No. 05-50754
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS, Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, in his Official Capacity as Secretary of the Department of the Interior, Defendant-Appellees,

KICKAPOO TRADITIONAL TRIBE OF TEXAS,
Intervenor-Defendant-Appellee

BRIEF OF TRIBAL AMICI SUPPORTING THE APPELLEES' PETITIONS FOR REHEARING *EN BANC*

JENA BAND OF CHOCTAW INDIANS; POARCH BAND OF CREEK INDIANS; COQUILLE INDIAN TRIBE; RINCON BAND OF LUISENO INDIANS; SHOALWATER BAY INDIAN TRIBE; SPOKANE TRIBE OF INDIANS; STANDING ROCK SIOUX TRIBE

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CERTIFICATE OF INTERESTED PERSONS

As governmental parties, the Amici are not required to furnish a Certificate of Interested Persons pursuant to Fifth Circuit Local Rule 28.2.1.

STATEMENT PURSUANT TO FED. R. APP. P. 35(b)(1)

En banc reconsideration is necessary because this case raises an issue of paramount importance to every federally recognized tribe in the United States and in order to maintain uniformity of the law within this Circuit, sister Circuits, and the Supreme Court.

Every federally recognized tribe in the United States is potentially affected by the panel's decision in this case. Under the Indian Gaming Regulatory Act ("IGRA") as written, Congress gave the states only a limited role in the conduct of Indian gaming. Congress did not give the State of Texas, or any other state, a veto over tribal gaming activities, and it ensured that the tribal-state compact requirement would not become a veto by providing a last-resort remedy for tribes in uncooperative states – the availability of tribal gaming under procedures prescribed by the Secretary of the Interior ("Secretarial procedures").

The panel's decision in this case strips tribes of the Secretarial procedures remedy. In doing so, it has had an immediate impact on at least one tribe in this Circuit, the Jena Band of Choctaw Indians, whose request for Secretarial procedures was stayed when this decision was issued. The fate of other tribes around the country that are pursuing the Secretarial procedures remedy as a last resort is likewise in jeopardy.

Tribes across the country that have successfully obtained tribal-state compacts will also be negatively impacted if this decision stands. By depriving tribes of the remedy that was intended to establish a balance between tribes and states at the negotiating table, the panel's ruling has tipped the balance wholly in favor of the states, to the detriment of any tribe engaged in compact negotiations or renegotiations and directly contrary to Congress' intent when enacting IGRA.

The panel has also brought this Circuit into conflict with the decisions of the Ninth and Eleventh Circuits, which have held that Congress did not intend for states to have a veto of tribal gaming activities and that the last-resort remedy of Secretarial procedures must remain available to tribes to effectuate Congress' intent. *See United States v. Spokane Tribe*, 139 F.3d 1297, 1301-02 (9th Cir. 1998); *Seminole Tribe v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994). By invalidating the Secretarial procedures remedy while leaving the compact requirement intact, the panel's decision also failed to follow Supreme Court precedent providing that severance of invalid statutory provisions is permitted only where Congress would still have enacted the statute with only the remaining provisions. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). Because Congress would not have enacted the Class III compact requirement without providing a safeguard for tribes, the panel's severance of the Secretarial procedures while leaving the compact requirement intact conflicted with this precedent.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Case **Page**

Federal Cases

Docketed Cases

Rules, Regulations and Statutes

Code of Federal Regulations:

Page

Other Authorities

I. STATEMENT OF INTEREST

The tribal amici represent a broad spectrum of tribes from across the nation, and the impact of the panel's decision on their individual situations demonstrates the exceptional importance of the issue decided by the panel in this case. Some of the tribal amici have obtained tribal-state compacts only after long struggles that demonstrate the essential role of the Secretarial procedures, while others, such as the Jena Band in Louisiana, have been unable to reach agreement with the states entirely, and their efforts to utilize the Secretarial procedures remedy have been abruptly terminated by this decision.

