PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CITIZEN POTAWATOMI NATION, Plaintiff-Appellee, v. STATE OF OKLAHOMA, Defendant-Appellant.	No. 16-6224

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. NO. 5:16-CV-00361-C)

(Filed Feb. 6, 2018)

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Gregory M. Quinlan, Citizen Potawatomi Nation, Shawnee, Oklahoma, for Plaintiff-Appellee.

Before **TYMKOVICH**, Chief Judge, **BRISCOE**, and **MURPHY**, Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

Oklahoma and the Citizen Potawatomi Nation (the "Nation") entered into a Tribal-State gaming compact (the "Compact"). *See* 25 U.S.C. § 2710(d)(3) (providing for such compacts). Part 12 of the Compact contains a dispute-resolution procedure that calls for arbitration of disagreements "arising under" the Compact's provisions. It also indicates that either party may, "[n]otwithstanding any provision of law," "bring an action against the other in a federal district court for the de novo review of any arbitration award." In *Hall Street Associates, LLC. v. Mattel, Inc.*, however, the Supreme Court held that the Federal Arbitration Act ("FAA") precludes parties to an arbitration agreement from contracting for de novo review of the legal determinations in an arbitration award. 552 U.S. 576, 583-84 (2008). Instead, according to the Court, 9 U.S.C. §§ 10 and 11 provide the exclusive grounds for a court to vacate or modify an arbitration award. *Id.*

This court must resolve how to treat the Compact's de novo review provision given the Supreme Court's decision in *Hall Street Associates*. The Nation asserts the appropriate course is to excise from the

Compact the de novo review provision, leaving intact the parties' binding obligation to engage in arbitration, subject only to limited judicial review under 9 U.S.C. §§ 9 and 10. This is the approach adopted, sub silentio, by the district court. Oklahoma, in contrast, asserts the de novo review provision is integral to the parties' agreement to arbitrate disputes arising under the Compact and, therefore, this court should sever the entire arbitration provision from the Compact.

The language of the Compact demonstrates that the de novo review provision is a material aspect of the parties' agreement to arbitrate disputes arising thereunder. Because *Hall Street Associates* clearly indicates the Compact's de novo review provision is legally invalid, and because the obligation to arbitrate is contingent on the availability of de novo review, we conclude the obligation to arbitrate set out in Compact Part 12 is unenforceable. Thus, exercising jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362, this matter is **remanded** to the district court to enter an order **vacating** the arbitration award.

II. BACKGROUND

A. The Compact

The Nation's Chairman signed the Compact on November 30, 2004. *See* Okla. Stat. tit. 3A, §§ 280-281 (offering "a model tribal gaming compact" to federally recognized tribes within Oklahoma's borders and providing that a compact would take effect through the "signature of the chief executive officer of the tribal

government," with "[n]o further action by the Governor or the state" required). The Compact was deemed approved and in effect as of February 9, 2005. *See* Notice of Class III Gaming Compacts Taking Effect, 70 Fed. Reg. 6903-01 (Feb. 9, 2005); *see also* 25 U.S.C. § 2710(d)(8)(C) (allowing a Tribal-State gaming compact to be deemed approved if not acted on by the Secretary of the Interior within forty-five days after the Compact's submission).

The Compact opens with a series of recitals, specifically noting the sovereign nature of the parties, the need for respectful government-to-government relations, and the "long recognized . . . right" of the Nation to govern tribal lands. It then sets forth a comprehensive structure regarding Class III gaming on the Nation's lands and describes the parties' rights and responsibilities with regard to that gaming. The Compact applies to "[f]acilit[ies]," which are defined as "any building of the tribe in which the covered games authorized by this Compact are conducted." The Nation has two such facilities, the FireLake Grand Casino and the FireLake Entertainment Center. Particularly important for understanding the underlying arbitration proceedings that lead to this appeal, Part 5(I) of the Compact provides that the "sale and service of alcoholic beverages in a facility shall be in compliance with state, federal, [and] tribal law in regard to the licensing and sale of such beverages." The Compact contains the following dispute resolution procedure:

> In the event that either party to this Compact believes that the other party has

failed to comply with any requirement of this Compact, or in the event of any dispute hereunder, including, but not limited to, a dispute over the proper interpretation of the terms and conditions of this Compact, the following procedures may be invoked:

. . . ;

2. Subject to the limitation set forth in paragraph 3 of this Part, either party may refer a dispute arising under this Compact to arbitration under the rules of the American Arbitration Association (AAA), subject to enforcement or pursuant to review as provided by paragraph 3 of this Part by a federal district court. The remedies available through arbitration are limited to enforcement of the provisions of this Compact. The parties consent to the jurisdiction of such arbitration forum and court for such limited purposes and no other, and each waives immunity with respect thereto. . . .

. . . ; and

3. Notwithstanding any provision of law, either party to the Compact may bring an action against the other in a federal district court for the de novo review of any arbitration award under paragraph 2 of this Part. The decision of the court shall be subject to appeal. Each of the parties hereto waives immunity and consents to suit therein for such limited purposes, and agrees not to raise the Eleventh

> Amendment to the United States Constitution or comparable defense to the validity of such waiver.

See Okla. Stat. tit. 3A, § 281.

B. The Underlying Dispute and Arbitration Proceedings

The dispute underlying the arbitration award and this appeal began with administrative proceedings before Oklahoma's alcohol (the Alcoholic Beverage Laws Enforcement Commission ("ABLE")) and sales tax (the Oklahoma Tax Commission ("OTC")) regulators. ABLE began proceedings against the Nation on the ground the Grand Casino was selling alcoholic beverages on Sundays, in violation of Okla. Stat. tit. 37, § 591.[1] ABLE has authority to refuse to renew, suspend, or revoke licenses if the license holder fails to comply with license requirements. Okla. Stat. tit. 37, §§ 527.1, 528.

While ABLE proceedings were ongoing, the OTC sent a request to the Nation as the holder of Oklahoma licenses and permits. According to the OTC:

> 4. As the holder of Sales Tax Permits, [the Nation] is required to report and remit

[1] Oklahoma utilizes a "county option" for sales of liquor by the drink. Such sales are prohibited unless authorized by the county's voters and, even if such sales are authorized, county voters have the choice to restrict sales on certain days. Okla. Const. art. XXVIII, §§ 4, 6; Okla. Stat. tit. 37, § 591. When the voters of Pottawatomie County approved the sale of alcoholic beverages by the drink, they provided that such sales are not authorized on Sundays.

> sales tax due on transactions subject to Oklahoma Sales Tax. . . . [The Nation] has filed Oklahoma Sales Tax Returns on a semi-annual basis, commencing January 18, 2011. . . .
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> 5. . . . [E]ach return filed by [the Nation] reported total sales and claimed exemptions in the exact amount of total sales, reporting a "zero" sales tax liability.
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> 6. Pursuant to [OTC regulations], all gross receipts are presumed subject to tax, until shown to be tax exempt. The burden of proving that a sale is an exempt sale is on the vendor.
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> 7. [The Nation's] returns . . . , while claiming exemptions in the exact total amount of reported sales, fail to identify, much less establish that all sales were exempt.

In Oklahoma, businesses selling alcoholic beverages by the drink must obtain both an appropriate liquor license from ABLE and a matching tax permit from the OTC. Okla. Stat. tit. 37, §§ 163.7, 577. The OTC is empowered to revoke all of a licensee's tax permits and licenses upon a violation of state tax law. *Id.* tit. 68, § 212(A)(2).[2]

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[2] The record reveals, however, that for years OTC representatives requested the Nation to submit periodic reports for sales of goods by tribal businesses on tribal lands, with the express agreement and assurance (1) the purpose of the request was to facilitate administrative convenience to the Tax Commission and (2) the Nation should report its sales tax collections as "0." This historic approach was consistent with the Nation's practice of never collecting Oklahoma sales tax on sales to non-tribal

In the ABLE proceedings, the Nation claimed it did not have to submit to the prohibition on Sunday sales because that prohibition flowed from a county rule, not state law. It also asserted arbitration pursuant to Compact Part 12 was the only proper forum for resolving licensing disputes. An administrative law judge recommended that ABLE reject the Nation's first argument because (1) the county option as to sales of liquor by the drink flowed directly from state law and the Oklahoma Constitution and (2) the Nation had applied for and received state-granted liquor licenses, and federal law establishes that states have jurisdiction over liquor sales in "Indian Country."[3] The administrative law judge also reasoned that the overall structure of the Compact demonstrated the parties did not agree to resolve licensing disputes via the mechanism set out in Compact Part 12.

The administrative law judge issued his decision in the middle of the Nation's briefing schedule at the OTC. The Nation then invoked the Compact's arbitration provision and made Compact Part 5(I) central to its arbitration theory.[4] According to the Nation,

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members. The instant OTC proceedings were the first and only time Oklahoma has taken any enforcement action against a tribe on the basis Oklahoma sales taxes apply to all sales by a tribe to non-tribal members.

[3] Oklahoma is entitled to regulate and license tribal liquor transactions. *Rice v. Rehner*, 463 U.S. 713, 723-724 (1983); *Citizen Band Potawatomi Indian Tribe of Okla. v. Okla. Tax Comm'n*, 975 F.3d 1459, 1461-62 (10th Cir. 1992).

[4] While the arbitration progressed, administrative proceedings at the OTC continued. OTC staff and the Nation engaged in

disputes involving alcohol sales and licensing that might impact its gaming businesses were subject to arbitration under the Compact.[5] In response, Oklahoma

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briefing separately from the arbitration, after which the OTC concluded the Nation had applied for a state alcohol license and, therefore, had to comply with the attendant obligations such as responding to an audit request. The OTC rejected the Nation's argument that the issue before it was a gaming dispute due to the possibility the OTC's actions might affect the Nation's liquor sales at its gaming facilities. The OTC eventually revoked the Nation's sales tax permits and liquor licenses for failure to comply with Oklahoma law. The Nation's appeal to the Oklahoma Supreme Court is currently stayed pending the instant litigation over the arbitration award.

[5] The Nation's Demand for Arbitration specifically sought a determination "whether the Dispute Resolution (including arbitration) procedures of the Compact are the exclusive means by which Oklahoma may seek to enforce against the Nation's Compact facilities the Nation's duties imposed to comply with state laws governing sales and service of alcoholic beverages." According to the Nation:

> Part 12 of the Compact provides unambiguous Dispute Resolution procedures in the event of a dispute. The preamble to Part 12 reads, in its entirety,
>
> > In the event that either party to this Compact believes that the other party has failed to comply with any requirement of this Compact, or in the event of any dispute hereunder, including, but not limited to, a dispute over the proper interpretation of the terms and conditions of this Compact, the following procedures may be invoked.
>
> Any violation of any term of the Compact or disagreement about the scope or interpretation of the Compact engages Part 12.

Finally, the Nation asserted the parties' dispute over liquor licenses and/or permits arose under the Compact: "The Compact expressly covers a Compact facility's duties with respect to sale

disputed the Nation's assertion arbitration was the proper forum for determining disputes that arise because of the Nation's failure to comply with laws and regulations governing sales tax and liquor licenses.[6] Ultimately, for that very reason, Oklahoma filed a motion to dismiss the Nation's demand for arbitration, arguing regulatory disputes between the parties must be resolved through administrative proceedings, not arbitration. The arbitrator refused to dismiss the Nation's arbitration demand, reasoning that the Nation's theory (i.e., that Part 12 of the Compact was the exclusive means of enforcing the Nation's obligations under Part 5(I)) was substantively arbitrable.[7]

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and service of alcoholic beverages. Part 5(I) states: 'The sale and service of alcoholic beverages in a facility shall be in compliance with state, federal and tribal law in regard to the licensing and sale of such beverages.' "

[6] In its first response to the Nation's demand for arbitration, Oklahoma filed an "Answering Statement." In that answer, Oklahoma repeatedly denied "that the administrative actions brought by ABLE and OTC arise from any rights, duties, or obligations of either [the Nation] or [Oklahoma] under the Compact." Instead, according to Oklahoma, "both administrative actions are based upon the duties and obligations imposed upon [the Nation] by the various permits and licenses at issue in those proceedings." For that reason, Oklahoma asserted the licensing disputes were not arbitrable.

[7] Oklahoma also filed a motion for summary judgment. In that motion, Oklahoma argued the Compact does not subsume every licensing issue that arises between the Nation and the State's administrative licensing bodies. Oklahoma also asserted it has preexisting authority to regulate liquor transactions in Indian Country under federal statutory law and binding United States Supreme Court precedent. Thus, Oklahoma argued, Part 5 of the Compact does not alter the parties' jurisdiction regarding

The arbitrator conducted a hearing. The Nation's Vice-Chairman, Linda Capps, and Tribal Counsel, Gregory Quinlan, testified as to the history of the interaction between the OTC and the Nation. As to the parties' intended meaning of the Compact, the Nation presented the testimony of Oklahoma's ex-Governor, Brad Henry, and the Nation's Chairman, John A. Barrett. Governor Henry testified he directed and oversaw the model gaming compact negotiations. He testified the Compact provided for arbitration: (1) to resolve disputes more quickly and with less expense; and (2) to maintain each party's sovereignty by preventing Oklahoma from attempting to pull Native American tribes into state court to resolve claims. Governor Henry testified the Compact was authored by the state and offered to the Nation as a "take it or leave it" proposition. He further testified the Compact was not intended to

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alcohol sales but, instead, conditions the availability of gaming on compliance with Oklahoma's preexisting authority. The arbitrator refused to grant Oklahoma summary judgment, concluding as follows:

> The underlying dispute centers primarily on the Nation's contention that they have no obligation to accede to the State's demand for all of the Nation's businesses to collect, report and remit sales taxes on sales to non tribal members. The Nation's claim is *arbitrable.* The arbitration agreement in question is extremely broad. It is governed by the Federal Arbitration Act which embodies a strong presumption that an arbitration clause applies and resolves any doubt arising from the contract language to favor arbitration.

The arbitration then progressed through discovery and an evidentiary hearing.

subject the Nation to the taxation urged by Oklahoma.[8]

As to economic aspects of a federal preemption analysis,[9] the Nation presented the testimony of, inter alia, Dr. Joseph P. Kalt, Professor Emeritus at the John F. Kennedy School of Government at Harvard University. Dr. Kalt testified there is an explicit federal policy regarding Native American self-determination and that:

> [T]he federal government has been on a quite consistent path in which it is seeking to fulfill its trust responsibilities to tribes by letting the tribes hold the reins of self-government in order to hopefully make better decisions and begin to move tribes, both culturally and economically, politically forward under their own decision-making as tribal nations under self-rules of self-governance.

As to the Nation's provision of governmental functions and services, Dr. Kalt testified that: "[The Nation] is extremely well-known, actually, for its going well

[8] Governor Henry testified Compact Part 5(I) was intended to ensure minors had no access to alcohol, not as leverage to enforce other laws outside of the Compact. He explained model-compact negotiations were delicate and Oklahoma's primary goal was to obtain a portion of tribal gaming revenues to supplement funding for education. According to Governor Henry, "the last thing (the State) would have wanted to do, in my opinion, is try to backdoor in some language to require these Tribes that we're trying to get a deal with, to pay other taxes that they weren't paying."

