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ATTORNEY GENERAL OPINION NO. 2025-11

Justin H. Whitten
Chief Counsel, Governor Laura Kelly
Capitol Building
Room 241, South
Topeka, Kansas 66612

Re: Legislature—State-Tribal Relations—Negotiation of Compacts; Submission to Legislature; Approval or Rejection; Attorney General as Legal Counsel; Compact Provisions; Report of Governor to Legislature

Legislature—State-Tribal Relations—Negotiation of Sports Wagering Compacts

State Boards, Commissions and Authorities—State Lottery—Definitions

State Boards, Commissions and Authorities—State Lottery—Lottery Gaming Facilities; Gaming Zones; Gaming Facility Management Contract Requirements; Privilege Fees

Synopsis: The Wyandotte Nation, a federally recognized tribe, wants to negotiate in good faith with the State of Kansas for a gaming compact under the federal Indian Gaming Regulatory Act (IGRA) that would allow it to conduct Class III gaming on land in the State. Under the Kansas Expanded Lottery Act (KELA), the State Lottery owns one casino in each of the four statutorily designated geographic areas, and each casino is managed by an outside entity. KELA and the governing management contracts for these casinos prevent the State from

> entering into additional management contracts or designating additional areas of the State for gaming by lottery gaming facilities and similar gaming facilities. Because KELA and the management contracts do not prohibit efforts that further tribal gaming under IGRA, they do not prohibit negotiating with the Wyandotte Nation over a compact. And sports wagering is eligible to be included in any compact with the Wyandotte Nation because Kansas currently permits this type of Class III gaming. Cited herein: K.S.A. 46-2302; K.S.A. 46-2305; K.S.A. 74-8702; K.S.A. 74-8734.

* * *

Dear Mr. Whitten:

As Chief Counsel to Kansas Governor Laura Kelly, you ask four questions stemming from the Wyandotte Nation's request to negotiate in good faith with the State of Kansas for a gaming compact under the federal Indian Gaming Regulatory Act (IGRA).[1] The Wyandotte Nation, a federally recognized Native American tribe, has two parcels of trust land in Kansas: one in Wyandotte County commonly known as "the Shriner Tract,"[2] and one in Sedgwick County commonly known as "the Park City Parcel."[3] On each parcel, the Wyandotte Nation currently operates a facility with Class II gaming, and it wants to offer Class III gaming at the facilities.[4] Both parcels are eligible for Class III gaming pursuant to a valid tribal-state gaming compact.

Your questions focus on the interplay between federal law—IGRA—and state law—the Kansas Expanded Lottery Act (KELA). As explained below, IGRA imposes on the State (via the Governor) a duty to negotiate in good faith for a tribal-state gaming compact, which may include sports wagering, with the Wyandotte Nation. We conclude negotiations would not violate KELA and the relevant lottery gaming facility management contracts.

Before turning to your specific inquiries, we provide a brief overview of IGRA and KELA.

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[1] Your questions are slightly rephrased below.
[2] *See generally Governor of Kan. v. Norton*, 430 F. Supp. 2d 1204 (D. Kan. 2006), *judgment vacated, appeal dismissed sub nom. Governor of Kan. v. Kempthorne*, 516 F.3d 833 (10th Cir. 2008); *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193 (D. Kan. 2006).
[3] *See generally State ex rel. Kobach v. U.S. Dep't of Interior*, 72 F.4th 1107 (10th Cir. 2023).
[4] Class II gaming includes games like bingo, while Class III gaming is much more expansive and "includes such things as slot machines, casino games, banking card games, dog racing, and lotteries." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48 (1996); 25 U.S.C. § 2703.

