OFFICE OF THE GOVERNOR
The Chickasaw Nation
Post Office Box 1548 • Ada, Oklahoma 74821
(580) 436-2603 • Fax (580) 436-4287
http://www.chickasaw.net

BILL ANOATUBBY
GOVERNOR

November 6, 2023

The Honorable Charles McCall, Speaker
Oklahoma House of Representatives
2300 North Lincoln Boulevard, Room 401
Oklahoma City, OK 73105

Dear Speaker McCall:

We appreciate the invitation to participate in the interim study being conducted by the Oklahoma House of Representatives. Included with this letter is the written analysis and comments of the Chickasaw Nation regarding tribal-state compacting in Oklahoma.

We look forward to continuing our work together, in service to our communities and our citizens.

Sincerely,

Bill Anoatubby

Bill Anoatubby, Governor
The Chickasaw Nation

Oklahoma House of Representatives Interim Study No. 23-094

State-Tribal Compacts: A study on the number and variety of compacts with the State of Oklahoma, the current state of the various compacts, and compacting authority

Analysis and Comments of the Chickasaw Nation
Regarding Tribal-State Compacting in Oklahoma
(November 7, 2023)

I. Introduction

We appreciate the Oklahoma House of Representative's conducting this interim study and for inviting us to participate. Intergovernmental compacts have served State and Tribal nation governments well and merit the Oklahoma Legislature's thoughtful attention. We offer this report to supplement the comments Governor Bill Anoatubby and Special Counsel Stephen Greetham offered during the study hearing so that we might more fully explore four topics:

- The ***legal foundation of our intergovernmental relations***—namely, the United States Constitution, our treaties with the United States, and Congress's enactment authorizing Oklahoma's entry to the Union (*see* Part III.A., p.3);
- The ***role of Tribal-State compacting*** in resolving our disputes, strengthening our relations, and supporting good governance (*see* Part III.B., p.8);
- The ***practice and law of how we compact***, particularly with respect to what is required for Oklahoma to form and enter a compact (*see* Part III.C., p.14); and
- Recommendations for ***strengthening Tribal-State compacting*** in Oklahoma (*see* Part III.D., p.25).

Our efforts make Oklahoma better, and we look forward to continuing our work together, in service to our communities and our citizens.

II. Executive Summary

Like Oklahoma's relationship with the federal government and other states, the relationship between Oklahoma and Tribal nations is grounded in the United States Constitution. Like those other relationships, neither party controls the other: Oklahoma cannot control Tribal nations, and Tribal nations cannot control Oklahoma. Instead, we must find ways to work together.

Litigation has clarified key legal rules in our relations, both substantively and procedurally, but our best work has tended to be what we have gotten done through meaningful cooperation—through compacts. Those compacts have helped us to resolve and avoid legal disputes while providing also for cooperation, intergovernmental comity, improved relations, and mutual benefit.

Oklahoma has relied on several legal models for forming its compacts with Tribal governments, and recent legal disputes have produced court rulings that have clarified relevant rules of the road under Oklahoma law. Our experience shows that while the Oklahoma Executive and Legislative departments both play important roles in our relations, the Oklahoma Legislature is central to Oklahoma's ability to form durable compacts.

Applying the lessons learned (and sometimes relearned) so far, we recommend the following to strengthen our ability to make the most of our compacting opportunities:

- Provide additional resources and appropriate rulemaking to support the important function of the Joint Committee on State-Tribal Relations; and

- Work to restore Oklahoma's relevant institutional knowledge and to identify opportunities for strengthening our current and future ability to compact by directing the Oklahoma Attorney General to chair a comprehensive study of the subject, working in meaningful consultation with Tribal nations.

III. Discussion

A. Separate Sovereignties: The Constitutional Foundation of Our Relations

> Like Oklahoma's relationship with the federal government and the other states, Oklahoma's relationship with Tribal nations is set by the United States Constitution. Like those other relations, neither government controls the other. Accordingly, Oklahoma does not control Tribal nations, and Tribal nations do not control Oklahoma.
>
> Instead, we must find ways to cooperate and work together in a spirit of intergovernmental comity.

Before turning to the subject of compacting and the shape of the Tribal-State relationship, it is useful to consider the interplay of state and federal powers. As in Tribal-State relations, the Federal-State relationship involves different sovereignties. As between local and national units of government, the Constitution affirms certain powers in each but also allocates and limits those powers. Those allocations and prescribed limits in the Federal-State relationship in turn shape the law of Tribal-State relations.

The United States' founding generation designed the Constitution to, among other things, establish a strong national government. As a key element of that design, the Constitution provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 3 (emphasis added). *Accord* OKLA. CONST., art. 1, § 1 ("[T]he Constitution of the United States is the supreme law of the land."). This passage—the Constitution's Supremacy Clause—affirms the national government's paramount domestic power, but shortly after its ratification, the founders amended the Constitution to include the Bill of Rights, which includes the following Reserved Powers Clause: "The powers not delegated to the United States by the

Constitution nor prohibited by it to the States, *are reserved to the States respectively, or to the people*." U.S. CONST., Amend. X (emphasis added). The later Reserved Powers clause does not reduce the power of the earlier Supremacy Clause but clarifies that ***the legal supremacy of the national government applies to a defined set of subject matters***. Accordingly, the national government's supreme powers are those vested in it by the Constitution, either directly or by necessary implication, and all other powers are reserved to the various States and the people.

While the outer bounds of the Federal-State relationship may be easily described, the exact point where one government's authority ends and another's begins is a recurring political debate. That interplay, controlled at each end by the Supremacy and Reserved Powers Clauses, shapes the practice of cooperative federalism, but in it all, a fundamental principle is beyond dispute: ***The national government does not control state government, and state governments neither control the national government nor each other's***. Instead, each government operates within its own sphere of responsibility, and together, they strive to work together as a Union.