[9] This preemption analysis is derived from the Supreme Court's decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

beyond its provision of services and performance of governmental functions than what would have been allowed by just the level of federal funding." Dr. Kalt testified that given the Nation's millions of dollars of payments in Compact exclusivity fees and mixed beverage taxes, the incremental burdens on Oklahoma caused by the Nation's economy were not uncompensated, stating:

> [T]he State of Oklahoma does not have any uncompensated burden. In fact, it's benefitting from a wealthy neighbor, or getting wealthier neighbor, that is producing its own GDP now, the [Nation], that benefits the State of Oklahoma. And there's no evidence that I can find that indicates that the State is suffering some uncompensated burden as a result of the Tribe's success in developing its own economy. . . .
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> Two hundred and fifty million dollars spending by the [Nation] will generate five hundred million dollars, a little more than five hundred million dollars, of economic activity overall in the region. Well, that level of economic activity will far outweigh any uncompensated burden that we could imagine. It's implausible to imagine that there's, you know, a quarter of a billion or half a billion dollars' worth of uncompensated burden.

Oklahoma's only witness was former gubernatorial General Counsel, Steve Mullins. He maintained Oklahoma could attach any condition whatsoever, including taxation of activities unrelated to the sale of

alcoholic beverages, to the Nation's alcoholic beverage sales license. Mullins testified he did not believe Oklahoma was seeking to compel the Nation to pay taxes, but that it sought to compel the Nation to file tax reports as a condition of maintaining alcoholic beverage permits at the facilities covered by the Compact. Oklahoma offered no testimony or other evidence material to a preemption analysis derived from *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), or to the parties' intended meaning of the Compact terms at issue.

The arbitrator issued an award in favor of the Nation. The award began by reiterating that the dispute between Oklahoma and the Nation was arbitrable. The arbitration award went on to declare that, under the test set out in *Bracker*, federal law preempts Oklahoma's ability to levy a tax on sales made within tribal jurisdiction by the nation to individuals that are not members of the Nation.[10] Finally, the award enjoined

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[10] The arbitration award simply provides as follows:

> The Nation contends that even if the State's Sales Tax Code purported to apply to the Nation's sales of goods and services to nontribal members, it would be preempted under the federal balancing test applied in *Indian Country, U.S.A. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) and *White Mountain Apache Tribe v Bracker*, 448 U.S. 136 (1980). . . . [W]hen the legal incidence of a tax falls on non-Indians, as it does here, no categorical bar prevents enforcement of the tax. Federal and tribal interests must be weighed against state interests. At the hearing, the Nation established (i) significant federal and tribal interests in the Nation's

Oklahoma from (1) taking any action to divest Compact facilities of the right to sell and serve alcoholic beverages or (2) "threaten[ing] other enforcement actions" against the Nation on the ground the Nation does not comply with Oklahoma's sales tax laws.

C. Confirmation Proceedings in the Federal District Court

The Nation moved to enforce the arbitration award by filing an action in the United States District Court for the Western District of Oklahoma. 9 U.S.C. § 9. It argued that, pursuant to the extraordinarily narrow review provisions set out in 9 U.S.C. § 10, the arbitrator properly determined the dispute was arbitrable and correctly concluded the Nation has no legal duty to report, collect, or remit the state sales taxes at issue in the state administrative proceedings.

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self-governance, economic self-sufficiency, and self-determination; (ii) the Nation alone invests value in the goods and services that it sells, does not derive such value through an exemption from State sales taxes, and imposes its own equivalent tribal sales tax on the sales; (iii) the State possesses no economic interest beyond a general quest for additional revenue in imposing a sales tax on the Nation's transactions and suffers no uncompensated economic burden arising therefrom; and (iv) the federal and tribal interests at stake predominate significantly over any possible State interest in the transactions upon which the State seeks to impose its sales tax. Accordingly, federal law protecting tribal sovereignty interests preempts and invalidates the State's sales tax on the Nation's sales in question. . . .

Oklahoma filed a motion to vacate the arbitration award. *Id.* § 10(a)(4). It asserted it was entitled to have the award vacated because the arbitrator (1) exceeded his powers by failing to limit the award to enforcement of the Compact's provisions[11] and (2) "so imperfectly executed [his powers] that a mutual, final, and definite award upon the subject matter submitted was not made."[12] *See id.* In any event, Oklahoma asserted it was entitled to de novo federal court adjudication of the factual and legal issues involved in the arbitration.

After the parties engaged in further briefing, the district court entered an order enforcing the arbitration award. The district court began its analysis by recognizing that review of arbitration awards is among the narrowest known to the law. *Cf. Litvak Packing Co. v. United Food & Commercial Workers, Local Union No. 7*, 886 F.2d 275, 276 (10th Cir. 1989). With that standard in mind, the district court concluded the arbitrator's determination – that Oklahoma could not force the Nation to collect, record, or remit sales taxes for transactions on tribal lands involving individuals who are not members of the Nation – at least arguably drew its essence from the Compact. The district court also

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[11] Oklahoma claimed the arbitrator failed to interpret and enforce the Compact. Instead, according to Oklahoma, the arbitrator opted to make public policy by invalidating Oklahoma's sales tax laws as they relate to Compact gaming facilities and conferring upon the Nation a right to sell and serve alcohol that does not exist in the law and is not created by the Compact.

[12] Oklahoma claimed the award was so indefinite or ambiguous that enforcement of the award was problematic and failed to resolve all issues submitted for arbitration.

rejected Oklahoma's assertion the arbitrator recognized a right to serve alcoholic beverages that is not conferred by the Compact. According to the district court, "it is clear that the arbitrator was not suggesting or implying that some unfettered right exists to sell alcohol. Rather, it is clear from that surrounding language in the portions of the award where the term 'right' is used, that the arbitrator's intent was simply a manner of expressing the [Nation's] entitlement to sell alcohol without improper enforcement actions against it by [Oklahoma]." As to Oklahoma's asserted entitlement to de novo review, the district court concluded as follows:

> [Oklahoma] requests that the Court conduct de novo review of the award, relying upon Part 12(3) of the Compact. As [the Nation] notes, [Oklahoma's] argument in this regard is foreclosed by the Supreme Court's ruling in *Hall Street Assocs.* . . . There, the Supreme Court noted that the parties may not expand the grounds of review of an award beyond those set forth by the . . . [FAA]. . . . The Supreme Court made clear that the only grounds for vacating or modifying an arbitration award were those set forth in §§ 10 or 11 of the FAA. As [the Nation] notes, to engage in de novo review as requested by [Oklahoma] would improperly broaden the permissible grounds for setting aside the award. Thus, [Oklahoma's] argument is foreclosed by Supreme Court precedent.

The district court's decision does not contain a discussion of Oklahoma's properly raised assertion that the arbitration provision of Compact Part 12 was invalid if the de novo review provision was rendered unenforceable by *Hall Street Associates*.

III. ANALYSIS

On appeal, Oklahoma challenges, on two independent bases, the order of the district court confirming the arbitration award. Oklahoma asserts the district court erred in confirming the award because the award did not finally resolve all submitted issues, suffers from fatal vagueness, and exceeds the arbitrator's powers. *See* 9 U.S.C. § 10(a)(4). Oklahoma also asserts the district court erred in failing to conduct de novo review of the merits of the parties' dispute, as contemplated by Compact Part 12(3). And, if such de novo review is unavailable, Oklahoma asserts the district court erred in failing to sever the obligation to engage in binding arbitration from the Compact, as de novo review was a material aspect of the parties' agreement to arbitrate disputes arising under the Compact.

Prudential concerns counsel in favor of resolving Oklahoma's appeal by reference to the validity of the Compact's requirement to engage in binding arbitration. As set out below, the decision in *Hall Street Associates* leaves no doubt that an attempt to alter the review standards set out in the FAA is legally invalid. Furthermore, the text of the Compact demonstrates the materiality of Part 12(3) to the parties' agreement

to engage in binding arbitration, leaving resolution of the appeal straight forward and providing Oklahoma with all the relief sought. Addressing this issue also has the salutary effect of resolving legal uncertainty. Oklahoma has entered into gaming compacts with many tribes, https://www.bia.gov/as-ia/oig/gaming-compacts (last visited Jan. 9, 2018). Because those compacts are all derived from Oklahoma's "model tribal gaming compact," Okla. Stat. tit. 3A, § 281, resolving the issue of the validity of Compact Part 12's arbitration provision will allow the parties to those compacts to develop roadmaps for how to proceed when gaming-related disputes arise between Oklahoma and a tribe with a compact.

On the other hand, beginning the analysis with an FAA § 10(a)(4) merits review of the arbitrator's award is not particularly productive. It is uncertain, although we do not offer any definitive resolution of the question, whether Oklahoma could obtain all the relief it seeks under the limited review of an arbitration award set out in § 10(a)(4). That being the case, this court would likely need to resolve the validity of the Compact's arbitration provision anyway. *See* Oklahoma's Reply Brief at 2 ("The critical issue raised by this appeal is whether the district court was correct in holding that the parties are bound by an arbitration agreement that has been fundamentally altered by a Supreme Court decision that rendered one of its material terms unenforceable."). Nor does it seem proper, given the Supreme Court's decision in *Hall Street Associates*, to engage in some type of shadow de novo review to

determine whether Oklahoma would prevail even were this court to apply the review advocated for by Oklahoma on appeal. In any event, even if this court were inclined to engage in such a review, it is not clear we are properly equipped for such a task. In its motion to vacate the arbitration award in the district court, Oklahoma asserted the de novo review provision entitled it to de novo review of the arbitrator's factual findings and legal determinations.[13] On appeal, however, neither party has briefed whether the Compact's de novo review provision only applies to the arbitrator's legal conclusions or to both legal conclusions and factual findings. And, if Oklahoma is correct that the Compact requires de novo review of the arbitrator's factual findings, such a task would necessarily have to occur in the district court.[14]

For all of the reasons set out above, the prudent course is for this court to resolve this appeal by reference to Oklahoma's argument that Compact Part 12(3)'s de novo review provision is a material aspect of Part 12's requirement that the parties engage in

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[13] For an example of what such a system of de novo review might resemble, *see generally United States v. Raddatz*, 447 U.S. 667 (1980) (describing district court review of recommendations made by magistrate judges under the provisions of 28 U.S.C. § 636(b)(1)(B)).

[14] Compact Part 12(3) provides as follows: "Notwithstanding any provision of law, either party to the Compact may bring an action against the other in a federal district court for the de novo review of any arbitration award under paragraph 2 of this Part. The decision of the court shall be subject to appeal." Okla. Stat. tit. 3A, § 281.

binding arbitration and, assuming the legal invalidity of that provision, the arbitration provision must be severed from the Compact.

A. Compact Part 12(3)'s De Novo Review Provision is Legally Invalid

This court can quickly dispose of Oklahoma's argument that even given the Supreme Court's decision in *Hall Street Associates*, the de novo review provision in Compact Part 12(3) is still valid and enforceable. Oklahoma concedes *Hall Street Associates* held that parties to an arbitration agreement cannot contract for any review other than the narrow review set out in 9 U.S.C. §§ 10 and 11.[15] It argues, however, that "the

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[15] *Hall Street Associates* provides as follows:

> The [FAA] . . . supplies mechanisms for enforcing arbitration awards: a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it. [9 U.S.C. §§ 9-11]. An application for any of these orders will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court. [*Id.* § 6]. Under the terms of § 9, a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10 and 11. Section 10 lists grounds for vacating an award, while § 11 names those for modifying or correcting one.
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> . . . . We now hold that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification.

552 U.S. at 582-84 (footnote omitted). To be clear, both the Nation's motion to confirm the arbitration award and Oklahoma's motion to vacate that award were predicated on the provisions of the FAA. *See id.* at 590 (noting that the holding applies only to

policies behind the Indian Gaming Regulatory Act [("IGRA")] have substantially more importance than the policies behind the Federal Arbitration Act." Oklahoma's Opening Br. at 42. *But see Hall Street Assocs.*, 552 U.S. at 588 ("[I]t makes more sense to see [9 U.S.C. §§ 9-11] as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in post arbitration process." (citation, quotation, and alteration omitted)). Oklahoma goes on to argue that IGRA favors federal court litigation to resolve disputes between sovereign Indian tribes and sovereign states. Apparently, Oklahoma infers from this supposed IGRA "policy" in favor of federal court litigation, a parallel, though unstated, IGRA preference for de novo review in federal court of arbitration awards flowing from Compact-based arbitration agreements. Finally, Oklahoma notes a gaming compact must be approved or deemed approved by the Secretary of the Interior before it can go in to effect, 25 U.S.C. § 2710(d)(1)(C), and that the Compact was deemed approved. Notice of Class III Gaming Compacts Taking Effect, 70 Fed. Reg. 6903-01 (Feb. 9, 2005). From all this, Oklahoma argues

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motions to confirm or vacate an award under the FAA and declining to consider whether a party to an arbitration agreement can obtain "more searching review" "under state statutory or common law").

Compact Part 12(3) survives the Supreme Court's decision in *Hall Street Associates*. Oklahoma's Opening Br. at 43-44 ("Given [IGRA's] reliance on federal court litigation to resolve disputes between states and tribes, it is unsurprising that the Bureau of Indian Affairs has not objected to the de novo review clause in Oklahoma's state-tribal gaming compacts. Preventing federal court review under the [FAA] would actually undermine [IGRA's] reliance on federal courts to protect tribal and state interests." (footnote omitted)).

Oklahoma's arguments in support of the application of de novo review are unconvincing. It does not provide a single citation to authority in support of its contention that the policies underlying IGRA are more important than the policies underlying the FAA. Nor has this court found any such authorities. Furthermore, although it is true that IGRA provides a federal forum to litigate and vindicate interests related to gaming and gaming compacts, 25 U.S.C. § 2710(d)(7)(A), arbitration is not mentioned in IGRA and no provision of IGRA purports to alter the FAA review provisions. Given that *Hall Street Associates* makes clear de novo review is entirely incompatible with the expedited process envisioned in the FAA, 552 U.S. at 588, this court is unwilling to treat the mere provision of a federal forum in IGRA as some implicit rejection of the applicability of the FAA review standards to arbitrations involving gaming compacts. After all, IGRA neither encourages nor discourages the inclusion of arbitration provisions in gaming compacts, leaving the matter entirely to the parties entering into

such a compact.[16] *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2035 (2014) (noting the parties had agreed to arbitrate disputes related to the gaming compact, but specifically recognizing IGRA gave Michigan the leverage necessary to obtain from the tribe a waiver of sovereign immunity so that such disputes would be dealt with in litigation). Finally, Oklahoma has not identified, and this court has not found, any support for the notion it is entitled to have the de novo review provision of the arbitration agreement enforced because the Secretary of the Interior deemed the compact approved pursuant to 25 U.S.C. § 2710(d)(3)(B), (d)(8). Although the Secretary is obligated to reject any

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[16] To the extent Oklahoma's brief could be read as asserting this court should enforce its right to de novo review because the liberal policy in favor of arbitration is based on freedom of contract, that argument was specifically rejected by the Court in *Hall Street Associates*:

> Hall Street says that the agreement to review for legal error ought to prevail simply because arbitration is a creature of contract, and the FAA is motivated, first and foremost, by a congressional desire to enforce agreements into which parties have entered. But, again, we think the argument comes up short. Hall Street is certainly right that the FAA lets parties tailor some, even many, features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law. But to rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration.

552 U.S. at 585-86 (quotation, alteration, and citations omitted).

gaming compact that "violates . . . any other provision of Federal law," *id.* § 2710(d)(8)(B)(ii), in so doing, the Secretary is not empowered to unilaterally alter the provisions of the FAA (or, for that matter, the provisions of any other federal statute). *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997) (rejecting contention that Secretary of the Interior can, by simple act of approving gaming compacts, "ratify or authorize" otherwise unauthorized conduct).