IGRA

In 1988, Congress enacted IGRA, which authorizes Class III gaming on certain tribal lands if the gaming is conducted under "a Tribal-State compact entered into by the Indian tribe and the State" in which the lands are located.[5] IGRA prescribes the process through which the tribe may ultimately obtain a compact. To begin, the tribe must request that the State "enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities."[6] And "[u]pon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact."[7]

K.S.A. 46-2302 is the primary state statute that addresses Kansas's process for handling requests for gaming compacts, and it designates the Governor as the State's representative in these negotiations. However, the Kansas Legislature must approve any compact on behalf of the State,[8] and the United States Secretary of the Interior has the final say over whether to allow the compact to become effective.[9] There are currently four tribes that operate casinos in Kansas pursuant to tribal-state compacts.[10]

KELA

In 2007, the Kansas Legislature enacted KELA, which divides the State into four gaming zones—northeast (Wyandotte County), south central (Sedgwick and Sumner counties), southwest (Ford County), and southeast (Crawford and Cherokee counties)—and authorizes the Kansas Lottery to own and operate one lottery gaming facility (*i.e.*, a casino) in each zone, with an outside party managing the casino via a "lottery gaming facility management contract."[11] Under this statutory scheme, "the State owns the casino's gaming operations but hires a gaming facility manager via a management contract to construct and own the casino improvements and infrastructure as well as to manage the gaming operations."[12] Although "a resident Kansas American Indian tribe" may be a facility gaming manager, it need

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[5] 25 U.S.C. § 2710(d)(1)(C).
[6] 25 U.S.C. § 2710(d)(3)(A).
[7] *Id.*
[8] K.S.A. 46-2302(d).
[9] 25 U.S.C. § 2710(d)(8).
[10] The Iowa Tribe of Kansas and Nebraska, the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas, the Prairie Band Potawatomi Nation, and the Sac and Fox Nation of Missouri in Kansas and Nebraska. K.S.A. 74-9802(h).
[11] K.S.A. 74-8702(h); K.S.A. 74-8734(a), (d).
[12] *In re Equalization Appeal of Kan. Star Casino, L.L.C.*, 52 Kan. App. 2d 50, 52, 362 P.3d 1109 (2015).

not be.[13] Each gaming zone currently has one Lottery-owned, KELA-authorized casino, none of which is managed by a tribe.[14]

KELA provides certain requirements for the management contracts. Relevant here, K.S.A. 74-8734(h)(19)(A) requires these contracts include provisions that prohibit the State, before July 1, 2032, from:

- "Entering into management contracts for more than four lottery gaming facilities or similar gaming facilities, one located in the northeast Kansas gaming zone, one located in the south central Kansas gaming zone, one located in the southwest Kansas gaming zone and one located in the southeast Kansas gaming zone," and

- "designating additional areas of the state where operation of lottery gaming facilities or similar gaming facilities would be authorized."[15]

If the State violates either provision, it must "repay to the lottery gaming facility manager an amount equal to the privilege fee paid by such lottery gaming facility manager, plus interest on such amount, compounded annually at the rate of 10%."[16]

Although all current management contracts contain these prohibitions, the contracts use slightly different language. For example, the contract for the operation of Kansas Star Casino in the south-central gaming zone provides:

> The Kansas Lottery, acting on behalf of the State of Kansas, agrees by entering into this Agreement that, until July 1, 2032:
>
> a) Neither the Kansas Lottery nor the State of Kansas will enter into a management contract for, more than four (4) lottery gaming facilities or similar facilities in the four gaming zones outlined in the Kansas Expanded Lottery Act with one Lottery Gaming Facility in each gaming zone; [and]
>
> b) Neither the Kansas Lottery nor the State of Kansas will designate additional areas of the state where operation of Lottery Gaming

[13] K.S.A. 74-8734(g).
[14] The northeast gaming zone is occupied by Hollywood Casino at Kansas Speedway, the south-central gaming zone is occupied by Kansas Star Casino, the southwest gaming zone is occupied by Boot Hill Casino and Resort, and the southeast gaming zone is occupied by Kansas Crossing Casino.
[15] The statute also prevents the State from "operating an aggregate of more than 2,800 electronic gaming machines at all parimutuel licensee locations." K.S.A. 74-8734(h)(19)(iii). There is no indication that subpart (iii) is relevant to your inquiry, so we do not analyze it.
[16] K.S.A. 74-8734(h)(19)(B).

> Facilities or similar gaming facilities will be authorized, other than those set out in the Kansas Expanded Lottery Act[.][17]

We now turn to your questions.

I. Would the Governor negotiating with the Wyandotte Nation over a gaming compact violate K.S.A. 74-8734(h)(19) or the management contracts?

