CASE NO. 05-50754

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, ET AL,
Defendants-Appellees,

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; GALE NORTON, in her Official Capacity as Secretary of the Department of the Interior,
Defendants-Appellees,

KICKAPOO TRADITIONAL TRIBE OF TEXAS,
Intervenor-Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR KICKAPOO TRADITIONAL TRIBE OF TEXAS

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CERTIFICATE OF INTERESTED PERSONS

As a governmental party, Intervenor-Defendant-Appellee Kickapoo Traditional Tribe of Texas is not required to furnish a Certificate of Interested Persons pursuant to Fifth Circuit Local Rule 28.2.1.

REQUEST FOR ORAL ARGUMENT

Intervenor-Defendant-Appellee Kickapoo Traditional Tribe of Texas respectfully requests oral argument. Oral discussion of the facts and legal authorities governing this case would benefit the Court due to the unique issues raised by federal Indian law cases such as this.

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STATEMENT OF JURISDICTION

Intervenor-Defendant-Appellee Kickapoo Traditional Tribe of Texas (hereafter "Tribe") adopts by reference the Statement of Jurisdiction provided by Plaintiff-Appellant State of Texas (hereafter "State") regarding appellate jurisdiction only. Brief of Appellant State of Texas, July 11, 2005 at 2 hereafter "State's Brief"). The Tribe submits that the District Court was correct in dismissing this pre-application challenge to agency regulations on the ground that it is not a ripe controversy because the case (1) was contingent on future events that may or may not occur, and (2) the State failed to demonstrate the necessary hardship. (5 ROA 00966-00978;[1] State's R.E. Tab 2.) (Citing *Central and South West Services, Inc., v. U.S. E.P.A.*, 220 F.3d 683, 690 (5th Cir. 2000), and *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled in part on separate issue by Califano v. Sanders*, 430 U.S. 99 (1977)). This Court should decline jurisdiction on the same subject matter jurisdiction grounds.

[1] References to the Record on Appeal are designated by the number of the record volume assigned by the Clerk, followed by "ROA" and the record page number(s). Certain items in the record were not identified by a volume number and/or were not paginated in the same sequence as the rest of the record. These documents will be identified by the applicable indicators on those documents. Items included in the Tribe's Record Excerpts will be additionally identified as "Tribe's R.E." followed by the applicable tab number.

STATEMENT OF THE ISSUES

Issue One: Whether the State of Texas' pre-application challenge to the Secretary's Gaming Procedures Regulations[2] is ripe where the State has failed to demonstrate any present hardship resulting from the mere existence of the regulations and where any possible damage to the State resulting from the regulations is speculative?

Issue Two: Whether the Secretary of the Interior lawfully promulgated the Gaming Procedures Regulations, which fill a gap in the administration of the Indian Gaming Regulatory Act ("IGRA") created by the Supreme Court's decision in *Seminole* to sever the application of the judicial remedy provisions of the IGRA when a state asserts its Eleventh Amendment Immunity, and where the Regulations are necessary to ensure that the IGRA can continue to operate in the manner Congress intended by giving tribes an effective remedy through the Procedures process?

[2] For clarity and to avoid confusion, we refer to the 25 C.F.R. Part 291 regulations as the "Gaming Procedures Regulations" and to the procedures issued pursuant to those regulations as the "Secretarial Procedures."

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Court Below

This case involves an appeal of a Final Judgment and Memorandum Opinion and Order issued by Judge Lee Yeakel for the United States District Court for the Western District of Texas, Austin Division, in Cause No. A-04-CA-143-LY on March 30, 2005. *Texas v. United States*, 362 F.Supp.2d 765 (W.D. Tex. 2004); (5 ROA 00966-00978 (hereafter "Memorandum Opinion")). We adopt the description of the proceedings below as set out in the State's Brief at 4 - 5, with the following additions.

This case was initiated on March 11, 2004, when the State filed a Complaint against the United States and the Secretary of Interior, seeking a declaration from the District Court for the Western District of Texas that the Gaming Procedures Regulations promulgated by the Secretary of the Interior at 64 Fed. Reg. 17,543 (Apr. 12, 1999) (codified at 25 C.F.R. pt. 291) are invalid, and seeking an order enjoining the Secretary's application of the Gaming Procedures Regulations to process the Kickapoo Traditional Tribe of Texas' application for Secretarial Procedures. (1 ROA 00008-00011.) On March 22, 2004, the Kickapoo Tribe filed a motion to intervene as a party Defendant (1 ROA 00138-00148) which was granted on March 24, 2004. (1 ROA 00200.)

After the State's application for a preliminary injunction was denied by the Court on April 20, 2004 (2 ROA 00354), the parties filed and briefed cross-motions for summary judgment. The Court held oral argument on the parties' motions on October 26, 2004, and invited supplemental briefing.

The District Court entered its Memorandum Opinion and Order and Final Judgment on March 30, 2005. The District Court held:

First, that the Secretary of the Interior has the authority to fill the statutory gap created by *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994), *aff'd* 517 U.S. 44 (1996), which severed the application of the judicial remedy provisions of the IGRA when a state does not consent to waive its Eleventh Amendment Immunity. Accordingly, the Court denied the State's motion for summary judgment. (5 ROA 00971-75; State's R.E. Tab 2.)

Second, that the State of Texas' pre-application challenge to the Gaming Procedures Regulations promulgated by the Secretary was not ripe because the outcome of the application was speculative and because the State could not demonstrate hardship. The court ruled that the mere existence of the Gaming Procedures Regulations was not enough to make the case ripe for judicial review since the Secretary had not yet reached a determination whether to issue Secretarial Procedures to the Tribe under

those regulations. Accordingly, the District Court ordered that the State of Texas' cause of action be dismissed without prejudice. (5 ROA 00975-78.)

II. Statement of the Facts

A. The Indian Gaming Regulatory Act

In 1987, the Supreme Court, consistent with 150 years of legal precedent, affirmed that Indian tribal gaming on Indian tribal lands was not subject to State regulation absent an express grant of authority by Congress. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (noting that "[t]he Court has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory'") (internal citations omitted).

The states urged Congress to grant them such regulatory authority over Indian gaming; the tribes urged Congress not to allow any state regulation. *See* S. REP. NO. 100-446, at 3-5 (1988); (4 ROA 00731-00732; Tribe's R.E. Tab 1.)[3] Congress ultimately enacted the Indian Gaming

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[3] Senator John McCain, a key senator involved in the development of Indian gaming legislation, noted, in his own remarks attached to the Senate Report:

> As the debate unfolded, it became clear that the interests of the states and of the gaming industry extended far beyond their expressed concern about organized crime. Their true interest was protection of their own games from a new source of economic competition.

Id. at 33 (Additional Views of Senator McCain); (4 ROA 00761-00762; Tribe's R.E. Tab 2.)

Regulatory Act ("IGRA") in 1988. Pub. L. No. 100-497, 102 Stat. 2467 (Oct. 17, 1988) (codified at 25 U.S.C. § 2701 *et seq*). The IGRA fashioned a carefully balanced compromise between the tribal and state positions. One of the primary purposes of the IGRA is to provide a statutory framework for gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments. 25 U.S.C. § 2702(1). But the IGRA also contains a limited opportunity for states to participate in the regulation of what the Act defines as "Class III" Indian gaming, [4] an opportunity that is expressly conditioned upon a state's participation in the IGRA statutory scheme. 25 U.S.C. § 2710(d). In crafting this compromise, Congress "attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land." S. REP. NO. 100-446, at 5; (4 ROA 00733; Tribe's R.E. Tab 1.)

