OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2020-3

The Honorable Roger Thompson
Oklahoma State Senate, District 8
2300 N. Lincoln Blvd., Room 537
Oklahoma City, OK 73105

March 9, 2020

Dear Senator Thompson,

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

> **The required allocation of fees paid to the State pursuant to the Model Tribal Gaming Compact is set forth in 3A O.S.Supp.2019, § 280. The status of the Compacts is currently the subject of litigation, but covered gaming is ongoing and the associated fees continue to be paid to the State. In light of the uncertainty regarding the status of the Compacts—specifically whether they have expired or continue in effect—must the State continue to deposit the fees paid as set forth in 3A O.S.Supp.2019, § 280?**

I.
BACKGROUND

Under the State-Tribal Gaming Act, "of all fees received by the state pursuant to subsection A of Part 11 of the Model Tribal Gaming Compact: a. twelve percent (12%) shall be deposited in the General Revenue Fund, and b. eighty-eight percent (88%) of such fees shall be deposited in the Education Reform Revolving Fund," with certain set amounts also going to the Department of Mental Health and Substance Abuse Services. 3A O.S.Supp.2019, § 280. Meanwhile, the referenced portion of the Model Tribal Gaming Compact—subsection A of Part 11—provides for the payment of fees to the State by Tribes in consideration for the "substantial exclusivity" enjoyed by the Tribes to conduct gaming in Oklahoma, and is conditioned on the State not authorizing additional gaming by other entities not contemplated by the Model Compact. *See id.* § 281, Part 11(A); *see also id.* at Part 11(E).

You have asked where state entities should deposit monies paid by Indian Tribes to the State generated by tribal gaming operations when the status of the Compacts is currently the subject of active litigation in federal court. *See Cherokee Nation et al. v. Stitt*, No. CIV-19-1198 (W.D. Okla.).

The litigation centers around the interpretation of Part 15(B) of the Model Tribal Gaming Compact, which provides:

> (1) This Compact shall have a term which will expire on January 1, 2020,
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> (2) 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;
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> (3) 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.

See 3A O.S.Supp.2019, § 281 (enumeration added for reference purposes).

Clause (1) of Part 15(B) states that the Compact's initial term expired on January 1, 2020. The Governor of Oklahoma in the pending litigation has contended that this clause has gone into effect and the Compacts have therefore expired. The plaintiff Tribes, in contrast, contend that under clause (2) of Part 15(B) the Compacts automatically renewed because the conditions that trigger that renewal have been met.

This provision also contains a third clause. The Governor has contended that he validly called for renegotiation under clause (3) of Part 15(B). Because clause (3) is a proviso, it should generally be read as a limitation or condition upon the preceding clauses. *See Proviso*, BLACK'S LAW DICTIONARY (11th ed. 2019). A valid call for renegotiation could therefore operate to suspend the clauses that precede the semicolon commencing the proviso. *See, e.g.*, *Judge v. Quinn*, 612 F.3d 537, 550-51 (7th Cir. 2010). Otherwise clause (3)—and its specification of both the time to call for and the subject matter of renegotiation—would be superfluous since parties to a contract always may jointly agree to renegotiate and modify a contract's term even absent a proviso like clause (3). *See Nat'l Interstate Life Ins. Co. v. Thomas*, 1981 OK 71, ¶ 30, 630 P.2d 779, 783; AM. JUR. 2D *Contracts* § 496 (2004); RESTATEMENT OF CONTRACTS § 408 (1936). Under this view, both the termination and automatic renewal of the Compacts have been suspended during the period of renegotiation—and the Compacts are still in effect (but also have not automatically renewed for a second fifteen-year term).

The question pending before the federal court is whether the Compacts are expired, are still in effect, or have automatically renewed. This Opinion does not, and cannot, decide that question. *See* STATEMENT OF POLICY OF THE ATTORNEY GENERAL REGARDING ISSUING FORMAL OPINIONS (2019); 2006 OK AG 35, ¶ 27. But because the Tribal Nations have continued to pay exclusivity fees to the State, you ask how state agencies should allocate such funds while the status of the Compacts remains pending in federal litigation.

II.
DISCUSSION

As noted at the outset, Section 280 of Title 3A requires that fees received "pursuant to" Part 11(A) of the Compacts be deposited into the Education Reform Revolving Fund and the General Revenue Fund, with certain amounts also transferred to the Department of Mental Health and Substance Abuse Services. Under the view that the Compacts have automatically renewed, or are otherwise still in effect, the answer to your question is clear: The Compacts' exclusivity fees must be deposited as provided for in Section 280.

That answer does not change despite the fact that the Governor has argued—and a federal court may agree—that the Compacts have expired. Expired or not, the funds delivered by the Tribes can still be said to have been paid "pursuant to" the Compacts as contemplated by Section 280, rather than pursuant to some other obligation or theory of conveyance. Part 11(A) of the Compacts states that these fees are in consideration for the Tribes' "substantial exclusivity" to conduct gaming in Oklahoma—exclusivity that the Tribes still enjoy because the State has not acted to authorize gaming inconsistent with that exclusivity. The Tribes still benefit from exclusivity, and to the extent that the State accepts fees paid by the Tribe in the interregnum while the Compacts' effectiveness is in doubt, those fees must be deposited as required by Section 280.

