IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

QUAPAW TRIBE OF INDIANS, Plaintiff, v. STATE OF KANSAS, Defendant.	)))))))))	Case No. 16-2037

COMPLAINT

Plaintiff, the Quapaw Tribe of Indians, alleges as follows:

NATURE OF THIS ACTION

1. The Indian Gaming Regulatory Act of 1988 (the "IGRA") obligates states, upon the request of an Indian tribe, to "negotiate with the Indian tribe in good faith" for a tribal-state compact governing gaming activities on the tribe's Indian lands. 25 U.S.C. § 2710(d)(3)(A). The State of Kansas ("the State" or "Kansas") has failed to enter into good faith compact negotiations with the Quapaw Tribe of Indians ("the Tribe") for gaming activities on Indian lands. The Tribe therefore brings this action pursuant to § 2710(d)(7)(A)(i), seeking, among other relief, a judicial determination that Kansas has failed to comply with the requirements of § 2710(d)(3)(A), and an order requiring the State to enter into a compact with the Tribe within sixty (60) days pursuant to 25 U.S.C. § 2710(d)(7).

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 25 U.S.C. § 2710(d)(7)(A)(i). As specified in the IGRA, United States District Courts have jurisdiction over "any cause of action initiated by an Indian tribe arising from the failure of a

State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A)(i).

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

PARTIES

4. The plaintiff, the Quapaw Tribe of Indians, also known as the Quapaw Tribe of Oklahoma and as the "O-Gah-Pah," is a federally recognized Indian nation. *See* 80 Fed. Reg. 1942, 1946 (Jan. 14, 2015). The Tribe exercises jurisdiction over land within the State, the title to which is held by the United States in trust for the benefit of the Tribe, and which is within the Tribe's Indian country jurisdiction for purposes of federal law, and which is also "Indian land" pursuant to the IGRA, *see* 25 U.S.C. § 2703(4)(B), and that is eligible for gaming, *see* 25 U.S.C. § 2719(a)(2)(B).

5. The defendant is the State of Kansas. Congress has permitted this action against states and the State to enable Indian tribes to enforce their rights under the IGRA, including the obligation imposed on states to negotiate tribal-state gaming compacts in good faith. *See* 25 U.S.C. to § 2710(d)(3)(A) & (7)(A) .

FACTUAL BACKGROUND

Tribe's Re-Acquisition of Trust Land Within the Quapaw Strip

6. Through the Treaty of May 13, 1833, 7 Stat. 424 (Kappler 1904, vol. 2, at 395) (the "Treaty of 1833"), the United States government forcibly removed the Quapaw from their homeland in the present-day State of Arkansas to a permanent reservation located within the present-day States of Oklahoma and Kansas. Under the Treaty of 1833, the United States set aside the new reservation, consisting of 150 sections of land, for the Tribe "so long as they shall exist as a nation or continue to reside thereon." *Id*. art. II.

7. As originally established, the Tribe's 1833 reservation was located within the far northeastern corner of present-day Oklahoma and within the far southeastern corner of present-day Kansas. The portion of the original Quapaw Reservation within Kansas consisted of approximately 12 sections of land, and was approximately one-half mile in width from north to south. The area of the reservation within Kansas came to be known—and still is referred to—as the "Quapaw Strip."

8. Pursuant to a subsequent treaty, the Treaty of February 23, 1867, 515 Stat. 513 (Kappler 1904, vol. 2, at 961), the Tribe sold and ceded to the United States most of the Tribal land within the Quapaw Strip portion of the reservation. The reservation boundaries, however, remained intact.

9. In 2008, as part of longstanding efforts by the Tribal leadership to generate economic development and to create jobs for Quapaw people, the Tribe opened the Downstream Casino Resort, an up-scale gaming resort (the "Resort"), on Indian land within the Oklahoma portion of the reservation along the Kansas-Oklahoma state line. Parking lots and other infrastructure of the Resort were constructed on approximately 124 acres of land reacquired by the Tribe within the Quapaw Strip in Cherokee County, Kansas (the "Kansas Tract").

10. During the construction of the Resort, the Tribe began the process of applying to the United States Secretary of the Interior to convey title to the Kansas Tract to the United States, in trust for the Tribe. This process was completed in 2012, when the Secretary acquired title to the Kansas Tract in the name of the United States in trust for the Tribe.

Governor Brownback's Encouragement to the Tribe to Seek a Compact

11. Following the opening of the Resort, the Tribe's leadership received encouragement from both local and state leaders in Kansas to explore conducting class III

gaming on its Kansas trust land pursuant to a tribal-state compact that would yield funds for local governments.