Because *Hall Street Associates* makes clear the de novo review provision set out in Compact Part 12(3) is legally invalid, this court must turn to the question whether that provision is a material aspect of the parties' agreement to engage in binding arbitration.

B. Materiality of Compact Part 12(3) to the Parties' Agreement to Arbitrate

1. *Hall Street Associates*

Before turning to the language of the Compact and, at least potentially, the record evidence regarding the intent of the parties, it is necessary to resolve a predicate assertion on the part of the Nation. The Nation's brief on appeal could be read to suggest the decision in *Hall Street Associates* forecloses the relief sought by Oklahoma. *See* The Nation's Br. at 23 ("The *Hall Street* Court did not find that the infirm standard of review provision worked to invalidate the entire arbitration clause at issue in that matter. The District Court correctly found that the invalidity of the non-FAA standard of review provision likewise does not

work to invalidate any other portion of the Compact." (footnote omitted)). In so arguing, the Nation fails to recognize that the Court in *Hall Street Associates* made clear it was not passing on the question whether severability of the obligation to engage in binding arbitration was an appropriate response to the invalidity of a de novo review provision. 552 U.S. at 587 n.6 (noting the Ninth Circuit ruled against Hall Street Associates on the issue of severability and Hall Street Associates did not seek certiorari on the issue, so the issue was not before the Court); *see also Hall Street Assocs., LLC v. Mattel Inc.*, 113 F. App'x 272, 273 (9th Cir. 2004) (holding its decision in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 1000-02 (9th Cir. 2003) (en banc) mandated a determination that "terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable"); *Kyocera*, 341 F.3d at 1000-02 (en banc) (holding, as a matter of California state contract law, that invalid de novo review provisions in arbitration agreements would not render invalid the agreement to engage in binding arbitration). Thus, the decision in *Hall Street Associates* does not speak to the severability question currently before this court.

2. Severability Analysis

"[A]rbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). "The FAA . . . places arbitration agreements on an equal footing with other contracts and requires courts to enforce them according to their terms. Like other

contracts, however, they may be invalidated by generally applicable contract defenses. . . ." *Id.* at 67-68 (citations and quotation omitted). "A compact is a form of contract." *Pueblo of Santa Ana*, 104 F.3d at 1556. It is a creation of IGRA, which determines a gaming compact's effectiveness and permissible scope. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48-49 (1996); 25 U.S.C. § 2710(d)(3). For that reason, a gaming compact is similar to a "congressionally sanctioned interstate compact the interpretation of which presents a question of federal law." *Cuyler v. Adams*, 449 U.S. 433, 442 (1981); *see also Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996) ("Tribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes. They are a creation of federal law, and IGRA prescribes the permissible scope of a Tribal-State compact. . . ." (quotation omitted)).[17] Accordingly, in interpreting the Compact, including whether the de novo review provision is material to the parties' agreement to engage in binding arbitration, we

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[17] It is for this very reason that this court has jurisdiction over the instant appeal. *See Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) ("The State's obligation to the Bands thus originates in the Compacts. The Compacts quite clearly are a creation of federal law; moreover, IGRA prescribes the permissible scope of the Compacts. We conclude that the Bands' claim to enforce the Compacts arises under federal law and thus that we have jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362."); *see also Forest Cnty. Potawatomi Cmty. of Wisc v. Norquist*, 45 F.3d 1079, 1082 (7th Cir. 1995) (holding federal jurisdiction was proper and noting rights flowing from a gaming compact are federal rights).

look to the federal common law. *See Puma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155, 1163 (9th Cir. 2015) ("General principles of federal contract law govern . . . Compacts, which were entered pursuant to IGRA." (quotation omitted)).[18]

Under federal contract principles, if the terms of a contract are not ambiguous, this court determines the parties' intent from the language of the agreement itself. *See Anthony v. United States*, 987 F.2d 670, 673 (10th Cir. 1993); *see also Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 560-61 (9th Cir. 2016) ("Federal common law follows the traditional approach for the parol evidence rule: A contract must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the contract." (quotation and alterations omitted)).[19] Further, this court will

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[18] This court's opinion in *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557-59 (10th Cir. 1997), is not to the contrary. In that case, we examined whether a gaming compact purportedly entered into by New Mexico was valid ab initio. *Id.* at 1548. This court recognized that as a general matter "the validity of a compact necessitates an interpretation of both federal and state law." *Id.* at 1557. As to the narrow question "whether a state has validly bound itself to a compact," the court determined state law controlled. *Id.* Here, on the other hand, the materiality of Compact Part 12(3) to the parties' agreement to engage in binding arbitration turns on routine matters of contract law (the intent of the parties), not on some particular or peculiar aspect of the laws of Oklahoma or the Nation. As set out above, the federal common law of contracts provides a ready vehicle for resolving that question.

[19] Even if this court's decision in *Pueblo of Santa Ana* could plausibly be read for the proposition that Oklahoma law plays some part in the interpretation of the Compact, such a conclusion

construe the Compact to give meaning to every word or phrase. *See United States v. Brye*, 146 F.3d 1207, 1211 (10th Cir. 1998).

When considered as a whole, Compact Part 12 makes clear that the parties' agreement to engage in binding arbitration was specifically conditioned on, and inextricably linked to, the availability of de novo review in federal court. The Compact contains a specific severability provision.[20] This provision requires a materiality analysis to determine whether the parties would have agreed to engage in binding arbitration if they had known de novo review of an arbitration award was unavailable. Compact Part 12(2), the provision

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would not have any impact on the resolution of this case because Oklahoma's law of contract interpretation mirrors the federal common law. *See Gamble, Simmons & Co. v. Kerr-McGee Corp.*, 175 F.3d 762, 767 (10th Cir. 1999) (acknowledging that, in Oklahoma, "[i]f the contract is unambiguous its language is the only legitimate evidence of what the parties intended, and [courts] will not rely on extrinsic evidence to vary or alter the plain meaning" (citation omitted)); *see also* Okla. Stat. tit. 15, § 154 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve absurdity.")

[20] Compact Part 13(A) provides as follows:

> Each provision, section, and subsection of this Compact shall stand separate and independent of every other provision, section, or subsection. In the event that a federal district court shall find any provision, section, or subsection of this Compact to be invalid, the remaining provisions, sections, and subsections of this Compact shall remain in full force and effect, unless the invalidated provision, section or subsection is material.

Okla. Stat. tit. 3A, § 281.

establishing binding arbitration, specifically limits that requirement to the availability of de novo review as set out in Compact Part 12(3). Okla. Stat. tit. 3A, § 281 ("*Subject to the limitation set forth in paragraph 3 of this Part*, either party may refer a dispute arising under this Compact to arbitration under the rules of the American Arbitration Association (AAA), *subject to enforcement or pursuant to review as provided by paragraph 3 of this Part by a federal district court.*" (emphasis added)). Compact Part 12(3) makes clear that federal district court review includes de novo review and that the district court's de novo review is subject to appeal to this court.

Importantly, the Compact links the parties' waivers of sovereign immunity to the kind of judicial review available. Part 12(2) of the Compact authorizes arbitration subject to de novo review in federal court as provided in Part 12(3), while Part 12(3) states that the parties "waive[] immunity and consent[] to suit [in federal court] for such limited purposes." *Id.* That is, the language of the Compact makes clear that the parties' waiver of sovereign immunity is only for purposes of the type of de novo review contemplated in Part 12(3), not for suits to enforce an arbitration award under the limited review procedures set out in 9 U.S.C. §§ 9-11. Given the importance of immunity as an aspect of sovereignty, *Alden v. Maine*, 527 U.S. 706, 713 (1999), the narrow and purposeful waiver in Part 12(3) makes clear that the availability of de novo review was a material aspect of the parties' agreement to arbitrate.

In response to all this, the Nation does not argue Compact Part 12(3) or, for that matter, any portion of Compact Part 12 is ambiguous. Thus, its reliance on extrinsic evidence is inappropriate because, absent such ambiguity, there is no need to look beyond the four corners of the Compact to resolve the question of materiality. *Anthony*, 987 F.2d at 673. Even if extrinsic evidence were admissible, however, the extrinsic evidence offered by the Nation is simply not meaningfully relevant to the question of materiality. The Nation relies solely on Governor Henry's statement during arbitration proceedings that "the arbitration clause was included to resolve disputes straightaway and to preserve each party's sovereignty." According to the Nation, this bare snippet of testimony "is harmonious with *Hall Street*'s primary basis for declining to permit expansion of the FAA standard of review." The Nation's Br. at 24. That the arbitration clause was included to "resolve disputes straightaway" says almost nothing about the parties' insistence on including a de novo review provision in Part 12. We are unwilling to infer from the parties' apparent desire to resolve disputes expeditiously a desire to arbitrate disputes at the expense of a specific provision meant to maintain critical aspects of the parties' sovereign immunity.

Finally, the Nation speculates that invalidating the arbitration clause might result in enforcement problems when future disputes arise between it and Oklahoma. It is far from clear this is a viable consideration in assessing the materiality of Part 12(3) of the Compact. The Nation has not identified, and this court

has not found, any precedent indicating federal courts are empowered to overlook material provisions of a contract, especially when those material provisions are intended to protect the sovereign interests of a tribe and a State, on the basis of what this court might perceive to be sound public policy.[21]

Because the availability of de novo review is a material aspect of the parties' agreement to engage in binding arbitration, and because *Hall Street Associates* renders the de novo review provision legally unenforceable, the district court erred in refusing to sever Compact Part 12(2) from the Compact.

IV. CONCLUSION

For those reason set out above, the matter is **REMANDED** to the United States District Court for the Western District of Oklahoma to enter an order **VACATING** the arbitration award.

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[21] In any event, the Nation's assertion is only true if it is now taking the position it will invoke its sovereign immunity to avoid federal-court adjudication of any future dispute. In its brief on appeal, Oklahoma solemnly states it will readily litigate such disputes in federal court. Given that in the Compact, Oklahoma and the Nation explicitly agreed to waive sovereign immunity in federal court for the purpose of de novo review of arbitration decisions, it is difficult for the Nation to creditably argue submitting disputes related to gaming or gaming compacts to federal courts for resolution as an initial matter is not a viable option.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CITIZEN POTAWATOMI NATION, Plaintiff-Appellee, v. STATE OF OKLAHOMA, Defendant-Appellant.	No. 16-6224 (D.C. No. 5:16-CV-00361-C) (W.D. Okla.)

JUDGMENT

(Filed Feb. 6, 2018)

Before **TYMKOVICH**, Chief Judge, **BRISCOE**, and **MURPHY**, Circuit Judges.

This case originated in the Western District of Oklahoma and was argued by counsel.

The judgment of that court is vacated. The case is remanded to the United States District Court for the Western District of Oklahoma for further proceedings in accordance with the opinion of this court.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

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

CITIZEN POTAWATOMI NATION, Plaintiff, v. STATE OF OKLAHOMA, Defendant.	)	Case No. CIV-16-361-C

MEMORANDUM OPINION AND ORDER

(Filed Jun. 21, 2016)

In 2004, the parties entered into the Citizen Potawatomi Nation Tribal Gaming Compact. The purpose of the Compact was to create an agreement governing gaming on Plaintiff's Compact facilities which are located on federal trust lands held for the Nation's benefit. In 2014 a dispute arose between the parties regarding the collection of sales tax. Ultimately, on May 28, 2014, the Oklahoma Tax Commission ("OTC") started an adverse administrative complaint against Plaintiff demanding revocation of Plaintiff's alcoholic beverage permits, including those at Compact facilities, on the ground that the Nation had not reported sales tax collections on the State's behalf. On October 29, 2015, the OTC's administrative law judge issued an Order recommending that the OTC revoke all of the Nation's alcoholic beverage and sales tax permits. That Order was adopted by the OTC on January 14, 2016. Plaintiff has appealed that decision to the Oklahoma

Supreme Court. The Oklahoma Supreme Court stayed its case pending arbitration of the parties' dispute.

The Compact contains an arbitration clause which permits disputes arising under the Compact to be submitted to arbitration. Pursuant to that clause, on May 28, 2015, Plaintiff submitted its demand for arbitration. The parties agreed to appointment of Daniel J. Boudreau as the arbitrator. On August 7, 2015, the arbitrator ruled the dispute was arbitrable and issued a final award on April 4, 2016. That award made several rulings, the net result of which preclude Defendant from denying Plaintiff the ability to sell and serve alcohol at Compact facilities because Plaintiff does not remit sales taxes to Defendant.

On April 13, 2016, Plaintiff filed the present action seeking enforcement of the arbitration award. Defendant responded, filing a Motion to Vacate, or in the Alternative, for de Novo Review of Arbitration Award. Defendant raises several arguments in support of its Motion to Vacate: that the arbitrator exceeded his powers by failing to limit the award to enforcement of the Compact's provisions; that the arbitrator exceeded his powers by recognizing a right that does not exist and is not conferred by the Compact; that the arbitrator imperfectly executed his powers. Alternatively, Defendant seeks to invoke a separate section of the Compact which provides for de novo review of any arbitration award.

In considering a challenge to an arbitration award, the Court's review is extremely limited. *See Litvak*

Packing Co. v. United Food & Commercial Workers, Local Union No. 7, 886 F.2d 275, 276 (10th Cir. 1989) (holding review of arbitral awards is among the narrowest known to the law). In *Foster v. Turley*, 808 F.2d 38, 42 (10th Cir. 1986), the Circuit explained the reviewing court's role as follows:

> Once an arbitration award is entered, the finality that courts should afford the arbitration process weighs heavily in favor of the award, and courts must exercise great caution when asked to set aside an award. Because a primary purpose behind arbitration agreements is to avoid the expense and delay of court proceedings, it is well settled that judicial review of an arbitration award is very narrowly limited.

(citations omitted). Indeed, the Supreme Court has made clear that a final award may be set aside only for the reasons set forth in 9 U.S.C. §§ 10 & 11. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008). Finally, the Supreme Court has explained Court's duty in the present case:

> Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 36, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). We recently reiterated that if an "'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed

> serious error does not suffice to overturn his decision.'" *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000) (quoting Misco, supra, at 38, 108 S.Ct. 364). It is only when the arbitrator strays from interpretation and application of the agreement and effectively "dispense[s] his own brand of industrial justice" that his decision may be unenforceable. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's "improvident, even silly, factfinding" does not provide a basis for a reviewing court to refuse to enforce the award. *Misco*, 484 U.S., at 39, 108 S.Ct. 364.

Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509, 121 S. Ct. 1724, 1728, 149 L. Ed. 2d 740 (2001). With these standards in mind, the Court will consider Defendant's arguments for vacating the arbitrator's award.