II. ARGUMENT

A. The Panel's Decision Invalidating the Secretarial Procedures Conflicts with Two Other Circuits and Creates an Issue of Paramount National Importance.

Under IGRA as passed by Congress, the only tribes that would ever be completely unable to engage in Class III gaming were those tribes located in states that do not permit any Class III gaming anywhere in the state by any entity.[1] Any other tribe would be entitled to game, subject to the ability of the state in which it was located to have a voice in gaming procedures, so long as that state negotiated

[1] 25 U.S.C. § 2710(d)(1)(B).

with the tribe in good faith.[2] Congress intended for the good faith requirement to be enforceable in federal court.[3] Recognizing that some states might still refuse to consent, Congress provided tribes with a safety net – the ability to obtain permission to game directly from the Secretary of the Interior, who has the express statutory authority to prescribe "procedures" to govern tribal gaming in the absence of a compact.[4]

When the Supreme Court struck down Congress' attempt to waive states' sovereign immunity to such suits, the Secretary of the Interior used his general rulemaking authority to fill the unintended gap, thereby providing tribes in states that will not waive sovereign immunity with a path to the last-resort remedy provided by Congress.[5] By invalidating those regulations, the panel decision has destroyed the delicate balance between tribes and states intended by Congress and brought this Circuit into conflict with two others that have found that the Secretarial procedures remedy was an indispensable component of the regulatory structure established by IGRA.[6] As a result of the panel's decision, states that permit Class III gaming by tribal or non-tribal entities can refuse to negotiate in

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[2] 25 U.S.C. § 2710(d)(3).
[3] 25 U.S.C. § 2710(d)(7).
[4] 25 U.S.C. § 2710(d)(7)(B)(vii).
[5] *See Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996); 25 C.F.R. § 291 *et seq.* (1999).
[6] *See United States v. Spokane Tribe*, 139 F.3d 1297, 1301-02 (9th Cir. 1998); *Seminole Tribe v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994).

good faith with other tribes that wish to game, without consequence or recourse. The situations of the tribal amici demonstrate the predominant importance of this issue for tribes around the country and the need for en banc consideration.

1. Without Either Good Faith Adjudication or the Secretarial Procedures, States Will Be Able to Prevent Tribes From Pursuing Economic Self-Sufficiency Through Gaming, Contrary to Congress' Purpose.

Congress, through IGRA, provided "a statutory basis for the regulation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. The tribes most directly and immediately affected by the panel's decision are those that have not yet been able obtain tribal-state gaming compacts and thereby obtain the benefit of gaming that Congress intended to provide. Amicus Jena Band of Choctaw Indians provides a stark example. The Jena Band is located in Louisiana, which permits Class III gaming by three other tribes and by non-tribal entities, but refuses to negotiate a compact with the Jena Band because the Governor believes additional gaming within the state is undesirable.[7] The Jena Band was close to completing the process to obtain Secretarial procedures permitting it to game when

[7] LA. REV. STAT. ANN. tit. 27; 58 Fed. Reg. 36,264 (July 6, 1993) (Chitimacha Tribe of Louisiana); 65 Fed. Reg. 31,189 (May 16, 2000) (Louisiana Coushatta Tribe); 57 Fed. Reg. 54,415 (Nov. 18, 1992); Press Release, Governor Kathleen Babineaux Blanco, *Governor Blanco Responds to Jena Band of Choctaw Indians' Efforts to Establish Gaming in Louisiana* (Apr. 12, 2005), available at http://www.gov.state.la.us/index.cfm?md=newsroom&tmp=detail&catID=1&articleID=639&navID=3.

the panel's decision was issued; that process is now subject to an indefinite hold. Without either reversal of the panel's decision or a change of heart by the State of Louisiana, the Jena Band remains unable to game, while their sister Louisiana tribes and non-tribal entities are able to raise needed funds through gaming activities.

