'Alene Tribe & Idaho, art. 29, https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc-038262.pdf; Gaming Compact Between Mille Lacs Band of Chippewa Reservation & Minnesota, § 2.1, https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-025894.pdf; *Compacts*, Minn. Indian Gaming Ass'n, https://mnindiangamingassoc.com/about-miga/compacts (last visited June 12, 2020) (Minnesota's compacts "are perpetual").

Chesapeake & Ohio Ry., 175 F. 321, 329 (6th Cir. 1910); *Freeport Sulphur Co v. Aetna Life Ins Co.*, 206 F.2d 5, 8 (5th Cir. 1953); *Holt v. St. Louis Union Trust Co.*, 52 F.2d 1068, 1069 (4th Cir. 1931).

The cases Defendant cites discussing the "traditional principle that courts should not construe ambiguous writings to create lifetime promises," *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 441 (2015) (emphasis added), are inapposite because the Compacts are unambiguous, Nats.Br. 16, as Defendant has agreed, *see* Answer ¶9, at 20, ECF No. 15; Df.Br. 1; *see* Df.Br. 15 n.10. Even if ambiguous, the Compacts would be interpreted to be in place "for a reasonable time," *Tackett*, 574 U.S. at 441 (quoting 3 Corbin on Contracts § 553 (1960)); *Tahdooahnippah v. Thimmig*, 481 F.2d 438, 441 (10th Cir. 1973); *Readsboro*, 6 F.2d at 735; *Freeport*, 206 F.2d at 7-8; *Holt*, 52 F.2d at 1069-70; *William B. Tanner Co. v. Plains Broad. Co.*, 486 F. Supp. 1313, 1316-17 (W.D. Okla. 1980),[10] which is determined "in the light of conditions existing when [the contract] was entered into, what could be foreseen, and as this relates to conditions prevailing at the time performance is sought to be terminated," *Tahdooahnippah*, 481 F.2d at 441.

A "reasonable time" here would be as long as the State authorizes "organization licensees or others" to conduct electronic gaming. That is the only condition Part 15.B. sets

[10] Oklahoma law also provides that, "the fact that the contract contained no specified duration is not critical . . . inasmuch as its duration can be fairly implied from the contract's subject matter." *Cholier, Inc. v. Torch Energy Advisors, Inc.*, 83 F.3d 431, 1996 WL 196602, at *4 (10th Cir. 1996) (table) (citing *R.S. Mikesell Assocs. v. Grand River Dam Auth.*, 627 F.2d 211, 212-13 (10th Cir. 1980)). So even if Oklahoma law were applicable, the Compacts would be "fairly implied" to continue while "organization licensees or others" conduct gaming or at least for a new term. *See infra* at 12-13.

on renewal, and it is eminently reasonable for the Compacts to last as long as the conditions that trigger renewal are in place. In any event, the Compacts renew for at least one term, as they expressly anticipate and provide for automatic renewal for at least one term if Part 15.B.'s conditions are met. *See Winslow v. Baltimore & Ohio R.R.*, 188 U.S. 646, 654-55 (1903); *McLean v. United States*, 316 F. Supp. 827, 832 (E.D. Va. 1970) (citing *Syms v. Mayor of N.Y.*, 11 N.E. 369, 371 (N.Y. 1887) (provision for "future renewals" of thirty-year lease with municipality gave right to two renewals)).

Defendant also argues that the parties agreed the Compacts would continue for a "term" and that other provisions of the Compact make clear that a "term" means a limited period of time. Df.Br. 13-14. But the Compacts just as clearly provide that the definite "term" of the Compact automatically renews if certain conditions are met. Nats.Br. 17-25. And although Defendant claims the Secretary of the Interior agrees with him, Df.Br. 14 n.8, the Secretary has never interpreted the automatic renewal provision. The plain text of the Compacts defeats Defendant's arguments that they do not provide for renewal.

B. The Compacts Are Not Terminable At-Will.

The Compacts provide for a set term which renews for a series of fixed terms, *see* Nats.Br. 34, and therefore are not indefinite, as Defendant's own case agrees, *see* Df.Br. 17; *Preferred Physicians*, 961 S.W.2d at 105 (automatically-renewing contract not indefinite because "it was . . . a contract of definite, fixed terms"). There is therefore no basis to hold they are terminable at-will, and Defendant's position, Df.Br. 18-19, fails.

Assuming otherwise, only *arguendo*, the Compacts last as long as "organization licensees or others" are authorized to conduct gaming after the effective date of the

Compacts, or for at least one renewal term. On that point, *Miller v. Miller*, 134 F.2d 583 (10th Cir. 1943), which Defendant only quotes selectively, Df.Br. 18, holds that:

> If no period of duration is specified in a contract, and none can be inferred from its nature and subject matter, the law infers that the parties intended such agreement to be terminable at the pleasure of either party upon reasonable notice. If, however, a period of duration can be fairly implied from the nature of the contract, its subject matter, and the relationship of the parties, the contract is not terminable at the pleasure of either party and the court will give effect to the manifest intent of the parties.