In support of its argument that the arbitrator exceeded his powers by failing to limit the award to enforcement of the Compact's provisions, Defendant argues that the arbitrator ignored Part 12(2) of the Compact. That provisions states, "The remedies available through arbitration are limited to enforcement of the provisions of this Compact. The parties consent to the jurisdiction of such arbitration forum and court for such limited purposes and no other, and each waives

immunity with respect thereto." (Dkt. No. 1, Ex. 2, P. 50.) Defendant argues that rather than apply this provision and limit his findings to the Compact, the arbitrator moved beyond and made a ruling on the validity of the State's tax laws under the doctrine of federal preemption. But in this argument Defendant ignores the underlying nature of the dispute between the parties. That dispute centers upon the Tribe's ability to sell alcoholic beverages within its gaming facilities – facilities that operate under the authority of the Compact – without complying with the State's sales tax laws. Part 5(I) of the Compact provides: "The sale and service of alcoholic beverages in a facility shall be in compliance with state, federal, or tribal law in regard to the licensing and sale of such beverages." (Dkt. No. 1, Ex. 2, pp. 17-18.)* As the arbitrator recognized, in the OTC proceedings Defendant attempted to use non-applicable standards to impact actions that were permissible under the Compact. It was on this basis that the arbitrator began his analysis of Defendant's actions against Plaintiff. The arbitrator noted that under part 5(I) there was no obligation of Plaintiff to submit to the State's sales tax laws as a condition for its casinos to sell and serve alcoholic beverages. Recognizing that there were other grounds on which the State could arguably pursue its sales tax collection, the arbitrator proceeded to consider those grounds and determined that under the applicable law and the facts present in

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* In its briefs, Defendant replaces the "or" with "and" when referencing the jurisdiction's law with which the sale must comply.

the case the State was not entitled to collect sales taxes at Compact facilities. These findings were necessary to give full effect to the Compact. Contrary to Defendant's arguments in its Motion to Vacate, the arbitrator did, in fact, base his decision upon the terms of the Compact and resolved the parties' dispute by relying on those terms, as well as appropriate governing law. Therefore, the Court finds he did not exceed his powers by failing to limit the award to enforcement of the Compact provisions.

Next, Defendant argues that the arbitrator exceeded his powers by recognizing a right that does not exist and is not conferred by the Compact. On this argument, Defendant stretches the language of the arbitration award beyond any reasonable meaning. Defendant notes that the arbitrator twice refers to Plaintiff's "right" to sell and serve alcoholic beverages. Defendant then argues that no such right exists. However, when using this shorthand language, it is clear that the arbitrator was not suggesting or implying that some unfettered right exists to sell alcohol. Rather, it is clear from the surrounding language in the portions of the award where the term "right" is used, that the arbitrator's intent was simply a manner of expressing the Tribe's entitlement to sell alcohol without improper enforcement actions against it by Defendant. Thus, to the extent Defendant's attempt to argue that the award should be set aside because the arbitrator conferred a right not contained in the Compact, the argument will be rejected.

Finally, Defendant argues that the award does not lend itself to a clearly enforceable mandate and that the arbitrator failed to resolve all the issues before him. Defendant argues that the arbitrator's award is not final. Again, upon review it is clear that the arbitrator's award addresses the issues brought before him on which the parties requested resolution, and it provides a clear determination of each side's rights and responsibilities under the terms of the Compact. To the extent Defendant argues that Plaintiff is seeking to apply the arbitrator's award to non-Compact facilities, that is a matter beyond the scope of the present litigation. The arbitration award is, in the relief granted, limited to Compact facilities, and this Court declines to speculate as to any broader impact. Accordingly, the Court finds no basis on which to vacate the award under 9 U.S.C. § 10(a)(4).

Finally, Defendant requests that the Court conduct de novo review of the award, relying upon Part 12(3) of the Compact. As Plaintiff notes, Defendant's argument in this regard is foreclosed by the Supreme Court's ruling in *Hall Street Assocs.*, *supra.* There, the Supreme Court noted that the parties may not expand the grounds of review of an award beyond those set forth by the Federal Arbitration Act ("FAA"). *Id*. at 587. The Supreme Court made clear that the only grounds for vacating or modifying an arbitration award were those set forth in §§ 10 or 11 of the FAA. As Plaintiff notes, to engage in de novo review as requested by Defendant would improperly broaden the permissible

grounds for setting aside the award. Thus, Defendant's argument is foreclosed by Supreme Court precedent.

For the reasons set forth herein, Plaintiff's Application for Confirmation of Arbitration Award (Dkt. No. 1) is GRANTED. Defendant is enjoined "from taking any further action to divest the Nation's Compact facilities of the right to sell and serve alcoholic beverages or threaten other enforcement actions against them on the ground that the Nation does not comply with the State's sales tax laws." (Dkt. No. 1, Ex. 1, p. 5). A separate Judgment will issue.

IT IS SO ORDERED this 21st day of June, 2016.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
United States District Judge

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

CITIZEN POTAWATOMI NATION, Plaintiff, v. STATE OF OKLAHOMA, Defendant.	)	Case No. CIV-16-361-C

JUDGMENT

For the reasons set forth in the Order filed this date granting Plaintiff's Application for Confirmation of Arbitration Award, judgment is hereby entered in favor of Plaintiff and against Defendant.

DATED this 21st day of June, 2016.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
United States District Judge

AMERICAN ARBITRATION ASSOCIATION

COMMERCIAL ARBITRATION

CITIZEN POTAWATOMI NATION, a federally recognized Indian tribe,	)	
Claimant,	)	**AAA Case No. 01-15-0003-3452**
v.	)	
THE STATE OF OKLAHOMA	)	
Respondent.	)	

ARBITRATION AWARD

In November 2004, the Citizen Potawatomi Nation ("Nation"), a federally recognized Indian Tribe, entered into a Tribal Gaming Compact with the State of Oklahoma ("State"), Model Compact codified at 3A O.S. §281 ("Compact"). Former State Governor Brad Henry had directed negotiations with certain other tribes for the 2004 legislation adopting the States statutory offer, which he signed for the State before that legislation was approved by referendum. Part 12 of the Compact provides for arbitration of any dispute thereunder, including but not limited to an assertion of noncompliance with the Compact, or regarding the proper interpretation of its terms and conditions. Part 5(I) governs "*Sale of Alcoholic Beverages*" and provides: "The sale and service of alcoholic beverages in a [Compact] facility shall be in compliance with state, federal, or tribal law in regard to the licensing and sale of such

beverages." The Nation has two Compact facilities (casinos) that sell alcoholic beverages – its Grand Casino and its Firelake Entertainment Center.

Before this controversy arose, the State had never sought to apply its sales tax laws to any Indian Tribe's general sales of goods and services. In 2001, three years before the Nation accepted the State's Compact offer, a State representative from the Oklahoma Tax Commission ("OTC") visited the Nation's Vice-Chairman to request that the Nation submit sales tax reports for its tribal businesses. The OTC representative expressly assured that the request was for the OTC's own administrative convenience and that the Nation could report "0" taxable sales because the Nation was an Indian Tribe whose sales were exempt from sales tax. The Nation acceded to the OTC's request and, for the next 13 years, filed sales tax reports showing no taxable sales. The OTC accepted those filings, without questioning the claimed exemptions.

In 2014, the OTC sent an audit demand to the Nation questioning more than $27,000,000 of exemptions claimed on the Nation's past sales tax reports. The Nation did not respond and declined to submit further sales tax reports. The OTC then filed and prosecuted an administrative complaint seeking to revoke all of the Nation's alcoholic beverage permits relying on State law providing for revocation of any alcoholic beverage permit upon noncompliance with State tax laws. In its complaint, the OTC asserted for the first time that State sales taxes apply to all sales by an Indian Tribe to nontribal members.

The Nation commenced this arbitration, claiming that (i) Part 12 of the Compact compels the State to arbitrate Compact disputes like the State's effort to divest the Nation's casinos of the right to sell and serve alcoholic beverages, and (ii) the Nation is in compliance with Part 5(I), as it has no duty to submit to the State's sales tax laws as a condition for its casinos to sell and serve alcoholic beverages. Shortly before the arbitration hearing on the Nation's claims, the OTC revoked the alcoholic beverage permits of the Nation's two casinos for failure to comply with the State's sales tax laws. After the hearing and while the Arbitrator had the case under advisement, the OTC served on the Nation a written notice threatening to close all the Nation's businesses, including its casinos, for failure to comply with the State's sales tax laws.

Part 12 contains the Compact's dispute resolution procedures. It provides for arbitration in the event either party believes the other party has "failed to comply with any requirement of this Compact, or in the event of any dispute hereunder, including, but not limited to, a dispute over the proper interpretation of the terms and conditions of the Compact." The State contends that Part 12 does not apply to this dispute as neither ABLE nor the OTC relied upon the Compact as the basis of their respective administrative proceedings. It points out that the proceedings were brought under Oklahoma statutes and regulations applicable to the licenses issued to the Nation. Accordingly, it argues that this matter is not appropriate for the Compact's dispute resolution procedures and should

proceed through the States' adjudicatory processes. On the other hand, the Nation argues that the State is impermissibly attempting to impose its revenue laws on the Tribe's sale of goods and services to nontribal members.

The Nation asserts that it is in compliance with part 5(I) of the Compact which imposes upon it the obligation to conform to existing state law in the licensing and sale of alcoholic beverages.

I have previously characterized the underlying dispute in this proceeding as centering primarily on the Nation's contention that they have no obligation to accede to the State's demand for all of the Nation's businesses to collect, report and remit sales taxes on sales of goods and services to nontribal members. After conducting the hearing, I have not revised my view as to the nature of this dispute. At the hearing, the State disclaimed any assessment or collection efforts against the Nation and described its administrative revocation efforts as motivated solely by the Nation's failure to respond to a request for information. However, in the administrative proceedings directed against the Nation, the State consistently asserted the Nation was obligated to collect, report and remand sales taxes on sales to nonmembers. In response to this assertion by the State, the Nation argues that, for a number of reasons, the State lacks the *power* to tax on-reservation purchases by non-members of the Nation. Because these arguments contest the power of the State to apply its revenue laws to these sales, this dispute goes well beyond a mere garden variety compliance dispute,

one that almost certainly would be handled in the State administrative processes. Given the nature of the Nation's attack (the authority of the State to apply its revenue laws), the broad scope of the arbitration provision in the Compact and the strong federal presumption regarding the application of an arbitration clause, I find the dispute at issue arbitrable.

The Nation asserts four independent reasons that it contends prevent the state from validly divesting the Nation of its right to sell alcoholic beverages in its casinos. First, the Nation argues that the Indian Gaming Regulatory Act ("IGRA") forbids a state from demanding or compacting for compensation for a tribe to engage in gaming-related activity, except as "necessary to defray the costs of regulating such activity." While this is a correct statement of law, the Nation has not specifically identified any provision in the Compact itself in which the State has imposed an impermissible tax, fee, charge or other assessment nor has it alleged that the State has made an improper demand for such a payment as a condition of entering into Compact negotiations. The Nation's argument in this regard seems to be that Part 5(I) of the Compact which mandates that "the sale and service of alcoholic beverages in a [Compact] facility shall be in compliance with state . . . law in regard to the licensing and sale of such beverages" violates IGRA in the manner in which it has been applied by the State in this controversy. Because Oklahoma law provides that the Commission may refuse to issue a license or revoke a license for "failure to comply with any of the tax laws of this state. . . .," the State, as

the Nation sees it, is using the Compact, in conjunction with state law[1], as a subterfuge to unlawfully extract the Nation's compliance with Oklahoma's sales tax laws.

IGRA does not allow a state to convert invalid on-reservation taxes into valid taxes by merely conditioning alcohol licensure on paying the taxes. However, state taxes on non-tribal members are not categorically barred. *Flandreau Santee Sioux Tribe v. Gerlach, 2015 WL 9273931, 14 (D.S.D. 2015).* When a state imposes a tax on non-member activity on Indian land, the courts apply a flexible preemption analysis (see below) to determine whether the tax is valid or invalid. If the tax is valid, the State has the authority to require the tribe to collect, report and remit the tax. If the tax is invalid, it does not. However, in the absence of a provision in the Compact seeking an impermissible fee or the improper demand for such a fee as a condition of Compact negotiations, a state law provision that requires the holder of an alcoholic beverage license to comply with its (valid) tax laws does not violate IGRA.

Secondly, the Nation argues that 5(I) does not purport to condition the Nation's right to sell alcoholic beverages on the Nation's submission to the State's sales tax laws, even if such submission were permitted by IGRA. If the point the Nation seeks to make is that by applying for an alcohol license, a tribe does not consent

[1] Oklahoma law provides that the Commission my refuse to issue a license or revoke a license of any wholesaler or retail dealer for. . . ." failure to comply with any of the tax laws of this state or the rules pertaining thereto 710:20-213.

to invalid off-reservation taxes, I agree. By the same token, the plain language of 5(I) requires the Nation to submit to any sales tax on non-tribal members the State has authority to impose.

Thirdly, the Nation argues that the State has failed to satisfy its burden to establish that its Sales Tax Code applies to the Nation. The Nation's argument in this regard seems a bit disingenuous. Not only does the Nation hold licenses and permits issue by the OTC, it has been paying a mixed beverage sales tax to the State for years. Nation meets the definition of a "taxpayer," as that term is defined to include any person required to file a report, a return, or remit any tax or to obtain a license or permit or to keep any records under the provisions of any state tax law. 68 O.S. § 202(d). Also, under the Sales Tax Code, the definition of person includes " . . . any group or combination acting as a unit, in the plural or singular number." 68 O.S. 1352(18). Accordingly, I find that the Nation is a "taxpayer" to which the tax code applies.

Finally, The Nation contends that even if the State's Sales Tax Code purported to apply to the Nation's sales of good and services to nontribal members, it would be preempted under the federal balancing test applied in *Indian Country U.S.A. v State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) and *White Mountain Apache Tribe v Bracker*, 448 U.S. 136 (1980), among other decisions. As mentioned earlier, when the legal incidence of a tax falls on non-Indians, as it does here, no categorical bar prevents enforcement of the tax. Federal and tribal interests must be weighed against

state interests. At the hearing, the Nation established (i) significant federal and tribal interests in the Nation's self-governance, economic self-sufficiency, and self-determination; (ii) the Nation alone invests value in the goods and services that it sells, does not derive such value through an exemption from State sales taxes, and imposes its own equivalent tribal sales tax on the sales; (iii) the State possesses no economic interest beyond a general quest for additional revenue in imposing a sales tax on the Nation's transactions and suffers no uncompensated economic burden arising therefrom; and (iv) the federal and tribal interests at stake predominate significantly over any possible State interest in the transactions upon which the State seeks to impose its sales tax. Accordingly, federal law protecting tribal sovereignty interests preempt and invalidates the State's sales tax on the Nation's sales in question. Nation's request for a declaratory judgment to this effect is granted

Having declared the tax invalid under existing circumstances, I address the Nation's request for injunctive relief. At the hearing on August 26, 2015, I denied the Nation's request for interim relief solely on the basis that the Nation had failed to establish imminent irreparable harm. Since that time, the State has subsequently revoked the Nation's alcoholic beverage permits and threatened to close all of its businesses, actions that threatens irreparable harm to the Compact facilities. I conclude that the Nation has satisfied all the legal requirements for injunctive relief. I hereby presently enjoin the State from taking any further

action to divest the Nation's Compact facilities of the right to sell and serve alcoholic beverages or threaten other enforcement actions against them on the ground that the Nation does not comply with the State's sales tax laws.

Each party is bear its own respective costs and attorney fees.

Dated: ~~4/1/16~~ 4/4/16

Arbitrator's Signature: /s/ Daniel J. Boudreau
Daniel J. Boudreau

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CITIZEN POTAWATOMI NATION, Plaintiff-Appellee, v. STATE OF OKLAHOMA, Defendant-Appellant.	No. 16-6224

ORDER

(Filed Mar. 6, 2018)

Before **TYMKOVICH**, Chief Judge, **BRISCOE**, and **MURPHY**, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

RELEVANT STATUTES

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

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9 U.S.C. § 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon

the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

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9 U.S.C. § 10(a). Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

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9 U.S.C. § 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration –

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Tribal Gaming Compact Between the Citizen Potawatomi Nation and the State of Oklahoma (Nov. 11, 2004)

This Compact is made and entered into by and between the Citizen Potawatomi Nation, a federally recognized Indian tribe ("tribe"), and the State of Oklahoma ("state"), with respect to the operation of covered games (as defined herein) on the tribe's Indian lands as defined by the Indian Gaming Regulatory Act, 25 U.S.C., Section 2703 (4).