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[4] IGRA divides Indian gaming into three classes: Class I games, which include social games played solely for prizes of minimum value or traditional forms of Indian gaming; Class II games, which include bingo, including pull-tabs, lotto, punch boards, tip jars, instant bingo, other games similar to bingo, whether or not electronic, computer, or other technologic aids are used in connection therewith, and certain card games; and Class III games, which includes all other forms of gaming that are not Class I or Class II. 25 U.S.C. § 2703(6)-(8).

In order to conduct Class III gaming, an Indian tribe must "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 State has a concomitant obligation to negotiate in "good faith" with the Tribe to enter into the compact. *Id*. This compacting requirement was intended to provide a means for tribal and state governments to "work together" to develop a consistent and effective regulatory framework. S. REP. NO. 100-446, at 6; (4 ROA 00734; Tribe's R.E. Tab 1.)

Recognizing that the compacting requirement could create an "unequal balance" in favor of states (which might be able to obstruct tribal gaming by refusing to negotiate), Congress also included a remedial scheme for tribes faced with states that would not negotiate or not negotiate in good faith. The IGRA provides that a tribe may sue a state in federal district court if it believes that the State has failed to negotiate in good faith; the Tribe, however, cannot file the suit until at least 180 days after requesting negotiations. 25 U.S.C. § 2710(d)(7)(A)(i), (B)(i).

This provision of the Act authorizes the court, upon a finding that the State has not negotiated in good faith, to order the State and the Tribe to enter into compact negotiations and to conclude a compact within 60 days.

25 U.S.C. § 2710(d)(7)(B)(iii). If those negotiations do not result in a compact, the Act authorizes the court to appoint a mediator to facilitate those negotiations. 25 U.S.C. § 2710(d)(7)(B)(iv), (v), (vi). Finally, the IGRA provides that if the court mandated negotiation and mediation does not result in a compact due to the State's refusal to participate, the Secretary of Interior is authorized to prescribe "procedures" in lieu of a compact under which the Tribe can conduct Class III gaming on its lands. 25 U.S.C. § 2710(d)(7)(B)(vii). This appeal concerns the availability of this procedural remedy to a tribe faced with a state that has refused to consent to the jurisdiction of the federal courts to litigate the "good faith" question.

B. The State's Refusal to Negotiate with the Kickapoo Tribe and Its Refusal to Litigate the "Good Faith" Negotiation Question

The Kickapoo Traditional Tribe of Texas ("Tribe") is a federally recognized tribe subject to the IGRA. 68 Fed. Reg. 68,180, 68,181 (Dec. 5, 2003). Under the IGRA, the Tribe is authorized to offer, subject to terms and conditions set forth in a compact or procedures, those forms of Class III gaming permitted by the State "for any purpose by any person, organization, or entity, …." 25 U.S.C. § 2710(d)(1)(B). The State of Texas permits a broad range of Class III gaming including: the State lottery, TEX. CONST. art. III, § 47(e); casino style games conducted in

"private places," TEX. PENAL CODE ANN. § 47.02(b)(1); gambling devices with limited prizes, TEX. PENAL CODE ANN. § 47.01(4)(B); and pari-mutuel wagering on horse and dog racing, TEX. REV. CIV. STAT. ANN. 179e § 1.03(18). (Memorandum Opinion at 12, n. 8; 5 ROA 00977; 3 ROA 00606-00618.[5])

In the early 1990s the Tribe decided to avail itself of its rights under IGRA to conduct Class III gaming to generate funds for its governmental programs, to create jobs, and to promote economic development and self-sufficiency on its Reservation.[6] In 1995, the Tribe requested the State of Texas to enter into negotiations for a compact to conduct Class III gaming in Texas (1 ROA 00152; 3 ROA 00446). The State rejected the Tribe's request for negotiations. *Id.*

The Tribe then sued the State pursuant to the judicial remedy provisions of the IGRA on October 13, 1995, alleging that by its categorical refusal to negotiate, the State had violated the "good faith" negotiation

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[5] The issue of the scope of Class III gaming that should be allowed to the Tribe is not before this court in this appeal.

[6] Gaming revenue is vitally important to the Tribe for economic development and job creation: the Kickapoo reservation is located in one of the poorest counties in Texas; 45.1 percent of Kickapoo Tribal families earn less than $10,000 per year; 68.1 percent of families are living below the poverty level; 74.3 percent of individuals are living below the poverty level; 64.8 percent of Kickapoo Tribal homes lack telephone service; and 87.6 percent of its members have attained less than a ninth grade education. (ROA Attachments to Document #50, Exh. 4 at 1-12.)

requirement of the IGRA. (Memorandum Opinion at 3-4; 5 ROA 00969; 3 ROA 00446, 00476-00477, 00513-00526, 00550-00585.) Rather than litigate the merits of whether its refusal to negotiate violated the IGRA's "good faith" negotiation requirement, the State moved to dismiss the lawsuit on the grounds that without its consent the State's Eleventh Amendment sovereign immunity barred the action.

While the State's motion to dismiss was pending, the United States Supreme Court decided *Seminole Tribe of Florida v. Florida*, which held that the judicial remedy provisions of the IGRA that purported to waive states' Eleventh Amendment immunity from suit were unconstitutional when applied in the case of an unconsenting state. 517 U.S. 44, 72-73 (1996). Pursuant to the *Seminole* decision, the District Court dismissed the Kickapoo Tribe's "good faith" lawsuit on April 2, 1996. (3 ROA 00447, 00604.) The Court did not reach the merits of the "good faith" issue, and the IGRA remedial process was halted, because of the State's refusal to consent to federal court jurisdiction.

C. Department of Interior Promulgates Gaming Procedures Regulations to Fill the Gap Created by the *Seminole* Decision

As a result of the *Seminole* decision, there was "a gap in the application of the IGRA" when a state did not consent to suit, which

"creat[ed] an ambiguity to which the Department [of Interior] responded by promulgating the Gaming Procedures [Regulations] at issue in this case." (Memorandum Opinion at 7; 5 ROA 00972.) The Department promulgated the regulations after a lengthy process in which it first solicited comments on its authority to issue the regulations, then published a proposed rule and solicited comments on the proposal, and finally published its Final Rule for Class III Gaming Procedures on April 12, 1999. 64 Fed. Reg. 17,543 (Apr. 12, 1999) (codified at 25 C.F.R. pt. 291); (Memorandum Opinion at 4; 5 ROA 00969; 3 ROA 00448.) The Department, however, has repeatedly represented, both to the courts and to Congress, that it "will not make a set of procedures effective by publishing them in the Federal Register until a court has been able to adjudicate the Secretary's authority to issue the regulations." (2 ROA 00294-00295.)

The process set out under the Gaming Procedures Regulations tracks the IGRA process closely. Prior to initiating the Gaming Procedures Regulations process, the Tribe must first make its request to the State under the IGRA to negotiate a Class III gaming compact, the Tribe and the State must fail to agree to a compact within 180 days, and the Tribe must file a lawsuit under the IGRA alleging that the State has failed to negotiate in good faith. 25 C.F.R. § 291.3(a) – (c). If, *and only if*, the State refuses to consent

to the suit and successfully has the suit dismissed on Eleventh Amendment sovereign immunity grounds may the Tribe make an application for Secretarial Procedures under the regulations. 25 C.F.R. § 291.3(d) – (e). Then, after the Secretary determines that the Tribe's application is complete and the Tribe is eligible to request procedures, the Secretary notifies the Governor and Attorney General of the State, and must give them opportunity to comment, the opportunity to submit an alternative proposal, the opportunity to participate in an informal conference, and the opportunity to have a mediator resolve differences between the Tribe's and the State's proposals (if the State submits a proposal). 25 C.F.R. § 291.7 - 11. Only after this substantial opportunity for additional state participation can the Secretary issue Secretarial Procedures pursuant to the Gaming Procedures Regulations. 25 C.F.R. §§ 291.8, 291.11.