134 F.2d at 588 (emphasis added) (citing 17 C.J.S. *Contracts* § 398 (1942); *Robson v. Miss. River Logging Co.*, 43 F. 364 (C.C.N.D. Iowa 1890) (contract not terminable at-will when "fairly construed" it "gives any other means of determining its duration"); *McKell*, 175 F. at 329; *Rossmassler v. Spielberger*, 112 A. 876, 880 (Pa. 1921) ("courts will always deduce the term from the nature of the subject-matter if it is at all possible so to do" and avoid at-will status)). Here, the parties agreed the Compacts would automatically renew on January 1, 2020 if "organization licensees or others" are authorized by the State to conduct electronic gaming after the effective date of the Compacts. For the same reasons, the Compacts are "not terminable at the pleasure of either party." *Miller*, 134 F.2d at 588.[11]

[11] Defendant cites a case applying Texas law. Df.Br. 18-19 (citing *Cont'l Am. Corp. v. Barton*, 932 F.2d 981, 1991 WL 66046, at *2 n.3 (Fed. Cir. 1991) (table)). But under Texas law, indefinite contracts that can be construed to continue for a "reasonable time" are not terminable at-will. *Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385, 391 (Tex. 1977). And *Dunn v. Birmingham Stove & Range Co.*, 44 P.2d 88 (Okla. 1935), *see* Df.Br. 19, is another state law case that dealt with an indefinite sales contract that had no basis on which to imply a term, *see Dunn*, 44 P.2d at 88, which demonstrates only that in Oklahoma a contract is terminable at-will where a court is "unable to determine just how long the parties contemplated that it should continue," *Dunn v. Dunn*, 391 P.2d 885, 887 (Okla. 1964) (citation omitted).

The Compacts would not be terminable at-will even if indefinite, as Part 15.C. provides that they can only be terminated by expiration of the term or by mutual agreement, *id.*, and whether a renewing contract is terminable at-will depends on the bases for termination set forth in the contract, *see Hurletron Inc. v. Eltex-Elektrostatik-Gesellschaft mbH*, 116 F.3d 1482, 1997 WL 345902, at *1-2 (7th Cir. 1997) (table); *Nicholas Labs. Ltd. v. Almay, Inc.*, 900 F.2d 19, 21 (2d Cir. 1990) (applying state law governed by general principles of contract law). This is so because "[a] contractual interpretation that gives reasonable meaning to all terms of the agreement is preferable to an interpretation which gives no effect to some terms." *Hurletron*, 1997 WL 345902, at *4 (citing *GNB Battery Techs., Inc. v. Gould, Inc.*, 65 F.3d 615, 622 (7th Cir. 1995)).[12]

III. The Compacts Automatically Renewed On January 1, 2020.

Defendant admits organization licensees are "authorized to conduct electronic gaming in any form other than pari-mutuel wagering on live horse racing as of January 1, 2020" based on "governmental action of the State," Df.Br. 21, but denies the State authorized them to do so after the effective date of the Compacts, *id*. at 20. The plain

[12] Defendant also cites to the "'repealability' or 'nonentrenchment' canon" to argue for at-will termination, Df.Br. 18, which is not a canon of compact interpretation, *see* Antonin Scalia & Bryan A. Garner, *Reading Law* 243-46 (2012), and has never been cited in a publicly-available decision. Nor does it counsel against renewal, as "the right to make binding obligations" by contract "is a competence attaching to sovereignty." *Perry v. United States*, 294 U.S. 330, 353 (1935); *see also United States v. Winstar Corp.*, 518 U.S. 839, 884 & n.28 (1996). Defendant only cites *Panzer v. Doyle*, 680 N.W.2d 666, 690 (Wis. 2004), to support this argument, but there the Wisconsin Supreme Court found it would violate separation of powers under the Wisconsin Constitution for the Governor to sign indefinite compacts, *id.* at 690-91, while expressly not deciding if the legislature could approve indefinite compacts, *id.* at 690 n.28.

language of the Compacts, *see* Nats.Br. 17-27, and the terms of the STGA reject this argument.

A. Organization Licensees Were Authorized To Conduct Electronic Gaming On January 1, 2020.

Defendant admits "at that time" in Part 15.B. means January 1, 2020. Df.Br. 21. "[A]t that time," the Compacts' "term" either expires or renews, which means there is no hiatus in the effectiveness of the Compacts if it renews. *See* Nats.Br. 19-20. Defendant also acknowledges that "organization licensees" in Part 15.B. means horse racetracks, and admits Remington Park and Will Rogers Downs are "organization licensees," Df.Br. 21-22 (citing UMF ¶¶9-10), that the OHRC has licensed to conduct electronic gaming in 2020, Answer ¶43 at 12, ECF No. 15.[13] So it is hardly surprising that Defendant concedes organization licensees were authorized to conduct electronic gaming on January 1, 2020. Df.Br. 21. Defendant then attempts, unsuccessfully, to qualify these admissions.

[13] Defendant detours to assert that the word "others" in Part 15.B.'s phrase "organization licensees or others," means "some person or entity 'other' than the contracting parties." Df.Br. 22. It does not. The ordinary meaning of the word "other" is controlling, Nats.Br. 19, and "other" means something "different or distinct from one already mentioned," *New Oxford Am. Dictionary* 1242 (3d ed. 2010), as other parts of the Compacts confirm, Parts 6.A.6., 6.B.5. ("employees or others"), 10.A.5. (Tribal Compliance Agency may extend temporary license if "waiting on information from others"), 10.C.4. ("institutional investor who, alone or in conjunction with others"). As used in Part 15.B. "others" refers to anyone besides organization licensees. Nevertheless, Defendant says "others" does not include the Nations because then "the Compact's renewal provision would be triggered by the very existence of the Compact." Df.Br. 23. But the Nations' right to conduct gaming is authorized by IGRA, not by the State or court order.