Your first question asks whether the Governor negotiating with the Wyandotte Nation would cause the State to violate K.S.A. 74-8734(h)(19)(A) and, by extension, its management contracts for the casinos that currently operate under KELA. We believe it would not.

Negotiating

As an initial matter, the State could only violate KELA and the management contracts if it *enters into* other management contracts or impermissibly *designates* additional areas in the State for gaming before July 1, 2032. But neither action is the same as *negotiating* a compact. Thus, assuming that entering into a compact would violate KELA and the management contracts, simply negotiating in good faith with the Wyandotte Nation (which is all the State is obligated to do) likely would not.

Negotiating over a potential compact is necessarily not the same as entering into a compact.[18] That is particularly true here, where there is no guarantee the State and the Wyandotte Nation will agree on a compact that will become effective. Although the Governor negotiates, the Legislature must approve the compact. Even then, the Secretary of the Interior may disapprove the compact. IGRA does not force the State to enter into a compact. Not only does the statute lack any express requirement that a state agree to a compact, IGRA specifically contemplates situations where a state does not agree.[19]

Similarly, negotiating would not amount to impermissibly "designating" additional areas of the State for gaming. A designation requires an intentional selection by the

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[17] Kansas Star Casino Contract ¶ 30 (on file with the Attorney General); *see also* Boot Hill Casino and Resort Contract ¶ 30 (on file with the Attorney General); Hollywood Casino at Kansas Speedway Contract ¶ 30 (on file with the Attorney General); Kansas Crossing Casino Contract ¶ 30 (on file with the Attorney General). There are minor discrepancies between this contract and the other contracts (*e.g.*, the other contracts do not include a comma in subpart (a), "Lottery Gaming Facility" in subpart (a) is not capitalized in two other contracts), but these are not material to our analysis.
[18] *Cf. Albers v. Nelson*, 248 Kan. 575, 578, 809 P.2d 1194 (1991).
[19] *See* 25 U.S.C. § 2710(d)(7); *see also New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1223 (10th Cir. 2017).

State.[20] Simply negotiating is not intentionally selecting anything. Again, there is no guarantee the Wyandotte Nation and the State will enter into a compact.

Assuming that entering into an IGRA compact would violate KELA and the management contracts, negotiating with the Wyandotte Nation, even in good faith, is neither entering into a contract nor making an impermissible designation.[21] Thus, negotiating in good faith would not breach the statute or the contracts.[22]

IGRA and KELA

Regardless, negotiating—and even entering into—a tribal-state gaming compact would not run afoul of KELA and the management contracts because their prohibition does not cover *tribal* gaming in the State pursuant to an IGRA compact. IGRA and KELA are separate statutory tracks to casino gaming in Kansas. And the language in KELA and the management contracts establishes that the relevant prohibition concerns conduct that increases gaming under KELA. Thus, a compact with the Wyandotte Nation would not fall under (and would not violate) KELA.

Congress enacted IGRA in 1988 to govern the "regulation of gaming activity that occurs *on* Indian lands."[23] In other words, IGRA is the (federal) pathway to tribal gaming on tribal land; it does not govern—and is not concerned with—state regulation of gaming on non-tribal lands.[24]

Long before it passed KELA, the Kansas Legislature facilitated tribal gaming under IGRA by enacting statutes that govern the negotiation and approval of tribal-state