Amicus Poarch Band of Creek Indians in Alabama likewise has been struggling for two decades to obtain a tribal-state gaming compact in the face of Alabama's assertion of its Eleventh Amendment immunity. It requested negotiations of a tribal-state compact in 1990, but Alabama refused to negotiate a compact even though Alabama permits Class III gaming by other entities. Alabama asserted its Eleventh Amendment immunity in response to the Poarch Band's IGRA lawsuit and the suit was dismissed. In March 2006, the Poarch Band requested Secretarial procedures. Its request remains pending. Without the availability of that Secretarial procedures remedy, it too will remain without a compact, and its ability to game will remain solely within the control of the state, contrary to Congress' intent.

2. Some Tribes Have Only Been Able to Obtain Compacts Because of the Existence of the Secretarial Procedures Remedy.

Other tribes have been able to overcome negotiating difficulties and to obtain tribal-state gaming compacts, but their stories reveal the essential role of

IGRA's remedies, including the Secretarial procedures, in the overall statutory scheme. Amicus Spokane Indian Tribe of Washington, whose case gave rise to the Ninth Circuit opinion with which the panel's decision conflicts, spent 18 years trying to obtain a compact.[8] Another Washington tribe, the Confederated Tribes of the Colville Reservation, likewise struggled in negotiations with Washington. In its suit against the State of Washington for failure to negotiate in good faith, the District Court struck down all of IGRA's compacting provisions rather than leaving the Tribe without any remedy.[9] Both the Spokane and the Colville Tribes now have compacts, but the availability of judicial and Secretarial remedies were crucial in bringing the State to the negotiating table.

3. Tribes with Existing Compacts Need the Secretarial Procedures.

Without the availability of a Secretarial procedures remedy, tribes have no real bargaining power in their negotiations to renew or amend compacts. The panel decision in this case tells states that, if they wish to oppose tribal gaming in whole or in part, they can simply refuse to negotiate, even if they lack a good faith basis. What remaining bargaining authority can tribes have without either the judicial protection or the Secretarial procedures prescribed by Congress?

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[8] *Spokane Tribe*, 139 F.3d at 1299.

[9] *Confederated Tribes of the Colville Reservation v. Washington*, No. CS-92-0426, slip op. at 4-5 (E.D. Wash. June 4, 1993).

Tribes such as the amicus Coquille Tribe, whose compact with Oregon may be affected by pending legal challenges to the validity of Oregon's tribal-state compacts, could find themselves needing to return to the bargaining table to negotiate anew.[10] Tribes like the amici Rincon, Shoalwater Bay, and Standing Rock Sioux Tribes, who presently have tribal-state compacts, anticipate the panel decision will impact their ability to negotiate necessary compact amendments and renewals. Each of these tribes has been a party to contentious compact negotiations, has faced the Hobson's choice of making concessions rather than litigating uncertain federal remedies, and has seen firsthand the effect that the existence of IGRA's remedies have in keeping states at the negotiating table and allowing the tribes and the states to reach agreement.

B. Severance of the Secretarial Procedures Defeated Congress' Intent.

Even with a severance clause, unconstitutional provisions of a statute cannot be severed and other provisions left intact if the resulting statute would be inconsistent with Congress' intent.[11] The Secretarial procedures are an essential safeguard for tribes that preserves their bargaining power and their ability to use

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[10] The validity of Oregon's compact with the Confederated Tribe of Coos, Umpqua, and Siuslaw Indians is currently being challenged in state court. *State ex. rel Dewberry v. Kulongoski*, No. A124001 (Or. App.). That challenge could also affect the Coquille Tribe's compact. Other tribes have faced similar challenges. *See, e.g., Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997); *Warren v. United States*, No. 06-CV-00226 (W.D.N.Y., filed Aug. 16, 2006).