1. In Part 15.B., "authorized" includes to permit by license.

The OHRC authorizes organization licensees to conduct electronic gaming by licensing them. Defendant's contrary argument fails for several reasons. First, Defendant concedes "[t]he term 'authorized,' as used in the Compact, should be ascribed its plain and ordinary meaning," Df.Br. 23, which may be determined with reference to a dictionary, Nats.Br. 19. Virtually all of these references define "authorize" to include permission or approval and thus to include licensing by the OHRC.[14]

Second, federal law confirms the OHRC "authorizes" electronic gaming by issuing licenses: "the word 'license' means permission or authority; and a license to do any particular thing is a permission or authority to do that thing, and, if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize." *Sinnot v. Davenport*, 63 U.S. (22 How.) 227, 240 (1859); *see also United States v. Uintah Valley Shoshone Tribe*, 946 F.3d 1216, 1219 (10th Cir. 2020); *Hecla Mining Co. v. United States*, 909 F.2d 1371, 1372 (10th Cir. 1990); *Grand River Dam Auth. v. Fed.*

[14] "Authorization is defined . . . as 'permission or power granted by an authority.'" *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1133 (9th Cir. 2009) (citing *Random House Unabridged Dictionary* 139 (2001); *Webster's Third Int'l Dictionary* 146 (2002)). "'[A]uthorize' means '[t]o give legal authority; to empower [or] [t]o formally approve; to sanction.'" '[t]o grant authority or power to. To give permission for; sanction." *United States v. Norberto*, 373 F. Supp. 2d 150, 156 (E.D.N.Y. 2005) (first alteration added) (quoting *Black's Law Dictionary* 143 (8th ed. 2004); *Am. Heritage Dictionary of the English Language* (2000)). The American Heritage Dictionary includes "the following example of its usage: 'city agency that authorizes construction projects.' . . . The definitions of 'authorize' and 'authorized' make clear that the terms are commonly used in reference to a grant of permission by a state or municipal agency." *Russell v. ChoicePoint Servs., Inc.*, 300 F. Supp. 2d 450, 456 (E.D. La. 2004).

Power Comm'n, 246 F.2d 453, 454 (10th Cir. 1957) (all saying a license "authorized" action).

Third, Defendant's reliance on *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), to say otherwise backfires. Df.Br. 23-24. *Murphy* concerned whether a federal law, which "makes it 'unlawful' for a State or any of its subdivisions 'to . . . authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on' competitive sporting events," 138 S. Ct. at 1470 (quoting 28 U.S.C. § 3702(1)), forbade States from repealing existing laws against gambling, or simply prohibited States from taking "affirmative action" to "empower" entities to engage in sports gambling or giving them the "right or authority" to do so, *id.* at 1468, 1473. The Court held that "authorize" encompassed both repeal and affirmative action, as "[t]he repeal of a state law banning sports gambling not only 'permits' sports gambling . . . it also gives those now free to conduct a sports betting operation the 'right or authority to act'; it 'empowers' them . . . ." *Id.* at 1474. Defendant is thus flatly wrong to suggest that *Murphy* held that "the legislative act of changing laws that prohibit gambling 'authorizes' such gaming," but that licensing cannot do so. Df.Br. 24.

Defendant's contention that only legislative action after the effective date of the Compacts can trigger automatic renewal, Df.Br. 27, is rejected by the STGA, which provides that "the [OHRC] shall license organization licensees" to conduct electronic gaming "[i]f at least four Indian tribes enter into the model [tribal gaming compact set forth in Okla. Stat. tit. 3A, § 281]," and such compacts go into effect, Okla. Stat. tit. 3A, § 262(A). The STGA's date of enactment does not alter its terms, which also expressly

require that an organization licensee must pay its gaming license fee "prior to any organization licensee *being authorized by the* [*OHRC*] *to conduct gaming pursuant to the State-Tribal Gaming Act*." *Id.* § 282(A) (emphasis added);[15] *see also* Okla. Admin. Code §§ 325:80-1-2 ("Racetrack Gaming Operator License" is a "license issued by the Commission which authorizes an Organization Licensee to conduct Authorized Games . . . ."), 325:80-3-1(b) (Racetrack Gaming Operator License "authorizes an Organization Licensee to conduct Authorized Games as defined by the Act under the regulation, implementation and enforcement of the Commission."). Accordingly, the enactment of the STGA "authorized [organization licensees] 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," Compact Part 15.B., and as the STGA was in effect on January 1, 2020, the Compacts automatically renewed on that date.

Part 15.B. is also satisfied by the licenses the OHRC has issued under the STGA every year since 2005, most recently on October 17, 2019. *See* SOF ¶17; Answer ¶43 at 12, ¶54 at 15, ECF No. 15. Those licenses are necessary for organization licensees to lawfully conduct electronic gaming, Okla. Stat. tit. 3A, § 262(A), and are issued under the OHRC's rules, *id.* § 262(F), so their issuance is not perfunctory, Df.Br. 30-31.

[15] Other OHRC-issued licenses also explicitly "authorize" the licensed activity. *Id.* §§ 262.1(A) ("No person required to be licensed pursuant to the provisions of this section may participate in any capacity at a gaming facility at a racetrack without a valid license authorizing such participation."), 262.1(B)(1)-(11) (describing "[t]he activities authorized by the occupation gaming licenses issued pursuant to this section").

Defendant's contention that "the legislature never authorized the OHRC to act to renew the Compact," Df.Br. 27 (emphasis omitted), fails because the Compacts have been entered into and are in effect, SOF ¶¶12-13, and accordingly their plain language controls their interpretation, not state law, *see Citizen Potawatomi*, 881 F.3d at 1239. And the Compacts' plain language provides that they renew automatically if Part 15.B.'s set precondition is met. Nats.Br. 19-20.

Finally, even assuming *arguendo* that "only a legislative enactment" after the effective date of the Compacts triggers renewal, that requirement was met in 2017 when the Legislature repealed the STGA's express limits on the number of hours per day and week that organization licensees can conduct electronic gaming. 2017 Okla. Sess. Law Serv. ch. 115, § 1 (West) (codified at Okla. Stat. tit. 3A, § 262(B)); *see also Murphy*, 138 S. Ct. at 1474 (state repeal of laws banning sports gambling "'authorize[s]' that activity.").

2. "[E]lectronic gaming in any form" means what it says.