Meanwhile, Tribal nations possess an inherent sovereignty arising under principles of international law and which includes powers of self-government and jurisdiction over Tribal citizens, territory, and resources. At the country's founding, the Constitution's framers recognized Tribal sovereigns as external to the new domestic governing system they were attempting to establish, and this is reflected in the text of the Constitution itself. While Tribal nations were neither party to nor bound by it, ***the Constitution is nonetheless critical to Tribes for, among other things, expressly allocating the Union's powers as between its national and local units of governments and intergovernmental dealings with Tribal nations.***

The pre-constitutional Articles of Confederation, which were effective between 1781 and 1789, differed substantially from the Constitution and lacked clarity regarding Tribal relations. They instead vested the Union and the various states with separate claims to authority. The resulting ambiguity caused confusion and bred conflict. Recognizing the model as a failure, the founders changed course and wrote the Constitution to expressly delegate to Congress the centralized power: "To regulate commerce with foreign nations, and among the several states, and *with the Indian tribes*." U.S. Const, art. 1, sec. 8, cl. 3 (emphasis added). Further, they included in the Constitution the uniquely federal power of treaty making, U.S. Const., art. 2, sec. 2, cl. 2, on which the United States relied for its dealings with Tribal nations. Pursuant to the Supremacy Clause, those treaties are the "supreme Law of the Land" and binding on each of the states. *Id*. art. VI, cl. 3. Based on these foundations, courts have affirmed that ***the Federal government has an exclusive and plenary power in Tribal affairs that preempts any conflicting State claim to authority***. Thus, parallel to the basic rule in Federal-State relations, ***no State government controls Tribal government, and no Tribal government controls State government***.

This constitutional allocation of power is reflected in our treaties. For example, in the Choctaw Nation's 1830 Treaty of Dancing Rabbit Creek with the United States, to which the Chickasaw Nation is also a beneficiary, *see* TREATY WITH THE CHOCTAW AND CHICKASAW, 11 Stat. 611 (Jun. 22, 1855), the United States provided:

> The Government and people of the United States are hereby obliged to secure to the said [Tribal nation] the jurisdiction and government of all the persons and property that may be within their limits west, *so that no Territory or State shall ever have a right to pass laws for the government of the [Tribal nation] and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said [Tribal nation] from, and against, all laws except such as from time to time may be enacted in their own National Councils*, not inconsistent with the Constitution, Treaties, and Laws of the

> United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

TREATY WITH THE CHOCTAW, 7 Stat. 333 (Sep. 27, 1830) (emphasis added). Similar provisions are included in other treaties. *E.g.*, *Atlantic & P.R. Co. v. Mingus*, 165 U.S. 413, 435-36 (1897) (discussing the legal and jurisdictional significance of the Five Tribes' treaties with the United States). *See generally Choctaw v. Oklahoma*, 397 U.S. 620 (1970) (discussing relevant legal history and the continuing legal effect of federal treaties with the Cherokee Nation, Chickasaw Nation, and Choctaw Nation of Oklahoma with regard to Oklahoma's rights); *cf. generally In re Chickasaw Nation and Int'l Brotherhood of Teamsters, Local 886*, 362 NLRB 109 (Jun. 4, 2015) (applying Treaty of Dancing Rabbit Creek to assessment of federal labor statute jurisdiction).

Likewise, Congress integrated this rule to the Oklahoma Enabling Act, which provides:

> That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, That *nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Governor of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed*.

34 Stat. 267, 267-68 (Jun. 16, 1906) (emphasis added). An unbroken line of court decisions affirms this language as reserving to the United States its exclusive authority in Tribal affairs. *E.g.*, *Seneca Cayuga Tribe v. Oklahoma, ex rel., Thompson*, 874 F.2d 709, 711-12 (10th Cir. 1989); *Indian Country U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 979 (10th Cir. 1987); *Mashankashey v. Mashankashey*, 1942 OK 314, 134 P.2d 976, 979.

Of course, in exercising this broad authority, Congress can grant defined powers to States. For example, Section 1161 of title 18 of the U.S. Code requires sales of liquor in Indian country be done "in conformity both *with the laws of the State in which such act or transaction occurs* and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country." Similarly, section 11 of the Act of 1947, 61 Stat. 731, provides that "all restricted lands of the Five Civilized Tribes are hereby made *subject to all oil and gas conservation laws of the State of Oklahoma*," so long as the orders of the Corporation Commission are "submitted to and approved by the Secretary of the Interior or his duly authorized representative." More broadly, Congress has provided mechanisms under which a State, with Tribal consent, may assume civil and criminal jurisdictions in Indian country. *See generally* Pub. L. 83-280, 67 Stat. 588 (1953).[1] Each of these special and limited enactments, along with others, allow a State to exercise a specified authority that would otherwise be preempted by the power the Constitution has expressly and exclusively vested in the Federal government.

In short, Tribal nations possess an inherent sovereignty that is reflected in (though does not arise from) the United States Constitution, and the Constitution expressly grants the federal government an exclusive power regarding Tribal nations that preempts any state claim to contrary authority. Congress may delegate a role to a state or to state law in this area, but such roles are a limited exception to the broad and general rule.[2] As such, these three separate governments, each

[1] As has been repeatedly observed by the courts, Oklahoma has never sought authority under these mechanisms for obtaining lawful jurisdictions relating to Tribal affairs. *E.g.*, *Milne v. Hudson*, 2022 OK 84, ¶15 n.8, 519 P.3d 511.

[2] The United States Supreme Court's ruling in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2021), is not to the contrary. That case exclusively concerned Oklahoma's claim to jurisdiction over non-Indian persons and, as such, the Court repeatedly observed that the dispute did not involve Tribal sovereignty or rights to self-government, despite its arising within the Indian country of a sovereign Tribal nation, *e.g.*, *id*. at 2501

recognized in the United States Constitution, operate within designated and separate sovereign spheres, and just as the United States may not lawfully control any state in the Union, no state in the Union may lawfully control any Tribal nation.

B. Sovereigns Relations: The Value and Role of Compacting

> Litigation has clarified key rules in our intergovernmental relations, but our most productive engagements have come through Tribal-State compacts. Those agreements provide for meaningful cooperation and intergovernmental comity in the context of our actual day-to-day relations. They deepen our common interest, improve the health of our partnerships, and benefit all Oklahomans.