D. Tribe's Application for Secretarial Procedures Under the Gaming Procedures Regulations

On December 11, 2003, the Tribe exercised its right to apply to the Department of the Interior for Secretarial Procedures pursuant to the 25 C.F.R. Part 291 Gaming Procedures Regulations. (3 ROA 00448.) On January 12, 2004, the Secretary of the Interior, acting through the Acting Assistant Secretary – Policy and Economic Development, issued notice to the State and the Tribe that the Secretary had determined that the Tribe's

proposal was complete and met the eligibility requirements in 25 C.F.R. Part 291 (the Gaming Procedures Regulations at issue in this case) and invited the State of Texas to comment on the proposal and submit an alternative proposal. (Memorandum Opinion at 5; 5 ROA 00970; 3 ROA 00450, 00459, 00461.) The State rejected the offer to participate, despite the fact that the State permits Class III gaming and despite the Tribe's previous efforts to negotiate, and instead filed this lawsuit. (ROA Attachments to Document #50, Exh. 5.)

SUMMARY OF ARGUMENT

The State's lawsuit is a pre-application challenge to the Gaming Procedures Regulations promulgated by the Secretary of Interior pursuant to her delegated authority under the IGRA and the general authority statutes, 25 U.S.C. §§ 2 and 9. The Court below properly held that this challenge was not ripe, because the outcome of the application of the regulations in this instance is speculative. Further, the Court below found that as a factual matter the State had failed to demonstrate the necessary hardship to meet the ripeness requirement, a determination that should be upheld unless it is "clearly erroneous."

Similarly, the State's substantive challenge to the Gaming Procedures Regulations themselves (raised in its challenge to the court's denial of its

motion for summary judgment) must fail. The Gaming Procedures Regulations are an appropriate exercise of the Secretary's delegated authority to administer this portion of the IGRA statutory framework, and were promulgated specifically in response to a gap in the statutory scheme created by the severance of the IGRA's judicial remedy (when applied in the case of an unconsenting state) in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The Secretary's action addressed the ambiguity in the IGRA's remedial provisions created by this gap, and the Regulations ensure that the IGRA will function in the manner intended by Congress. The Secretary's action is supported by well established principles concerning judicial severance and deference to agency decision making.

First, under judicial severance principles, courts must only sever so much of a statute as is necessary, and such severance is appropriate only if the remaining provisions can still function in the manner that Congress intended. *Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987).

Congress enacted the IGRA as a compromise between Indian tribes and states and specifically included a remedial process to ensure that states could not use the IGRA as a means of vetoing or obstructing Indian gaming by refusing to participate in the IGRA statutory framework. Because the availability of a remedy for tribes was an integral part of the statutory

scheme (without which the IGRA would not have been enacted), the court could not invalidate the entire remedial process without having to invalidate the entire statute – since it would otherwise have created a state veto, leaving the statute to function in a manner completely at odds with Congressional intent. Thus, as already recognized by the Eleventh and Ninth Circuits, in order for the IGRA to operate in the manner Congress intended, the Secretarial procedures remedy must still remain available to a tribe faced with a state that will not consent to federal court jurisdiction to resolve the "good faith" question. *Seminole Tribe of Florida v. Florida,* 11 F.3d 1016, 1029 (11th Cir. 1994), *aff'd* 517 U.S. 44 (1996); *Spokane Tribe v. Washington*, 139 F.3d 1297, 1301-02 (9th Cir. 1998) ("*Spokane II*").

Second, the Gaming Procedures Regulations are a proper exercise of the Secretary's delegated authority in response to the ambiguity created by the *Seminole* Supreme Court decision, and are thus entitled to deference under well-established delegation and administrative law doctrine. The Secretary appropriately exercised her authority to promulgate regulations to fill that gap created by *Seminole* in a manner consistent with Congress's intent that tribes be permitted to offer as an economic development tool those forms of gaming permitted by a state.

Finally, the State wrongly asserts that the IGRA requires a "judicial finding of bad-faith" as a prerequisite to Indian gaming even when, per *Seminole*, such a finding is constitutionally unavailable. Under the State's reading, a state's assertion of its sovereign immunity would effectively veto the entire process because there could never be a judicial finding of bad-faith. But this reading ignores the limited severance by *Seminole*. Neither *Seminole* nor the IGRA stands for the proposition, as the State would have it, that states can erect an impenetrable barrier preventing tribes from offering games otherwise authorized under state law.

For these reasons, the District Court's decision to deny the State's motion for summary judgment was sound and should be upheld.

ARGUMENT AND AUTHORITIES

I. The District Court Correctly Held That the State's Challenge to the Gaming Procedures Regulations and the Yet-to-Be-Issued Secretarial Procedures Was Not Ripe

The State's claims are not ripe because they are not currently fit for judicial review and delaying review would cause the State no hardship. A claim is not ripe for adjudication if, as here, such claim rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). *See* Memorandum Opinion at 12; (5 ROA 00977 (holding that State's

asserted hardship is entirely "contingent upon future events that may or may not occur. . ."). Further, the Court determined as a factual matter that the mere existence of the Gaming Procedures Regulations poses no hardship to the State, and indeed, does not require the State to take any action or alter its behavior in any way. The Tribe adopts and incorporates by reference the arguments made by the United States in its response brief that the State's lawsuit is not ripe and that the State lacks standing. The Tribe adds the following brief points to supplement the United States' brief.

A. Standard of Review

The District Court's findings of fact – i.e., those findings regarding the State's failure to meet the "hardship" prong of the ripeness test – must be accepted unless those findings are "clearly erroneous." *Ayers v. Thompson,* 358 F.3d 356, 368 (5th Cir. 2004). The Court's conclusions of law are reviewed *de novo. Id.*

B. A Pre-Application Challenge Is Not Ripe Where the Outcome of the Application Is Speculative

This Court has recently held that conjectural harm – such as the State's assertions here – is not sufficient to satisfy the injury requirement for standing. *Kitty Hawk Air Cargo, Inc. v. Chao,* -- F.3d -- , 2005 WL 1692613, *4 (5th Cir. July 20, 2005).

C. A Pre-Application Challenge to Regulations Is Not Ripe Where There Is No Showing of Hardship

The two-part ripeness inquiry established by the Supreme Court in *Abbott Laboratories v. Gardner* requires a plaintiff to demonstrate *both* that a claim is fit, and that it would incur hardship if consideration were delayed. 387 U.S. 136, 149 (1967) *overruled in part on separate issue by Califano v. Sanders*, 430 U.S. 99 (1977); a*ccord Central & South West Servs., Inc. v. United States EPA*, 220 F.3d 683, 690 (5th Cir. 2000); *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 296-97 (5th Cir. 1998); *Merchants Fast Motor Lines v. Interstate Commerce Commission*, 5 F.3d 911, 919-20 (5th Cir. 1993). The District Court correctly acknowledged this two part standard, stating that "[e]ven where an issue presents a purely legal question, the plaintiff still must show some hardship in order to establish ripeness." (Memorandum Opinion at 12; 5 ROA 00977 (citing *American Forest*).) Final regulations that impose no hardship on a plaintiff cannot form the basis for a challenge that is ripe for review. *American Forest*, 137 F.3d at 296.