Defendant argues that automatic renewal under Part 15.B. is triggered only if the State authorizes "electronic gaming" as that term is defined in the STGA. Df.Br. 27-28; Okla. Stat. tit. 3A, § 269(8). That argument fails as the Compacts' terms, not the STGA, control the Nations' rights. *See supra* at 6-7. And the Compacts' terms provide in pertinent part that "electronic gaming in <u>any</u> form other than pari-mutuel wagering on live horse racing" triggers automatic renewal. Part 15.B. (emphasis added). "Any" means what it says. Nats.Br. 22. Any form of electronic gaming that the State has authorized, including "Internet gambling," SOF ¶24, satisfies Part 15.B., with the sole exception of the specifically-excluded "pari-mutuel wagering on live horse racing," Nats.Br. 24, 26-27.

B. Organization Licensees Are Authorized To Conduct Electronic Gaming Pursuant To Governmental Action Of The State.

For the reasons set forth below, actions of the OHRC are "state governmental action" under Part 15.B., and Defendant's contrary argument, Df.Br. 26-27, is futile.

1. Licenses issued by the OHRC are "state governmental action."

Part 15.B. is satisfied by "*any* governmental action" that authorizes organization licensees to conduct electronic gaming "following the effective date of this Compact." *Id.* (emphasis added). "[A]ny . . . means what it says," *United States v. Gonzales*, 520 U.S. 1, 5 (1997), and Part 15.B. therefore includes actions of the OHRC, which is a state agency, SOF ¶8. The Compacts also recognize OHRC actions as state governmental actions, Parts 3.5, 4.B., and under federal common law "governmental action" covers all actions by all branches of the government, including permitting, Nats.Br. 23 n.10.[16]

Defendant argues that "Part 11(A) clearly contemplates legislative action," Df.Br. 30, so Part 15.B. does too. That argument proves the opposite. Under Part 11.A., the Nations must pay revenue sharing "*so long as the state does not change its laws*" to permit organization licensees to conduct any additional form of gaming, "or *change its laws* to permit any additional electronic or machine gaming within Oklahoma." *Id.* (emphasis added). No such language appears in Part 15.B., which is satisfied by "*any* governmental action of the state." *Id.* (emphasis added); *see also SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827, 835 (10th Cir. 2016) ("When a contract uses different language in

[16] This rejects Defendant's contrary contention at Df.Br. 29-30 n.16.

proximate and similar provisions, we commonly . . . assume that the parties' use of different language was intended to convey different meanings.").

Finally, Defendant implies that the OHRC's actions are insufficient because "it has no independent constitutional power," Df.Br. 31, but the plain language of Part 15.B. controls its interpretation, not state law, *supra* at 4-7, and it imposes no such requirement.

2. The unmistakability doctrine is inapplicable here.

Defendant also asserts that "[r]ules of construction provide that any purported surrender of a state's power in a governmental contract, such as the power to impose durational limits on its obligations, must be stated in unmistakable language," Df.Br. 31, and that the Legislature "did not delegate to the OHRC the power to cause the Compact to renew or to bind the State to perpetual obligations,"[17] Df.Br. 33. This argument fails because the State validly entered into the Compacts with the Nations under IGRA, *supra* at 5, thereby obtaining "a power [otherwise] withheld from [the State] by the Constitution" rather than surrendering any sovereign power, see *Seminole Tribe*, 517 U.S. at 58 (citation omitted). Moreover, the plain and unambiguous language of the Compacts controls their interpretation, *see supra* at 4-5, and shows that the State unmistakably agreed the term of the Compacts would automatically renew pursuant to Part 15.B.

Furthermore, the unmistakability doctrine is not applicable here. That doctrine is itself an exception to the "sovereign acts" doctrine, and both are inapplicable as Oklahoma

[17] Defendant's perpetuity argument is not properly before the Court, and even if the Compacts are perpetual, they are valid and enforceable. *See supra* at 8-11.

has taken no sovereign act contrary to enforcement of Part 15.B.[18] As explained in *Centex Corp. v. United States*, 395 F.3d 1283, 1306-07 (Fed. Cir. 2005) (original alterations omitted):

> [T]he unmistakability doctrine provides that, absent a clear statement to the contrary, a contract entered into by a private party with the government will not be interpreted to exempt the private party from the operation of a subsequent sovereign act by the government. . . .
>
> A prerequisite for invoking the unmistakability doctrine is that a sovereign act must be implicated. As the plurality option in *Winstar* [518 U.S. at 879] noted, "the application of the unmistakability doctrine turns on whether enforcement of the contractual obligation would block the exercise of a sovereign power of the Government."

And in *Resolution Trust Corp. v. Federal Savings & Loan Insurance Corp.*, 34 F.3d 982, 984 (10th Cir. 1994) (en banc), the Tenth Circuit found that the three-member panel had correctly concluded that the unmistakability doctrine is irrelevant when the sovereign acts doctrine is not applicable. These cases establish that the unmistakability doctrine does not apply here because enforcing Part 15.B. does not interfere with any sovereign act.

C. State Governmental Action Authorized Organization Licensees To Conduct Electronic Gaming Following The Compacts' Effective Date.

Defendant recycles arguments earlier made, Df.Br. 27, by asserting state governmental action has not authorized organization licensees to conduct electronic gaming following the effective date of the Compacts because: the STGA is the only authority by which they may do so; it authorized organization licensees to conduct electronic gaming as of January 27, 2005, prior to the effective date of the Compacts; and the STGA "has not been amended to authorize electronic gaming by organization

[18] The cases Defendant relies on, Df.Br. 31-32 & n.18, are inapposite for the same reasons.

licensees or others since 2004." Df.Br. 35-36 (citing UMF ¶¶11-12). This fails for the reasons earlier set forth. *See supra* at 14-20.

