ORIGINAL

2021 OK 3

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

THE HONORABLE GREG TREAT, SENATE PRESIDENT PRO TEMPORE, in his official capacity, and THE HONORABLE CHARLES MCCALL, SPEAKER OF THE HOUSE, in his official capacity,

Petitioners,

v.

THE HONORABLE J. KEVIN STITT, GOVERNOR OF THE STATE OF OKLAHOMA, in his official capacity,

Respondent.

No. 118,913

FOR OFFICIAL PUBLICATION

ORIGINAL PROCEEDING FOR DECLARATORY RELIEF

¶0 Petitioners brought this action seeking declaratory relief that Respondent lacked authority to enter into two tribal gaming compacts on behalf of the State. The Court assumes original jurisdiction and grants the declaratory relief sought by Petitioners that the two tribal gaming compacts are invalid under Oklahoma law.

ORIGINAL JURISDICTION ASSUMED AND DECLARATORY RELIEF GRANTED.

V. Glenn Coffee, Cara Rodriguez, Denise Lawson, Glenn Coffee & Associates, PLLC, Oklahoma City, Oklahoma, for Petitioners.

Phillip G. Whaley, Daniel G. Webber, Jr., Patrick R. Pearce, Jr., Matthew C. Kane, Ryan Whaley, Oklahoma City, Oklahoma, for Respondent.

Mark E. Burget and Jeffrey C. Cartmell, Office of the Governor, Oklahoma City, Oklahoma, for Respondent.

Winchester, J.

¶1 Petitioners, the Honorable Greg Treat, Senate President Pro Tempore, and the Honorable Charles McCall, Speaker of the House, request the Court to assume original jurisdiction to declare that the new tribal gaming compacts between the State and the United Keetoowah Band of Cherokee Indians and between the State and the Kialegee Tribal Town are invalid under Oklahoma law. The Court assumes original jurisdiction. Okla. Const. art. VII, § 4. The Court invokes its *publici juris* doctrine to assume original jurisdiction here as Petitioners have presented this Court with an issue of public interest in urgent need of judicial determination. *Fent v. Contingency Review Bd.*, 2007 OK 27, ¶ 11, 163 P.3d 512, 521. The Court grants the declaratory relief sought by Petitioners, as the Executive branch did not validly enter into the new tribal gaming compacts with the United Keetoowah Band of Cherokee Indians and the Kialegee Tribal Town. *Ethics Comm'n of State of Okla. v. Cullison*, 1993 OK 37, ¶ 4, 850 P.2d 1069, 1072.

FACTS AND PROCEDURAL HISTORY

¶2 This Court previously declared that the tribal gaming compacts the Executive branch entered into with the Comanche and Otoe-Missouria Tribes were invalid under Oklahoma law because the gaming compacts authorized certain forms of Class III gaming prohibited by state law. *Treat v. Stitt*, 2020 OK 64, ¶¶ 6-8, 473 P.3d 43, 45 (*Treat I*). While *Treat I* was pending before this Court, the Executive branch entered into two additional compacts with the United Keetoowah Band of Cherokee Indians and the Kialegee Tribal Town. The parties to the

compacts submitted the tribal gaming compacts to the United States Department of the Interior, and the Department of the Interior deemed them approved by inaction, only to the extent they are consistent with the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. § 2710(d)(8)(C). The Court acknowledges that the United Keetoowah Band of Cherokee Indians and the Kialegee Tribal Town are not parties in this matter; these Tribes are sovereign nations and have not submitted to the jurisdiction of this Court.

¶3 The question before this Court is whether the Executive branch validly entered into the new tribal gaming compacts with the United Keetoowah Band of Cherokee Indians and the Kialegee Tribal Town. We hold it did not. For the new compacts to be valid under Oklahoma law, the Executive branch must have negotiated the new compacts within the statutory bounds of the Model Tribal Gaming Compact (Model Compact)[1] or obtained the approval of the Joint Committee on State-Tribal Relations.

DISCUSSION

¶4 The issue before this Court, as in *Treat I*, implicates the separation of powers. To better understand the balance of powers between the Executive branch and the Legislative branch in negotiating and entering into tribal gaming compacts, we must look at the history of tribal gaming in Oklahoma.

[1] *See* 3A O.S. Supp. 2018, § 280.1; 3A O.S. Supp. 2012, § 281.