Part 1. TITLE

This document shall be referred to as the "Citizen Potawatomi Nation and State of Oklahoma Gaming Compact".

Part 2. RECITALS

1. The tribe is a federally recognized tribal government possessing sovereign powers and rights of self-government.

2. The State of Oklahoma is a state of the United States of America possessing the sovereign powers and rights of a state.

3. The state and the tribe maintain a government-to-government relationship, and this Compact will help to foster mutual respect and understanding among Indians and non-Indians.

4. The United States Supreme Court has long recognized the right of an Indian tribe to regulate activity on lands within its jurisdiction.

5. The tribe desires to offer the play of covered games, as defined in paragraphs 5, 10, 11 and 12 of Part 3 of this Compact, as a means of generating revenues for purposes authorized by the Indian Gaming Regulatory Act, 25 U.S.C., Section 2701, et seq., including without limitation the support of tribal governmental programs, such as health care, housing, sewer and water projects, police, corrections, fire, judicial services, highway and bridge construction, general assistance for tribal elders, day care for the children, economic development, educational opportunities and other typical and valuable governmental services and programs for tribal members.

6. The state recognizes that the positive effects of this Compact will extend beyond the tribe's lands to the tribe's neighbors and surrounding communities and will generally benefit all of Oklahoma. These positive effects and benefits may include not only those described in paragraph 5 of this Part, but also may include increased tourism and related economic development activities.

7. The tribe and the state jointly wish to protect their citizens from any criminal involvement in the gaming operations regulated under this Compact.

Part 3. DEFINITIONS

As used in this Compact:

1. "Adjusted gross revenues" means the total receipts received from the play of all covered games minus all prize payouts;

2. "Annual oversight assessment" means the assessment described in subsection B of Part 11 of this Compact;

3. "Central computer" means a computer to which player terminals are linked to allow competition in electronic bonanza-style bingo games;

4. "Compact" means this Tribal Gaming Compact between the state and the tribe, entered into pursuant to Sections 21 and 22 of the State-Tribal Gaming Act;

5. "Covered game" means the following games conducted in accordance with the standards, as applicable, set forth in Sections 11 through 18 of the State-Tribal Gaming Act: an electronic bonanza-style bingo game, an electronic amusement game, an electronic instant bingo game, nonhouse-banked card games; any other game, if the operation of such game by a tribe would require a compact and if such game has been: (i) approved by the Oklahoma Horse Racing Commission for use by an organizational licensee, (ii) approved by state legislation for use by any person or entity, or (iii) approved by amendment of the State-Tribal Gaming Act, and upon election by the tribe by written supplement to this Compact, any Class II game in use by

the tribe, provided that no exclusivity payments shall be required for the operation of such Class II game;

6. "Covered game employee" means any individual employed by the enterprise or a third party providing management services to the enterprise, whose responsibilities include the rendering of services with respect to the operation, maintenance or management of covered games. The term "covered game employee" includes, but is not limited to, the following: managers and assistant managers; accounting personnel; surveillance and security personnel; cashiers, supervisors, and floor personnel; cage personnel; and any other person whose employment duties require or authorize access to areas of the facility related to the conduct of covered games or the maintenance or storage of covered game components. This shall not include upper level tribal employees or tribe's elected officials so long as such individuals are not directly involved in the operation, maintenance, or management of covered game components. The enterprise may, at its discretion, include other persons employed at or in connection with the enterprise within the definition of covered game employee;

7. "Documents" means books, records, electronic, magnetic and computer media documents and other writings and materials, copies thereof, and information contained therein;

8. "Effective date" means the date on which the last of the conditions set forth in subsection A of Part 15 of this Compact have been met;

9. "Electronic accounting system" means an electronic system that provides a secure means to receive, store and access data and record critical functions and activities, as set forth in the State-Tribal Gaming Act;

10. "Electronic amusement game" means a game that is played in an electronic environment in which a player's performance and opportunity for success can be improved by skill that conforms to the standards set forth in the State-Tribal Gaming Act;

11. "Electronic bonanza-style bingo game" means a game played in an electronic environment in which some or all of the numbers or symbols are drawn or electronically determined before the electronic bingo cards for that game are sold that conforms to the standards set forth in the State-Tribal Gaming Act;

12. "Electronic instant bingo game" means a game played in an electronic environment in which a player wins if his or her electronic instant bingo card contains a combination of numbers or symbols that was designated in advance of the game as a winning combination. There may be multiple winning combinations in each game and multiple winning cards that conform to the standards set forth in the State-Tribal Gaming Act;

13. "Enterprise" means the tribe or the tribal agency or section of tribal management with direct responsibility for the conduct of covered games, the tribal business enterprise that conducts covered games, or a person, corporation or other entity that has entered into a management contract with the tribe to conduct

covered games, in accordance with IGRA. The names, addresses and identifying information of any covered game employees shall be forwarded to the SCA at least annually. In any event, the tribe shall have the ultimate responsibility for ensuring that the tribe or enterprise fulfills the responsibilities under this Compact. For purposes of enforcement, the tribe is deemed to have made all promises for the enterprise;

14. "Facility" means any building of the tribe in which the covered games authorized by this Compact are conducted by the enterprise, located on Indian lands as defined by IGRA. The tribe shall have the ultimate responsibility for ensuring that a facility conforms to the Compact as required herein;

15. "Game play credits" means a method of representing value obtained from the exchange of cash or cash equivalents, or earned as a prize, in connection with electronic gaming. Game play credits may be redeemed for cash or a cash equivalent;

16. "Player terminals" means electronic or electromechanical terminals housed in cabinets with input devices and video screens or electromechanical displays on which players play electronic bonanza-style bingo games, electronic instant bingo games or electronic amusement games;

17. "Independent testing laboratory" means a laboratory of national reputation that is demonstrably competent and qualified to scientifically test and evaluate devices for compliance with this Compact and to otherwise perform the functions assigned to it in this

Compact. An independent testing laboratory shall not be owned or controlled by the tribe, the enterprise, an organizational licensee as defined in the State-Tribal Gaming Act, the state, or any manufacturer, supplier or operator of gaming devices. The selection of an independent testing laboratory for any purpose under this Compact shall be made from a list of one or more laboratories mutually agreed upon by the parties; provided that the parties hereby agree that any laboratory upon which the National Indian Gaming Commission has relied for such testing may be utilized for testing required by this Compact;

18. "IGRA" means the Indian Gaming Regulatory Act, Pub. L. 100-497, Oct. 17, 1988, 102 Stat. 2467, codified at 25 U.S.C., Section 2701 et seq. and 18 U.S.C., Sections 1166 to 1168;

19. "Nonhouse-banked card games" means any card game in which the tribe has no interest in the outcome of the game, including games played in tournament formats and games in which the tribe collects a fee from the player for participating, and all bets are placed in a common pool or pot from which all player winnings, prizes and direct costs are paid. As provided herein, administrative fees may be charged by the tribe against any common pool in an amount equal to any fee paid the state; provided that the tribe may seed the pool as it determines necessary from time to time;

20. "Patron" means any person who is on the premises of a gaming facility, for the purpose of playing covered games authorized by this Compact;

21. "Principal" means, with respect to any entity, its sole proprietor or any partner, trustee, beneficiary or shareholder holding five percent (5%) or more of its beneficial or controlling ownership, either directly or indirectly, or any officer, director, principal management employee, or key employee thereof;

22. "Rules and regulations" means the rules and regulations promulgated by the Tribal Compliance Agency for implementation of this Compact;

23. "Standards" means the descriptions and specifications of electronic amusement games, electronic bonanza-style bingo games and electronic instant bingo games or components thereof as set forth in Sections 11 through 18 of the State-Tribal Gaming Act as enacted in 2004 or as amended pursuant to paragraph 27 of this Part or subsection D of Part 13 of this Compact, including technical specifications for component parts, requirements for cashless transaction systems, software tools for security and audit purposes, and procedures for operation of such games;

24. "State" means the State of Oklahoma;

25. "State Compliance Agency" ("SCA") means the state agency that has the authority to carry out the state's oversight responsibilities under this Compact, which shall be the Office of State Finance or its successor agency. Nothing herein shall supplant the role or duties of the Oklahoma State Bureau of Investigation under state law. The Oklahoma Horse Racing Commission and the Oklahoma Tax Commission shall have no

role in regulating or oversight of any gaming conducted by a tribe;

26. "Tribal Compliance Agency" ("TCA") means the tribal governmental agency that has the authority to carry out the tribe's regulatory and oversight responsibilities under this Compact. Unless and until otherwise designated by the tribe, the TCA shall be the [Name of Tribe] Gaming Commission. No covered game employee may be a member or employee of the TCA. The tribe shall have the ultimate responsibility for ensuring that the TCA fulfills its responsibilities under this Compact. The members of the TCA shall be subject to background investigations and licensed to the extent required by any tribal or federal law, and in accordance with subsection B of Part 7 of this Compact. The tribe shall ensure that all TCA officers and agents are qualified for such position and receive ongoing training to obtain and maintain skills that are sufficient to carry out their responsibilities in accordance with industry standards;

27. "State-Tribal Gaming Act" means the legislation in which this Model Tribal Gaming Compact is set forth and, at the tribe's option, amendments or successor statutes thereto;

28. "Tribal law enforcement agency" means a police or security force established and maintained by the tribe pursuant to the tribe's powers of self-government to carry out law enforcement duties at or in connection with a facility; and

29. "Tribe" means the Citizen Potawatomi Nation.

Part 4. AUTHORIZATION OF COVERED GAMES

A. The tribe and state agree that the tribe is authorized to operate covered games only in accordance with this Compact. However, nothing in this Compact shall limit the tribe's right to operate any game that is Class II under IGRA and no Class II games shall be subject to the exclusivity payments set forth in Part 11 of this Compact. In the case of electronic bonanza-style bingo games, there have been disagreements between tribes and federal regulators as to whether or not such games are Class II. Without conceding that such games are Class III, the tribe has agreed to compact with the state to operate the specific type of electronic bonanza-style bingo game described in this Compact to remove any legal uncertainty as to the tribe's right to lawfully operate the game. Should the electronic bonanza-style bingo game or the electronic instant bingo game described in this act be determined to be Class II by the NIGC or a federal court, then the tribe shall have the option to operate such games outside of this Compact; provided, any obligations pursuant to subsection F of Part 11 of this Compact shall not be affected thereby.

B. A tribe shall not operate an electronic bonanza-style bingo game, an electronic instant bingo game or an electronic amusement game pursuant to this Compact until such game has been certified by an independent testing laboratory and the TCA as meeting the

standards set out in the State-Tribal Gaming Act for electronic bonanza-style bingo games, electronic instant bingo games or electronic amusement games, as applicable or any standards contained in the Oklahoma Horse Racing Commission rules issued pursuant to [subsection] B of Section 9 the State-Tribal Gaming Act that modify the standards for such games that may be conducted by organizational licensees. Provided, the tribe may rely on any certification of an electronic bonanza-style bingo game, an electronic instant bingo, or electronic amusement games by the Oklahoma Horse Racing Commission which was obtained by an organization licensee pursuant to the State-Tribal Gaming Act to establish certification compliance under this Compact. The tribe may also rely on any certification of an electronic bonanza-style bingo game, electronic instant bingo or an electronic amusement game by the TCA obtained by another tribe which has entered into the model compact to establish certification compliance under this Compact.

Part 5. RULES AND REGULATIONS; MINIMUM REQUIREMENTS FOR OPERATIONS

A. Regulations. At all times during the Term of this Compact, the tribe shall be responsible for all duties which are assigned to it, the enterprise, the facility, and the TCA under this Compact. The tribe shall promulgate any rules and regulations necessary to implement this Compact, which at a minimum shall expressly include or incorporate by reference all provisions of Part 5 and the procedural requirements of

Part 6 of this Compact. Nothing in this Compact shall be construed to affect the tribe's right to amend its rules and regulations, provided that any such amendment shall be in conformity with this Compact. The SCA may propose additional rules and regulations related to implementation of this Compact to the TCA at any time, and the TCA shall give good faith consideration to such suggestions and shall notify the SCA of its response or action with respect thereto.

B. Compliance; Internal Control Standards. All enterprises and facilities shall comply with, and all covered games approved under the procedures set forth in this Compact shall be operated in accordance with the requirements set forth in this Compact, including, but not limited to, those set forth in subsections C and D of this Part. In addition, all enterprises and facilities shall comply with tribal internal control standards that provide a level of control that equals or exceeds those set forth in the National Indian Gaming Commission's Minimum Internal Control Standards (25 C.F.R., Part 542)

C. Records. In addition to other records required to be maintained herein, the enterprise or tribe shall maintain the following records related to implementation of this Compact in permanent form and as written or entered, whether manually or by computer, and which shall be maintained by the enterprise and made available for inspection by the SCA for no less than three (3) years from the date generated:

1. A log recording all surveillance activities in the monitoring room of the facility, including, but not limited to, surveillance records kept in the normal course of enterprise operations and in accordance with industry standards; provided, notwithstanding anything to the contrary herein, surveillance records may, at the discretion of the enterprise, be destroyed if no incident has been reported within one (1) year following the date such records were made. Records, as used in this Compact, shall include video tapes and any other storage media;

2. Payout from the conduct of all covered games;

3. Maintenance logs for all covered games gaming equipment used by the enterprise;

4. Security logs as kept in the normal course of conducting and maintaining security at the facility, which at a minimum shall conform to industry practices for such reports. The security logs shall document any unusual or nonstandard activities, occurrences or events at or related to the facility or in connection with the enterprise. Each incident, without regard to materiality, shall be assigned a sequential number for each such report. At a minimum, the security logs shall consist of the following information, which shall be recorded in a reasonable fashion noting:

a. the assigned number of the incident,

b. the date of the incident,

c. the time of the incident,

d. the location of the incident,

e. the nature of the incident,

f. the identity, including identification information, of any persons involved in the incident and any known witnesses to the incident, and

g. the tribal compliance officer making the report and any other persons contributing to its preparation;

5. Books and records on all covered game activities of the enterprise shall be maintained in accordance with generally accepted accounting principles (GAAP); and

6. All documents generated in accordance with this Compact.

D. Use of Net Revenues. Net revenues that the tribe receives from covered games are to be used for any one or more of those purposes permitted under IGRA:

1. To fund tribal government operations or programs;

2. To provide for the general welfare of the tribe and its members;

3. To promote tribal economic development;

4. To donate to charitable organizations; or

5. To help fund operations of local government agencies.

E. 1. The tribe's rules and regulations shall require the enterprise at a minimum to bar persons based on their prior conduct at the facility or who, because of their criminal history or association with criminal offenders, pose a threat to the integrity of the conduct of covered games.

2. The TCA shall establish a list of the persons barred from the facility.

3. The enterprise shall employ its best efforts to exclude persons on such list from entry into its facility; provided, neither persons who are barred but gain access to the facility, nor any other person, shall have any claim against the state, the tribe or the enterprise or any other person for failing to enforce such bar.

4. Patrons who believe they may be playing covered games on a compulsive basis may request that their names be placed on the list. All covered game employees shall receive training on identifying players who have a problem with compulsive playing and shall be instructed to ask them to leave. Signs and other materials shall be readily available to direct such compulsive players to agencies where they may receive counseling.