D. The District Court Determined as a Factual Matter that State Had Not Demonstrated "Hardship"

The District Court's factual determination that the State demonstrated no hardship from the existence of the regulations must be upheld if it is not "clearly erroneous." *Ayers v. Thompson*, 358 F.3d at 368**.** The State

addresses this issue by relying heavily on the affidavit by David Medina. State's Brief at 16 (asserting that the Court below "ignored" the Medina affidavit). Such reliance is misplaced, since the Medina affidavit merely offers summary conclusions of hardship (4 ROA 00847 – 00853; State's R.E. at Tab 7) and as such is simply insufficient evidence of hardship. *See Kitty Hawk Air Cargo*, 2005 WL 1692613 at *4 ("conclusory statement" of harm in witness affidavit not sufficient). Rather than "ignoring" the affidavit, it appears more likely that the Court simply did not find the Medina Affidavit persuasive, particularly in light of the live testimony offered by Mr. Medina at the preliminary injunction hearing, in which he repeatedly conceded that the State has in fact suffered no hardship. (4 ROA 00793-00795; 6 ROA at pp. 51-52, 60; Tribe's R.E. 3.)

E. Nothing in the Gaming Procedures Regulations Has Any Immediate Effect on the State's Conduct

The Gaming Procedures Regulations provide no sanctions or penalties for non-compliance, impose no legal obligations on the State of any kind, impact no legal authority, create no legal right, and indeed do not require the State to take any action at all. Absent any coercive or "immediate effect" on its conduct, the State's challenge to the Gaming Procedures Regulations is not ripe. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 386 (1999); *Abbott Laboratories*, 387 U.S. at 153.

F. State's Assertion of "Bargaining Power" Harm Is Without Merit

The State also asserts, relying solely on the Medina Affidavit, a harm to its "bargaining power." State's Brief at 14-16. However, the State's repeated arguments about the effect of the Gaming Procedures Regulations on a state that negotiates in good faith are simply inapposite to the present situation, where the State of Texas has steadfastly refused to negotiate at all. (Memorandum Opinion at 3-4, 5 ROA 00968-00969; 3 ROA 00446.) Such categorical refusal to negotiate has been uniformly found to be prima facie evidence of lack of good faith. *See Ysleta del Sur Pueblo v. State of Tex.,* 852 F.Supp. 587, 596 (W.D. Tex. 1993), *rev'd on other grounds* 36 F.3d 1325 (5th Cir. 1994); *Mashantucket Pequot Tribe v. State of Connecticut,* 913 F.2d 1024, 1032-1033 (2nd Cir. 1990), *cert. denied* 499 U.S. 975 (1991); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin,* 770 F.Supp. 480, 482, 488 (W.D. Wis 1991), *app. dism'd* 957 F.2d 515 (7th Cir. 1992), *cert. denied* 506 U.S. 829 (1992).

In addition, the State does not allege or demonstrate economic injury other than the costs incurred in filing this lawsuit. *See* Medina testimony (4 ROA 00795; 6 ROA at p. 60; Tribe's R.E. 3.) Demonstrating such injury is a prerequisite under "bargaining power harm" case law. *See Clinton v. City of New York,* 524 U.S. 417, 432-33 (1998), *quoting* 3 KENNETH CULP

DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE 13-14 (3d ed. 1994). The State's voluntary filing of this lawsuit, as well as any participation in the Regulations process, does not constitute 'hardship' for ripeness analysis as even the authority cited by the State demonstrates. *Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998) (participation in administration and judicial proceedings "does not constitute sufficient hardship for purposes of ripeness").

Further, the State's description of how the alleged bargaining power harm will occur is based on a misstatement of how the Gaming Procedures Regulations work. The State incorrectly asserts that the Tribe can avoid negotiating with the State because a "Tribe faced with negotiation of a compact with a State will simply opt to wait out the 180 days and apply to the Secretary (the tribes' trustee) for the Secretarial Procedures." State's Brief at 18. The Gaming Procedures Regulations simply do not work like this. The Regulations require that the Tribe demonstrate that (1) it submitted a written request to the State to conduct negotiations; (2) negotiations did not result in a compact within 180 days; (3) the Tribe sued the State in Federal Court; (4) the State sought dismissal of the suit on Eleventh Amendment sovereign immunity grounds; and (5) the suit was dismissed on those grounds. 25 C.F.R. §§ 291.3, 291.4(e), (f), (g). The Regulations can

be triggered only where the *State* has refused to consent to the "good faith" lawsuit.

Moreover, as a legal matter, the State's position would give it an absolute veto over tribal gaming – a dramatic and concrete diminishment of the *Tribe's* bargaining power. The State's theory of bargaining power harm should be rejected and the District Court's holding affirmed.

II. The District Court Correctly Denied the State's Motion for Summary Judgment

The Court below properly rejected the State's flawed arguments in support of its motion for summary judgment, holding that the Gaming Procedures Regulations were a valid exercise of delegated agency authority in light of *Seminole's* limited severance of the IGRA. The intent of Congress in enacting the IGRA, as the Court correctly found, was to balance state and tribal interests, not to grant states a unilateral, unconditional power to veto tribal gaming. Thus, the Court recognized, the only means of preserving the statute so that it would function in the manner intended by Congress was to recognize the continuing availability of the Secretarial procedures remedy.

The State pays lip service to this concept of balance. Yet, in its appeal brief the State makes clear that its intent is to use the IGRA and *Seminole* decision as a means of exercising a unilateral veto over Indian gaming.

State's Brief at 23 (asserting that a "state veto over tribal gaming" is somehow "in keeping with Congress' intent in 'maintaining a balance of interests'"). This Court should reject the State's attempt to secure a judicial rewrite of the IGRA and uphold the District Court's denial of the State's motion for summary judgment.

A. Standard of Review

The standard of review for the grant or denial of a motion for summary judgment is *de novo,* with the evidence considered in the light most favorable to the nonmovant. *Salge v. Edna Independent School District*, 411 F.3d 178, 184 (5th Cir. 2005).

B. The IGRA's Grant of a Limited Opportunity to States Includes a Process Expressly Intended to Prevent a State Veto Power

The IGRA granted states a limited, conditional opportunity to participate in the regulation of Indian gaming that the states previously lacked. But the IGRA also specifically included remedial processes to ensure that states could not use this newly granted opportunity as a means for vetoing Indian gaming. The State's position here – which in essence asks the court to graft such a veto power onto the IGRA – is undermined by the same fundamental mischaracterization of the law regarding Indian gaming that has informed the State's position throughout this case. Placing the

IGRA in its appropriate legal and historical context is fatal to the State's position.

1. *Cabazon* Decision Affirmed Existing Law

Contrary to the State's assertion (State's Brief at 12), prior to the enactment of the IGRA, states had no role in the regulation of Indian gaming. In its seminal 1987 decision in *California v. Cabazon Band of Mission Indians*, the Supreme Court followed and affirmed the longstanding judicial precedent that states generally do not have regulatory authority over the actions of Indian tribes absent a specific grant of such authority by Congress, and it held that Congress had granted no such regulatory authority to states over gaming on Indian lands. 480 U.S. at 207 (1987) (internal citations omitted). *Cabazon* did not, as the State incorrectly asserts, "change the status of the parties relating to Indian gaming from a federal-state-tribe relationship to a *federal-tribe relationship*." State's Brief at 12 (emphasis in original). The State's misreading of *Cabazon* leads to its incorrect characterization of the IGRA as "restoring" a previously non-existent state "right" to regulate Indian gaming.

2. The IGRA is a Conditional, Limited Grant of an Opportunity to States

The IGRA did not "restore" a lost state right to regulate Indian gaming. Nor in fact did it grant the states any "rights" at all, despite the

State's repeated and erroneous reference to a state "right" created by the IGRA. *See* State's Brief at 12. The IGRA uses no such language, and neither does the legislative history that the State itself quotes, which refers to a balancing of tribal rights with state "interests." S. REP. NO. 100-446, at 1-3, 13; (4 ROA 00729-00731, 00741; Tribe's R.E. at Tab 1.) Nor does any case refer to a state "right" under the IGRA.