1. *In General: The Practical Context of Our Relationship*

Broad rules of constitutional law are easily stated, and the effect of congressional enactments can be researched and applied, but when one looks closely at the day-to-day of life in an intergovernmental context, matters can get jurisdictionally and factually complex. In turn, those complexities can produce friction and give rise to disputes.

Consider, for example, that Tribal nations engage every day as governments with federal, state, and a variety of county or municipal agencies on any number of subjects. Meanwhile, the members or citizens of that nation (many of whom are also residents or citizens of Oklahoma towns or cities) do the same in their personal capacities. The nation and those citizens then, in turn, also transact business with private entities, which potentially include Tribal and non-Tribal individuals and businesses. Each of these engagements and transactions may give rise to questions as to which government has what regulatory interest, but setting those questions aside, one should

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("[A] state prosecution of a non-Indian does not involve the exercise of state power over any Indian or any Tribe."); *see also*, *e.g.*, *id.* at 2495 n.2, 2501 n.6, & 2504 n.9, nor did it otherwise displace otherwise controlling precedent concerning State and Tribal sovereign powers, *e.g.*, *Lac Courte Oreilles Band of Lake Superior Chippewa v. Evers*, 46 F.4th 552, 557-58 (7th Cir. 2022).

not forget that Tribal nations—like Oklahoma—have a sovereign immunity from any unconsented suit, which limits the legal processes that might otherwise be lawfully available if a Tribe were not involved. ***Accordingly, while constitutional rules and federal statutes help us navigate through questions that may arise from our day-to-day activities, our managing our relations in real time usually benefits from respectful engagement in a spirit of intergovernmental comity.***

Thus, just as states form and rely on compacts between and among themselves to address matters of shared concern, *see*, *e.g.*, 47 O.S. § 781, *et seq.* (codifying interstate driver license compact), states and Tribal nations also turn to negotiated agreements, *see*, *e.g.*, 47 O.S. § 2-108.3 (authorizing Service Oklahoma director "to develop a proposal for an intergovernmental cooperative agreement" between Oklahoma and Tribal nations to provide for "a more uniform and expeditious method of obtaining ownership and registration information of all motor vehicles operating on the roads and highways of this state"). ***Over the years, the overall trend in Tribal-State relations has steadily moved away from case-by-case conflict and toward negotiated and mutually acceptable agreements.*** *Accord* Reid Peyton Chambers, "Reflections on Changes in Indian Law, Federal Indian Policies and Conditions on Indian Reservations Since the Late 1960s," 46 *ARIZ. ST. L. J.* 729, 762 (2014). This trend has been encouraged by experience that has shown ***relying on litigation is not the best option for managing our relations***.

The Council of Western States Attorneys General has observed that "[r]ather than spend resources and goodwill in litigation, it can be more fruitful to attempt to find a cooperative way to solve the underlying problem," Council of Western Attorneys General (CWAG), *AMERICAN INDIAN LAW DESKBOOK* § 14 at 1092 (2020), and such "cooperative way[s]" can offer real advantages:

> In the face of potentially overlapping or conflicting jurisdictional claims, tribal-state cooperative agreements offer both sets of governments the opportunity to

> coordinate the exercise of authority, share resources, reduce administrative costs, deliver services in more efficient and culturally appropriate ways, address future contingencies, and save costs of litigation. They also enable governments to craft legal arrangements reflecting the particular circumstances of individual Indian nations, rather than relying on uniform national rules. Insofar as cooperative agreements create a stable legal environment conducive to economic development, they may appeal to the common interests of tribes and states.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (COHEN'S) § 6.05, at 588-89 (Nell Jessup Newton ed., 2021). Importantly, federal policy often supports "cooperation between Tribal and State governments," CWAG § 14 at 1092-92, which can further foster additional legal certainty.

2. *In Oklahoma: Our Experience of Tribal-State Compacting*

Congressman Tom Cole (Chickasaw), who served as Oklahoma's Secretary of State from 1995 to 1999, has spoken to the lessons he learned from his experience in government and Tribal-State relations: "I think you're always better to work it out. Tribes aren't going anywhere, the state of Oklahoma is there. When we partner, we do some pretty amazing things together. When we go to war, it's not good for the state and it divides us." Reese Gorman, "Cole encourages state-tribal relations over state challenges to *McGirt*," *NORMAN TRANSCRIPT* (Jul. 23, 2021), available at https://www.normantranscript.com/news/cole-encourages-state-tribal-relations-over-state-challenges-to-mcgirt/article_e15e2378-eb4b-11eb-80f4-c39595196dbb.html. The Congressman's observation well describes the approach Oklahoma and Tribal nations have applied since the 1990s, which is when we first turned in earnest to dealing with each other through compacted agreements.

But to be clear: Things did not start out cooperatively.

Oklahoma's experience with Tribal-State compacting grew from the sometimes-intense intergovernmental court battles of the 1980s and 1990s. Those cases clarified local application of many foundational rules of federal Indian law, but one case particularly helped to guide us away

from an exclusive reliance on litigation and toward a pursuit of stability and improved relations through cooperative agreements when possible.

In *Oklahoma Tax Commission v. Citizen Potawatomi Nation*, 498 U.S. 505 (1991), Oklahoma sought to enforce its tax laws against a sovereign Tribe. Earlier rulings had affirmed that states may not lawfully tax Tribal retail sales in Indian country to Tribal citizens, but Oklahoma claimed taxes associated with Tribal retail sales to non-Indians and sued to enforce the claim, which was met with the Tribe's claim of sovereign immunity. Oklahoma urged several propositions for changing the controlling law, fundamentally arguing that federal law limiting State powers respecting Tribal nations left it "with a right without any remedy." *Id.* at 514. But the Court disagreed, adhered to precedent, and ruled against Oklahoma.