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[20] *See Designate*, *Black's Law Dictionary* 561 (11th ed. 2019) ("To choose (someone or something) for a particular job or purpose."); *cf. Verlo v. Martinez*, 820 F.3d 1113, 1141 (10th Cir. 2016) ("To create a designated public forum, 'the government must make an affirmative choice to open up its property for use as a public forum.'" (quoting *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 206 (2003)).
[21] *See generally N.L.R.B. v Am. Nat. Ins. Co.,* 343 U.S. 395, 404 (1952) (recognizing that an obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession").
[22] We believe any suit alleging an anticipatory breach of contract would fail because, among other reasons, of the uncertainty over whether the State would enter into a compact before July 1, 2032. *Cf. Hefner v. Deutscher*, 58 Kan. App. 2d 58, 75, 464 P.3d 367 (2020) (recognizing that an anticipatory breach of contract "requires 'a clear and unequivocal refusal to perform' a contractual obligation." (quoting *Burcham v. Unison Bancorp, Inc.*, 276 Kan. 393, 408, 77 P.3d 130 (2003)).
[23] *Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226, 1235 (10th Cir. 2017); *see also id.* at 1236 ("The purpose of IGRA is to provide a statutory basis for both the operation and regulation of gaming by Indian tribes."); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014) ("Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else."); *Navajo Nation v. Dalley*, 896 F.3d 1196, 1201 (10th Cir. 2018) ("Congress enacted IGRA in 1988 to create a framework for states and Indian tribes to cooperate in regulating on-reservation tribal gaming.").
[24] *Cf. Pueblo of Pojoaque*, 863 F.3d at 1235–36 (concluding IGRA did not preempt off-reservation regulatory actions by New Mexico).

gaming compacts.[25] There are currently four casinos that operate in Kansas pursuant to IGRA compacts that were entered into in 1995.[26] And in 1996, the Legislature enacted the Tribal Gaming Oversight Act, in which it empowered the Kansas State Gaming Agency to oversee Class III gaming conducted under these compacts.[27]

The Kansas Legislature enacted KELA in 2007 to provide an avenue for non-tribal casino gaming in the State. Under KELA, the State, through the Kansas Lottery, owns and operates the casinos. In enacting KELA, the Legislature did not directly address any interplay with IGRA, although its definition of "lottery facility games" formerly referenced the Tribal Oversight Gaming Act.[28] The Kansas Racing and Gaming Commission oversees casinos that operate under KELA.[29]

KELA's reach is limited to gaming that occurs off tribal lands "[b]ecause IGRA preempts the field of governance of gaming activities on tribal lands."[30] This field preemption means KELA could never govern gaming matters on Indian land, which includes the Wyandotte Nation's parcels. When it enacted KELA, the Legislature knew of IGRA and the tribal-state gaming compacts. After all, the Legislature not only referenced the Tribal Gaming Oversight Act in a relevant definition, it also *approved the compacts*. Regardless, we presume the Legislature knows the law.[31] And when it enacted KELA, the law limited the Legislature to passing statutes that governed non-tribal gaming.[32]

Understanding that KELA cannot govern tribal gaming and the Wyandotte Nation's parcels, we proceed to interpret KELA, an exercise in which we are bound by the "plain and unambiguous" meaning of the relevant statutes.[33] We can neither "speculate" nor "read into the statute language not readily found there."[34] And we

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[25] K.S.A. 46-2301–05.
[26] U.S. Dep't of Interior, *Gaming Compacts: Kansas*, https://perma.cc/5KX6-RP8H (last visited Apr. 30, 2025); *see also* K.S.A. 74-9802(h).
[27] K.S.A. 74-9801–09.
[28] *See* 2007 Kan. Sess. Laws ch. 110, § 1(j) ("'Lottery facility games' means any electronic gaming machines and any other games which, as of January 1, 2007, are authorized to be conducted or operated at a tribal gaming facility, as defined in K.S.A. 74- 9802, and amendments thereto, located within the boundaries of this state."). This reference is included in the management contracts. *E.g.*, Kansas Star Casino Contract ¶ 1(n).
[29] K.S.A. 74-8772.
[30] *Pueblo of Pojoaque*, 863 F.3d at 1232.
[31] *Application of Am. Rest. Operations*, 264 Kan. 518, 524, 957 P.2d 473 (1998).
[32] To be clear, as we explain below, negotiating in good faith with the Wyandotte Nation would not violate K.S.A. 74-8734(h)(19) and the management contracts, because they only limit efforts to further additional gaming under KELA. We detail IGRA's preemptive reach because it necessarily limits what KELA (and the management contracts) can govern and it provides important context for interpreting KELA and the contracts.
[33] *In re Est. of Strader*, 301 Kan. 50, 55, 339 P.3d 769 (2014) (internal quotation marks omitted).
[34] *Id.* (internal quotation marks omitted).

must consider and give effect to "the entire act," striving, "as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible."[35] When the Legislature has expressly defined a term, we employ its definition.[36] Similar rules apply to interpreting contracts.[37] Within K.S.A. 74-8734(h)(19), there are two relevant restrictions.