F. Audits. 1. Consistent with 25 C.F.R., Section 571.12, Audit Standards, the TCA shall ensure that an annual independent financial audit of the enterprise's conduct of covered games subject to this Compact is secured. The audit shall, at a minimum, examine revenues and expenses in connection with the conduct of covered games in accordance with generally accepted

auditing standards and shall include, but not be limited to, those matters necessary to verify the determination of adjusted gross revenues and the basis of the payments made to the state pursuant to Part 11 of this Compact.

2. The auditor selected by the TCA shall be a firm of known and demonstrable experience, expertise and stature in conducting audits of this kind and scope.

3. The audit shall be concluded within five (5) months following the close of each calendar year, provided that extensions may be requested by the tribe and shall not be refused by the state where the circumstances justifying the extension request are beyond the tribe's control.

4. The audit of the conduct of covered games may be conducted as part of or in conjunction with the audit of the enterprise, but if so conducted shall be separately stated for the reporting purposes required herein.

5. The audit shall conform to generally accepted auditing standards. As part of the audit report, the auditor shall certify to the TCA that, in the course of the audit, the auditor discovered no matters within the scope of the audit which were determined or believed to be in violation of any provision of this Compact.

6. The enterprise shall assume all costs in connection with the audit.

7. The audit report for the conduct of covered games shall be submitted to the SCA within thirty (30) days of completion. The auditor's work papers concerning covered games shall be made available to the SCA upon request.

8. Representatives of the SCA may, upon request, meet with the auditors to discuss the work papers, the audit or any matters in connection therewith; provided, such discussions are limited to covered games information and pursue legitimate state covered games interests.

G. Rules for Play of and Prizes for Covered Games. Summaries of the rules for playing covered games and winning prizes shall be visibly displayed in the facility. Complete sets of rules shall be available in pamphlet form in the facility.

H. Supervisory Line of Authority. The enterprise shall provide the TCA and SCA with a chart of the supervisory lines of authority with respect to those directly responsible for the conduct of covered games, and shall promptly notify those agencies of any material changes thereto.

I. Sale of Alcoholic Beverages. The sale and service of alcoholic beverages in a facility shall be in compliance with state, federal, or tribal law in regard to the licensing and sale of such beverages.

J. Age Restrictions. No person who would not be eligible to be a patron of a pari-mutuel system of wagering pursuant to the provisions of subsection B of

Section 208.4 of Title 3A of the Oklahoma Statutes shall be admitted into any area in a facility where covered games are played, nor be permitted to operate, or obtain a prize from or in connection with the operation of, any covered game, directly or indirectly.

K. Destruction of Documents. Enterprise books, records and other materials documenting the conduct of covered games shall be destroyed only in accordance with rules and regulations adopted by the TCA, which at a minimum shall provide as follows:

1. Material that might be utilized in connection with a potential tort claim pursuant to Part 6 of this Compact, including, but not limited to, incident reports, surveillance records, statements, and the like, shall be maintained at least one (1) year beyond the time which a claim can be made under Part 6 of this Compact or, if a tort claim is made, beyond the final disposition of such claim;

2. Material that might be utilized in connection with a prize claim, including but not limited to incident reports, surveillance records, statements, and the like, shall be maintained at least one hundred eighty (180) days beyond the time which a claim can be made under Part 6 of this Compact or, if a prize claim is made, beyond the final disposition of such claim; and

3. Notwithstanding anything herein to the contrary, all enterprise books and records with respect to the conduct of covered games or the operation of the enterprise, including, but not limited to, all interim and final financial and audit reports and materials

related thereto which have been generated in the ordinary course of business, shall be maintained for the minimum period of three (3) years.

L. Location. The tribe may establish and operate enterprises and facilities that operate covered games only on its Indian lands as defined by IGRA. The tribe shall notify the SCA of the operation of any new facility following the effective date of this Compact. Nothing herein shall be construed as expanding or otherwise altering the term "Indian lands", as that term is defined in the IGRA, nor shall anything herein be construed as altering the federal process governing the tribal acquisition of "Indian lands" for gaming purposes.

M. Records of Covered Games. The TCA shall keep a record of, and shall report at least quarterly to the SCA, the number of covered games in each facility, by the name or type of each and its identifying number.

Part 6. TORT CLAIMS; PRIZE CLAIMS; LIMITED CONSENT TO SUIT

A. Tort Claims. The enterprise shall ensure that patrons of a facility are afforded due process in seeking and receiving just and reasonable compensation for a tort claim for personal injury or property damage against the enterprise arising out of incidents occurring at a facility, hereinafter "tort claim", as follows:

1. During the term of this Compact, the enterprise shall maintain public liability insurance for the

express purposes of covering and satisfying tort claims. The insurance shall have liability limits of not less than Two Hundred Fifty Thousand Dollars ($250,000.00) for any one person and Two Million Dollars ($2,000,000.00) for any one occurrence for personal injury, and One Million Dollars ($1,000,000.00) for any one occurrence for property damage, hereinafter the "limit of liability", or the corresponding limits under the Governmental Tort Claims Act, whichever is greater. No tort claim shall be paid, or be the subject of any award, in excess of the limit of liability;

2. The tribe consents to suit on a limited basis with respect to tort claims subject to the limitations set forth in this subsection and subsection C of this Part. No consents to suit with respect to tort claims, or as to any other claims against the tribe shall be deemed to have been made under this Compact, except as provided in subsections B and C of this Part;

3. The enterprise's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity in connection with any claim made within the limit of liability if the claim complies with the limited consent provisions of subsection C of this Part. Copies of all such insurance policies shall be forwarded to the SCA;

4. Any patron having a tort claim shall file a written tort claim notice by delivery to the enterprise or the TCA. The date the tort claim notice is filed with the enterprise or the TCA shall be deemed the official date of filing the tort claim notice. The tort claim notice

shall be filed within one (1) year of the date of the event which allegedly caused the claimed loss. Failure to file the tort claim notice during such period of time shall forever bar such tort claim; provided that a tort claim notice filed with the enterprise or the TCA more than ninety (90) days, but within one (1) year, after the event shall be deemed to be timely filed, but any judgment thereon shall be reduced by ten percent (10%).

5. If the tort claim notice is filed with the TCA, the TCA shall forward a copy of the tort claim to the enterprise and the SCA within forty-eight (48) hours of filing, and if the tort claim notice is filed with the enterprise, the enterprise shall forward a copy of the tort claim to the TCA and the SCA within forty-eight (48) hours of filing;

6. The tort claim notice shall state the date, time, place and circumstances of the incident upon which the tort claim is based, the identity of any persons known to have information regarding the incident, including employees or others involved in or who witnessed the incident, the amount of compensation and the basis for said relief; the name, address and telephone number of the claimant, and the name, address and telephone number of any representative authorized to act or settle the claim on behalf of the claimant;

7. All tort claim notices shall be signed by the claimant. The rules and regulations may additionally require that the tort claim notices be signed under oath. The rules and regulations may also require that as a condition of prosecuting tort claims, the claimant

shall appear to be interviewed or deposed at least once under reasonable circumstances, which shall include the attendance of the claimant's legal counsel if requested; provided that the enterprise shall afford claimant at least thirty (30) days' written notice of the interview or deposition; and provided further that the claimant's failure to appear without cause for any interview or deposition properly noticed pursuant to this paragraph shall be deemed a voluntary withdrawal of the tort claim;

8. The enterprise shall promptly review, investigate, and make a determination regarding the tort claim. Any portion of a tort claim which is unresolved shall be deemed denied if the enterprise fails to notify the claimant in writing of its approval within ninety (90) days of the filing date, unless the parties by written agreement extend the date by which a denial shall be deemed issued if no other action is taken. Each extension shall be for no more than ninety (90) days, but there shall be no limit on the number of written agreements for extensions, provided that no written agreement for extension shall be valid unless signed by the claimant and an authorized representative of the enterprise. The claimant and the enterprise may continue attempts to settle a claim beyond an extended date; provided, settlement negotiations shall not extend the date of denial in the absence of a written agreement for extension as required by this paragraph;

9. A judicial proceeding for any cause arising from a tort claim may be maintained in accordance

with and subject to the limitations of subsection C of this Part only if the following requirements have been met:

a. the claimant has followed all procedures required by this Part, including, without limitation, the delivery of a valid and timely written tort claim notice to the enterprise,

b. the enterprise has denied the tort claim, and

c. the claimant has filed the judicial proceeding no later than the one-hundred-eightieth day after denial of the claim by the enterprise; provided, that neither the claimant nor the enterprise may agree to extend the time to commence a judicial proceeding; and

10. Notices explaining the procedure and time limitations with respect to making a tort claim shall be prominently posted in the facility. Such notices shall explain the method and places for making a tort claim, that this procedure is the exclusive method of making a tort claim, and that claims that do not follow these procedures shall be forever barred. The enterprise shall make pamphlets containing the requirements in this subsection readily available to all patrons of the facility and shall provide such pamphlets to a claimant within five (5) days of the filing of a claim.

B. Prize Claims. The enterprise shall ensure that patrons of a facility are afforded due process in seeking and receiving just and reasonable compensation arising from a patron's dispute, in connection with his or

her play of any covered game, the amount of any prize which has been awarded, the failure to be awarded a prize, or the right to receive a refund or other compensation, hereafter "prize claim", as follows:

1. The tribe consents to suit on a limited basis with respect to prize claims against the enterprise only as set forth in subsection C of this Part; no consents to suit with respect to prize claims, or as to any other claims against the tribe shall be deemed to have been made under this Compact, except as provided in subsections A and C of this Part;

2. The maximum amount of any prize claim shall be the amount of the prize which the claimant establishes he or she was entitled to be awarded, hereafter "prize limit";

3. Any patron having a prize claim shall file a written prize claim notice by delivery to the enterprise or the TCA. The date the prize claim is filed with the enterprise or the TCA shall be deemed the official date of filing the prize claim notice. The prize claim notice shall be filed within ten (10) days of the event which is the basis of the claim. Failure to file the prize claim notice during such period of time shall forever bar such prize claim;

4. If the prize claim notice is filed with the TCA, the TCA shall forward a copy of the prize claim to the enterprise and the SCA within forty-eight (48) hours of its filing; and if the prize claim notice is filed with the enterprise, the enterprise shall forward a copy of

the tort claim to the TCA and the SCA within forty-eight (48) hours of filing;

5. The written prize claim notice shall state the date, time, place and circumstances of the incident upon which the prize claim is based, the identity of any persons known to have information regarding the incident, including employees or others involved in or who witnessed the incident, the amount demanded and the basis for said amount, the name, address and telephone number of the claimant, and the name, address and telephone number of any representative authorized to act or settle the claim on behalf of the claimant;

6. All notices of prize claims shall be signed by the claimant. The rules and regulations may additionally require that the prize claim notices be signed under oath;

7. The enterprise shall promptly review, investigate and make a determination regarding the prize claim. Claimants shall cooperate in providing information, including personal sworn statements and agreeing to be interviewed, as the enterprise shall reasonably request. The claimant is permitted to have counsel present during any such interview;

8. If the prize claim is not resolved within seventy-two (72) hours from the time of filing the claim in accordance with paragraph 5 of this subsection, the TCA shall immediately notify the SCA in writing that the claim has not been resolved;

9. In the event the claim is resolved, the TCA shall not be obligated to report that fact to the SCA, but shall make TCA reports available for review;

10. Any portion of a prize claim which is unresolved shall be deemed denied if the enterprise fails to notify the claimant in writing of its approval within thirty (30) days of the filing date, unless the parties agree by written agreement to extend the date. Each extension shall be for no more than thirty (30) days, but there shall be no limit on the number of written agreements for extensions; provided, that no written agreements for extension shall be valid unless signed by the claimant and an authorized representative of the TCA. The claimant and the enterprise may continue attempts to settle a claim beyond an extended date; provided, settlement negotiations shall not extend the date of denial in the absence of a written extension required by this paragraph;

11. A judicial proceeding for any cause arising from a prize claim may be maintained in accordance with and subject to the limitations of subsection C of this Part only if the following requirements have been met:

a. the claimant has followed all procedures required by this Part, including without limitation, the delivery of a valid and timely written prize claim notice to the enterprise,

b. the enterprise has denied the prize claim, and

c. the claimant has filed the judicial proceeding no later than one hundred eighty (180) days after denial of the claim by the enterprise; provided that neither the claimant nor the enterprise may extend the time to commence a judicial proceeding; and

12. Notices explaining the procedure and time limitations with respect to making a prize claim shall be prominently posted in the facility. Such notices shall explain the method and places for making claims, that this procedure is the exclusive method of making a prize claim, and that claims that do not follow this procedure shall be forever barred. The enterprise shall make pamphlets containing the requirements in this subsection readily available to all patrons of the facility and shall provide such pamphlets to a claimant by the TCA within five (5) days of the filing date of a claim.

C. Limited Consent to Suit for Tort Claims and Prize Claims.

The tribe consents to suit against the enterprise in a court of competent jurisdiction with respect to a tort claim or prize claim if all requirements of paragraph 9 of subsection A or all requirements of paragraph 11 of subsection B of this Part have been met; provided that such consent shall be subject to the following additional conditions and limitations:

1. For tort claims, consent to suit is granted only to the extent such claim or any award or judgment

rendered thereon does not exceed the limit of liability. Under no circumstances shall any consent to suit be effective as to any award which exceeds such applicable amounts. This consent shall only extend to the patron actually claiming to have been injured. A tort claim shall not be assignable. In the event any assignment of the tort claim is made in violation of this Compact, or any person other than the patron claiming the injury becomes a party to any action hereunder, this consent shall be deemed revoked for all purposes. Notwithstanding the foregoing, consent to suit shall not be revoked if an action on a tort claim is filed by (i) a court appointed representative of a claimant's estate, (ii) an indispensable party, or (iii) a health provider or other party subrogated to the claimant's rights by virtue of any insurance policy; provided, that nothing herein is intended to, or shall constitute a consent to suit against the enterprise as to such party except to the extent such party's claim is:

a. in lieu of and identical to the claim that would have been made by the claimant directly but for the appointment of said representative or indispensable party, and participation of such other party is in lieu of and not in addition to pursuit of the claim by the patron, and

b. the claim of such other party would have been subject to a consent to suit hereunder if it had been made by the claimant directly; and

2. For prize claims, consent is granted only to the extent such claim does not exceed the prize limit.

Under no circumstances shall any award exceed the prize limit. This consent shall only extend to the patron actually claiming to have engaged in the play of a covered game on which the claim is based. Prize claims shall not be assignable. In the event any assignment of the prize claim is made, or any person other than the claimant entitled to make the claim becomes a party to any action hereunder, this consent shall be deemed revoked for all purposes. Notwithstanding the foregoing, consent to suit shall not be revoked if an action on a prize claim is filed by (i) a court-appointed representative of a claimant's estate, or (ii) an indispensable party, provided that nothing herein is intended to, or shall constitute a consent to suit against the enterprise as to such party except to the extent such party's claim is:

a. in lieu of and identical to the claim that would have been made by the claimant directly but for the appointment of said representative or indispensable party, and participation of such other party is in lieu of and not in addition to pursuit of the claim by the patron, and

b. the claim of such other party would have been subject to a consent to suit hereunder if it had been made by the claimant directly.

