



GENTNER DRUMMOND  
ATTORNEY GENERAL

October 23, 2023

*Via Hand Delivery*

President *Pro Tempore* Greg Treat  
Oklahoma Senate  
2300 N. Lincoln, Room 422  
Oklahoma City, OK 73105

Speaker Charles McCall  
Oklahoma House of Representatives  
2300 N. Lincoln, Room 401  
Oklahoma City, OK 73105

Senator Brent Howard, Senate Chair  
Joint Committee State-Tribal Relations  
Oklahoma Senate  
2300 N. Lincoln, Room 427  
Oklahoma City, OK 73105

Representative Kevin Wallace, House Chair  
Joint Committee State-Tribal Relations  
Oklahoma House of Representatives  
2300 N. Lincoln, Room 200  
Oklahoma City, OK 73105

Senator Bill Coleman  
Joint Committee State-Tribal Relations  
Oklahoma Senate  
2300 N. Lincoln, Room 426  
Oklahoma City, OK 73015

Representative Steve Bashore  
Joint Committee State-Tribal Relations  
Oklahoma House of Representatives  
2300 N. Lincoln, Room 248.2  
Oklahoma City, OK 73105

Senator Kay Floyd  
Joint Committee State-Tribal Relations  
Oklahoma Senate  
2300 N. Lincoln, Room 517  
Oklahoma City, OK 73105

Representative John Echols  
Joint Committee State-Tribal Relations  
Oklahoma House of Representatives  
2300 N. Lincoln, Room 457  
Oklahoma City, OK 73105

Senator Greg McCortney  
Joint Committee State-Tribal Relations  
Oklahoma Senate  
2300 N. Lincoln, Room 421  
Oklahoma City, OK 73105

Representative Mike Osburn  
Joint Committee State-Tribal Relations  
Oklahoma House of Representatives  
2300 N. Lincoln, Room 246.2  
Oklahoma City, OK 73105

Senator Dave Rader  
Joint Committee State-Tribal Relations  
Oklahoma Senate  
2300 N. Lincoln, Room 233  
Oklahoma City, OK 73105

Representative Ajay Pittman  
Joint Committee State-Tribal Relations  
Oklahoma House of Representatives  
2300 N. Lincoln, Room 544.2  
Oklahoma City, OK 73105

**Re: Governor Stitt's proposed gaming agreements with the Kialegee Tribal Town and United Keetoowah Band**

Dear President *Pro Tem*, Speaker, and honored members of the Joint Committee:

On September 14, 2023, Governor Kevin Stitt requested the Joint Committee "endorse" gaming agreements he executed on July 1, 2020, with the Kialegee Tribal Town and the United Keetoowah

Band.<sup>1</sup> I write in my capacity as Oklahoma Attorney General to summarize my office's legal analysis of what he is asking the Joint Committee to do. As Oklahoma's chief law officer, I remain available to provide you with additional legal guidance on this matter, as may be appropriate, or otherwise to answer any question the Joint Committee or any of you may have. In the meantime, please consider this letter as setting forth my informed conclusion and counsel on the matter.

Proper respect for the law compels the conclusion that the Joint Committee lacks authority to make valid that which the Oklahoma Supreme Court earlier declared to be invalid. The agreements tendered for your review are the same that the Governor previously submitted to the U.S. Department of the Interior for review under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. The *Pro Tem* and Speaker challenged these very agreements in an original action filed with the Oklahoma Supreme Court in 2020. The Oklahoma Supreme Court ultimately ruled that they were formed in violation of Oklahoma law. *See Treat, et al., v. Stitt*, 2021 OK 3, 481 P.3d 240.

In ruling against the Governor, the Court held that Oklahoma law requires “the Executive branch and the Tribe obtain the approval from the Joint Committee prior to submitting the compact to the Department of the Interior.” *Id.* at ¶10 (emphasis added).<sup>2</sup> While the Governor's transmittal letters show a miscomprehension (or perhaps a rejection) of this point,<sup>3</sup> the Court's reasoning serves a real purpose and should not be dismissed as requiring some sort of mere administrative box checking. As the Court reasoned, the proper sequencing of government reviews preserves to the state government the constitutional function of “allow[ing] for checks and balances of power between the Legislative branch and the Executive branch” before a compact is submitted to the federal government for its own inquiries. *Id.* (emphasis added). The Governor's ongoing disregard for this point is fatal to his request of the Joint Committee.

Even if Oklahoma's highest court had not already struck down these agreements, the Joint Committee lacks the authority to give legal effect to compacts that conflict with Oklahoma statute. In ruling against the Governor, the Court stated “[t]he new compacts contain terms that are different or outside the Model Compact provisions altogether.” *Id.* at ¶6. The Governor's transmittal letters

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<sup>1</sup> The Oklahoma Governor's letters to the Joint Committee are undated, but copies were included with the media release his office issued on Sep. 14, 2023. *See* Governor Stitt, Chief Bunch and Mekko Yahola Send Letters to Joint Committee on State-Tribal Relations, Request Approval of Tribal Gaming Compacts (Sep. 14, 2023), <https://oklahoma.gov/governor/newsroom/newsroom/2023/sepember2023/governor-stitt--chief-bunch-and-mekko-yahola-send-letters-to-joi.html>.