¶5 Gambling has long been broadly prohibited by Oklahoma's criminal laws,[2] and carving out exceptions to these criminal laws is a question of public policy.[3] The Legislature, ***through a vote of the citizens of Oklahoma***, carved out certain exceptions to gambling when it enacted the State-Tribal Gaming Act, 3A O.S.2011, §§ 261-282. State Question No. 712 proposed to the citizens contained the specific language found in the State-Tribal Gaming Act, which sets forth the terms and conditions under which the State's federally recognized Tribes can engage in Class III gaming on tribal land through compacts. The citizens of Oklahoma approved a specific statutory process by which the State enters into Model Compacts with Indian Tribes within Oklahoma. *See* 3A O.S. Supp. 2018, §§ 280, 280.1; 3A O.S. Supp. 2012, § 281(15)(A) and (16). The Executive branch's role is to administer the State-Tribal Gaming Act by advocating and negotiating compacts within the bounds of the law. *Treat I*, 2020 OK 64, ¶ 5, 473 P.3d at 44.

¶6 The Executive branch's authority to advocate and negotiate gaming compacts is statutory—not constitutional. *Id.* ¶ 5, 473 P.3d at 44. And the use of such authority must be in conformity with statute. Oklahoma statutes currently provide the Executive branch two methods by which it can negotiate tribal gaming

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[2] *See generally* 21 O.S.2011, §§ 941-988; *e.g.*, 21 O.S.2011, § 941 (prohibiting card and table games); *id.* at § 942 (subjecting gamblers to prosecution); *id.* at § 946 (prohibiting gambling houses); *id.* at § 982(B) (prohibiting commercial gambling).

[3] *See Whirlpool Corp. v. Henry*, 2005 OK CR 7, ¶ 4, 110 P.3d 83, 84 (holding only the Legislature may define what constitutes a crime in Oklahoma); *see also D.C. v. John R. Thompson Co.*, 346 U.S. 100, 114 (1953) (holding "[t]he repeal of laws is as much a legislative function as their enactment").

compacts: (1) via the Model Compact,[4] or (2) via the general statutory authority conferred under 74 O.S. Supp. 2012, § 1221(C), which requires the approval of the Joint Committee on State-Tribal Relations (Joint Committee) when a tribal gaming compact contains provisions different from those in the Model Compact. The Executive branch did not follow either of these two methods in entering into the new compacts with the United Keetoowah Band of Cherokee Indians and the Kialegee Tribal Town.

I. Model Compact Method.

¶7 The first method by which the Executive branch can negotiate tribal gaming compacts is through the Model Compact, approved by the citizens of Oklahoma. But the Model Compact confers little negotiating authority to the Executive branch as the Model Compact is not an ordinary private contract. *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51, ¶ 7, 230 P.3d 488, 491. It is a voter-approved statute codified in the Oklahoma Statutes. *Id.* Sections 280.1 and 281 of the State-Tribal Gaming Act set out the provisions of the Model Compact. *See* 3A O.S. Supp. 2018, § 280.1; 3A O.S. Supp. 2012, § 281. Because the Model Compact is a state statute, the provisions of the gaming compact are fixed and not negotiable except by Legislative amendment. *See Cossey v. Cherokee Nation Enter., LLC*, 2009 OK 6, ¶ 12, 212 P.3d 447, 464 (Taylor, J., concurring). It is an "all or none" offer to the Tribes, "which if accepted, constitutes the gaming compact between this [S]tate

[4] *See* 3A O.S. Supp. 2018, §§ 280, 280.1; 3A O.S. Supp. 2012, § 281.

and the accepting [T]ribe for purposes of IGRA without any further action on behalf of the State of Oklahoma." *Griffith*, 2009 OK 51, ¶ 14, 230 P.3d at 493. As a result, the Executive branch's authority to negotiate the provisions of the Model Compact is limited.

¶8 Per the Model Compact, the Executive branch's authority to amend the terms and conditions of a Model Compact is constrained to advocating for fees and exclusivity.[5] Its authority does not extend to modifying other terms or provisions of the Model Compact without approval from the Joint Committee, as discussed below. The Court notes the Executive branch could have sole authority to negotiate additional terms and provisions of the Model Compact. However, the Legislature must amend the State-Tribal Gaming Act to grant the Executive branch that authority. Until that time, the Executive branch's authority to negotiate the Model Compact is constrained by the terms of the State-Tribal Gaming Act—to negotiate fees and exclusivity. 3A O.S. Supp. 2012, § 281(15)(B).

II. Joint Committee Method.

¶9 The second method by which the Executive branch can negotiate tribal gaming compacts is by the approval of the Joint Committee. Section 1221(C) of

[5] Title 3A O.S. Supp. 2012, § 281(15)(B) states:

> 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.

Part 11(A) relates entirely to fees derived from covered gaming revenue. *Id.* at § 281(11)(A). Part 11(E) sets for the exclusivity fee schedule. *Id.* at § 281(11)(E).