D. Remedies in the Event of No or Inadequate Insurance for Tort Claim. In the event a tort claim is made and there is no, or inadequate, insurance in effect as required under this Compact, the enterprise shall be deemed to be in default hereunder unless,

within ten (10) days of a demand by the SCA or a claimant to do so, the enterprise has posted in an irrevocable escrow account at a state or federally chartered bank which is not owned or controlled by the tribe, sufficient cash, a bond or other security sufficient to cover any award that might be made within the limits set forth in paragraph 1 of subsection A of this Part, and informs the claimant and the state of:

1. The posting of the cash or bond;

2. The means by which the deposit can be independently verified as to the amount and the fact that it is irrevocable until the matter is finally resolved;

3. The right of the claimant to have this claim satisfied from the deposit if the claimant is successful on the claim; and

4. The notice and hearing opportunities in accordance with the tribe's tort law, if any, otherwise in accordance with principles of due process, which will be afforded to the claimant so that the intent of this Compact to provide claimants with a meaningful opportunity to seek a just remedy under fair conditions will be fulfilled.

Part 7. ENFORCEMENT OF COMPACT PROVISIONS

A. The tribe and TCA shall be responsible for regulating activities pursuant to this Compact. As part of its responsibilities, the tribe shall require the enterprise do the following:

1. Operate the conduct of covered games in compliance with this Compact, including, but not limited to, the standards and the tribe's rules and regulations;

2. Take reasonable measures to assure the physical safety of enterprise patrons and personnel, prevent illegal activity at the facility, and protect any rights of patrons under the Indian Civil Rights Act, 25 U.S.C., Sec. 1302-1303;

3. Promptly notify appropriate law enforcement authorities of persons who may be involved in illegal acts in accordance with applicable law;

4. Assure that the construction and maintenance of the facility meets or exceeds federal and tribal standards for comparable buildings; and

5. Prepare adequate emergency access plans to ensure the health and safety of all covered game patrons. Upon the finalization of emergency access plans, the TCA or enterprise shall forward copies of such plans to the SCA.

B. All licenses for members and employees of the TCA shall be issued according to the same standards and terms applicable to facility employees. The TCA shall employ qualified compliance officers under the authority of the TCA. The compliance officers shall be independent of the enterprise, and shall be supervised and accountable only to the TCA. A TCA compliance officer shall be available to the facility during all hours of operation upon reasonable notice, and shall have immediate access to any and all areas of the facility for

the purpose of ensuring compliance with the provisions of this Compact. The TCA shall investigate any such suspected or reported violation of this Compact and shall require the enterprise to correct such violations. The TCA shall officially enter into its files timely written reports of investigations and any action taken thereon, and shall forward copies of such reports to the SCA within fifteen (15) days of such filing. Any such violations shall be reported immediately to the TCA, and the TCA shall immediately forward the same to the SCA. In addition, the TCA shall promptly report to the SCA any such violations which it independently discovers.

C. In order to develop and foster a positive and effective relationship in the enforcement of the provisions of this Compact, representatives of the TCA and the SCA shall meet, not less than on an annual basis, to review past practices and examine methods to improve the regulatory scheme created by this Compact. The meetings shall take place at a location mutually agreed to by the TCA and the SCA. The SCA, prior to or during such meetings, shall disclose to the TCA any concerns, suspected activities, or pending matters reasonably believed to possibly constitute violations of this Compact by any person, organization or entity, if such disclosure will not compromise the interest sought to be protected.

Part 8. STATE MONITORING OF COMPACT

A. The SCA shall, pursuant to the provisions of this Compact, have the authority to monitor the conduct of covered games to ensure that the covered games are conducted in compliance with the provisions of this Compact. In order to properly monitor the conduct of covered games, agents of the SCA shall have reasonable access to all areas of the facility related to the conduct of covered games as provided herein:

1. Access to the facility by the SCA shall be during the facility's normal operating hours only; provided that to the extent such inspections are limited to areas of the facility where the public is normally permitted, SCA agents may inspect the facility without giving prior notice to the enterprise;

2. Any suspected or claimed violations of this Compact or of law shall be directed in writing to the TCA; SCA agents shall not interfere with the functioning of the enterprise; and

3. Before SCA agents enter any nonpublic area of the facility, they shall provide proper photographic identification to the TCA. SCA agents shall be accompanied in nonpublic areas of the facility by a TCA agent. A one-hour notice by SCA to the TCA may be required to assure that a TCA officer is available to accompany SCA agents at all times.

B. Subject to the provisions herein, agents of the SCA shall have the right to review and copy documents of the enterprise related to its conduct of covered

games. The review and copying of such documents shall be during normal business hours or hours otherwise at tribe's discretion. However, the SCA shall not be permitted to copy those portions of any documents of the enterprise related to its conduct of covered games that contain business or marketing strategies or other proprietary and confidential information of the enterprise, including, but not limited to, customer lists, business plans, advertising programs, marketing studies, and customer demographics or profiles. No documents of the enterprise related to its conduct of covered games or copies thereof shall be released to the public by the state under any circumstances. All such documents shall be deemed confidential documents owned by the tribe and shall not be subject to public release by the state.

C. At the completion of any SCA inspection or investigation, the SCA shall forward a written report thereof to the TCA. The TCA shall be apprised on a timely basis of all pertinent, nonconfidential information regarding any violation of federal, state, or tribal laws, the rules or regulations, or this Compact. Nothing herein prevents the SCA from contacting tribal or federal law enforcement authorities for suspected criminal wrongdoing involving the TCA. TCA may interview SCA inspectors upon reasonable notice and examine work papers and SCA in the same fashion that SCA inspectors may examine auditors' notes and make auditor inquiry unless providing such information to the TCA will compromise the interests sought to be protected. If the SCA determines that providing the

information to the TCA will compromise the interests sought to be protected, then the SCA shall provide such information to the tribe in accordance with Part 13 of this Compact.

D. Nothing in this Compact shall be deemed to authorize the state to regulate the tribe's government, including the TCA, or to interfere in any way with the tribe's selection of its governmental officers, including members of the TCA; provided, however, the SCA and the tribe, upon request of the tribe, shall jointly employ, at the tribe's expense, an independent firm to perform on behalf of the SCA the duties set forth in subsections A and B of this Part.

Part 9. JURISDICTION

This Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction.

Part 10. LICENSING

A. 1. Except as provided in paragraph 4 of Part 3, no covered game employee shall be employed at a facility or by an enterprise unless such person is licensed in accordance with this Compact. In addition to the provisions of this Part which are applicable to the licensing of all covered game employees, the requirements of 25 C.F.R., Part 556, Background Investigations for Primary Management Officials and Key Employees, and 25 C.F.R., Part 558, Gaming Licenses for Key Employees and Primary Management Officials, apply to

Key Employees and Primary Management Officials of the facility and enterprise.

2. All prospective covered game employees shall apply to the TCA for a license. Licenses shall be issued for periods of no more than two (2) years, after which they may be renewed only following review and update of the information upon which the license was based; provided, the TCA may extend the period in which the license is valid for a reasonable time pending the outcome of any investigation being conducted in connection with the renewal of such license. In the event the SCA contends that any such extension is unreasonable, it may seek resolution of that issue pursuant to Part [11 of this Compact.]

3. The application process shall require the TCA to obtain sufficient information and identification from the applicant to permit a background investigation to determine if a license should be issued in accordance with this Part and the rules and regulations. The TCA shall obtain information about a prospective covered game employee that includes:

a. full name, including any aliases by which applicant has ever been known,

b. social security number,

c. date and place of birth,

d. residential addresses for the past five (5) years,

e. employment history for the past five (5) years,

f. driver license number,

g. all licenses issued and disciplinary charges filed, whether or not discipline was imposed, by any state or tribal regulatory authority,

h. all criminal arrests and proceedings, except for minor traffic offenses, to which the applicant has been a party,

i. a set of fingerprints,

j. a current photograph,

k. military service history, and

l. any other information the TCA determines is necessary to conduct a thorough background investigation.

4. Upon obtaining the required initial information from a prospective covered game employee, the TCA shall forward a copy of such information to the SCA, along with any determinations made with respect to the issuance or denial of a temporary or permanent license. The SCA may conduct its own background investigation of the applicant at SCA expense, shall notify the TCA of such investigation within a reasonable time from initiation of the investigation, and shall provide a written report to the TCA of the outcome of such investigation within a reasonable time from the receipt of a request from the TCA for such information. SCA inspector field notes and the SCA inspector shall

be available upon reasonable notice for TCA review and inquiry.

5. The TCA may issue a temporary license for a period not to exceed ninety (90) days, and the enterprise may employ on a probationary basis, any prospective covered game employee who represents in writing that he or she meets the standards set forth in this Part, provided the TCA or enterprise is not in possession of information to the contrary. The temporary license shall expire at the end of the ninety-day period or upon issuance or denial of a permanent license, whichever event occurs first. Provided that the temporary license period may be extended at the discretion of the TCA so long as good faith efforts are being made by the applicant to provide required information, or the TCA is continuing to conduct its investigation or is waiting on information from others, and provided further that in the course of such temporary or extended temporary licensing period, no information has come to the attention of the TCA which, in the absence of countervailing information then in the record, would otherwise require denial of license. A permanent license shall be issued or denied within a reasonable time following the completion of the applicant's background investigation.

6. In covered gaming the tribe shall not employ and shall terminate, and the TCA shall not license and shall revoke a license previously issued to, any covered game employee who:

a. has been convicted of any felony or an offense related to any covered games or other gaming activity,

b. has knowingly and willfully provided false material, statements or information on his or her employment application, or

c. is a person whose prior activities, criminal record, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of the conduct of covered games, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of covered games or the carrying on of the business and financial arrangements incidental thereto.

7. The SCA may object to the employment of any individual by the enterprise based upon the criteria set forth in paragraph 6 of subsection A of this Part. Such objection shall be in writing setting forth the basis of the objection. The SCA inspector's work papers, notes and exhibits which formed the SCA conclusion shall be available upon reasonable notice for TCA review. The enterprise shall have discretion to employ an individual over the objection of the SCA.

8. The TCA shall have the discretion to initiate or continue a background investigation of any licensee or license applicant and to take appropriate action with respect to the issuance or continued validity of any license at any time, including suspending or revoking such license.

9. The TCA shall require all covered game employees to wear, in plain view, identification cards issued by the TCA which include a photograph of the employee, his or her first name, a four-digit identification number unique to the license issued to the employee, a tribal seal or signature verifying official issuance of the card, and a date of expiration, which shall not extend beyond such employee's license expiration date.

B. 1. Any person or entity who, directly or indirectly, provides or is likely to provide at least Twenty-five Thousand Dollars ($25,000.00) in goods or services to the enterprise in any twelve-month period, or who has received at least Twenty-five Thousand Dollars ($25,000.00) for goods or services provided to the enterprise in any consecutive twelve-month period within the immediately preceding twenty-four-month period, or any person or entity who provides through sale, lease, rental or otherwise covered games, or parts, maintenance or service in connection therewith to the tribe or the enterprise at any time and in any amount, shall be licensed by the TCA prior to the provision thereof. Provided, that attorneys or certified public accountants and their firms shall be exempt from the licensing requirement herein to the extent that they are providing services covered by their professional licenses.

2. Background investigations and licensing shall follow the same process and apply the same criteria as for covered game employees set forth in paragraph 6 of subsection A of this Part.

3. In the case of a license application of any entity, all principals thereof shall be subjected to the same background investigation required for the licensing of a covered game employee, but no license as such need be issued; provided, no license shall be issued to the entity if the TCA determines that one or more of its principals will be persons who would not be qualified to receive a license if they applied as covered game employees.

4. Nothing herein shall prohibit the TCA from processing and issuing a license to a principal in his or her own name.

5. Licenses issued under this subsection shall be reviewed at least every two (2) years for continuing compliance, and shall be promptly revoked if the licensee is determined to be in violation of the standards set forth in paragraph 6 of subsection A of this Part. In connection with such a review, the TCA shall require the person or entity to update all information provided in the previous application.

6. The enterprise shall not enter into, or continue to make payments pursuant to, any contract or agreement for the provision of goods or services with any person or entity who does not meet the requirements of this Part including, but not limited to, any person or entity whose application to the TCA for a license has been denied, or whose license has expired or been suspended or revoked.

7. Pursuant to 25 C.F.R., Part 533, all management contracts must be approved by the Chair of the

National Indian Gaming Commission. The SCA shall be notified promptly after any such approval.

8. In addition to any licensing criteria set forth above, if any person or entity seeking licensing under this subsection is to receive any fee or other payment based on the revenues or profits of the enterprise, the TCA may take into account whether or not such fee or other payment is fair in light of market conditions and practices.

C. 1. Subject to the exceptions set forth in paragraph 4 of this subsection, any person or entity extending financing, directly or indirectly, to the facility or enterprise in excess of Fifty Thousand Dollars ($50,000.00) in any twelve-month period shall be licensed prior to providing such financing. Principals thereof shall be subjected to background investigations and determinations in accordance with the procedures and standards set forth in subsection A of this Part. Licenses issued under this section shall be reviewed at least every two (2) years for continuing compliance, and shall be promptly revoked if the licensee is determined to be in violation of the standards set forth in paragraph 6 of subsection A of this Part. In connection with such a review, the TCA shall require the person or entity to update all information provided in the previous application.

2. The SCA shall be notified of all financing and loan transactions with respect to covered games or supplies in which the amount exceeds Fifty Thousand Dollars ($50,000.00) in any twelve-month period, and

shall be entitled to review copies of all agreements and documents in connection therewith.

3. A supplier of goods or services who provides financing exclusively in connection with the sale or lease of covered games equipment or supplies shall be licensed solely in accordance with licensing procedures applicable, if at all, to such suppliers herein.

4. Financing provided by a federally regulated or state-regulated bank, savings and loan, or trust, or other federally or state-regulated lending institution; any agency of the federal, state, tribal or local government; or any person or entity, including, but not limited to, an institutional investor who, alone or in conjunction with others, lends money through publicly or commercially traded bonds or other commercially traded instruments, including but not limited to the holders of such bonds or instruments or their assignees or transferees, or which bonds or commercially traded instruments are underwritten by any entity whose shares are publicly traded or which underwriter, at the time of the underwriting, has assets in excess of One Hundred Million Dollars ($100,000,000.00), shall be exempt from the licensing and background investigation requirements in subsection B of this Part or this subsection.

D. In the event the SCA objects to a lender, vendor or any other person or entity within subsection B or C of this Part seeking to do business with the enterprise, or to the continued holding of a license by such person or entity, it may notify the TCA of its objection.

The notice shall set forth the basis of the objection with sufficient particularity to enable the TCA to investigate the basis of the objection. The SCA inspector and SCA inspector field notes shall be available for TCA review and inquiry. Within a reasonable time after such notification, the TCA shall report to the SCA on the outcome of its investigation and of any action taken or decision not to take action.

Part 11. EXCLUSIVITY AND FEES

A. The parties acknowledge and recognize that this Compact provides tribes with substantial exclusivity and, consistent with the goals of IGRA, special opportunities for tribal economic opportunity through gaming within the external boundaries of Oklahoma in respect to the covered games. In consideration thereof, so long as the state does not change its laws after the effective date of this Compact to permit the operation of any additional form of gaming by any such organization licensee, or change its laws to permit any additional electronic or machine gaming within Oklahoma, the tribe agrees to pay the following fees:

1. The tribe covenants and agrees to pay to the state a fee derived from covered game revenues calculated as set forth in paragraph 2 of this subsection. Such fee shall be paid no later than the twentieth day of the month for revenues received by the tribe in the preceding month; and

2. The fee shall be:

a. four percent (4%) of the first Ten Million Dollars ($10,000,000.00) of adjusted gross revenues received by a tribe in a calendar year from the play of electronic amusement games, electronic bonanza-style bingo games and electronic instant bingo games,

b. five percent (5%) of the next Ten Million Dollars ($10,000,000.00) of adjusted gross revenues received by a tribe in a calendar year from the play of electronic amusement games, electronic bonanza-style bingo games and electronic instant bingo games,

c. six percent (6%) of all subsequent adjusted gross revenues received by a tribe in a calendar year from the play of electronic amusement games, electronic bonanza-style bingo games and electronic instant bingo games, and

d. ten percent (10%) of the monthly net win of the common pool(s) or pot(s) from which prizes are paid for nonhouse-banked card games. The tribe is entitled to keep an amount equal to state payments from the common pool(s) or pot(s) as part of its cost of operating the games.