Rather, the IGRA granted states an opportunity for a limited role in Indian gaming where previously they had had none. *Seminole*, 517 U.S. at 58 (finding that the IGRA "extends to the States a power withheld from them by the Constitution."). Moreover, the IGRA was structured specifically to ensure that this new state role was not a unilateral regulatory authority or veto power. The State's role, rather, would be negotiated through a "compact" with the Tribe. 25 U.S.C. § 2710(d)(3)(A). The IGRA's compacting process allows states and tribes to bargain for and negotiate a broad variety of issues concerning Class III gaming by tribes on Indian lands, including: application of the criminal and civil laws; allocation of criminal and civil jurisdiction between the State and the Indian tribe; assessment and payment of costs to the State; taxation by the tribe; remedies for breach of the compact; licensing standards; and any other subjects related to the operation of gaming activities. 25 U.S.C. § 2710(d)(3)(C)(i)-(vii).

The compacting process is a requirement that lies upon both the tribe and the state: for the tribe, a compact is required in order to conduct Class III gaming; for the state, a compact is required to exercise any regulatory authority over such gaming. Again, this negotiating role was not a "right" granted to states; rather, the IGRA *requires*, as a condition of asserting any regulatory role, that the State enter into negotiations when such negotiations are requested by a tribe. 25 U.S.C. § 2710(d)(3)(A) (upon request of tribe, "State *shall* negotiate with the Indian tribe in good faith to enter into such a compact") (emphasis added).

Congress established the compacting requirements as a means of balancing this newly created state role and the tribes' pre-existing and long-established right to be independent of state regulation. S. REP. NO. 100-446, at 5; (4 ROA 00733; Tribe's R.E. Tab 1.) Congress did not intend for the compacting process to serve as a means by which states could block tribal gaming, as this would conflict with the balance it strived for as well as with the principles affirmed in *Cabazon*. *See* S. REP. NO. 100-446, at 13; (4 ROA 00741; Tribe's R.E. Tab 1.) ("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 or for the protection of other State-licensed gaming enterprises from free market competition with Indian

tribes"); s*ee also* 134 CONG. REC. 24,024 (Sept. 15, 1988); (4 ROA 00766, Tribe's R.E. Tab 4; (Statement of Senator Inouye: "I do want to publicly state that I hope the States will be fair and respectful of the authority of the tribes in negotiating these compacts and not take unnecessary advantage of the requirement for a compact.")).

3. The IGRA Included Remedial Processes to Prevent State Veto Power

Congress, however, did not rely on statements of admonition alone. To ensure that a state – through a simple refusal to negotiate or a failure to negotiate in good faith – could not use the compacting requirement to create a unilateral state veto power over tribal gaming, Congress established a set of remedial processes in the IGRA. *See Seminole Tribe of Florida v. Florida*, 11 F.3d at 1020 (Congress's intent in including the Class III remedial processes was to "ensure that dilatory actions by the state could not preclude or unreasonably delay Indian gaming"); *United States v. Spokane Tribe*, 139 F.3d at 1301 ("Spokane II") ("Congress meant to guard against [states' refusal to comply with the IGRA] when it created IGRA's interlocking checks and balances"); s*ee also* 134 CONG. REC. 25,377-25,378 (Sept. 26, 1988); (4 ROA 00769-00770; Tribe's R.E. Tab 5 (Statement of Representative Vucanovich, which explains: "In order to meet tribal

concerns that states may refuse to allow them to initiate class III gaming, the bill includes protections for tribes in the process or achieving a compact.")).

As described in the above Statement of Facts above (Section II.A), the IGRA authorizes tribes to seek relief in federal district court where a state has refused to negotiate or failed to negotiate in good faith; the court can order negotiations, and if that fails, can order mediation. 25 U.S.C. § 2710(d)(7)(A)(i), (d)(7)(B)(iii) – (vi).

Ultimately, however, Congress recognized that even this judicial process may not provide a remedy if a state steadfastly refuses to participate. Congress therefore provided that if the judicially-mandated process did not produce a compact, then the Secretary of Interior was authorized to promulgate procedures in lieu of a compact under which the tribe could conduct Class III gaming within the parameters of the IGRA. 25 U.S.C. § 2710(d)(7)(B)(vii). This ultimate remedy of Secretarial procedures is structured so as to prevent a state – by its refusal to participate in the IGRA process, including the court-ordered processes – from effectively vetoing a tribe's right to conduct Class III gaming.

C. *Seminole's* Limited Severance of the IGRA's Judicial Remedy Mechanism Leaves the Procedures Remedy Available to a Tribe Faced with an Unconsenting State

The State rests its argument on the assumption that the Supreme Court somehow did away with the entirety of the IGRA remedial process in *Seminole Tribe of Florida v. Florida*, creating what would be a state veto right over Indian gaming. This assumption is wrong. First, the Supreme Court in *Seminole* expressly declined to address the question of the continuing availability of the procedures remedy, 517 U.S. at 76, n. 18, and then declined the states' subsequent petition to reconsider this issue. *Florida v. Seminole Tribe of Florida*, 517 U.S. 1133 (1996). Second, under well-established principles guiding judicial severance, *Seminole* resulted in a limited severance of the IGRA's judicial remedy mechanism as applied to an unconsenting state, leaving the availability of the procedures remedy intact. Third, *Seminole* did not simultaneously declare the judicial remedy unavailable to a tribe faced with an unconsenting state while leaving untouched the requirement that a tribe must still obtain a judicial determination regarding lack of good faith before the procedures remedy is available. Such an outcome would require the tribe to do what is legally impossible: obtain a judicial ruling on the merits where the state has refused to consent to the judicial process. Examining what the *Seminole* decision

did to the IGRA – and, equally important, what it did not do –undermines the State's assertion, and, by extension, the remainder of its argument.

1. Limited Scope of the *Seminole* Holding

In *Seminole*, the Supreme Court engaged in a "narrowly focused" inquiry involving one aspect of the IGRA's remedial mechanisms: whether the IGRA's judicial remedy authorizing tribes to sue states without their consent violated the states' sovereign immunity under the Eleventh Amendment. 517 U.S. at 58 (internal citations omitted). The Court held that "Congress does not have authority under the Constitution to make the State suable in federal court under § 2710(d)(7) [the judicial remedy provisions of the IGRA]." *Id*. at 75. Accordingly, the Court severed the application of that provision in the case of an unconsenting state, while allowing it to operate with respect to states that had waived their immunity. As a result, after the *Seminole* decision, a tribe could no longer sue a state under the IGRA's judicial remedy provision if that state does not consent to suit.[7]

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[7] The Eleventh Amendment is a bar to jurisdiction only if the state refuses to consent to suit and asserts its immunity. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997). If a State consents to an IGRA "good faith" suit, the remedy provisions stand, and can be used by both parties to obtain a judicial determination on any dispute involving their compact negotiations. *See, e.g., In re Indian Gaming Related Cases*, 147 F.Supp.2d 1011, 1013 (N.D. Cal. 2001) (noting that "good faith" lawsuit can proceed where state does not assert sovereign immunity defense), *aff'd* 331 F.3d 1094, 1099 n.5 (9th Cir. 2003), *cert. denied* 540 U.S. 1179 (2004); *Northern Arapaho Tribe v.*

Seminole's holding did not, as the State appears to assert, declare the entirety of the IGRA's remedial processes invalid, nor did it prohibit the use of the Secretarial procedures remedy in situations where the state has asserted its sovereign immunity. Rather, the Court expressly refused to review this question (which had been addressed by the Eleventh Circuit), noting but stating that it was not ruling on the portion of the Eleventh Circuit's decision that held that the procedures remedy survived severance of the judicial remedy. *Id.* at 76, n. 18. The Court also subsequently denied review of the petition filed by Florida asking the Court specifically to overturn this part of the Eleventh Circuit decision. *Florida v. Seminole Tribe of Florida*, 517 U.S. 1133. In short, the Court deliberately left open the question of how the remaining procedures remedy might work in light of such severance.