12. In late 2012 and early 2013, Kansas Governor Sam Brownback expressed to the Tribe's Chairman, John L. Berrey, his support for negotiating a tribal-state gaming compact, if the Tribe could confirm its legal right to conduct gaming on its Kansas trust land. Governor Brownback was supportive of a compact with the Tribe that would pay a portion of the proceeds from class III gaming to Cherokee County and other local governments.

13. In early 2013, Governor Brownback assigned his Tribal Liaison and Executive Director of Native American Affairs, Chris Howell, to meet with Quapaw leaders, and to begin compact negotiations. Howell advised the Tribe that, for political reasons, Governor Brownback could not support gaming in general, but that he could support economic development that involved gaming. At a February 2013 meeting Howell advised the Tribe's leadership to begin preparing a proposal for a compact. In late spring 2013, Howell advised the Tribe to submit a proposed compact to Governor Brownback.

14. Throughout the discussions, Governor Brownback made clear to the Tribe that he would proceed with compact negotiations only if the Tribe confirmed its right to conduct gaming on its trust land in Cherokee County. Thus, the Tribe, before submitting a proposed compact to Governor Brownback, requested an advisory letter opinion from the Office of the General Counsel of the National Indian Gaming Commission (the "NIGC") pursuant to 25 C.F.R. § 292.3(a) concerning whether the Tribe's Kansas trust land was eligible for gaming. Howell confirmed this condition for compact negotiations by notifying the Tribe in a letter in September 2013 that the compact negotiations depended on the results of the NIGC's advisory opinion.

Tribe's Submission of a Proposed Compact

15. Pursuant to the IGRA, and in coordination with the Governor's staff, the Tribe submitted a compact proposal to Governor Brownback dated June 6, 2013. In keeping with the Tribal leadership's commitment to Governor Brownback, that initial compact proposal provided that the Tribe would pay compact fees to four local governments, including the Board of County Commissioners of Cherokee County, the City of Baxter Springs, the City of Galena, and the Riverton Unified School District No. 404, located at Riverton.

16. In late 2013 and early 2014, the previously mutually cooperative discussions between Governor Brownback and the Tribe stalled. During that same time, the Kansas Legislature dramatically reduced the fees necessary for an applicant to seek approval to develop and manage a state casino in the Southeastern Kansas Gaming Zone, which includes Cherokee and Crawford Counties. The Kansas Lottery Commission began seeking applications to develop a state-owned casino in the zone in July 2014.

17. On November 21, 2014, the Acting General Counsel of the NIGC, Eric N. Shepard, issued an advisory letter opinion confirming that the Tribe's Kansas trust land is eligible for gaming. The Tribe continued to attempt to pursue a compact, but Governor Brownback refused to engage in any further negotiations.

State's Refusal to Negotiate a Compact with the Tribe

18. Governor Brownback's general counsel sent a letter to the Tribe dated April 9, 2015, notifying the Tribe that the State planned to file a judicial challenge to NIGC's advisory opinion—guidance that Governor Brownback had made a condition for compact negotiations. In fact, on that same date—and without conferring with the Tribe—the State filed an action in this Court challenging the agency's advisory letter guidance, which suit was captioned and styled as

Kansas ex rel. Schmidt et al. v. National Indian Gaming Commission et al., No. 15-cv-4857-DDC-KGS (the "NIGC Lawsuit").

19. On April 14, 2015, without any prior notice or consultation with the Tribe, the State filed an amended complaint in the NIGC Lawsuit, in which it named three governmental entities of the Tribe, as well as 18 individual elected officers, employees of governmental agencies, and members of boards of enterprises of the Tribe as party defendants. Most of the individuals named in the State's amended complaint had no authority or responsibility with respect to gaming, including gaming on the Tribe's Kansas trust land.

20. On December 18, 2015, this Court dismissed the complaint, holding that the State did not have the right to bring a suit against the federal government or the Quapaw Tribe under the IGRA. (Doc. 91.)

REQUIREMENTS UNDER THE IGRA FOR A STATE TO NEGOTIATE GAMING COMPACTS AND TO NEGOTIATE IN GOOD FAITH

21. Indian gaming began to be developed in the 1970s as a means for tribal governments—otherwise lacking viable tax bases—to generate revenues to provide governmental services. Prior to the enactment of the IGRA, tribes established their right to conduct and regulate gaming on Indian lands within states that otherwise allow and encourage gaming. *See, e.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22, 107 S. Ct. 1083, 1094 (1987); *Bryan v. Itasca County*, 426 U.S. 373, 390, 96 S. Ct. 2102, 2111-12 (1976). In 1988, Congress adopted the IGRA to further tribal economic development through gaming revenues, to promote tribal self-government, and to ensure adequate regulation of Indian gaming. *See* 25 U.S.C. § 2701.