Furthermore, the STGA's express terms reject Defendant's argument that "[o]rganization licensees were authorized to conduct electronic gaming as of January 27, 2005," before the effective date of the Compacts. Df.Br. 36 (emphasis omitted). Under the STGA, the organization licensees are authorized to conduct electronic gaming pursuant to licenses issued by the OHRC. *Supra* at 18 & n.15 (quoting Okla. Stat. tit. 3A, §§ 282(A), 262.1(A), 262.1(B)(1)-(11)); Okla. Admin. Code §§ 325:80-3-1(b) (Racetrack Gaming Operator License "authorizes an Organization Licensee to conduct Authorized Games as defined by the Act under the regulation, implementation and enforcement of the Commission."), 325:80-1-2 (same). And the OHRC first authorized organization licensees to do so on August 11, 2005, and has done so every year since then, after the effective dates of the Nations' Compacts. SOF ¶17.

IV. The Automatic Renewal Of The Compacts Was Not Affected By Defendant's Purported Request To Renegotiate Parts 11.A. And E.

Defendant asserts the Nations cannot enforce the automatic renewal provision of Part 15.B. because he requested to renegotiate Parts 11.A. and E., and the Nations would not do so unless he conceded his "legal position on expiration." Df.Br. 38 (citing UMF ¶¶13-16); *see also id.* at 40. The Court need not consider that contention because the sole question presented by the Nations in this action is whether the Compacts automatically renewed on January 1, 2020, Compl. ¶¶2-3, ECF No. 1, which does not require any action

by the parties. And to the extent Defendant relies on his counterclaims to advance that contention, the Nations' sovereign immunity bars its consideration. Nats.Br. 28 n.12.

Defendant's argument fails in any event because a request to renegotiate Parts 11.A. and E. does not affect the Compacts' automatic renewal; nor did the Nations' response to Defendant's request breach the Compacts. Furthermore, Defendant's repudiation of the Compacts' automatic renewal provision and assertion that the Nations must negotiate a new compact for Class III gaming to be lawful after January 1, 2020, negate any obligation that the Nations may have had to renegotiate Parts 11.A. and E.

A. Automatic Renewal Is Not Affected By A Request To Renegotiate Parts 11.A. And E.

While Defendant labels the renegotiation provision a "proviso," and attempts to invoke the "proviso canon" to interpret it, Df.Br. 38 n.21, that efforts fails because the plain language of Part 15.B. controls its interpretation, *Citizen Potawatomi*, 881 F.3d at 1239, including the question whether the renegotiation provision conditions the automatic renewal provision, *see Republic of Iraq v. Beaty*, 556 U.S. 848, 858 (2009) (effort to construe proviso to limit its principle clause rejected based on the text of the principle clause and the proviso);[19] *McDonald v. United States*, 279 U.S. 12, 21-22 (1929) ("the word 'provided' in Acts of Congress . . . is employed for many purposes" (citation

[19] "Use of a proviso 'to state a general, independent rule,' may be lazy drafting, but is hardly a novelty." *Id.* at 858 (quoting *Alaska v. United States*, 545 U.S. 75, 106 (2005); and citing *McDonald*, 279 U.S. at 21). *Accord* Scalia & Garner at 154 ("[T]he rule that a proviso introduces a condition has become a feeble presumption. One now often finds *provided that* introducing not a condition to an authorization or imposition, but an exception to it, or indeed even an addition to it.").

omitted)); *United States v. Wewoka Creek Water & Soil Conservancy Dist. No. 2*, 222 F. Supp. 225, 230 (E.D. Okla. 1963) ("[T]he Court must ascertain and give effect to [a statute's] legislative intent, and this rule applies equally well to the construction of provisos."). And the plain language of the renegotiation provision makes clear that it has an independent purpose that can be achieved only if the automatic renewal provision is also interpreted in accord with its plain language.

The automatic renewal provision states when and how the Compacts renew; the renegotiation provision establishes a period of time *before* the expiration or renewal of the Compacts within which either party may request to renegotiate Parts 11.A. and E. of the Compacts. If the renegotiation provision was intended to affect automatic renewal, it would say so, as renewal is mandatory when Part 15.B.'s set precondition is met. *See* Nats.Br. 29-31. Instead, the renegotiation provision merely sets parameters for when a party may request renegotiations and which provisions may be renegotiated.

At the same time, the renegotiation provision does all that IGRA permits it to do, as revenue sharing provisions are lawful under IGRA only if negotiated and agreed upon by the State and the tribe, and are illegal when imposed by the State. That is,

> the parties must have "*negotiated* a bargain permitting such payments in return for meaningful concessions from the state (such as a conferred monopoly or other benefits). Although the state [does] not have *authority* to exact such payments, it [can] bargain to receive them in exchange for a quid pro quo conferred in the compact."

Pueblo of Isleta v. Lujan Grisham, No. 17-654 KG/KK, 2019 WL 1429586, at *19 (D.N.M. Mar. 30, 2019) (alterations in original) (quoting *Idaho v. Shoshone-Bannock Tribes*, 465

F.3d 1095, 1101-02 (9th Cir. 2006)). If parties had to agree on new Parts 11.A. and E., the State could stonewall to get what it wanted, which would violate IGRA.

Finally, the renegotiation provision depends on the Compacts' automatic renewal, as Parts 11.A. and E. are meaningless standing alone. Nats.Br. 32.

B. Defendant's Repudiation Of The Automatic Renewal Provision Negated Any Obligation To Respond To His Renegotiation Request.

Defendant's assertion that the Nations cannot enforce the automatic renewal provision because they allegedly refused to comply with the renegotiation provision also fails. The Nations did not breach the renegotiation provision; instead they negotiated in good faith, by responding to Defendant's demands to renegotiate the entire Compacts with requests that he make a valid proposal to renegotiate Parts 11.A. and E. UMF ¶15.[20] Furthermore, Defendant repudiated the automatic renewal provision of the Compact, which negated any obligation that the Nations may have had to respond to that request.