Payments of such fees shall be made to the Treasurer of the State of Oklahoma. Nothing herein shall require the allocation of such fees to particular state purposes, including, but not limited to, the actual costs of performing the state's regulatory responsibilities hereunder.

B. Annual oversight assessment. In addition to the fee provided for in subsection A of this Part, the state shall be entitled to payment for its costs incurred in connection with the oversight of covered games to the extent provided herein, "annual oversight assessment". The annual oversight assessment, which shall be Thirty-five Thousand Dollars ($35,000.00), shall be determined and paid in advance on a fiscal year basis for each twelve (12) months ending on June 30 of each year.

C. Upon the effective date of this Compact, the tribe shall deposit with the SCA the sum of Fifty Thousand Dollars ($50,000.00) ("start-up assessment"). The purpose of the start-up assessment shall be to assist the state in initiating its administrative and oversight responsibilities hereunder and shall be a one-time payment to the state for such purposes.

D. Nothing in this Compact shall be deemed to authorize the state to impose any tax, fee, charge or assessment upon the tribe or enterprise except as expressly authorized pursuant to this Compact; provided that, to the extent that the tribe is required under federal law to report prizes awarded, the tribe agrees to copy such reports to the SCA.

E. In consideration for the covenants and agreements contained herein, the state agrees that it will not, during the term of this Compact, permit the nontribal operation of any machines or devices to play covered games or electronic or mechanical gaming devices otherwise presently prohibited by law within the

state in excess of the number and outside of the designated locations authorized by the State-Tribal Gaming Act. The state recognizes the importance of this provision to the tribe and agrees, in the event of a breach of this provision by the state, to require any nontribal entity which operates any such devices or machines in excess of such number or outside of the designated location to remit to the state at least quarterly no less than fifty percent (50%) of any increase in the entities' adjusted gross revenues following the addition of such excess machines. The state further agrees to remit at least quarterly to eligible tribes, as liquidated damages, a sum equal to fifty percent (50%) of any increase in the entities' adjusted gross revenues following the addition of such excess machines. For purposes of this Part, "eligible tribes" means those tribes which have entered into this Compact and are operating gaming pursuant to this Compact within forty-five (45) miles of an entity which is operating covered game machines in excess of the number authorized by, or outside of the location designated by, the State-Tribal Gaming Act. Such liquidated damages shall be allocated pro rata to eligible tribes based on the number of covered game machines operated by each Eligible Tribe in the time period when such adjusted gross revenues were generated.

F. In consideration for the covenants and agreements contained herein, the tribe agrees that in the event it has currently or locates in the future a facility within a radius of twenty (20) miles from a recipient licensee as that term is defined in subsection K of

Section 4 of the State-Tribal Gaming Act that it shall comply with the requirements of subsection K of Section 4 of the State-Tribal Gaming Act.

Part 12. DISPUTE RESOLUTION

In the event that either party to this Compact believes that the other party has failed to comply with any requirement of this Compact, or in the event of any dispute hereunder, including, but not limited to, a dispute over the proper interpretation of the terms and conditions of this Compact, the following procedures may be invoked:

1. The goal of the parties shall be to resolve all disputes amicably and voluntarily whenever possible. A party asserting noncompliance or seeking an interpretation of this Compact first shall serve written notice on the other party. The notice shall identify the specific Compact provision alleged to have been violated or in dispute and shall specify in detail the asserting party's contention and any factual basis for the claim. Representatives of the tribe and state shall meet within thirty (30) days of receipt of notice in an effort to resolve the dispute;

2. Subject to the limitation set forth in paragraph 3 of this Part, either party may refer a dispute arising under this Compact to arbitration under the rules of the American Arbitration Association (AAA), subject to enforcement or pursuant to review as provided by paragraph 3 of this Part by a federal district court. The remedies available through arbitration are

limited to enforcement of the provisions of this Compact. The parties consent to the jurisdiction of such arbitration forum and court for such limited purposes and no other, and each waives immunity with respect thereto. One arbitrator shall be chosen by the parties from a list of qualified arbitrators to be provided by the AAA. If the parties cannot agree on an arbitrator, then the arbitrator shall be named by the AAA. The expenses of arbitration shall be borne equally by the parties.

A party asserting noncompliance or seeking an interpretation of this Compact under this section shall be deemed to have certified that to the best of the party's knowledge, information, and belief formed after reasonable inquiry, the claim of noncompliance or the request for interpretation of this Compact is warranted and made in good faith and not for any improper purpose, such as to harass or to cause unnecessary delay or the needless incurring of the cost of resolving the dispute. If the dispute is found to have been initiated in violation of this Part, the Arbitrator, upon request or upon his or her own initiative, shall impose upon the violating party an appropriate sanction, which may include an award to the other party of its reasonable expenses incurred in having to participate in the arbitration; and

3. Notwithstanding any provision of law, either party to the Compact may bring an action against the other in a federal district court for the de novo review of any arbitration award under paragraph 2 of this Part. The decision of the court shall be subject to

appeal. Each of the parties hereto waives immunity and consents to suit therein for such limited purposes, and agrees not to raise the Eleventh Amendment to the United States Constitution or comparable defense to the validity of such waiver.

Nothing herein shall be construed to authorize a money judgment other than for damages for failure to comply with an arbitration decision requiring the payment of monies.

Part 13. CONSTRUCTION OF COMPACT; FEDERAL APPROVAL

A. Each provision, section, and subsection of this Compact shall stand separate and independent of every other provision, section, or subsection. In the event that a federal district court shall find any provision, section, or subsection of this Compact to be invalid, the remaining provisions, sections, and subsections of this Compact shall remain in full force and effect, unless the invalidated provision, section or subsection is material.

B. Each party hereto agrees to defend the validity of this Compact and the legislation in which it is embodied. This Compact shall constitute a binding agreement between the parties and shall survive any repeal or amendment of the State-Tribal Gaming Act.

C. The parties shall cooperate in seeking approval of this Compact from an appropriate federal

agency as a tribal-state compact under the Indian Gaming Regulatory Act.

D. The standards for electronic bonanza-style bingo games, electronic instant bingo games and electronic amusement games established in the State-Tribal Gaming Act as enacted in 2004, and, at the election of the tribe, any standards contained in the Oklahoma Horseracing Commission rules issued pursuant to subsection B of Section 9 of the State-Tribal Gaming Act are hereby incorporated in this Compact and shall survive any repeal of the State-Tribal Gaming Act, or any games authorized thereunder. In the event that any of said standards are changed by amendment of the State-Tribal Gaming Act, the tribe shall have the option to incorporate said changes into this Compact by delivery of written notice of said changes to the Governor and the SCA.

Part 14. NOTICES

All notices required under this Compact shall be given by certified mail, return receipt requested, commercial overnight courier service, or personal delivery, to the following persons:

Governor

Chair, State-Tribal Relations Committee

Attorney General

John A. Barrett
Citizen Potawatomi Nation
1601 S. Gordon Cooper Drive
Shawnee Oklahoma
74801

With copies to:

_____

_____

Part 15. DURATION AND NEGOTIATION

A. This Compact shall become effective upon the last date of the satisfaction of the following requirements:

1. Due execution on behalf of the tribe, including obtaining all tribal resolutions and completing other tribal procedures as may be necessary to render the tribe's execution effective;

2. Approval of this Compact by the Secretary of the Interior as a tribal-state compact within the meaning of IGRA and publication in the Federal Register or satisfaction of any other requirement of federal law; and

3. Payment of the start-up assessment provided for in subsection C of Part 11 of this Compact.

B. This Compact shall have a term which will expire on January 1, 2020, and at that time, if organization licensees or others are authorized to conduct electronic gaming in any form other than pari-mutuel

wagering on live horse racing pursuant to any governmental action of the state or court order following the effective date of this Compact, the Compact shall automatically renew for successive additional fifteen-year terms; provided that, within one hundred eighty (180) days of the expiration of this Compact or any renewal thereof, either the tribe or the state, acting through its Governor, may request to renegotiate the terms of subsections A and E of Part 11 of this Compact.

C. This Compact 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.

D. This Compact may be terminated by state upon thirty (30) days' prior written notice to the tribe in the event of either (1) a material breach by the tribe of the terms of a tobacco Compact with the state as evidenced by a final determination of material breach from the dispute resolution forum agreed upon therein, including exhaustion of all available appellate remedies therefrom, or (2) the tribe's failure to comply with the provisions of Section 346 et seq. of Title 68 of the Oklahoma Statutes, provided that the tribe may cure either default within the thirty-day notice period, or within such additional period as may be reasonably required to cure the default, in order to preserve continuation of this Compact.

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 state's authority under IGRA.

Part 16. AUTHORITY TO EXECUTE

This Compact, as an enactment of the people of Oklahoma, is deemed approved by the State of Oklahoma. No further action by the state or any state official is necessary for this Compact to take effect upon approval by the Secretary of the Interior and publication in the Federal Register. The undersigned tribal official(s) represents that he or she is duly authorized and has the authority to execute this Compact on behalf of the tribe for whom he or she is signing.

APPROVED:

Citizen Potawatomi Nation

/s/ John A. Barrett, Jr. Date: 11-30-04
John A. Barrett, Jr.
Chairman

Deemed Approved
Jan 16, 2005."

MATERIAL ESSENTIAL TO
UNDERSTAND THE PETITION

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION

CITIZEN POTAWATOMI NATION, a federally-recognized Indian Tribe, Claimant, -vs- THE STATE OF OKLAHOMA, Respondent.	)	AAA Case No. 01-15-0003-3452

TRANSCRIPT OF PROCEEDINGS

HAD ON FEBRUARY 16, 2016

IN OKLAHOMA CITY, OKLAHOMA

* * *

Testimony of Gubernatorial General Counsel Steve Mullins

[160] "Q. If it says the State can demand whatever it wants in return for alcoholic beverage licenses, would – would that be consistent with what you believe to be true?

A. I think that's true. I think that the State can, by statute, outline the specific requirements for a

liquor license, for example. And I believe it has to be uniformly applied. And I think that's what I said.

Q. And so you believe that the State of Oklahoma can apply all of those same requirements for a liquor license not involved with the gaming compact facility in the same way within a gaming compact facility?

A. I believe that there is no restriction to applying Oklahoma law in an Indian gaming facility at this time. We could compact around it, but we have not.

* * *

[161] Q. So is it your testimony, then, that you believe the State of Oklahoma has legal authority to establish as a condition to being able to provide a Class III gaming service at a compact facility, that the Nation collect and remit and report sales taxes – and have a sales tax license as a condition?

A. I believe it could be a condition, yes.

Q. Okay. Well, isn't that the condition that the State is trying to enforce in the Oklahoma Tax Commission proceeding?

A. The Oklahoma Tax Commission proceeding, as I understand it, wasn't to enforce collection. It was to enforce compliance with regulatory framework. I don't believe Oklahoma has ever [162] sought to compel the payment of taxes, if that's what you're asking.

Q. But they are requiring the Nation to comply with the reporting requirements.

A. That's correct."

* * *

Testimony of Joseph P. Kalt. Ph.D.

[204] So beginning in 1975 with that drive toward shifting governmental functions to tribes, the federal government has been on a quite consistent path in which it is seeking to fulfill its trust responsibilities to tribes by letting the tribes hold the reins of self-government in order to hopefully make better decisions and begin to move tribes both culturally, economically, politically forward under their own decision-making as tribal nations under self-[205]rules of self-governance.

* * *

[207] And these were recognized as the ways by which these tribes could begin to boot-strap themselves and add to whatever federal dollars might be available. And many tribes – and Citizen Potawatomi is extremely well known, actually, for its going well beyond its provision of services and performance of governmental functions than what would have been allowed by just the level of federal funding.

* * *

[218] But, also, I believe the evidence I talk about in my report is clear that, in fact, the State of Oklahoma does not have any uncompensated burdens.

In fact, it's benefiting from having a wealthy neighbor – or getting wealthier neighbor that is producing its own GDP now, the Citizen Potawatomi Nation, that benefits the State of Oklahoma. And there's no evidence that I can find that indicates that the State is suffering some [219] uncompensated burden as a result of the tribe's success in developing its own economy.

* * *

[229] It generates 250 million dollars spending by the Citizen Potawatomi Nation will generate about 500 million dollars, little more than 500 million dollars, of economic activity overall in the region. Well, that level of economic activity will far outweigh any uncompensated burden that we could imagine.

It's implausible to imagine that there's, you know, quarter of a million – quarter of a billion or half a billion dollars' worth of uncompensated burden."

* * *

AMERICAN ARBITRATION ASSOCIATION

COMMERCIAL ARBITRATION

CITIZEN POTAWATOMI NATION, a federally recognized Indian Tribe,	)	
Plaintiff,	)	AAA Case No. 01-15-0003-3452
vs.	)	
THE STATE OF OKLAHOMA,	)	
Respondent.	)	

TRANSCRIPT OF PROCEEDINGS

HAD ON FEBRUARY 17, 2016

IN OKLAHOMA CITY, OKLAHOMA

* * *

Testimony of Gov. Bradford Henry

[333] A It was agreed by the parties that any disputes under the compact, relating to compacted facilities, would be resolved through arbitration.

Q And why was that method of dispute resolution adopted?

A To the best of my recollection, I think it was maybe a couple of reasons: Number one, arbitration is generally less expensive and cumbersome than litigation, and you can get to a resolution quicker; number two, there were concerns about maintaining the sovereignty of both sides, the state's and the tribe's. And the

tribes obviously didn't want the state trying to pull them into state court to resolve claims. And it was decided that arbitration was – was the best way to maintain the – the sovereign immunity on – on both sides.

* * *

[334] Q Did you have any understanding that the provision in 5(I) could be used by the state as leverage to coerce a tribe to comply with state laws, which had no direct relationship to the regulation of the sale of alcoholic beverages?

* * *

A Well, I mean – as best I recall, the real concern that we had at the time was to ensure that minors had no access to alcohol. There was a great [335] concern in the legislature, and as you might imagine, opponents of the – the model compact were claiming that 18-year-olds who can gamble would be drinking at these facilities. And that was the primary concern, that I recall.

There may have been other concerns discussed in – among parties, but that's the primary concern that I recall with this, not – I don't think it was ever discussed that this provision would be used as leverage to enforce other laws outside of this compact. And I, frankly, don't think that was the intent.

* * *

Q Was there any intent to use the provision of 5(i) in the compact to force the tribes into collecting, remitting or reporting on state sales taxes in compact facilities?

A To the best of my knowledge, I don't believe so. That was not my intent. And these negotiations were very delicate. And the state needed this compact. We wanted to, [336] for the first time in state history, to have a cut of the gaming revenues that were growing exponentially in our state. And, you know, the last thing we would have wanted to do, in my opinion, is to try to backdoor in some language to require these tribes, that we're trying to get a deal with, to pay other taxes that they weren't paying"

* * *

State/Appellant's Brief in the United States Court of Appeals for the Tenth Circuit (Sept. 19, 2016)(p. 20)

* * *

"The text of the arbitration agreement conditions the availability of arbitration on de novo judicial review, and it contains sovereign immunity waivers that would not be effective without de novo review."

* * *