22. Within the IGRA, Congress recognized the right of tribes to conduct and regulate

gaming on Indian lands in two categories—namely, traditional and social games (classified as class I gaming) and bingo and similar games (classified as class II gaming). *See* 25 U.S.C. § 2703(6) & (7). The statute recognized tribes' exclusive jurisdiction over class I and class II gaming, subject to certain provisions within the IGRA. *See* 25 U.S.C. § 2710(a)(1) & (2). The IGRA classified other types of games not within class I and class II—including gaming sometimes referred to as high-stakes or "casino-style" gaming—as class III gaming, *see* 25 U.S.C. § 2703(8), and gave states a limited role in the regulation of gaming in that category, *see id*. § 2710(d).

23. The IGRA established a framework under which Indian tribes may conduct class III gaming. The statute provides that "[a]ny Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity . . . is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). The IGRA requires that "[u]pon receiving such a request, the State *shall negotiate with the Indian tribe in good faith* to enter into such a compact." *Id.* (emphasis added).

24. Under the IGRA, compact negotiations are not voluntary—the act specifies the "State *shall* negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A) (emphasis added). As the courts have recognized, through the IGRA "Congress took from the tribes collectively whatever sovereign rights they might have had to engage in unregulated gaming activities, but imposed on the states the obligation to work with tribes to reach an agreement under the terms of IGRA permitting the tribes to engage in lawful class III gaming activities." *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1030 (9th Cir. 2010).

25. A state's obligation to enter into good faith compact negotiations is triggered immediately upon request of a tribe. *See Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1032 (2d Cir. 1990). "The only condition precedent to negotiation specified by the IGRA is a request by the tribe to enter into negotiations." *Id.* at 1028. The Quapaw Tribe met this condition precedent, and as a result compact negotiations by the State were and are mandatory. States are not excused from their obligation to enter into compact negotiations even if a tribe has not yet received final regulatory approval to conduct gaming on Indian lands. *See id*.

26. Not only must a state enter into compact negotiations upon the request of a tribe, a state must engage in such negotiations in *good faith* as a matter of law. *See* 25 U.S.C. § 2710(d)(3)(A). A failure to negotiate at all constitutes a breach of the duty to renegotiate in good faith. *Northern Arapaho Tribe v. State of Wyoming*, 389 F.3d 1308, 1312 (10th Cir. 2004); (noting "[w]hen a state wholly fails to negotiate . . . it obviously cannot meet its burden of proof to show that it negotiated in good faith."); *Mashantucket Pequot Tribe*, 913 F.2d at 1032-33. The IGRA sets forth a limited number of terms that may be considered during the negotiation process. *See* 25 U.S.C. § 2710(d)(3)(C). The IGRA contains these limitations "in order to ensure that tribal-state compacts cover only those topics that are related to gaming and are consistent with IGRA's stated purposes . . . ." *Rincon Band*, 602 F.3d at 1028-29.

27. Further, a state cannot use the compacting requirement to exclude a tribe from gaming in order to protect its state-licensed gaming enterprises. Congress intended that "the compact requirement for class III [gaming] not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes." S. Rep. No. 100-446, at 13. States may not, for example, exclude a tribe from gaming on the basis that another casino in the area may

provide more financial benefits to the state. The IGRA "was not designed to give states complete power over tribal gaming such that each state can put the opportunity to operate casinos up for sale to the tribe willing to pay the highest price." *Rincon Band*, 602 F.3d at 1030. Rather, "IGRA's stated purposes include ensuring that *tribes* are the *primary beneficiaries* of gaming and ensuring that gaming is protected as a means of generating *tribal revenue*." *Rincon Band*, 602 F.3d at 1035 (emphasis in original).

28. In general, a state may not take a hard line position in negotiations, making a take-it-or-leave-it offer that would require the tribe either to accept provisions outside the permissible scope of the IGRA or go without a compact. *See Rincon Band*, 602 F.3d at 1039. Further, a state's subjective belief that it is not required to negotiate or that it is doing so in good faith does not excuse a failure to negotiate or to do so in good faith. *See Mashantucket Pequot Tribe*, 913 F.2d at 1033. For purposes of the IGRA, "good faith should be evaluated objectively based on the record of negotiations, and . . . a state's subjective belief in the legality of its requests" does not excuse improper actions. *Rincon Band*, 602 F.3d at 1041.