Title 74 grants the Executive branch general authority to negotiate and enter into cooperative agreements with Tribes within the State to address issues of mutual interest.[6] This Court has previously recognized the Legislature's creation of the Joint Committee to oversee agreements between the Tribes and the State, which includes tribal gaming compacts. *See e.g.*, *Griffith*, 2009 OK 51, ¶ 12, 230 P.3d at 492; *Cossey*, 2009 OK 6, ¶ 7, 212 P.3d at 471 (Kauger, J., concurring in part, dissenting in part). Since a tribal gaming compact involves trust responsibilities, Section 1221(C) requires two separate approvals for a gaming compact to become effective: approval by the Joint Committee and approval by the Department of Interior. Though 74 O.S. § 1221 has undergone several amendments over the years, the Legislature never withdrew the requirement that such agreements

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[6] Title 74 O.S. Supp. 2012, § 1221(C) states:

> C. 1. The Governor is authorized to negotiate and enter into cooperative agreements on behalf of this state with federally recognized Indian tribal governments within this state to address issues of mutual interest. The Governor may elect to name a designee who shall have authority to negotiate and enter into cooperative agreements on behalf of the state with federally recognized Indian tribes as provided for in this section. Except as otherwise provided by this subsection, such agreements shall become effective upon approval by the Joint Committee on State-Tribal Relations.
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> 2. If the cooperative agreements specified and authorized by paragraph 1 of this subsection involve trust responsibilities, approval by the Secretary of the Interior or designee shall be required.
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> 3. Any cooperative agreement specified and authorized by paragraph 1 of this subsection involving the surface water and/or groundwater resources of this state or which in whole or in part apportions surface and/or groundwater ownership shall become effective only upon the consent of the Oklahoma Legislature authorizing such cooperative agreement.

require the approval of both the Joint Committee and Department of Interior. *See* 74 O.S. Supp. 2012, § 1221(C).

¶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 (outside of the provisions regarding fees and exclusivity as discussed previously), the Executive branch is acting under the general authority given to it pursuant to § 1221(C). It 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 Interior. 74 O.S. Supp. 2012, § 1221(C)(1); *see also Griffith*, 2009 OK 51, ¶ 12, 230 P.3d at 492.[7] This method allows for checks and balances of power between the Legislative branch and the Executive branch.

III. Analysis of the compacts with the United Keetoowah Band of Cherokee Indians and the Kialegee Tribal Town.

¶11 The Executive branch did not follow either the Model Compact method or the Joint Committee method in negotiating the new compacts with the United Keetoowah Band of Cherokee Indians and the Kialegee Tribal Town. The Executive branch's authority to negotiate the provisions of the Model Compact is constrained to advocating for fees and exclusivity, which are not at issue in this case. The new compacts contain terms that are different or outside the Model Compact provisions altogether. Due to the statutory nature of the Model Compact,

[7] During oral argument before a Referee in *Treat I*, Petitioners referenced that only two tribal gaming compacts have differed from the Model Compact, and the Tribes and the Executive branch submitted both of those gaming compacts to the Joint Committee for approval.

the new and differing provisions operate as the enactment of new laws and/or amend existing laws, which exceeds the authority of the Executive branch. Even if the Executive branch was attempting to negotiate with the United Keetoowah Band of Cherokee Indians and the Kialegee Tribal Town under the general authority conferred pursuant to 74 O.S. Supp. 2012, § 1221(C)(1), the parties were obligated to seek the approval of the Joint Committee. They did not, and the compacts are therefore invalid under Oklahoma law.

CONCLUSION

¶12 The Executive branch's action in entering into the new compacts with the United Keetoowah Band of Cherokee Indians and the Kialegee Tribal Town—containing different terms than the Model Gaming Compact and without approval from the Joint Committee—disrupts the proper balance between the Executive and Legislative branches. Without proper approval by the Joint Committee, the new tribal gaming compacts are invalid under Oklahoma law.

ORIGINAL JURISDICTION ASSUMED AND DECLARATORY RELIEF GRANTED.

CONCUR: Darby, C.J., Kauger **(by separate writing)**, Winchester, Combs, and Gurich, JJ., and Reif, S.J.

CONCUR IN RESULT: Rowe, J. **(by separate writing)**.

DISSENT: Kane, V.C.J.

Kane, V.C.J., dissenting:

"I dissent for the reasons set forth in my dissent to *Treat v. Stitt*, 2020 OK 64, 473 P.3d 43 (*Treat I*)."

RECUSED: Edmondson and Colbert, JJ.