First, the State cannot

> enter[] into management contracts for more than four lottery gaming facilities or similar gaming facilities, one to be located in the northeast Kansas gaming zone, one to be located in the south central Kansas gaming zone, one to be located in the southwest Kansas gaming zone and one to be located in the southeast Kansas gaming zone[.][38]

This prohibition does not try to prevent the State from negotiating over—or entering into—a tribal-state gaming compact under IGRA.

Lottery gaming facility management contracts are agreements "between the state and a lottery gaming facility manager for the management of a lottery gaming facility, the business of which is owned and operated by the Kansas lottery[.]"[39] In other words, these are contracts that allow the State to hire someone to run its gaming facilities. Although the prohibition uses the shortened term "management contracts," given its reference to the four gaming zones, where the casinos are managed under "lottery gaming facility management contracts," it is apparent that this prohibition covers those contracts and similar management agreements. In other words, this prohibition prevents additional agreements for outside entities to manage State-owned gaming facilities.

By negotiating with the Wyandotte Nation for a compact, the Governor would not be negotiating any sort of management contract, let alone entering one. The establishment of any casino resulting from a compact would be owned by the tribe, not the State. The State would not (and could not) be trying to contract for the management of a casino it did not own. Thus, the first prohibition is not concerned with a compact under IGRA.

Second, KELA prohibits the State from "designating additional areas of the state where operation of lottery gaming facilities or similar gaming facilities would be

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[35] *In re Marriage of Ross*, 245 Kan. 591, 584, 783 P.2d 331 (1989).
[36] *Cf. State v. Dooley*, 308 Kan. 641, 656, 423 P.3d 469 (2018) ("When our Legislature does not define a term or phrase, we ascertain legislative intent by giving common words their ordinary meanings.").
[37] *See Harding v. Capitol Fed. Sav. Bank*, 65 Kan. App. 2d 30, 41–42, 556 P.3d 910 (2024).
[38] K.S.A. 74-8734(h)(19)(i).
[39] K.S.A. 74-8702(r); *see also* K.S.A. 74-8702(s) (defining "[l]ottery gaming facility manager"). IGRA also allows tribes to enter into management contracts for their casinos. 25 U.S.C. § 2710(d)(9).

authorized."[40] Because a tribal casino is not a "lottery gaming facility" under KELA (because it is not owned by the State),[41] the issue is whether negotiating or entering into a compact would amount to designating an additional area of the State where a "similar gaming facility" would be authorized. We believe it would not.

KELA prohibits "designating *additional* areas" for gaming, a recognition that the State has already designated certain areas for gaming under KELA. And it has. The Legislature designated four gaming zones, which are limited to specific counties in those geographic regions.[42] Indeed, the preceding subpart references these areas.[43] And the management contracts use slightly different language that affirms the parties understood this prohibition is confined to designations similar to the existing ones (*i.e.*, KELA's gaming zones): "Neither the Kansas Lottery nor the State of Kansas will designate additional areas of the state where operation of Lottery Gaming Facilities or similar gaming facilities will be authorized, *other than those set out in the Kansas Expanded Lottery Act*."[44] Given the discussion of the existing zones, it is apparent that prohibited "additional areas" are zones created by the State to facilitate further gaming under KELA. But entering into a compact with the Wyandotte Nation would not amount to designating additional areas of the State for gaming under KELA.

And a tribal casino under IGRA is not a "similar gaming facility" within the meaning of KELA and the management contracts. As shown by the references to the existing gaming zones, designating an additional area where a "similar facility" would operate means that the State would be creating a new gaming zone to host a facility that resembles the current lottery gaming facilities in terms of their creation and operation. For example, a facility that is owned by the State, created pursuant to KELA, and regulated by the Kansas Racing and Gaming Commission may qualify. But a tribal casino lacks all three characteristics. A tribal casino lacks the relevant similarities to the lottery gaming facilities because it is created, owned, and operated entirely outside of KELA. KELA's prohibition against designating areas for similar gaming facilities was implemented to prevent the State from expanding KELA; it was not implemented to prevent the State from engaging in compact negotiations with a tribe or entering into a compact.[45]

