No. 05-50754

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS,

Plaintiff-Appellant

v.

**UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF INTERIOR;
GALE NORTON, IN HER OFFICIAL CAPACITY
AS SECRETARY OF THE INTERIOR,**

Defendant-Appellee

and

KICKAPOO TRADITIONAL TRIBE OF TEXAS,

Intervenor-Defendant-Appellee

RESPONSE BRIEF OF FEDERAL APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fifth Circuit Rule 28.2.4, Appellee United States of America requests oral argument in this case. The United States believes that oral argument would be helpful to the Court in resolving this matter.

Respectfully submitted,

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STATEMENT OF JURISDICTION

The State of Texas alleged jurisdiction in the district court pursuant to 28 U.S.C. § 1331. The district court issued final judgment on March 30, 2005, and in its accompanying Memorandum and Order held that it lacked subject matter jurisdiction because the State of Texas's complaint was not ripe for review. R. 00978; ER Tab 2 at 13.[1] The State of Texas filed a Motion for a New Trial pursuant to Fed. R. Civ. P. 59,[2] R. 00981, and the district court denied the motion on April 27, 2005. R. 00997. The State of Texas filed a timely appeal on April 29, 2005, R. 00999, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The State of Texas challenges the authority of the Secretary of the Interior to promulgate Secretarial Gaming Procedures to address the gap in the remedial provisions of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710, created by the Supreme Court's opinion in Seminole Tribe v. Florida, 517 U.S. 44 (1996). The Secretary of the Interior has made no final decision with respect to the Class III Gaming Application of the Kickapoo Tribe, and thus has not applied the

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1. "ER" refers to the Excerpts of Record attached to the brief of Appellant State of Texas. "SER" refers to the Supplemental Excerpts of Record attached to the Appellees' Brief. "ISER" refers to the Intervenor's Supplemental Excerpts of Record attached to the Intervenor-Appellee's Brief. Citations to the record on appeal are preceded by "R."
2. The State's motion was entitled "Motion for a New Trial," ER Tab 4, but the district court interpreted the motion as one to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). ER Tab 5 at 1.

Secretarial Gaming Procedures in a manner that affects the State of Texas. This appeal raises the following issues:

1. Whether the State of Texas lacks standing to challenge the Secretarial Gaming Procedures when the Secretary has made no final decision that could injure the State;

2. Whether the State's claims are not ripe for judicial review when they are contingent on indeterminate future events and the State would endure no hardship if review is deferred until the claim is ripe;

3. Whether the Secretary of the Interior has the authority to promulgate regulations to fill the gap in IGRA created by the Supreme Court's decision in Seminole Tribe;

4. Whether the Secretarial Gaming Procedures are a reasonable interpretation of IGRA.

STATEMENT OF THE CASE

On December 11, 2003, the Kickapoo Traditional Tribe submitted a Class III gaming application to the Bureau of Indian Affairs, an agency within the Department of the Interior. R. 00969; ER Tab 2 at 4. The Secretary of the Interior, acting through the Acting Deputy Assistant Secretary of Policy and Economic Development, notified the Kickapoo Tribe and the State of Texas on January 12, 2004, that the Kickapoo Tribe's proposal was complete and met the eligibility requirements of the Class III Gaming Procedures promulgated by the

Secretary. 25 C.F.R. § 291, et seq. ("Secretarial Gaming Procedures"). The Secretary requested comment from the State of Texas pursuant to 25 C.F.R. § 291.7, but the State offered no comment on the Tribe's proposal.

Instead, on March 11, 2004, the State of Texas filed a complaint and an Application for Preliminary Injunction and for Stay of Administrative Proceedings with the United States District Court for the District of Texas. The State challenged the validity of the Gaming Procedures and sought to have the district court stay the application of those procedures while the State's challenge was pending. The district court held a hearing on April 20, 2004, and denied Texas's application for a preliminary injunction.

The parties filed cross-motions for summary judgment, and in a Memorandum and Opinion issued on March 30, 2005, the district court granted the Department of the Interior's motion for summary judgment. The district court held that the State's challenge to the Secretary's Gaming Procedures was not ripe because the Secretary had not yet decided whether or not to grant the Tribe's Class III gaming application. R. 00977; ER Tab 2 at 12. The district court also held, apparently in the alternative, that the Gaming Procedures were a valid exercise of the Secretary's delegated authority, and that the Secretary reasonably interpreted IGRA in promulgating the Procedures. R. 00973-74; ER Tab 2 at 8-9. The court dismissed the State's complaint without prejudice, and the State timely appealed.

STATEMENT OF THE FACTS

A. STATUTORY BACKGROUND

In 1988, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, which regulates gaming on Indian lands. Among other things, Congress intended "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." 25 U.S.C. § 2702(1). Congress found that "Indian tribes have the exclusive right to regulate gaming on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5).