[20] The opportunities the Nations offered Defendant to make a valid request to renegotiate Parts 11.A. and E. reject his argument that the Nations "refus[ed] to participate in good faith renegotiations of the Compact . . . ." Df.Br. 38. Part 15.B. doesn't require a response to demands other than a request to renegotiate Parts 11.A. and E. Moreover, in Part 13.B., the parties agreed that they would "defend the validity of this Compact . . . ." Defendant argued the Compacts would not renew but insisted that the parties not seek to resolve that question and negotiate entirely new compacts instead. It is not reasonable for Defendant to expect that Parts 13.B. and 15.B. permitted that conduct or required the Nations' accession. *See Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 562 (9th Cir. 2016); Restatement (Second) of Contracts § 205 cmt. a (1979) ("Restatement") ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party") (quoted in *O'Tool v. Genmar Holdings, Inc.*, 387 F.3d 1188, 1202 (10th Cir. 2004)).

Defendant repudiated the automatic renewal provision of the Compacts in his July 5 letter to the Nation by stating that "since there has been no governmental action of the State, or court order authorizing electronic gaming in the State, since the effective date of the Compact, . . . the Compact will not automatically renew" on January 1, 2020, that "I am hereby requesting that we 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," and that unless the Nations agreed to renegotiate the Compact, Class III gaming would be illegal in Oklahoma after December 31, 2019. SOF ¶29; Answer ¶48.[21]

In response to that letter, the Nations informed Defendant that he had "declar[ed] his repudiation of the Compact," which "if implemented, would violate the Compact's express terms authorizing parties' rights to request renegotiation of only select provisions, i.e., subsections A and E of Part 11," and that "the Compacts will automatically renew on January 1, 2020, barring any attempted bad faith interference arising from Governor Stitt's declarations." Ex. 1, Inter-Tribal Council of Five Civilized Tribes, Res. No. 19-17 (Jul. 12, 2019); Countercls. ¶38, ECF No. 15.[22]

Defendant sent another letter on August 13, 2019, UMF ¶14, in which he did not retract the positions taken in the July 5 letter. Nor has he done so since then, SOF ¶30, even

[21] In so doing, the Defendant repudiated the Compacts as a whole, since in the Defendant's estimation, the entire Compacts would be a nullity on January 1, 2020. Were that so, an effective renegotiation would not be possible, as any renegotiated parts of the Compacts would not have survived past the initial term.

[22] Defendant's assertion that the Nations never responded to the July 5 letter, UMF ¶13, is therefore false.

after the Nations offered Defendant another opportunity to make a valid request to renegotiate Parts 11.A. and E. The Nations' August 28, 2019 letter acknowledged that state or tribal governments may request a Part 11 renegotiation and stated that "[w]e will consider such a proposal, however, only when the State of Oklahoma affirms the automatic renewal of the [Compact]." *See* UMF ¶15. Defendant never did so. Therefore, he never made a valid request to renegotiate Parts 11.A. and E. and forfeited the opportunity to do so. The Nations have not breached the renegotiation provision for that reason as well.

Defendant repudiated the automatic renewal provision of Part 15.B. of the Compacts, and repudiated the Compacts as a whole, by stating and adhering to the position taken in his July 5 letter to the Nations. A "promisor's renunciation of a 'contractual duty before the time fixed in the contract for . . . performance' is a repudiation." *Franconia Assocs. v. United States*, 536 U.S. 129, 143 (2002) (emphasis omitted) (citing 4 A. Corbin, Contracts § 959, at 855 (1951); Restatement § 250). "[T]o constitute a repudiation, a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not perform." *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1014 (10th Cir. 2002) (alteration in original) (quoting *Scott v. Majors*, 980 P.2d 214, 218 (Utah Ct. App. 1999)). Defendant's explicit statement that "the Compact will not automatically renew," SOF ¶29, easily passes that standard, *see Bill's Coal Co. v. Bd. of Pub. Utils.*, 682 F.2d 883, 886 (10th Cir. 1982) ("repudiation is a party's manifestation that it is not going to" perform when required "at some future date"); *Roye Realty & Dev'g, Inc. v. Arkla, Inc.*, 78 F.3d 597, 1996 WL 87055, at *6 (10th Cir. 1996) (table) (wrongfully insisting one does not have to perform in the future "would constitute an anticipatory repudiation of the contract"). So

does Defendant's statement in that letter that the Nations must negotiate a new compact to conduct Class III gaming after January 1, 2020. Restatement § 250 cmt. b. ("[A] statement of intention not to perform except on conditions which go beyond the contract constitutes a repudiation." (quotation omitted)); *see Lantec*, 306 F.3d at 1014; *Bill's Coal*, 682 F.2d at 886 (citing Restatement § 250 & cmt. b).

Defendant's repudiation of the automatic renewal provision of the Compacts is fatal to his position that the Nations may not enforce the automatic renewal provision of the Compacts because they did not renegotiate Parts 11.A. and E. of the Compact. "Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance." Restatement § 253(2); *id.* cmt. b. ("where performances are to be exchanged under an exchange of promises, one party's repudiation discharges any remaining duties of performance of the other party with respect to the expected exchange"); *see Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 632-33 (D.C. Cir. 2017) (citing, *inter alia*, Restatement § 253(1); *Franconia Assocs.*, 536 U.S. at 143) (anticipatory repudiation gives non-repudiator immediate right to relief). Accordingly, Defendant's repudiation of the automatic renewal provision of Part 15.B. of the Compacts discharged any duty that the Nations might have had with respect to the renegotiation provision of Part 15.B. *See In re Okla. Trash Control, Inc.*, 258 B.R. 461, 465 (Bankr. N.D. Okla. 2001) (finding repudiation based on Restatement §§ 250, 253). And for the same reasons, the Nations did not and have not breached the Compact.