The *Citizen Potawatomi* ruling is of course important for what it held as a matter of law, but it is perhaps more important for what it reminded the parties—namely, that ***there are more paths to sorting out our differences than those that take us through the courtroom***. The Court recognized that Oklahoma retained enforcement tools other than direct attempts to enforce against a Tribal sovereign. It also noted we could seek recourse in Congress if we want the rules changed. ***More importantly, though, it spoke to our power to work through and voluntarily resolve our differences, noting we are free to "enter into agreements . . . to adopt a mutually satisfactory regime for the collection of this sort of tax." Id.*** This invitation was a turning point.

Having ridden this apparent dispute to the end of the road, Oklahoma and several Tribes began to talk about how to form an intergovernmental agreement that could take the place of entrenched adverse legal positions. Those talks produced Oklahoma's first substantive framework for managing Tribal-State tax administration disputes—namely, section 346 of title 68 of the

Oklahoma Statutes, which sets forth Oklahoma's tax administration rules when an appropriate compact is in place.

The results were immediate and positive. By the end of the following year, four (4) Tribes entered agreements with Oklahoma under this statute; the next year, eight (8) more Tribes signed up; and by 2001, twenty-eight (28) Tribes had signed such pacts. *See* Okla. Sec'y of State database of Tribal-State agreements and compacts, https://www.sos.ok.gov/gov/tribal.aspx (last visited Oct. 30, 2023). While conflict over these Section 346 compacts has recently occurred, *e.g.*, *Stitt v. Treat, et al.*, No. O-121,497 (Okla. S. Ct.), most of the agreements remain in place and continue to support the stable administration of tobacco products taxation. The fact is: Tribal nations still operate and license tobacco retail enterprises and make compact payments to Oklahoma in lieu of taxes, which compacted operations create jobs and generate Tribal and State revenues. ***In 2022 alone, those tobacco compacts netted Oklahoma $57 million. And bear in mind: <u>This is only one example of how our compacts have worked well for us all</u>.***

Periodic litigation of course recurs, but more frequently, Tribes and the State manage to work with each other. Over the years, Oklahoma and Tribal nations have formed and entered nearly nine hundred (900) intergovernmental agreements that are now on file with the Oklahoma Secretary of State, covering a broad range of subjects. Payments Oklahoma receives under several of those agreements (e.g., payments in lieu of taxes with respect to tobacco product sales, 68 O.S. § 346; revenues derived from Tribal non-contestation of State motor fuel taxation of Indian country sales to third-party consumers, 68 O.S. § 500.63; and monies received as revenue-share payments from Tribal governments in relation to certain of their Tribal gaming operations, 3A O.S. §§ 280, 280.1, & 281) contribute significantly to Oklahoma's fiscal health.

Beyond Oklahoma's revenue benefits from these agreements, they have more broadly supported productive intergovernmental relations as well as market and regulatory stability that has benefited productive economic activity throughout the State as a whole. ***The foundation for this approach, i.e., intergovernmental cooperation, is Oklahoma's only codified policy preference for Tribal-State relations.*** As provided at Section 1221(B) of Title 74:

> The State of Oklahoma recognizes the unique status of Indian tribes within the federal government and shall work in a spirit of cooperation with all federally recognized Indian tribes in furtherance of federal policy for the benefit of both the State of Oklahoma and tribal governments.

See also, *e.g.*, 68 O.S. §§ 346.1, 500.63(A)(4), 74 O.S. § 1207. Recognizing this preferred policy, the United States Supreme Court recently reviewed progress we have made over the years and offered a heartening followup to its observations in *Citizen Potawatomi*:

> With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes . . . . These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions.

McGirt v. Oklahoma, 140 S. Ct. 2452, 2481 (2020). This is a history of which we should be proud.

Intergovernmental disagreements still occur (and always will occur), but we retain our power of choice, perhaps especially when we find ourselves disagreeing: ***Will we engage based on common interest and look for ways to work productively together, or will we retreat into differences and treat each other as competitors and adversaries?*** As governments, we each have basic obligations to the welfare of our citizens and to the preservation of our sovereignty, and in this context, our mutual embrace of the policy of "cooperation . . . for the benefit of both the State of Oklahoma and tribal governments," 74 O.S. § 1221, has been a success that should be continued and, where possible, expanded.

C. The Effectiveness of Our Cooperation: ***How*** we Compact

The law of each compacting government determines whether an agreement has been lawfully formed. Oklahoma's practice under its laws has included several models, namely—

Pure Legislative Compact – Statute enacts express offer of terms (*see*, *e.g.*, 3A O.S. §§ 280, 280.1; 68 O.S. § 500.63)

Modified Legislative Compact – Statute enacts offer of terms but authorizes Executive department official to form and enter compacts on state's behalf (*see*, *e.g.*, 68 O.S. § 346)

Specific Statutory Authorization – Statute authorizes Executive department official to form compact on defined subject matter without enacting terms for such agreement and further authorizes official to enter on state's behalf (*e.g.*, 10 O.S. § 40.7)

General Statutory Authorization Subject to Approval – Statute authorizes Oklahoma official to form and enter (or sanction) compacts which do not take legal effect unless and until approved by Joint Committee on State-Tribal Relations (*see* 74 O.S. § 1221)

Pure Executive Compact – Oklahoma Governor forms and enters agreement without legislative authorization or approval

Each model has its own strengths and weaknesses. Meanwhile, recent Oklahoma Supreme Court rulings have clarified state law rules of the road: Overall, Oklahoma's Executive and Legislative both play important roles in our compacts and Tribal-State relations, but the law-making power of the Oklahoma Legislature is central to Oklahoma's forming durable intergovernmental agreements.

1. *In General: Formation and Entry to a Compact*

Like any agreement, parties to a Tribal-State compact must take care in how they form and enter into an agreement. A failure to do so can lead to defects that undermine their operation, potentially even invalidating them. While our agreements may be best known for resolving disputes, litigation has also occurred regarding their attempted formation.