2. Well-Established Severance Principles Dictate that the IGRA's Secretarial Procedures Remedy Survives *Seminole*

The narrow holding of *Seminole,* as even the State has acknowledged, left a "gap" in the IGRA remedial scheme.[8] According to the State, this gap should be interpreted as requiring a tribe faced with an unconsenting state to

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Wyoming, 389 F.3d 1308 (10th Cir. 2004) (State did not assert sovereign immunity, thus allowing "good faith" litigation to proceed to merits).

[8] As the State's counsel asserted at the Preliminary Injunction hearing, the *Seminole* decision "leaves a gap, if you will, in the wall." (6 ROA at p. 8.)

do what is legally impossible: obtain a "lack of good faith" determination from a court that has been deprived of jurisdiction to make such a determination – through a state's refusal to consent – as a prerequisite to obtaining the Secretarial procedures remedy. The State is wrong.

Under traditional judicial principles regarding severance, the most relevant inquiry is whether, after severance, "the statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685 (emphasis in original). The *Alaska Airlines* Court also noted that, in severing a statute, courts should refrain from invalidating more of the statute than is necessary to ensure that the constitutional problem is avoided. 480 U.S. at 684 (internal citations omitted). Following this standard, a court should avoid severing a statute in such a way that would leave the statutory scheme operating in a manner inconsistent with the intent of Congress. Further, this principle of limited severance has been used to sever particular *applications* of a statute. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 22 (1985) (state statute authorizing police to use all necessary means to effect an arrest was unconstitutional as applied to unarmed, non-dangerous suspects, but otherwise remained in effect in full); *U.S. v. Grace*, 461 U.S. 171, 183-84 (1983) (holding that statute prohibiting display of signs

and flags at the Supreme Court was unconstitutional when *applied* to demonstrations held on the public sidewalks outside the Court).

Under this traditional severance analysis, preserving some portion of the IGRA's remedial mechanism as applied to a tribe faced with a state that has refused to consent to the judicial remedy process is necessary to preserve the Class III provisions of the IGRA. Every court that has considered this issue has held such a limited severance is required to preserve the statute. The first court to consider the issue, the Eastern District of Washington, in fact held that if a tribe were denied a remedy under the IGRA because a state refused to consent to the judicial remedy, the Class III provisions as a whole must fall, leaving such gaming to be governed under the pre-existing framework affirmed by *Cabazon* (i.e., with no state participation or regulatory authority). *Colville Confederated Tribes of the Colville Reservation v. State of Washington*, No. CS-92-0426, slip op. at 4-5 (E.D. Wash. June 4, 1993); (ROA, Attachments to Document #50, Exh. 11; Tribe's R.E. Tab 6.)

The Eleventh Circuit in the *Seminole* case, and all subsequent courts addressing the issue, took the more limited approach. The Eleventh Circuit's analysis was a response to the Seminole Tribe's argument, following the *Colville* precedent, that where an unconsenting state left a tribe without

access to the IGRA's judicial remedy, all of the Class III provisions of the IGRA must fall. *Seminole*, 11 F.3d at 1029.[9] The Eleventh Circuit held that the Class III provisions of the IGRA could survive severance of the judicial remedy when a tribe is faced with an unconsenting state – so long as the Secretarial procedures remedy remained available. *Id.*

Relying on the Supreme Court's judicial principles regarding severance, the Court reasoned that a limited severance would preserve Congressional intent:

> If the state pleads an Eleventh Amendment defense [to a tribe's "good faith" lawsuit], the suit is dismissed, and the tribe, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02.

11 F.3d at 1029.

The Eleventh Circuit thus severed the application of the judicial and mediator process in the IGRA,[10] when these are rendered inoperative by a

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[9] The court had the power to sever these provisions, even though the court's jurisdiction over the case was based upon the provisions found to be invalid. *See Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality decision).

[10] Since the mediator provisions of the IGRA are directly dependent upon the availability of the judicial remedy, with appointment of the mediator being made by a federal district court, *see* 25 U.S.C. §§ 2710(d)(7)(A)(i) and 2710(d)(7)(B)(iv)-(vi), these too were severed as applied to unconsenting states by the *Seminole Tribe* decision.

state's assertion of the Eleventh Amendment immunity defense, but left intact the Secretary's authority to issue procedures under 25 U.S.C.§ 2710(d)(7)(B)(vii).[11] The Eleventh Circuit's approach was subsequently adopted by the Ninth Circuit Court of Appeals. *Spokane II*, 139 F.3d at 1301-02.

In *Spokane II*, the Ninth Circuit discussed its previous dictum criticizing the Eleventh Circuit's analysis in *Spokane Tribe of Indians v. Washington*, 28 F.3d 991, 997 (9th Cir. 1994) ("*Spokane I*"), *vacated and remanded*, 517 U.S. 1129 (1996). Rejecting its initial criticism, the Ninth Circuit stated:

> [T]hat was in the context of our (incorrect) assumption that tribes could sue states. We were pointing out that the Eleventh Circuit's suggestion would not be as close to Congress's intent as the scheme Congress in fact passed. True. But the Supreme Court has now told us that Congress's scheme is unconstitutional; *the Eleventh Circuit's suggestion is a lot closer to Congress's intent than mechanically enforcing IGRA against tribes even when states refuse to negotiate*.

139 F.3d at 1301-1302 (emphasis added). *Accord State v. Oneida Indian Nation of N.Y.*, 78 F.Supp.2d 49 at 56-57 (N.D. N.Y. 1999).

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[11] As noted above, although invited to do so by the State, the Supreme Court did not address the decision of the Eleventh Circuit on this issue, *Seminole*, 517 U.S. at 76, and denied the State's subsequent petition to review this specific issue. *Seminole*, 517 U.S. at 1133.

The District Court below applied the same traditional approach to this issue, and also held that the Secretarial procedures remedy survived *Seminole's* severance of the application of the judicial remedy to an unconsenting state:

> This Court finds that affirming the Secretary's authority to issue these Gaming Procedures, in light of Texas's assertion of its Eleventh Amendment immunity, is the only means of severing IGRA while still allowing it to operate in a manner consistent with the intent of Congress. Congress's intent in enacting IGRA was to develop a regulatory framework that balanced the interest of the states and the tribes. It would appear, therefore, that if the Gaming Procedures could not be applied to an unconsenting state, the outcome would be a state veto over tribal gaming—a result directly at odds with Congress's intent in maintaining a balance of interests.

(Memorandum Opinion at 8 (citations omitted); 5 ROA 00973.) The District Court's holding in this regard is consistent with well-settled law.

3. The State's Arguments Seek a Radical Rewrite of the IGRA, Which Would Create an Unintended State Veto

The State's arguments are unsupported by any case authority and in effect ask the Court to engage in a radical rewrite of the IGRA statutory framework and remove its protections for tribal rights. Under *Seminole*, the judicial remedy provision is severed both as to states and as to tribes. When a state asserts its sovereign immunity from suit, the judicial remedy provision cannot be applied to the State. Nor can it be applied to the Tribe, however, as doing so would turn the IGRA's statutory scheme on its head,

requiring the Tribes to obtain the impossible, and would effectively grant the State a veto over Indian gaming, thus destroying the balance between States and Tribes that was the purpose of the Class III provisions enacted by Congress.

The State's reliance on the Supreme Court's statement in *Seminole* in which the Court said it would not "rewrite the statutory scheme" to make it approximate Congress' intent is misplaced. *Seminole,* 517 U.S. at 76 (*quoted* in State's Brief at 25). This statement does not support the State's arguments for several reasons.