Defendant urges that "the Tribes are not entitled to demand future performance by the State under one clause of Part(B), providing for 'automatic renewal,' while themselves refusing to comply with 'Clause 3' of Part 15(B), requiring renegotiation." Df.Br. 40. But the law is just the opposite. First, "[t]he injured party does not change the effect of a repudiation by urging the repudiator to perform in spite of his repudiation or to retract his repudiation." Restatement § 257; *accord Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 621-22 (2000). Second, "[w]here a party's repudiation contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." Restatement § 255; *see Mountain Highlands, LLC v. Hendricks*, 616 F.3d 1167, 1171 (10th Cir. 2010). The effect of Defendant's repudiation was not altered by the Nations' urging in the Inter-Tribal Council Resolution and the August 28, 2019 letter that he retract that repudiation. And Defendant's repudiation was the very reason that the Nations did not agree to renegotiate Parts 11.A. and E., as Defendant has conceded. UMF ¶15. Accordingly, even if renegotiation of Parts 11.A. and E. were a condition of automatic renewal, that obligation was excused by Defendant's repudiation.

In sum, Defendant's repudiation of the automatic renewal provision of the Compact negated any obligation that the Nations may have had to respond to his request to renegotiate Parts 11.A. and E.

CONCLUSION

For the foregoing reasons, the Nations respectfully request that the Court deny Defendant's Motion for Partial Summary Judgment and grant the Nations' Motion for Partial Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2020, I electronically filed the above and foregoing document with the Clerk of Court via the ECF System for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the parties registered to receive such notice.

/s/ Frank S. Holleman
Frank S. Holleman

Cherokee Nation, et al. v. Stitt, No. CIV-19-1198-D

Exhibit in Support of Plaintiffs' and Plaintiffs-in-Intervention's Response To Defendant's Motion For Partial Summary Judgment And Brief In Support Regarding Part 15(B) Expiration Of The Compacts At Issue

Exhibit 1

TRIBAL LEADERS SIGN JOINT RESOLUTION OPPOSING GOVERNOR STITT'S REPUDIATION OF THE STATE-TRIBAL GAMING COMPACTS

BILL JOHN BAKER
PRINCIPAL CHIEF

BILL ANOATUBBY
GOVERNOR

GARY BATTON
CHIEF

JAMES R. FLOYD
PRINCIPAL CHIEF

GREG P. CHILCOAT
PRINCIPAL CHIEF

OKLAHOMA CITY (July 12, 2019)– The Inter-Tribal Council of the Five Civilized Tribes (ITC) provided a unified, formal and firm response to Oklahoma Governor Kevin Stitt's recent repudiation of the Oklahoma Model Tribal Gaming Compact through a joint resolution signed by the leaders of the Cherokee, Chickasaw, Choctaw, Muscogee (Creek) and Seminole Nations. The Tribal leaders unanimously agreed and adopted the resolution at the Inter-Tribal Council meeting today at the River Spirit Casino Resort in Tulsa, Okla.

The ITC is an organization that unites the tribal governments of the Cherokee, Chickasaw, Choctaw, Muscogee (Creek), and Seminole Nations.

Leaders of all five nations, which collectively represent more than 750,000 Native people, jointly signed the resolution outlining a clear and strong response to Governor Stitt's letter dated July 5, 2019, proposing the Tribes negotiate a new Class III gaming compact.

Tribal leaders expressed their disappointment in the action by Gov. Stitt to take a matter of such great importance to the media before engaging in respectful and purposeful conversations given the complexity of the compacts and the law. The ITC memorialized through the joint resolution their collective intent to reject the state's attempt to unlawfully and unilaterally terminate the compact.

The gaming industry has become a significant driver of Oklahoma's economy, employing over 55,000 Oklahomans, primarily in rural areas, and paying more than $1.5 billion in exclusivity fees over the past 15 years, mostly for public education. In response to the exclusive fee arrangement outlined in the compacts, Tribes have invested hundreds of millions of those dollars into education, roads, health care, public safety, and tourism to support the betterment of our state for the benefit of all residents. The tribes' investments have allowed the state to channel tax revenue to other high priority needs.

During Friday's general session of the ITC, the tribal leaders detailed the extensive legal history and complexity surrounding gaming compacts and highlighted the current compact, which was approved by Oklahoma voters on November 4, 2004, and approved by the U.S. Secretary of Interior.

The tribes also detailed their concerns that Gov. Stitt made no proposal of any terms, nor presented a framework, for any renegotiation. That noted, the ITC pledged their support for the continuation of the exclusive fee structure and amounts outlined in the current compact. They underscored their confidence in the legal reality that the compact does not expire, but in fact renews on January 1, 2020.

Ex. 1

Joint Statement from the Five Tribal Leaders:

"We have considered the state of Oklahoma a trustworthy partner through the years. Working together we have made strides in building a better, stronger and more prosperous Oklahoma for the benefit of the hundreds of thousands of members of our Tribes who live and work here as well as all residents of this great State. We can trace the starting point of our constructive partnership to the carefully crafted and balanced approach represented in the current compact negotiated in a respectful manner between the State of Oklahoma and the sovereign Tribes residing in Oklahoma. This compact represents a continuing and mutually beneficial partnership. The recent action of Governor Stitt puts into question his sincerity to work with us in a cooperative manner moving ahead. We are resolute in our position, and it is our hope Governor Stitt and his advisors will not attempt any bad faith interference on the compact which could set back the progress we have achieved by working together."