For example, the Oklahoma Supreme Court recently struck down as unlawfully formed four gaming agreements the Oklahoma Governor negotiated and purported to enter on the State's

behalf. *Treat v. Stitt ("Treat II")*, 2021 OK 3, 481 P.3d 240; *Treat v. Stitt ("Treat I")*, 2020 OK 64, 473 P.3d 43; *see generally In re Treat, et al.*, Okla. AG Op. No. 2020-8 (May 5, 2020). *Cf. also Cherokee Nation, et al., v. U.S. Dep't of the Interior, et al.*, No. Civ.-20-2167 (D.D.C.) (ongoing challenge to U.S. Dep't of the Interior's "no action" approval of agreements the Oklahoma Supreme Court held to be invalid). Likewise, litigation has challenged the Oklahoma Legislature's enactments that establish compacting frameworks or enact statutory offers of supplemental compact terms, *Ryals v. Keating*, 2000 OK Civ. App. 24, 2 P.3d 378; *see also Stitt v. Treat, et al.*, No. O-121497 (Okla. S. Ct.); *OCPA v. Treat, et al.*, No. MA-121,585 (Okla. S. Ct.), *petition den'd* Oct. 16, 2023. Diligence is thus as appropriate in this area as it is in any other area of significant governmental interest.

No one source of law controls the parties' formation of a compact. ***A compact is an agreement between and among governments, so the laws of <u>each</u> government can be relevant***. Accordingly, Tribal entry is controlled by Tribal law, *see generally*, *e.g.*, 25 U.S.C. § 476(e), but aspects of the unique Federal-Tribal relationship may cause federal approvals to also be required, *see*, *e.g.*, 25 U.S.C. §§ 81, 415, & 2710(d)(8). Oklahoma's entry will, of course, be controlled by Oklahoma law. For this report, we focus on Oklahoma law.

2. *The Various Models of Oklahoma's Entry to a Tribal-State Compact*

Let's start with Oklahoma's compacting practice. Oklahoma has relied on various legal models for forming and entering compacts with Tribal nations, ranging from its acting solely through its legislative department, solely through its executive department, and various combinations of the two. ***While each may be lawful, the particular model Oklahoma uses to form***

an agreement will bear on what that agreement may lawfully accomplish. We will address each of the existing models before turning to recent opinions from the Oklahoma Supreme Court.

i. <u>Pure legislative model: Statutory compact offers</u> – Starting at one end of the spectrum, ***Oklahoma has offered and entered compacts exclusively through its legislative lawmaking powers, i.e., by enacting a statute that offers compact terms that take effect upon Tribal acceptance, without further Oklahoma government action.***

For example, as provided in Part 16 of Oklahoma's codified Offer of Model Tribal Gaming Compact, the State made a formal compact offer "as an enactment of the people of Oklahoma" and provided it was "deemed approved by the State of Oklahoma" upon acceptance and without any "further action by the state or any state official." 3A O.S. § 281. *See also* 3A O.S. § 280.1.D. The executive department is, of course, recorded as having been involved in the development of the offered terms, 3A O.S. § 280 (noting Governor's "concurrence" and the Legislature's consideration of "executive prerogatives," including "power to negotiate the terms of a compact"), but the compact offer and Oklahoma's entry to it was done exclusively by statute, *id*. (making offer "through the enactment of the State-Tribal Gaming Act").

Likewise, Oklahoma offered its motor fuels tax "contract" to Tribal nations by legislation. Section 500.63 of title 68 codifies the State's terms and sets forth rules for Oklahoma tax administration that are activated upon a Tribe's recorded acceptance. The statute reflects no role for the Oklahoma Governor, though, other than to serve as the State's agent for notice or for issuing any declaration the State intends to withdraw from an agreement. *See* 68 O.S. § 500.63(C)(8).

Oklahoma has formed scores of compacts by this model, including many generate millions of dollars for Oklahoma each year while providing a stable framework for Tribal nation economic activities that support programs and services for thousands of Tribal citizens.

ii. Modified legislative model: Statutory definition of terms with authorization for executive entry – Our next model differs slightly from the first. ***Under this approach, the Oklahoma Legislature enacts the basic terms for an agreement but then authorizes the Oklahoma Governor to form and enter final compacts.***

For example, section 346 of title 68 establishes Oklahoma's proposed terms for tobacco products tax compacts, but rather than enact the offer of compact, the Oklahoma Legislature chose to provide: "The Governor is authorized by this enactment to enter into cigarette and tobacco products tax compacts on behalf of the State of Oklahoma with the federally recognized Indian tribes or nations of this state." Once entered in accord with this provision, Section 346 does not require further Oklahoma government action for a compact to become legally effective.

Oklahoma has been forming tobacco compacts with Tribal nations in accord with Section 346 for more than thirty years—i.e., since shortly after the United States Supreme Court issued its *Citizen Potawatomi* ruling. Those agreements have accordingly provided stability for more than a generation. But the Oklahoma Legislature did not limit its own role or powers by approaching things in this manner. For example, the Legislature reverted to the first model earlier this year and enacted supplemental term offers that, if accepted, would extend otherwise expired or expiring Section 346 compacts until December 31, 2024. *See* 68 O.S. § 346.1. The Oklahoma Governor has filed suit to challenge this action, and the Oklahoma Supreme Court will hear oral arguments in

the case next month. *Stitt v. Treat, et al.*, *supra*. Meanwhile, these agreements continue to provide regulatory stability while supporting productive economic activity throughout Oklahoma.

iii. <u>Specific statutory authorization: Statutory authorization for executive negotiation and entry on defined subject</u> – Our next model provides far more Executive department flexibility. ***This model is premised on the Oklahoma Legislature's enacting a broad authorization for executive negotiation and entry of Tribal-State compacts relating to a designated subject matter, without requiring other post-entry review or approvals.***

For example, section 40.7 of title 10 provides:

> The Director of the Department of Human Services and the Executive Director of the Office of Juvenile Affairs are authorized to enter into agreements on behalf of the state with Indian tribes in Oklahoma regarding care and custody of Indian children and jurisdiction over child custody proceedings including agreements which provide for orderly transfer of jurisdiction on a case by case basis and agreements which provide for concurrent jurisdiction between the state and the Indian tribe, as authorized by the Federal Indian Child Welfare Act, 25 U.S.C. Section 1919.