[11] *Alaska Airlines*, 480 U.S. at 685.

gaming as an economic development tool.[12] By refusing to recognize the validity of Secretarial procedures, the panel's decision results in a version of IGRA that Congress never would have passed. The panel's decision therefore conflicts with established Supreme Court precedent regarding statutory severance, and this too justifies en banc reconsideration.

III. CONCLUSION

The tribal amici urge this Court to grant *en banc* rehearing of this case of national importance and to issue a new decision, consistent with those of the Ninth and Eleventh Circuits, that recognizes the Department of Interior's authority to permit tribal gaming under Secretarial procedures as a safeguard for tribes. The tribal amici also respectfully suggest that, when granting en banc rehearing, this Court provide an opportunity for supplemental briefing on the merits and oral argument before the entire panel.

[12] *Spokane Tribe*, 139 F.3d at 1299; *see also* S. REP. NO. 100-446, at 13 (1988) ("It is the Committee's intent that the compact requirement for Class III not be used as a justification by a state for excluding Indian tribes from such gaming.").

RESPECTFULLY SUBMITTED this 15th day of November, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2007, I caused two paper copies and one diskette containing a copy in Adobe Acrobat format of the above Brief of Tribal Amici to be served on the counsel listed below via First Class Mail.

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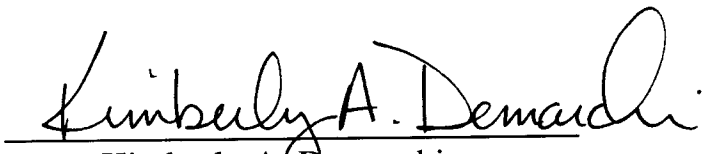

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FILED IN THE
U S DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUN 4 1993

JAMES R LARSEN, CLERK
DEPUTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Plaintiff,

-vs-

STATE OF WASHINGTON, and BOOTH GARDNER, et al.,

Defendants.

NO. CS-92-0426-WFN

ORDER

001682

Before the court is defendants' Motion for Dismissal or, in the Alternative, for a Stay, Ct. Rec. 5, heard on May 28, 1993. Appearing on behalf of plaintiff was Reservation Attorney Bruce Didasch; appearing on behalf of defendants was Assistant Attorney General of Washington State Jonathan McCoy. Having reviewed the record, having heard the oral argument of counsel and being fully informed, this court GRANTS the Motion for Dismissal.

Plaintiff Confederated Tribes of the Colville Reservation [Tribe] initiated this action to compel defendants Washington State [State] and certain officials to comply with the provisions of the Indian Gaming Regulatory Act [IGRA], 25 U.S.C. § 2701 et seq. Under the terms of the Act, the State shall negotiate in good faith in an attempt to reach a compact with the Tribe regarding regulation of class III gaming activities on the reservation. If a compact cannot be reached within 180 days, IGRA provides for court intervention to resolve any impasse.

The State requests dismissal on three grounds: (1) sovereign immunity under the Eleventh Amendment; (2) state sovereignty under the Tenth Amendment; and (3) failure to state a claim against the individual defendants. The State in the alternative also requests a stay pending the outcome of *Spokane Tribe of Indians v. Washington*, 790 F. Supp. 1057 (E.D. Wash. 1991) currently on appeal to the Ninth Circuit.

The argument regarding the Eleventh Amendment jurisdictional bar to this suit is identical to that presented in *Spokane Tribe*. This court concurs with the well-reasoned opinion of Judge Van Sickle in the *Spokane Tribe* case and concurs with the determination that sovereign immunity preserved in the Eleventh Amendment bars this action against the State.

As the *Spokane Tribe* rationale does not dismiss the individual defendants, the court looks to the Tenth Amendment challenge as it applies to the individual defendants, an issue not raised in *Spokane Tribe*. For the purposes of this discussion, the court will continue to address the State as the defendant. Any enforcement action by the Tribe against the individual state officers would necessarily be in their official capacity and would thus be against the State.