The statement only relates to the availability of an *Ex parte Young* remedy against state officials, which – unlike the Secretarial procedures remedy – is not provided for in the statute, 517 U.S. at 73-76, and cannot be made available through a severance analysis. Also, the Supreme Court's statement certainly did not address the continuing availability of Secretarial procedures specifically provided for in the IGRA, 25 U.S.C. § 2710(d)(7)(B)(vii), through a severance analysis, a ruling that the Court expressly noted it took no position on. *Seminole,* 517 U.S. at 76, n. 18.

Of course, whenever a court severs provisions of a statute or its application in order to save the statute from being struck down on Constitutional grounds, a change is necessarily made in the original statutory

scheme. But a severance analysis of the kind done by the Eleventh Circuit in *Seminole* with respect to Secretarial procedures does not "*rewrite* the statutory scheme" any more than that court's severance, affirmed by the Supreme Court, of the application of the IGRA's judicial remedy to any state that has not waived its Eleventh Amendment Immunity.

The State also mischaracterizes the IGRA as containing a "third alternative" in which tribes do not get a compact after a court fails to find a lack of good faith. This characterization is simply incorrect. A finding that the State has negotiated in good faith does not end the compacting process. It simply means that the negotiations resume (unless the tribe chooses not to continue) with a determination that one or more positions taken by the State do not amount to bad faith negotiations. Usually, this means that the parties eventually reach a compact that includes some or all of the language sought by the State. *See, e.g.*, *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003), *cert. denied* 540 U.S. 1179 (2004) (Coyote Valley Tribe's loss of "good faith" lawsuit required Tribe to accept conditions and limitations asserted by State in compact negotiations, but did not result in veto of all Tribal Class III gaming). Accordingly, the State's argument that this alternative gives States a "state veto over tribal gaming" simply by negotiating in good faith has no merit.

D. The Secretary Has Appropriately Exercised Her Delegated Authority by Promulgating the Gaming Procedures Regulations

The State also erroneously argues that the Secretary lacks the appropriately delegated authority to fill the gap in the IGRA created by *Seminole's* limited severance of the judicial remedy by promulgating the Gaming Procedures Regulations. The District Court rejected the State's approach, and applying well-established case law regarding the delegation doctrine and deference to agency decision making, found that the Secretary has the necessary authority to address the ambiguity created by *Seminole's* severance of the application of the judicial remedy and ensure that the IGRA's compacting and remedy provisions function in a manner consistent with congressional intent.[12]

1. State's Reliance on *Seminole* Language Inappropriate

The State's argument on this point again relies heavily on the quotation from the Supreme Court's decision in *Seminole* about the Court's reluctance to "rewrite the statutory scheme" to make it approximate Congress' intent, and that if this effort should be made, "it should be by Congress and not the federal courts." *Seminole*, 517 U.S. at 76. As

[12] In its Response Brief, the United States addresses in detail the Secretary's authority to promulgate the Gaming Procedures Regulations under the "general authority" statutes, 25 U.S.C. §§ 2, 9, as well as under the *Chevron* doctrine. The Tribe hereby incorporates those arguments by reference so as to avoid unnecessary repetition.

discussed in the previous section, the statement is inapposite to the legal question before this court. Further, the statement speaks only to the *Court's* ability to fill a legislative gap – not that of the agency delegated authority to carry out the statute. Under the well-established case law articulating the delegation doctrine and deference to administrative agency decision making, the Secretary has been delegated sufficient and appropriate authority to fill the gap created by the *Seminole* decision, and she has validly exercised that authority.

In light of the *Seminole* decision, particularly the Eleventh Circuit's articulation of the necessity of Secretarial procedures to maintain the ongoing validity of the IGRA's class III provisions, the Secretary had to determine how to implement the mandated saving construction. Rather than simply issue procedures to tribes on an *ad hoc*, case-by-case basis, the Secretary chose to enact the Procedures regulations to provide an orderly process that allowed for further opportunity for state participation in a manner that tracked the IGRA scheme as closely as possible. In doing so, the Secretary did not exceed her statutory authority, but in fact carried out her statutory responsibility to ensure that Congress's intent in adopting the IGRA was implemented.

2. Secretary Had Implicit Delegated Authority

Congress did not anticipate *Seminole's* severance of the application of the judicial provisions of the IGRA, and the IGRA is as a result silent on how the Secretary should proceed in light of this ambiguous gap in the statute's remedial provisions. As the District Court correctly noted, "...there is no dispute that Congress has not addressed this issue." (Memorandum Opinion at 9; 5 ROA 00974.)

The Supreme Court has held that where Congress has not directly spoken regarding a statutory issue, but instead has left an "ambiguous" gap, Congress has by implication delegated authority to the agency charged with administering the statute to clarify the ambiguity or fill the gap. *Chevron v. Natural Resources Defense Council,* 467 U.S. 837, 843-46 (1984). This same principle of implicit delegation applies where, as here, the statutory gap has been created by a judicial severance unforeseen by the Congress. The Supreme Court has noted that even where Congress has not "expressly delegated authority or responsibility to implement a particular provision or fill a particular gap," finding an implicit delegation is appropriate when it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a

space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

The State's assertion that the Secretary lacks such delegated authority is based on generalized citation to Supreme Court case law on the delegation doctrine. State's Brief at 26-27, *quoting Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 472 (2001). This case law, however, establishes that so long as Congress has established an "intelligible principle" for the agency to follow, the delegation should be upheld. *Whitman,* 531 U.S. at 472. In fact, in the *Whitman* case the Court noted that it has consistently interpreted the phrase "intelligible principle" broadly. 531 U.S. at 474 ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes. . ."). Moreover, in each of the delegation cases cited by Plaintiff, the Supreme Court upheld the challenged delegation.[13]

Under the test articulated by the Supreme Court for determining whether such intelligible principles are present, a delegation of legislative power will be found "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the

[13] *Whitman,* 531 U.S. at 474; *Loving v. United States,* 517 U.S. 748, 758 (1996); *Touby v. United States*, 500 U.S. 160, 165 (1991).

boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989). The IGRA's provision regarding Secretarial procedures sets forth sufficiently "intelligible principles" outlining and setting the boundaries of the Congressional conferral of authority upon the Secretary of the Interior to issue such Procedures. Congress has delineated the general policy involved: authorizing tribal Class III gaming on Indian lands within certain parameters that incorporate concern for state public policy. 25 U.S.C. §§ 2702(1) (policy of the IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments"); 2710(d)(7)(B)(vii)(I) (requiring Procedures to be "consistent with . . . the relevant provisions of the laws of the State"). Congress has specified that the Secretary of the Interior has the authority and responsibility to apply the policy. 25 U.S.C. § 2710(d)(7)(B)(vii). Finally, Congress has set out the boundaries of the delegated authority, requiring that the Procedures must be consistent with the relevant provisions of state law and consistent with the remaining provisions of the IGRA. *Id.* Congress has provided the Secretary with standards sufficiently intelligible to meet the Supreme Court's test for delegated authority.

3. *Chevron* Doctrine Supports Secretary's Promulgation of Procedures Regulations

Finally, the State's assertion misstates the applicability of the doctrine articulated in *Chevron v. Natural Resources Defense Council*, that where there is a gap in a statutory scheme, the regulatory agency charged by Congress to interpret and enforce the statute can fill that gap. 467 U.S. 837, 843-46 (1984). As this Court has recently held, where, as here, an agency fills an implicit gap in a statute that serves to advance the statute's "*remedial* purpose," the agency's construction "must be given considerable weight." *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 740 and n.6 (5th Cir. 2005) (emphasis added).