29. If a state fails to enter into mandatory compact negotiations or fails to negotiate in good faith, the IGRA permits a tribe to sue the state in federal court. 25 U.S.C. § 2710(d)(7)(A)(i). In such a suit, if a tribe shows that "the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith" then "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith . . . ." 25 U.S.C. § 2710(d)(7)(B)(ii). If "the court finds that the State has failed to negotiate in good faith . . . the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. § 2710(d)(7)(B)(iii). If a compact is not entered into within a 60-day period, the IGRA requires the parties to attend mediation. *See*

25 U.S.C. § 2710(d)(7)(B)(iv). If, after mediation, the state still fails to consent to a compact, the IGRA requires the Secretary of the Interior to prescribe, in consultation with the Tribe, procedures under which the Tribe may conduct gaming on the Tribe's Indian lands. *See* 25 U.S.C. § 2710(d)(7)(B)(vii).

CAUSES OF ACTION

(Failure by the State to negotiate a tribal-state gaming compact in good faith (25 U.S.C. § 2710(d)(7)(A)(i)).

30. The Tribe hereby incorporates the preceding paragraphs as if set forth herein.

31. More than 180 days have passed since the Tribe's June 6, 2013, request to the Governor of the State of Kansas to begin tribal-state compact negotiations, as required under 25 U.S.C. § 2710(d)(7)(B)(i).

32. Not only has a compact not yet been entered into between the State and the Tribe, but the State has not even responded to the request of the Tribe to negotiate, and has not entered into good-faith negotiations with the Tribe.

33. Contrary to the requirements of the IGRA, the governor of the State—after initially encouraging the Tribe to seek a compact—ceased communicating and cooperating with the Tribe, and instead began taking actions designed to promote a new State-owned gaming operation within the Southeastern Kansas Gaming Zone, and to protect it from competition from Indian gaming. Among other actions, the State—without any consultation with the Tribe, filed an action against the NIGC and other federal parties seeking to challenge the very advisory legal opinion letter Governor Brownback had made a condition of compact negotiations. Subsequently, the State named individual Tribal leaders, officers, department directors and others in claims without legal merit, and primarily to discourage the Tribe from seeking to

pursue its recognized legal rights under the IGRA. Governor Brownback's and the State's actions with respect to a possible class II gaming compact have been arbitrary, in bad faith, and have been designed to retaliate against an Indian tribe for exercising federally recognized rights, to harass and intimidate the Tribal leadership, and to delay compact negotiations improperly under color of law.

34. Because the State has failed to enter into good faith negotiations for a compact with the Tribe, the Tribe is entitled to appropriate relief under 25 U.S.C. § 2710.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court award the following relief:

35. Issue a declaration that the State was and is required to negotiate in good faith with the Tribe to enter into a tribal-state gaming compact relating to the Kansas Tract, but that it has failed to do so in bad faith and in violation of 25 U.S.C. § 2710(d)(3) and other federal law.

36. Issue an order requiring the State to conclude a gaming compact with the Tribe within sixty (60) days pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii), failing which a compact must be selected by a mediator pursuant to 25 U.S.C. § 2710(d)(7)(B)(iv), and providing that if the State fails to consent to the compact selected by the mediator within sixty (60) days, the Secretary of the Interior shall prescribe, in consultation with the Tribe, the procedures under which the Tribe may conduct gaming on the Tribe's Indian lands located in the state of Kansas, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii).

37. Any and all other relief that this Court deems just and appropriate.

Respectfully submitted,

s/ *Paul M. Croker*
Paul M. Croker Kansas Bar No. 21627
ARMSTRONG TEASDALE, LLP
2345 Grand Boulevard, Suite 1500
Kansas City, Missouri 64108
Telephone: (816) 221-3420
Telecopier: (816) 221-0786
pcroker@armstrongteasdale.com

Stephen R. Ward, Okla. Bar No. 13610*
* *Pro hac vice admittance pending*
R. Daniel Carter, Okla. Bar No. 30514*
* *Pro hac vice admittance pending*
CONNER & WINTERS, LLP
4000 One Williams Center
Tulsa, Oklahoma 74172-0148
Telephone: (918) 586-8978
Telecopier: (918) 586-8698

Attorneys for the Plaintiff, the Quapaw Tribe of Indians