Assuming, *arguendo*, that the fees are not being received "pursuant to" the Compacts because those Compacts have expired, and thus Section 280 is not directly applicable, the ultimate answer still does not change. The Office of Management and Enterprise Services ("OMES") has alternatively characterized Compact payments as a "voluntary act" of the tribes—in other words, a gift to the State. The Governor, or a specifically authorized officer or agency, may on behalf of the State accept gifts. *See* 60 O.S.Supp.2019, § 383. But this authority is not unlimited. If a "gift [is] made with a purpose inconsistent with state law and in contravention of the public mission of the State," then the gift "should not be accepted by the State." 2011 OK AG 6, ¶ 20. Thus, if a state agency believes the Tribes' payment is contrary to law because the Compacts have expired and the funds instead are the product of gaming declared illegal by state law, then the state agency should reject the funds. If the agency concludes otherwise and has the power to accept the funds as a gift, state law also requires OMES to allot that gift to the state entity specified in the gift or the state entity performing the purposes to which the gift is dedicated, "in accordance, as nearly as possible, with the terms of the gift." 60 O.S.Supp.2019, §§ 384 – 385. Here, it is evident that the purported gift by the Tribes is intended to be allotted to the state agencies and purposes specified in Section 280 of Title 3A.[1] In short, to the extent a state entity chooses to accept the exclusivity fees as a voluntary gift—assuming they can be appropriately characterized as a gift—those fees should be allotted in the same manner as provided by Section 280.

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[1] Because the Tribes have taken the view that the funds are being delivered in accordance with Part 11 of the Compacts, the intent and expectation of the Tribes is best read as desiring the funds be used in accordance with Section 280, which funds education among other purposes. *See also* Robby Korth & Kateleigh Mills, *$13 million in limbo while Stitt, tribes battle*, NPR, https://stateimpact.npr.org/oklahoma/2020/02/13/13-million-in-limbo-while-stitt-tribes-battle/ (Feb. 13, 2020) ("The compacted tribes are continuing to pay their monthly gaming fees, and they expect the state to spend that money on education. Matt Morgan[,] the chairman of the Oklahoma Indian Gaming Association[, stated:] 'Tribal leadership has been clear in their desire to do business as usual, to see the funding continue,' he said. 'They are remitting their fees still and hope the state of Oklahoma will continue utilizing those funds in the spirit it was intended.'").

Finally, we are not aware of any authority by which the State can deposit these monies in any fund other than those already mentioned. State agencies have only "those powers granted by law, by constitution or statute, and those officials and agencies cannot expand those powers by their own authority." *Oklahoma Pub. Employees Ass'n v. Oklahoma Dep't of Cent. Servs.*, 2002 OK 71, ¶ 25, 55 P.3d 1072, 1083.

Importantly, the State may conditionally receive the funds while explicitly reserving, without waiving or conceding, any legal position advanced by the Governor that the Compacts are no longer in effect. Waiver must be a "voluntary and intentional relinquishment" and must either be express or otherwise "clear, unequivocal, and decisive." *Barringer v. Baptist Healthcare of Oklahoma*, 2001 OK 29, ¶¶ 22-23, 22 P.3d 695, 700-01; *Cf. also Edelman v. Jordan*, 415 U.S. 651, 673-74 (1974) (state receipt of federal funds does not on its own constitute waiver of Eleventh Amendment sovereign immunity from suit in federal court); *State ex rel. W. State Hosp. v. Stoner*, 1980 OK 104, 614 P.2d 59 (acceptance of partial payment of debt did not constitute waiver of right to full payment nor would estoppel bar action seeking collection). Here, the opposite is true: in receiving the funds, there is an ***express reservation*** and ***denial of waiver***. It is our understanding that this conditional receipt and express reservation of rights has been and will be clearly set forth in letters to Tribal Nations from OMES when funds related to gaming are received, stating that the ultimate disposition of the funds will be contingent on the final determination of the federal courts. But any such conditional receipt of funds must nonetheless comply with Section 280.

In sum, to the extent a state entity accepts funds from Tribes that are a share of their gaming revenue as contemplated by Part 11(A) of the Model Compact, state law does not permit any course other than complying with Section 280 of Title 3A. This will retain the *status quo* while litigation on the Compacts is pending, recognizing that such acts do not constitute a waiver or concession of any legal position taken by the Governor in that litigation.

It is, therefore, the official Opinion of the Attorney General that:

If, during the course of litigation to determine whether Tribal Gaming Compacts are expired or continue in effect, the State continues to accept payments from the Tribes that are consistent with Part 11(A) of the Compacts, then the State must deposit such fees as set forth in 3A O.S.Supp.2019, § 280. Moreover, the act of depositing the fees consistent with 3A O.S.Supp.2019, § 280 does not constitute waiver of the State's legal position in litigation or otherwise concede that the Compacts are still operative.

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