The *Chevron* case and its progeny affirm that where an agency acts in accordance with its delegated authority to fill a statutory gap, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *See Chevron*, 467 U.S. at 844. *Chevron* noted that the Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* (internal citations omitted). *See also Auer v. Robbins*, 519 U.S. 452, 457 (1997) (where "Congress has not 'directly spoken to the precise question at issue'," court should uphold agency regulations so long as they are "'based on a

permissible construction of the statute.'") (*quoting Chevron*). Moreover, the Court recently held that agencies are accorded such deference under the *Chevron* doctrine that their interpretation will even trump a contrary construction by a court:

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion ...
> ... Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.

See National Cable & Telecommunications Ass'n v. Brand X Internet Services, ___ U.S. ___, 125 S.Ct. 2688, 2700 (June 27, 2005).

Thus, the Gaming Procedures Regulations, which clarify that the unwillingness of a state to consent to the IGRA process does not void a tribe's right to conduct Class III gaming, constitute a reasonable construction of the statute designed to ensure that the Act is implemented as close as possible to the balanced statutory scheme intended by Congress. The District Court's determination that the promulgation of the Gaming Procedures Regulations was an appropriate exercise of the Secretary's delegated authority was correct and should be affirmed.

E. Without the Gaming Procedures Regulations, All of the Class III Provisions of the IGRA Would Fail as Unconstitutional

Moreover, even if the Court finds the State's argument about the lack of delegated authority persuasive, the legal conclusion is not that the broken statute remains standing, creating a wholly unintended unilateral state veto power over tribal Class III gaming. Rather, the legal implication of the State's argument that Congress must fix the statute (if, as the State incorrectly asserts, the Secretary cannot fill this gap), is that the IGRA statute, or, at the very least, the entirety of its Class III regulatory scheme, must be declared unconstitutional and sent back to Congress to start over.

While the IGRA has a severability clause (25 U.S.C. § 2721) that clause merely creates a rebuttable presumption against the need to declare the entire statute invalid. *Alaska Airlines*, 480 U.S. at 686. The presumption of severability is overcome where severance would result in a statutory scheme (1) that no longer functions in the manner Congress intended, (2) that bears little resemblance to the scheme enacted by Congress, and (3) that would not be fully operative as a law. *Alaska Airlines*, 480 U.S. at 684-85.

If the IGRA were left without a remedy for tribes – as the State's argument proposes – the presumption of severability would be overcome

and the statute (or at least its Class III provisions) would fall, since these three conditions would be met. *See Colville*, No. CS-92-0426, slip op. at 4-5 (E.D. Wash. June 4, 1993); (ROA, Attachments to Doc. #50, Exh. 11; Tribe's R.E. 6 (striking down IGRA Class III provisions in absence of remedy for tribes)).

First, severing the entire remedial scheme would result in a statute that did not function in the manner Congress intended. *See Alaska*, 480 U.S. at 685 (most relevant inquiry in evaluating severability is "whether the statute will function in a manner consistent with the intent of Congress"). The final compromise resulting in the IGRA granted States a previously unavailable opportunity to participate in the regulation of Indian gaming. Given the strong opposition of tribes, however, to even a limited delegation to states of negotiated jurisdiction, and the strong support for the tribal position that existed prior to the passage of the Act,[14] the IGRA would not

[14] *See* S. REP. NO. 100-446, at 33-36; (4 ROA 00761-00764; Tribe's R.E. Tab 2.) (Additional Views of Senator McCain of Arizona, Co-Chairman of the Senate Select Committee on Indian Affairs and Senator Evans of Washington, a member of that Committee, indicating their great concern that the procedures adopted for compacting did not go far enough to protect Indian interest.)

have been passed unless it gave tribes a remedy when faced with an intransigent state.[15] As summarized by the Ninth Circuit in *Spokane*:

> IGRA as passed thus struck a finely-tuned balance between the interests of the states and the tribes. Most likely it would not have been enacted if that balance had tipped conclusively in favor of the states, and without IGRA the states would have no say whatever over Indian gaming.

Spokane II, 139 F.3d at 1301.

Without any tribal remedy, states would not be required to give consideration, good faith or otherwise, to tribal requests to engage in Class III gaming, even if the kind of gaming involved, as is the case here, is eligible for inclusion in a compact.[16] Removing all remedies would leave a statute that did not function in the manner intended by Congress.

Second, severing the remedial framework would leave a statute with "little resemblance" to that intended by the legislature. *Thornburgh v. American Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 764-765 (1986), *overruled in part on separate issue by Planned Parenthood of*

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[15] *Spokane*, 139 F.3d at 1300 (quoting Senator Daniel K. Inouye to explain that Congress would not have passed the IGRA in the form it did had it known that tribes would not have a remedy).

[16] *See Ysleta Del Sur Pueblo v. State of Texas* 852 F. Supp. at 595-596 (holding that the casino games requested by the Tribe [Black Jack, Roulette, Baccarat, Craps (Dice) and "Slot" machines including electronic and electromechanical games of chance] should be included in the negotiations of a Tribal-State Compact under the IGRA since the state permits casino gambling by some persons and individuals under the carnival exception in the Texas statutes and based on the definition of "lottery" in the Texas Lottery Act). *See* Memorandum Opinion at 12, n. 8; (5 ROA 00977.)

Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). The State's position would turn the careful compromise of the IGRA on its head: imposing all of the IGRA's requirements and burdens on tribes, but without providing any remedy against unconsenting states. States would be able to dictate terms to tribes or, as with Texas here, simply refuse to negotiate and thereby exercise an absolute veto. Removing all remedies would result in a statutory scheme that bears little resemblance to the intended Congressional scheme of give and take negotiations. S. REP. No. 100-446, at 5-6; (4 ROA 00733-00734; Tribe's R.E., Tab 1.)

Finally, removing the remedial framework would render the IGRA not "fully operative." *Alaska Airlines*, 480 U.S. at 684. The State here claims that the Secretary may not issue procedures unless the Tribe successfully obtains a "lack of good faith" determination by the court – which is an impossible feat if the state asserts the Eleventh Amendment in response to such suit. The IGRA's remedial scheme would not be "fully operative" if it put tribes in the position of having to obtain a result that is legally impossible.

The result would be a partially operative statutory scheme that profoundly alters the balance of power struck by Congress between tribal and state governments, which would defeat the Act's stated policy to

"promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). The opportunity for Secretarial procedures and the remaining provisions are so dependent upon each other that removal of the affected provisions would defeat the essential purposes of the Act. *See Carter v. Carter Coal Company*, 298 U.S. 238, 313 (1936) (if both the constitutional and unconstitutional provisions are so dependent upon each other that one cannot stand without the other, then despite the presence of a severability clause, both must fall).

After *Seminole*, the Gaming Procedures Regulations are the only thread holding the IGRA together when a state refuses to negotiate and refuses to consent to a tribe's suit. Removing this remedy would completely frustrate the Congressional scheme, and therefore the remedy cannot be removed from the statute without the whole statute (or at the very least its Class III provisions) being held invalid. *Alaska Airlines*, 480 U.S. at 684; *Seminole*, 11 F.3d at 1029. Therefore, if the Gaming Procedures Regulations are found unconstitutional, the IGRA in its entirety, or at the very least its Class III provisions, must be struck as unconstitutional.

CONCLUSION

The State's suit is not ripe and should be dismissed. Further, the State is essentially asking this Court to rewrite the IGRA to incorporate a de facto

state veto over tribal Class III gaming, a result wholly at odds with Congressional intent. The District Court's decision properly recognized the implicit authority delegated to the Secretary to fill the gap in the IGRA's remedial scheme created by Seminole. The Secretary appropriately exercised that delegated authority in promulgating the Gaming Procedures Regulations. The Tribe respectfully requests that the Court affirm the decision below.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct paper copies and one electronic copy in Adobe.pdf format on a 3.5" diskette of the foregoing Brief have been sent via certified mail, return receipt requested, to the following parties on this the 23rd day of August, 2005.

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