<sup>2</sup> In 2020, the U.S. Dep't of the Interior published notice that “[t]he Secretary took no action on the Kialegee Tribal Town and State of Oklahoma Gaming Compact and the United Keetoowah Band of Cherokee Indians and State of Oklahoma Gaming Compact within 45 days of their submission” that that, “[t]herefore, the Compacts are considered to have been approved, but only to the extent they are consistent with IGRA” pursuant to 25 U.S.C. 2710(d)(8)(C). *See* 2020 Fed. Reg. 19,707 (Sep. 8, 2020), <https://www.federalregister.gov/documents/2020/09/08/2020-19707/indian-gaming-tribal-state-class-iii-gaming-compacts-taking-effect-in-the-state-of-oklahoma>.

<sup>3</sup> The Governor's transmittal letters indicate his continued position that the compacts are “valid as a matter of federal law” and characterizes the Court's *Treat* ruling as simply requiring the Joint Committee's “endorse[ment]” of them, without more. *See* Letters of Sep. 14, 2023, at ¶2.

concede as much, i.e., that the compacts include “certain terms different than the Model Tribal Gaming Compact outlined in 3A O.S. § 281.” See Letters of Sep. 14, 2023, at ¶2. As such, the Governor effectively admits he is asking the Joint Committee to enact law.

The Governor’s improper sequencing of government reviews meant the Court was not called upon in *Treat* to address the scope of the Joint Committee’s powers. Justice Rowe nonetheless addressed the point in a concurring opinion. *Treat, et al., v. Stitt*, 2021 OK 3, 481 P.3d 249 (Rowe, J., concurring in result). Justice Rowe made clear that he did not “accede . . . as to any finding or implication in the Court’s opinion that the Joint Committee could validate these compacts.” *Id.* at ¶1. Specifically, Justice Rowe explained:

*A finding or implication to the contrary would be inconsistent with this Court’s jurisprudence on the non-delegation doctrine.* Article B, Section 1 of the Oklahoma Constitution vests legislative authority in the Legislature exclusively:

The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature.

The non-delegation doctrine rests on the premise that the legislature must not abdicate its responsibility to resolve fundamental policy making by [1] delegating that function to others or [2] by failing to provide adequate directions for the implementation of its declared policy. *If the Joint Committee could approve compacts that operate as amendments to Oklahoma law, the Joint Committee would possess functional legislative authority. Such an arrangement would unquestionably run afoul of the non-delegation doctrine.*

*Id.* at ¶3 (emphasis added but internal quotations, citations, and footnote omitted). Justice Rowe further explained that this rule of constitutional law “does not necessarily render the power of the Joint Committee illusory” as it “still possesses the power to approve or disapprove compacts that are consistent with Oklahoma law.” *Id.* at n.2.

Accordingly, properly understood, the statutory power of the Joint Committee is to serve as a legislative check on executive power by screening those acts the Governor seeks to implement by State-Tribal compact *prior to* any required federal government reviews of those agreements. Regardless of the sequencing of review, *the Joint Committee’s duty is to reject a tendered agreement that is inconsistent with Oklahoma statute.*

Turning to the agreements at issue, the Court has (as noted) already struck them down as invalid, which alone should be dispositive of the Governor’s request. But even setting that aside, they pertain to gambling, a subject matter that “has long been broadly prohibited by Oklahoma’s criminal laws, and carving out exceptions to these criminal laws is a question of public policy.” *Treat* at ¶5. As such, proper respect for Oklahoma law counsels close adherence to the limits on the Joint Committee’s power in this instance, but there is more: *The terms of these proposed compacts depart substantially from the codified Model Tribal Gaming Compact and, further, purport to make other significant departures from existing law.*

Certain sections of these agreements, for example, purport to empower the Governor to bypass the Oklahoma Legislature's power of appropriation and expenditure. *See, e.g.*, Part 9 sec. E. (imposing "a penalty of Five Thousand Dollars (\$5,000.00)" for certain acts, which amounts are "to be remitted to the [State Compliance Agency] for purposes of deposit and expenditure"); *see also* Part 10 sec. B.4. (establishing similar "penalties"); Part 10 sec. C. (establishing new "Annual Oversight Assessment" schedule). Other provisions enlarge the power of the Oklahoma Governor's office with respect to future disputes, *e.g.*, Part 6 sec. F. (vesting the Governor with "exclusive authority to settle and negotiate any dispute arising under the Compact," notwithstanding powers statutorily vested in the Office of the Oklahoma Attorney General under title 74 of the Oklahoma Statutes), and otherwise bind successors to his office to the Governor's own policy judgments, *e.g.*, Part 4 sec. K. (binding Governor's office to concurrence under state authority with respect to unspecified future Tribal trust land acquisition). These provisions transcend the sort of discretionary policy calls a Governor might reasonably make in the fulfillment of his office's duty under Article 6, Section 8 of the Oklahoma Constitution. They appear, instead, to reallocate existing power within Oklahoma government. In short, even a cursory review of these agreements shows that they raise substantive questions of public policy—questions our Constitution properly reserves to the Legislative branch of government.

Accordingly, it is my counsel that the Joint Committee lacks the authority to make valid that which the Oklahoma Supreme Court has struck down as invalid. Furthermore, both for the improper sequencing of government reviews and given their substantive inconsistencies with Oklahoma law, the Joint Committee should disapprove the tendered agreements and advise the Governor that, if he wants to pursue their implementation, he should first seek appropriate revisions to Oklahoma law.

Sincerely,



GENTNER DRUMMOND  
*Oklahoma Attorney General*