Unlike our first two models, the statute does not enact specific terms to be included in the agreements it authorizes. ***Instead, it defines <u>both</u> the scope of its authorization, including designation of the authorized Executive department officials, <u>and</u> the subject matter on which they may act.*** Once appropriate officials enter an agreement with a Tribal nation on the defined subject, the statute—like Section 346 of title 68—does not require further Oklahoma government action for the agreement to take legal effect.

Oklahoma has formed several such agreements with Tribal nations, and those agreements continue to provide a useful tool for cooperation in the provision of child welfare services.

iv. <u>General statutory authorization with subsequent approval: Statutory authorization for executive negotiation and entry subject to Joint Committee approval</u> – The broadest and perhaps best-known model for Tribal-State compacting provides the Oklahoma Governor ***general authorization to form "intergovernmental cooperative agreements" with Tribal nations on nearly any subject <u>but</u> conditions the legal effectiveness of such agreements on their approval by the Joint Committee on State-Tribal Relations*** or, in some instances, the Oklahoma Legislature as a whole. *See* 74 O.S. § 1221(C). This authorization is not limited to a particular topic, though specific subjects are called out. *See generally* 74 O.S. § 1221(D). As such, Section 1221 of Title 74 serves as ***a general catch-all authorization and procedural mechanism on which the Executive department may rely <u>in the absence of</u> an enacted compact offer or a specific statutory compact authorization***. *Accord* 47 O.S. § 2-108.3 (referencing back to 74 O.S. § 1221(D)(1) and authorizing Executive development of proposed "intergovernmental cooperative agreement" concerning motor vehicle registration information).

A prime example of this sort of agreement is the 2005 Master Cross-Deputation Agreement among the United States, Oklahoma, and various Tribal nations. *E.g.*, Deputation Agreement, https://www.sos.ok.gov/documents/filelog/63854.pdf (Chickasaw Nation's accepted agreement). The administration formed the base agreement in consultation with the Unted States and Tribal nations, and following the United States Bureau of Indian Affairs' entry to it on December 5, 2005, Governor Henry signed for Oklahoma on December 19, 2005. *See id*. at p.9. The Joint Committee then approved the agreement on January 23, 2006, *see id.*, thereby vesting it with legal effect by operation of Section 1221 of Title 74. Several Tribes then joined the master agreement, including the Chickasaw Nation, which made itself party on February 10, 2006, *see id*. at 1. Ever since, this

multiparty framework has provided important intergovernmental authorization for cooperative law enforcement throughout Oklahoma. *See also* 21 O.S. § 99A.

The title 74 intergovernmental cooperative agreement provision offers a critical tool for our relations. ***It balances a degree of durability (arising from the Oklahoma Legislature's involvement through its the enactment and periodic amendment of Section 1221, et seq., as well as the operation and role of the Joint Committee) with a degree of flexibility (arising from the Oklahoma Governor's broad administrative role).*** As the Oklahoma Supreme Court has observed, the interplay of the Executive and Legislative department functions under this statute "allows for checks and balances of power" between them. *Treat II*, 2021 OK 3, ¶10. When combined with a high-functioning relationship between the office of the Oklahoma Governor and the Tribal nations of Oklahoma and collaborative relations between the Executive and Legislative departments of Oklahoma government, this can be a valuable tool for productive relations.[3]

v. <u>Pure executive model: Executive-formed agreements without legislative authorization</u> – Our final model is the most flexible but likely least used: The purely Executive compact. As a general matter, these agreements might be considered an exercise of Oklahoma administrative authority akin to the issuance of executive orders. They operate by memorializing an agreement between an Oklahoma Governor and a Tribal nation and then directing, for Oklahoma law purposes, state administrative programs within the Governor's

[3] Use of this model dropped off during the Fallin Administration based on an apparent reliance on a flawed Oklahoma Attorney General opinion, *In re Williamson*, 2004 OK 27, ¶27 (opining statutory requirement for Joint Committee approval of "individual agreements or compacts negotiated by the Governor on behalf of the State with other sovereigns, such as Indian tribes," was unconstitutional), that has since been supplanted by a recent Oklahoma Supreme Court ruling, *Treat II*, 2021 OK 3, ¶10 ("When the Executive branch negotiates terms of a tribal gaming compact that differ from the Model Compact found in the State-Tribal Gaming Act . . . [i]t is then necessary that the Executive branch and the Tribe obtain the approval from the Joint Committee prior to submitting the compact to the Department of the Interior.").

purview so that they conform with the terms of the agreement struck. ***As such, they do not make "Oklahoma law" as much as they direct executive department administration of their duties in accord with both the agreement and Oklahoma law***, which nonetheless renders them limited in power. *See*, *e.g.*, *CompSource Mut. Ins. Co. v. State ex rel. Oklahoma Tax Comm'n*, 2018 OK 54, ¶43, 435 P.3d 90 ("The power of the Governor to direct how executive officials will execute statutory law is limited by the nature of the constitutional power vested in the Governor."); *cf. also Ho v. Tulsa Spine and Spec. Hosp.*, LLC, 2021 OK 68, ¶20, 507 P.3d 673 ("The Governor is without authority to exercise discretion not validly and specifically granted by the statutory law and not within the power conferred upon the Chief Executive by the constitution."). *Cf. also* Oklahoma Att'y Gen. Infm'l Op. No. 93-685 (1994) (concluding executive law enforcement compact formed with Cherokee Nation was lawful as within the bounds of the constitutional and statutory powers of the Oklahoma Governor).

Governor Fallin's 2013 Tribal-State Burn Ban Agreement with the Ft. Sill Apache Tribe is an example of this sort of agreement. *See* Okla. Sec'y of State Tribal-State agreement and compact database, document no. 46,212, https://www.sos.ok.gov/documents/filelog/89233.pdf. In that agreement, Oklahoma Governor Mary Fallin and Ft. Sill Apache Chairman Jeff Haozous stipulated to, one, ensure Tribal burn ban declarations would parallel state and local declarations and, two, implement substantive measures meant to facilitate intergovernmental cooperation in the investigation and cross-jurisdictional prosecution of burn ban violations. The agreement lasted only two years and included an express provision that any "changes or modifications to the Oklahoma Statutes that would materially alter this agreement will be automatically incorporated into this agreement and made a part hereof." *Id*. at Sec. 7.