The "additional areas" prohibition is only relevant for gaming under KELA. Indeed, the four current IGRA casinos are in counties—Brown, Doniphan, and Jackson—

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[40] K.S.A. 74-8734(h)(19)(ii).
[41] *Cf.* K.S.A. 74-8734(a).
[42] *See* K.S.A. 74-8702(h); K.S.A. 74-8734(d).
[43] *See* K.S.A. 74-8734(h)(19)(i).
[44] *E.g.*, Kansas Star Casino Contract ¶ 30 (emphasis added).
[45] A previous Opinion addresses whether a new racetrack gaming facility is a similar gaming facility that would violate KELA and the contracts, *see* Kan. Att'y Gen. Op. No. 2016-6 (Apr. 22, 2016), but because this Opinion does not address IGRA, we do not find it persuasive.

that are not accounted for in the current gaming zones. Had the Legislature (or the managers) believed gaming pursuant to IGRA would intrude upon or otherwise be relevant to the designated gaming areas, KELA and the management contracts almost certainly would have accounted for these existing casinos. Yet they did not.

This prohibition is concerned with efforts by the State to enable additional gaming under KELA that would compete with the existing facilities that operate under KELA. It is not concerned with tribal gaming under IGRA, and so neither negotiating nor entering into a tribal-state gaming compact would violate the prohibition.

IGRA and KELA provide parallel tracks to casino gaming in Kansas. The relevant prohibition in KELA and the management contracts is concerned with additional gaming enacted pursuant to KELA, not IGRA. We recognize that a significant amount of money is at stake, and we cannot absolutely guarantee that a court would agree with our analysis in the event of a lawsuit. However, we believe K.S.A. 74-8734(h)(19) does not cover—and is not concerned with—tribal gaming facilities that operate under a tribal-state gaming compact. Negotiating in good faith with the Wyandotte Nation would not violate K.S.A. 74-8734(h)(19) and the management contracts.

II. Would the Governor negotiating with the Wyandotte Nation violate any other provision of KELA?

We do not believe that the Governor negotiating in good faith with the Wyandotte Nation over a tribal-state gaming compact would violate any other provision of KELA. As previously noted, KELA and IGRA are two separate tracks to gaming in Kansas, and it is not apparent that negotiating in good faith for a compact under IGRA would violate any provision of KELA.

III. Even if the Governor violates KELA by negotiating with the Wyandotte Nation, does IGRA preempt KELA?

As previously noted, negotiating in good faith with the Wyandotte Nation would not violate K.S.A. 74-8734(h)(19) and the management contracts. Regardless, because "IGRA established a comprehensive regulatory regime for tribal gaming activities *on Indian lands*,"[46] it controls the State's action toward the Wyandotte Nation in this matter. And IGRA requires the State to negotiate in good faith with the Wyandotte Nation.[47]

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[46] *State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1108 (8th Cir. 1999); *see also Pueblo of Pojoaque*, 863 F.3d at 1235.

[47] 25 U.S.C. § 2710(d)(3)(A) ("Upon receiving such a request [from a tribe], the State *shall* negotiate with the Indian tribe in good faith to enter into such a compact." (emphasis added)).

To be sure, the Supreme Court severely weakened IGRA's primary mechanism for getting states to negotiate—a lawsuit by a tribe against a state—when it held in *Seminole Tribe of Florida* that IGRA does not abrogate state sovereign immunity.[48] This means that if the State does not negotiate with the Wyandotte Nation, or if the Wyandotte Nation believes the State is not negotiating in good faith, the State can invoke its sovereign immunity against any resulting suit by the tribe.[49]

However, the Tenth Circuit has recognized that the availability of sovereign immunity as a defense does not absolve states of their "obligation to negotiate in good faith."[50] And although a tribe may not be able to successfully sue a state, the federal government "may sue on behalf of a tribe in its role as trustee, sidestepping the sovereign immunity defense."[51] The Tenth Circuit has also recognized the possibility that "tribes *may* even be able to sue the United States to compel it to bring meritorious IGRA suits against states."[52] The State's sovereign immunity does not remove all legal risk.