Bill John Baker, Principal Chief, The Cherokee Nation
Bill Anoatubby, Governor, The Chickasaw Nation
Gary Batton, Chief, The Choctaw Nation
James R. Floyd, Principal Chief, The Muscogee (Creek) Nation
Greg P. Chilcoat, Chief, The Seminole Nation

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The INTER-TRIBAL COUNCIL of the FIVE CIVILIZED TRIBES

A Resolution in Opposition to Governor Stitt's Attempt to Repudiate the State-Tribal Gaming Compacts

Resolution No. 19-17

BILL JOHN BAKER
PRINCIPAL CHIEF

BILL ANOATUBBY
GOVERNOR

GARY BATTON
CHIEF

JAMES R. FLOYD
PRINCIPAL CHIEF

GREG P. CHILCOAT
PRINCIPAL CHIEF

WHEREAS, the Inter-Tribal Council of the Five Civilized Tribes (ITC) is an organization that unites the tribal governments of the Cherokee, Chickasaw, Choctaw, Muscogee (Creek), and Seminole Nations, representing approximately 750,000 Indian people throughout the United States; and

WHEREAS, the member Tribes of the ITC are all signatories to the Model Tribal Gaming Compact, the State's offered terms of which are codified at 3A.O.S. Section 281, as those terms have been approved by the Secretary of Interior and supplemented from time to time, (hereinafter the "Compact"); and

WHEREAS, as to the State, the Compact was approved by a vote of the citizens of the State of Oklahoma on November 4, 2004; and

WHEREAS, the Chief Executive Officer for the State of Oklahoma, Governor Kevin Stitt, issued a letter dated July 5, 2019 addressed to the Tribal leaders for each of the Tribes who are members of the ITC, and others, declaring his repudiation of the Compact and proposing the Tribes negotiate a new Class III gaming compact out of whole cloth; and

WHEREAS, Governor Stitt's repudiation of the Compact, if implemented, would violate the Compact's express terms authorizing parties' rights to request renegotiation of only select provisions, i.e., subsections A and E of Part 11; and

WHEREAS, the five member Tribes of the ITC have expended significant capital contributions within the State of Oklahoma, most importantly in rural areas, that would otherwise be non-existent without gaming tribes in Oklahoma; and

WHEREAS, Governor Stitt has made no proposal of any terms or otherwise proposed a framework for any renegotiation of terms; and

WHEREAS, the current Compacts, as negotiated and approved by the Secretary of Interior and upon which the State, the Tribes, and Tribal business partners have relied, represent a continuing and mutually beneficial partnership between the State and Tribes, which create competition and diversity in the Oklahoma economy, creates jobs and contributes to the wealth, health and prosperity of Oklahomans; and

Ex. 1

The INTER-TRIBAL COUNCIL of the FIVE CIVILIZED TRIBES

WHEREAS, notwithstanding Governor Stitt's declarations, it is the position of the Inter-Tribal Council and the Five Civilized Tribes that the Compacts will automatically renew on January 1, 2020, barring any attempted bad faith interference arising from Governor Stitt's declarations.

NOW, THEREFORE LET IT BE RESOLVED THAT, the Inter-Tribal Council of the Five Civilized Tribes do hereby memorialize our intent to reject the State's attempt to unlawfully and unilaterally terminate the Compact.

BE IT FURTHER RESOLVED THAT, the Inter-Tribal Council supports the continued exclusivity fee structure and amounts outlined in the Compact.

BE IT FURTHER RESOLVED THAT, the Inter-Tribal Council rejects the State's request to negotiate an entirely new Class III compact, as the current Compact represents a carefully negotiated and balanced approach between and among the respective sovereign Tribes and the State.

CERTIFICATION

The foregoing resolution was adopted by the Inter-Tribal Council of the Five Civilized Tribes meeting in Tulsa, Oklahoma on this 12th day of July 2019, by a vote of _____ for _____ against and _____ abstentions.

Bill Anoatubby, Governor
The Chickasaw Nation

James R. Floyd, Principal Chief
Muscogee (Creek) Nation

Gary Batton, Chief
Choctaw Nation of Oklahoma

Greg P. Chilcoat, Principal Chief
Seminole Nation of Oklahoma

Bill John Baker, Principal Chief
Cherokee Nation

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

THE CHEROKEE NATION, THE CHICKASAW NATION, and THE CHOCTAW NATION, Plaintiffs, THE CITIZEN POTAWATOMI NATION, THE MUSCOGEE (CREEK) NATION, THE QUAPAW NATION, THE DELAWARE NATION, THE SEMINOLE NATION, and THE WICHITA AND AFFILIATED TRIBES, Plaintiffs-in-Intervention, v. J. KEVIN STITT, in his official capacity as the Governor of the State of Oklahoma, Defendant/Counterclaimant.	)	No. CIV-19-1198-D

AFFIDAVIT OF GINA BLACKFOX IN SUPPORT OF RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

State of Oklahoma)
) ss.
County of Cherokee)

I, Gina Blackfox, declare as follows:

1. I maintain governmental records for the Cherokee Nation, including records and documents related to the operations of the Inter-Tribal Council of the Five Civilized Tribes. I reside in Halbert, Oklahoma and I am over the age of eighteen. I make this declaration based on my own personal knowledge and experience.

2. Attached to the Plaintiffs' and Plaintiffs-in-Intervention's Response to Defendant's Motion for Partial Summary Judgment is a true and correct copy of Resolution No. 19-17 of the Inter-Tribal Council of the Five Civilized Tribes and accompanying statements by the chief executives of the member Tribes' governments. This copy is identical to the copy of those documents that the Nation maintains in its records.

I declare under penalty of perjury that everything I have stated in this document is true and correct.

Dated: June 12, 2020 By: Gina Blackfox

Gina Blackfox