While the pure *legislative* compact has perhaps the greatest stability, durability, and power among the available models (because of the Oklahoma Legislature's involvement), the pure *executive* compact has the greatest operational flexibility (because of the Executive department's administrative discretion in day-to-day matters). The stability, durability, and power of legislative compacts, of course, is only achievable upon the completion of the burdensome process of enacting Oklahoma law; in turn, the flexibility of executive compacting is constrained by the limits that inhere to the Executive department. These considerations are relevant when evaluating what can be accomplished through any particular Tribal-State agreement.

3. *The Oklahoma Supreme Court and Tribal-State Compacting*

Each of the models Oklahoma has used to form and enter a Tribal-State compact has its own precedent and utility, and each should be understood in terms of its particular strengths and limits. ***Recent Oklahoma Supreme Court rulings have provided greater clarity in this area, particularly with respect to the limits on the power of various officials and bodies respecting Tribal-State compacts and Oklahoma law.*** Those rulings should be carefully considered in any study of this subject.

The Oklahoma Supreme Court, for example, has ruled that ***the Oklahoma Governor's role in compacting is statutory, not constitutional***. *See generally Treat I* & *Treat II*, *supra*. The Oklahoma chief executive certainly plays a representative role in our relations, not a law-making one. As the Court put it with respect to gaming matters: "The Executive branch's authority to advocate and negotiate gaming compacts is statutory—not constitutional. And the use of such authority must be in conformity with statute." *Treat II*, 2021 OK 3, ¶6 (internal citations omitted).

Cf. Cherokee Nation, et al. v. Stitt, 475 F. Supp. 3d 1277, 1282 n.4 (W.D. Okla.) (concluding Oklahoma Governor's role regarding statutory gaming compacts is quite narrow).

In a concurring opinion (in which Justices Combs and Gurich joined), Justice Kauger reinforced the constitutional and historical basis for this limit on the powers of the Oklahoma Governor's office. She emphasized the office's fundamental obligations to "'*cause the laws of the State to be faithfully executed*,'" including with respect to compacting, and to conduct "'*in such manner as may be prescribed by law*, all intercourse and business of the State.'" *Id.*, 2021 OK 3, ¶3 (quoting Okla. Const., art. VI, § 8) (Kauger, J., concurring). Justice Kauger further observed that "the framers of the Oklahoma Constitution intentionally created a weak state chief executive." *Id*. ***These limits are thus part of the very structure and design of Oklahoma's government.***

In reading these passages, it is important to remember that the Court was speaking in a case where the Oklahoma Governor had attempted to form Tribal-State agreements that were directly inconsistent with Oklahoma law, i.e., ***the Governor was attempting to make law on the State's behalf***. As such, the Court's conclusions may not control with equal force where a Tribal-State agreement is fully consistent with Oklahoma law or otherwise operates only within the scope of the powers vested in the Oklahoma Governor. *E.g.*, Oklahoma Att'y Gen. Infm'l Op. No. 93-685, *supra*. Consider, for example, Governor Fallin's 2013 burn ban agreement with the Ft. Sill Apache: Nothing in that agreement departed from or otherwise attempted to modify Oklahoma law. Instead, it appeared to relate to matters the Oklahoma Governor could have sought to implement, at least for Oklahoma's part, by executive order, which would surely have been within her office's power—subject of course to the general limits that apply to such actions.

The ruling also does not relate to a compact formed by specific legislative authorization, such as what is provided at Section 40.7 of Title 10. While the Oklahoma Supreme Court has not specifically passed on the validity of this model, Justice Combs (joined by Justices Gurich and Kuehn) proposed affirmation of a lower court decision last year based on his construction of Section 40.7 agreements formed by the Muscogee (Creek) Nation, the Cherokee Nation, and Oklahoma. *In re B.H.*, 2022 OK 80, ¶6 (Combs, J., concurring). In such an instance, the Executive department should be presumed to be acting with appropriate authority.

Meanwhile, Justice Rowe has offered guidance on the power of the Joint Committee on State-Tribal Relations. By concurring opinion, he wrote he could not "accede . . . as to any finding or implication in the Court's opinion that the Joint Committee could validate" compacts that were inconsistent with Oklahoma law, *Treat II*, 2021 OK 3, ¶1 (Rowe, J., concurring), In other words, ***the Joint Committee has no power to make lawful a compact that is otherwise unlawful***:

> A finding or implication to the contrary would be inconsistent with this Court's jurisprudence on the non-delegation doctrine. Article V, Section 1 of the Oklahoma Constitution vests legislative authority in the Legislature exclusively:
>
> > The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature.
>
> The non-delegation doctrine rests on the premise that the legislature must not abdicate its responsibility to resolve fundamental policy making by [1] delegating that function to others or [2] by failing to provide adequate directions for the implementation of its declared policy.

Id. at ¶3 (internal quotation marks and citation omitted).

The Oklahoma Attorney General recently cited Justice Rowe's reasoning to advise the Joint Committee that it "lacks authority to make valid that which the Oklahoma Supreme Court earlier declared to be invalid." Letter from Oklahoma Att'y Gen. Drummond to Senate President *Pro Tem* Treat, *et al.*, at 2 (Oct. 23, 2023). He advised that since the executive gaming compacts the Oklahoma Governor submitted "conflict with Oklahoma statute," the Joint Committee should disapprove them "and advise the Governor that, if he wants to pursue their implementation, he should first seek appropriate revisions to Oklahoma law." *Id*. at 3 & 4. We agree.

Generalizations can be dangerous, but we can still draw the following from these opinions:

- The Oklahoma Governor may presumably form and enter lawful compacts with Tribal nations that are limited to subjects that could be implemented, for Oklahoma law purposes, by executive order;

- Where the Oklahoma Legislature has vested authority in an Oklahoma Executive department official to form compacts with Tribal nations, such official may do so, subject to the terms or parameters established by the statute granting such authority as well as any other law that controls the matter.