IGRA governs gaming on tribal lands, like the Wyandotte Nation's parcels. It compels the State to negotiate in good faith, and it would override any state law (including KELA) to the contrary.[53]

IV. May a compact with the Wyandotte Nation include sports wagering even though K.S.A. 46-2305 only authorizes negotiating sports wagering with the tribes with whom the State already has compacts?

Your final question focuses on whether any compact with the Wyandotte Nation may authorize sports wagering. K.S.A. 46-2305 provides:

> If any federally recognized Indian tribe, as described in K.S.A. 74-9802(f), and amendments thereto, submits a request for negotiation of a gaming compact regarding sports wagering in accordance with K.S.A. 46-2302, and amendments thereto, the governor or the governor's designated representative shall negotiate in good faith with such Indian tribe to enter into such gaming compact.

K.S.A. 2022 Supp. 74-9802(f), now K.S.A. 74-9802(h), is part of the Tribal Gaming Oversight Act, and it defines "tribal-state gaming compact" as "a compact entered

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[48] 517 U.S. at 72–73.
[49] *See New Mexico*, 854 F.3d at 1211 ("[T]he Supreme Court, in *Seminole Tribe*, made clear that a state can invoke sovereign immunity in response to such a suit, thus effectively sidestepping the process that IGRA contemplates.").
[50] *Id.* at 1213.
[51] *Id.* at 1235.
[52] *Id.*
[53] *See* U.S. Const. art. VI, cl. 2.

into between the state of Kansas and" the named four tribes, each of which currently has a compact with the State.

IGRA allows Class III gaming on eligible Indian land if the state in which the land is located "permits such gaming for any purpose by any person, organization, or entity."[54] Sports wagering is considered Class III gaming,[55] and Kansas allows sports wagering,[56] which means that sports wagering may be part of any compact between the State and the Wyandotte Nation. And because federal law trumps state law, to the extent there is any conflict between IGRA and K.S.A. 46-2305, IGRA prevails. Thus, the State must negotiate with the Wyandotte Nation over sports wagering.[57]

That said, we believe it is questionable whether K.S.A. 46-2305 attempts to prohibit the State from negotiating (and entering into) a compact with the Wyandotte Nation that includes sports wagering. Notably, K.S.A. 46-2305 only addresses "a request for negotiation of a gaming compact regarding sports wagering." When the compacts referenced by that statute were negotiated, sports wagering was illegal in Kansas. K.S.A. 46-2305 is narrowly concerned with compacts over a type of gaming that would necessarily not have been permitted by the existing compacts when these compacts were initially negotiated. The statute's narrow focus indicates that it is not a bar to negotiating a compact with another eligible tribe that includes sports wagering. Rather, the statute is a means to *facilitate* negotiations with the tribes that already have compacts to ensure they have the opportunity to offer sports wagering.[58]

K.S.A. 46-2305 cannot (and likely does not) prevent the State from negotiating a compact with the Wyandotte Nation that includes sports wagering.

Conclusion

In sum, we believe the Governor has a federal obligation under IGRA to negotiate in good faith with the Wyandotte Nation over a gaming compact, which may include sports wagering, and that her negotiations will not violate KELA and the relevant lottery gaming facility management contracts.

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[54] 25 U.S.C. § 2710(d)(1)(B).
[55] 25 C.F.R. § 502.4(c); *cf.* 25 U.S.C. § 2703(8).
[56] K.S.A. 74-8781.
[57] *Cf. N. Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1313 (10th Cir. 2004) ("When a state refuses to negotiate beyond state law limitations concerning a game that it permits, the state cannot be said to have negotiated in good faith under the IGRA given the plain language of the statute.").
[58] *See Barrett ex rel. Barrett v. Unified Sch. Dist. No. 259*, 272 Kan. 250, 255, 32 P.3d 1156 (2001) ("This court's duty is to uphold the statute under attack rather than defeat it, if there is any reasonable way to construe the statute as constitutionally valid, that should be done."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 66 (2012) ("An interpretation that validates outweighs one that invalidates.").

Sincerely,

/s/ Kris W. Kobach

Kris W. Kobach
Attorney General

/s/ Adam T. Steinhilber

Adam T. Steinhilber
Assistant Solicitor General