IGRA divides gaming into three classes. Class I gaming consists of social games for prizes of minimal value and traditional games engaged in as part of tribal ceremonies. 25 U.S.C. §§2703(6), 2710(a)(1). Class II gaming consists of bingo and other similar games, and non-banking card games.[3] 25 U.S.C. § 2703(7). Class III gaming, at issue in this case, is gaming not covered by the previous two classes, and includes banking card games, casino games, slot machines, horse racing, dog racing, jai alai, and lotteries. 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4. Class III gaming is lawful only if it is located in a state that

3. A "banking" card game "means any game of chance that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win." 25 C.F.R. § 502.11.

permits such gaming for any purpose by any person, is authorized by a tribal ordinance, and is "conducted in conformance with a Tribal-State compact." 25 U.S.C. § 2710(d)(1). The IGRA provisions for Class III gaming grant substantial authority to the Secretary, including the authority to approve all tribal-state gaming compacts (or to disapprove them in certain circumstances), and to prescribe gaming regulations when a tribe and a state are unable to conclude a compact. 25 U.S.C. §§ 2710(d)(8), (d)(7)(B)(vii).

Prior to the enactment of IGRA, states were generally precluded from any regulation of gaming on Indian reservations. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987). By offering states the opportunity to participate with Indian tribes in developing regulations for Indian gaming, IGRA "extends to the States a power withheld from them by the Constitution." Seminole Tribe v. Florida, 517 U.S. 44, 58 (1996).

To conduct Class III gaming, IGRA requires the tribe to request the state "to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian Tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). Congress designed this process to provide "a means by which differing public policies of these respective governmental entities can be accommodated and reconciled." S. Rep. No. 100-446, at 6 (Aug. 3, 1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3076; R. 00733.

"The provisions for Tribal/State compacting are not meant to favor either party." 134 Cong. Rec. at 24027 (Sept. 15, 1988) (statement of Senator Evans, Vice Chairman of the Senate Select Committee on Indian Affairs); R. 00767. Rather, Congress intended to give the states a voice, but not a veto, in the process of permitting Class III gaming by Indian tribes. Congress designed IGRA to ensure that "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." Id. at 24024 (statement of Senator Daniel K. Inouye, primary sponsor of IGRA and Chairman of the Select Committee); R. 00766.

IGRA provided a four-step mediation process to facilitate negotiations between tribes and states. 25 U.S.C. § 2710(d)(7)(B). This process is triggered when a tribe files suit against a state, alleging that the state has refused to negotiate or has failed to negotiate in good faith. 25 U.S.C. §§ 2710(d)(7)(A)(i), (B)(i). A district court may find that the state failed to negotiate in good faith, 25 U.S.C. § 2710(d)(7)(B)(ii), and if the district court makes this finding, "the court shall order the State and the Indian tribe to conclude such a compact within a 60-day period." 25 U.S.C. § 2710(d)(7)(B)(iii). If they do not do so, the tribe and the state each must submit to a mediator appointed by the district court a proposed compact that represents "their last best offer." 25 U.S.C. § 2710(d)(7)(B)(iv). The mediator must then select the compact "which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of

this court." Id. Once the mediator selects a compact and submits it to the state and tribe, the state has 60 days to consent to the mediator's choice of compact. 25 U.S.C. § 2710(d)(7)(B)(vi).

In the event that the state does not consent, the mediator must notify the Secretary, who "shall prescribe . . . procedures . . . under which class III gaming may be conducted." 25 U.S.C. § 2710(d)(7)(B)(vii). This is the final step in the IGRA process, and is triggered only if the state refuses to consent to the remedial measures provided by IGRA.

In 1996, the United States Supreme Court held that a tribe could not sue a state in federal court for failure to negotiate in good faith if the state asserts its Eleventh Amendment immunity from suit. Seminole Tribe, 517 U.S. 44. The Court held that Congress lacked the authority to abrogate the sovereign immunity of states under the Indian Commerce Clause, and so federal courts do not have jurisdiction over suits brought by Indian Tribes against states if a state raises an Eleventh Amendment defense. Id. at 76.[4] See 25 U.S.C. §§ 2710(d)(7)(A)(i), (B)(i) (providing cause of action under IGRA). The Court did not, however, invalidate IGRA § 2710(d)(7)(B) in its entirety as the result of this unconstitutional provision. Accordingly, if a tribe filed suit against a state under IGRA and the defendant invoked its sovereign immunity under the Eleventh Amendment, the

4. The Court also held that the doctrine of Ex parte Young, 209 U.S. 123 (1908), was not applicable to the remedial provisions of IGRA at issue. 517 U.S. at 73-76.

procedures for judicial review and mediation were inapplicable. Seminole Tribe v. Florida, 11 F. 3d 1016, 1029 (11th Cir. 1996). This lack of a statutory remedy for the tribe created a "loophole" that allowed states to circumvent the dispute resolution system built into IGRA.

When presented with this problem, the Eleventh Circuit described the following solution:

> One hundred and eighty days after the tribe first requests negotiation with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, 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 may then prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress's goals, as delineated in §§ 2701-02.

Seminole Tribe, 11 F.3d at 1029.