- In the absence of a statute vesting specific authority, the Oklahoma Governor has general statutory authorization to form and enter compacts with Tribal nations, but

    - such agreement will not be legally effective unless and until it is approved by the Joint Committee on State-Tribal Relations; and

    - the Joint Committee on State-Tribal Relations cannot give legal effect to any agreement that is inconsistent with existing Oklahoma law.

- Finally, as the State's law-making body, the Oklahoma Legislature has broad power to enact or modify state law for purposes of forming, entering, or implementing compacts, which will then be binding on both the Executive department and the Joint Committee.[4]

[4] The Oklahoma Governor's petition to the Oklahoma Supreme Court's original jurisdiction in *Stitt v. Treat, et al.*, *supra*, would seem to contest this point, but the Court will hear oral arguments on the point on December 7, 2023.

As should go without saying, ***these general principles provide general guidance***. While they are accurate statements of law, they must be applied to specific facts to have any reliable force or meaning. Meanwhile, they are offered to supplement the Oklahoma Legislature's own study of the Oklahoma Supreme Court's rulings.

D. The Road Ahead: Opportunities for Improving Tribal-State Compacting

Crafted properly, Tribal-State compacts serve as critical tools for balancing our implementation of sovereign rights and responsibilities and for facilitating intergovernmental relationship-building and cooperation within multi-jurisdictional circumstances. ***Neither Oklahoma nor any Tribal nation should be expected to cede its sovereignty to the other, but we can agree as to how we exercise our sovereignties so that we avoid conflict and build on each other's capacities, abilities, and goals.*** To do this, of course, we need to look for cooperative paths forward, but we must also make sure we have the appropriate institutions for implementing effective and sustainable intergovernmental cooperation.

Oklahoma administrations and legislatures, regardless party, have seen the wisdom of choosing cooperation over conflict, and ***we believe it would be in all parties' interests to resolve and recommit ourselves to the work we can best do together in a spirit of comity and cooperation***. We would look forward to good faith discussions as to how we could improve our performance and engagement under our various compacts, and we offer the following topics for discussion as to how Oklahoma could improve its own intergovernmental engagements.

The Executive and Legislative departments of Oklahoma government both play important roles in our relations. The law-making power of the Oklahoma Legislature has been central to effective and durable Tribal-State compacting, but effective relations and engagement with the

Oklahoma Governor have likewise been critical to the sort of operational flexibility that is useful in both forming and implementing solid and workable agreements. Oklahoma's formal institutions for Tribal-State compacting, however, are somewhat diffuse and sometimes unclear. We believe useful measures could be considered for improving those institutions, for example:

- **Strengthen the Joint Committee:** The Oklahoma Supreme Court has affirmed the Joint Committee on State-Tribal Relations' role under title 74. However, recent Oklahoma administrations previously disregarded the Joint Committee's significance based on apparent reliance on a now-supplanted Oklahoma Attorney General opinion. *See* n.3, *supra*. Given recent clarifications in law, we recommend the Oklahoma Legislature increase its support for the Joint Committee by: (a) approving rules and procedural reforms, which would ideally be developed in consultation with the Oklahoma Attorney General and Tribal nations, to clarify and reaffirm the Joint Committee's role and procedures; and (b) making financial and staff resources available to the Joint Committee to support its fulfilment of its responsibilities, including appropriate legal counsel support. Substantively, the Joint Committee's role should include express oversight responsibilities concerning the Executive Department's: (a) implementation of Oklahoma's codified Tribal-State relations policy; (b) management of our compacts, through the Oklahoma Tribal Liaison or Secretary of Native American Affairs or otherwise; and (c) use of monies obtained under any compact, including gaming compact assessment fees allocated to OMES's for monitoring activities, or otherwise sourced and used for litigation against Tribal nations or conduct of Tribal-State relations.

- **Oklahoma Attorney General study:** Our cornerstone compacts (e.g., tobacco, motor fuels, and gaming) were first formed a generation ago, and over the years, the institutional memory of why and how we compacted has ebbed. As remedy, ***we recommend the Oklahoma Legislature direct a comprehensive Oklahoma study of Tribal-State compacting, both its past practice and how State compacting institutions could be improved.*** Specifically, we recommend the Oklahoma Legislature task the Oklahoma Attorney General with chairing a review of Oklahoma Tribal-State compacting for purposes of restoring institutional understanding of our compacting work and proposing state law reforms for strengthening the foundations for that work. The review should produce a report that evaluates, as a matter of law and fact: (a) the history of compacting in Oklahoma, both interstate as well as Tribal-State; (b) the policy utility of compacting; (c) the legal mechanics of compacting, including potential reforms to Section 1221 of title 74; and (d) the potential subjects of future compacts or procedural improvements. In performing this task, the Oklahoma Attorney General should substantively and meaningfully engage with Tribal nations on an ongoing basis and should ensure opportunities for Tribal participation in preparation of the final report.

IV. Conclusion

Tribal nations and the State are separate sovereigns. That point is affirmed and reinforced in the very language of the United States Constitution and the federal statute authorizing Oklahoma's formation as a state. But beyond any general rules of law, our experience underscores the importance of our finding ways to work together across sovereign lines in a spirit of intergovernmental comity and respect.

Tribal-State compacts work best when we endeavor to cooperate with each other in the mutual pursuit of good governance in accord with the law of our separate sovereignties. Likewise, our efforts benefit when the Oklahoma Executive and Legislative departments act with clear knowledge of and respect for the lawful roles each play with respect to Tribal-State relations. When we fail in such regard and, instead, adopt positions driven by competition or adversarial presumptions, we undermine the conditions necessary for effective intergovernmental comity and cooperation. In short, we undermine our chances to serve the best interests of our constituencies.

Compacting is not about who can get the better end of a deal. It is about finding a way forward together. Our shared history shows we know how to do that. It also shows that the wiser path is always to look for those paths we can take forward together rather than to let periodic disagreements make us unnecessary adversaries.

We look forward to continuing this good work with you.