The State claims IGRA impermissibly compels the State to negotiate with the Tribe. The Tribe counters by arguing that the State can simply elect to do nothing and then, in due course, the federal government will step in and do the regulating the State is avoiding.

IGRA provides that a tribe desiring to initiate class III gaming shall request the state to negotiate a compact and "[u]pon receiving such a request, the State shall negotiate with the Indian tribe." 25

U.S.C. § 2710(d)(7)(A). The State is required to negotiate in good faith. *Id.*

The Tenth Amendment limits the power of the federal government "to use the states as implements of regulation." *Board of Natural Resources v. Brown*, No. 92-35004, slip op. at 4401 (9th Cir. May 4, 1993). In *Board of Natural Resources*, the Ninth Circuit held as violative of the Tenth Amendment a statute which required Washington State to issue regulations to carry out the federal ban on the export of logs from public lands. Similarly, IGRA violates the Tenth Amendment because the State must negotiate a tribal/state compact "in good faith," this requires the State to endeavor to create a regulatory scheme.

The Tribe asks the court to look beyond the literal words of the statute and to its overall effect. The Tribe claims that if the State elects to do nothing, it is not in violation of the federal law and thus is not compelled to regulate for the federal government. However, this argument was advanced and rejected in *Board of Natural Resources*. *Id.* at 4402-03 (unconstitutional statutory directives cannot be construed as merely precatory admonitions). This court, having found the Act unconstitutional, cannot simply choose to ignore the mandatory language which forces the State to take part in this regulatory scheme.

The court is aware of the case of *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292, 1297 (D. Ariz. 1992) which holds that IGRA's "terms do not force the state to enter into a compact." However, *Yavapai* was decided without the benefit of *Board of Natural Resources*.

In finding that IGRA violates the Tenth Amendment, this court is faced with the issue of severability of the unconstitutional portions of

IGRA. The Act contains a severability clause. 25 U.S.C. § 2721. T Tribe requests that the entire Act be held unconstitutional whereas t State requests merely severing the offending mandatory language; i.e "the State shall negotiate . . . ." *Id.* at § 2710(d)(3)(A).

"A court should refrain from invalidating more of the statute th is necessary." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (198 (internal quotes omitted). When there is a severability clause, the is a presumption that "the objectionable provision can be excised fr the remainder of the statute." *Id.* at 686. The severability analys involves a two step process: (1) if severed, are the remaini provisions fully operative; and (2) if fully operative, would Congre have enacted IGRA without the deleted provisions. *Board of Natur Resources*, slip op. at 4403-04.

If this court were to only sever the mandatory language from IGR the Tribe would be left without recourse if they are unable to reach agreement with the State. Thus subsection (d) regarding class I gaming is not fully operable without the unconstitutional languag Further, even if subsection (d) were fully operable without t unconstitutional portions, the language of the act and the legislati history indicate State participation and speedy resolution of a impasse were key components of the bill. *See*; e.g., 25 U.S. § 2710(d)(7)(B)(i) (court assistance may be invoked if a compact is n reached within 180 days); Senate Report No. 100-466, 100th Cong., 2 Sess., reprinted in 1988 U.S.C.C.A.N. 3071, 3076 (the Act "does n contemplate and does not provide for the conduct of class III gami activities on Indian land in the absence of a tribal-State compact"

Therefore the entire subsection (d) regarding class III gaming must be severed from the act as unconstitutional.

Because of the above holding, this court finds it unnecessary to address the State's allegation of a failure to state a claim against the individual defendants and its request for a stay. Accordingly,

IT IS ORDERED that defendants' Motion to Dismiss, Ct. Rec. 5, be and the same is hereby GRANTED. The Clerk is directed to file this Order, forward copies to counsel and CLOSE THIS FILE.

DATED this 3 day of June, 1993.

WM. FREMMING NIELSEN
UNITED STATES DISTRICT JUDGE

601