In response to this decision, and the existing loophole in IGRA's dispute resolution procedures, the Secretary published an Advance Notice of Proposed Rulemaking on May 10, 1996, seeking comment on the Secretary's authority under IGRA to promulgate procedures authorizing Class III gaming on Indian lands when a state raises an Eleventh Amendment immunity defense to a suit pursuant to 25 U.S.C. § 2710(d)(7). 61 Fed. Reg. 21,394 (May 10, 1996). The Department received over 200 comments, including comments from 66 tribes and 12 states. In November 1997, Congress adopted an amendment to the 1998 Interior

Appropriations bill, effective during fiscal year 1998, prohibiting the Secretary from approving any gaming compact not first approved by the state. After the notice-and-comment period, the Secretary issued a Proposed Rule for Class III Gaming Procedures on January 22, 1998. 63 Fed. Reg. 3,289 (Jan. 22, 1998). After soliciting and responding to additional comments, the Secretary issued a Final Rule on April 12, 1999. 64 Fed. Reg. 17,535 (Apr. 12, 1999) (codified at 25 C.F.R. Part 291) ("Secretarial Gaming Procedures" or "Final Rule"). The State of Texas now challenges the procedures outlined in this Final Rule.

The Secretary based her authority to issue these procedures on the general grant of authority found in 25 U.S.C. §§ 2 and 9 to promulgate regulations to carry out acts related to Indian affairs. In doing so, the Secretary took into account the procedures and remedies provided in IGRA, 25 USC § 2710(d)(7)(B)(vii), permitting the Secretary to prescribe procedures when a State fails to agree to a proposed compact during court-ordered mediation. See 63 Fed. Reg. at 3,290-91. The Final Rule is designed to operate only in instances in which the dispute resolution procedure is not available. They may only be invoked in very particular circumstances. First, the tribe must request negotiations with the state, 25 U.S.C. § 2710(d)(3)(A), and not reach a compact with the state within 180 days, 25 U.S.C. § 2710(d)(7)(B)(i). If the tribe files suit against the state for failure to negotiate in good faith, 25 U.S.C. § 2710(d)(7)(A)(i), and the state invokes its immunity to suit under the Eleventh Amendment, then the Secretary's Gaming Procedures are

invoked if the tribe requests it. 25 C.F.R. § 291.1.

Once the process is invoked, the Secretary must determine whether the tribe's proposal qualifies for consideration of gaming procedures, and must then submit the tribe's proposal to the Governor and Attorney General of the state where the gaming is proposed. 25 C.F.R. § 291.7. The state may then comment on the proposal, and may also submit an alternative proposal, within 60 days. Id. If the state chooses to submit an alternative proposal, a mediation process begins under 25 C.F.R. §§ 291.9 and 291.10. Should the state choose not to submit an alternative proposal, the Secretary must then review the tribe's proposal to determine, among other things: (1) whether Class III gaming will be conducted on Indian lands within the tribe's jurisdiction; (2) whether the contemplated gaming activities are permitted in the state; (3) whether the proposal is consistent with relevant provisions of state law; (4) whether the proposal is consistent with the trust obligations of the United States to the tribe, IGRA, and other applicable federal law. 25 C.F.R. § 291.8(a).[5]

Once this process is concluded, the Secretary must either approve or disapprove gaming procedures for the Tribe. 25 C.F.R. § 291.8(c). Should the

5. The Class III Gaming Application submitted by the Kickapoo Tribe is presently at this stage in the process. At the time of this writing, the Department of the Interior has not yet concluded its scope-of-gaming determination, which requires the Department to conclude "[w]hether contemplated gaming activities are permitted in the State for any purposes by any person, organization, or entity." 25 C.F.R. § 291.8(a)(3).

Secretary choose to approve gaming procedures, those procedures must then be approved by the tribe and published in the Federal Register. 25 C.F.R. § 291.13. At this point, the gaming procedures become final.

B. FACTUAL BACKGROUND

The Kickapoo Tribe first requested negotiations for a Class III gaming compact with the State of Texas in 1995. R. 00446. The State of Texas rejected the Tribe's attempt to negotiate a compact, and the Tribe sued the State in federal district court, alleging that the State breached its duty under IGRA to negotiate in good faith. Id. In its defense, the State invoked its Eleventh Amendment immunity from suit. Following the Supreme Court's decision in Seminole Tribe, the district court dismissed the Tribe's suit in 1996. R. 00447.

In December 2003, the Tribe submitted a Class III gaming application to the Department of the Interior pursuant to the Secretarial Gaming Procedures codified at 25 C.F.R. § 291. R. 00448. The Department determined, pursuant to 25 C.F.R. § 291.4, that the Tribe's application was complete and satisfied the criteria to invoke the Department's process to determine whether gaming procedures are appropriate. R. 00450. On January 12, 2004, the Department of the Interior issued a letter to this effect to the State of Texas, notifying the Governor of Texas and the Attorney General of Texas that the Kickapoo Tribe was eligible for Class III gaming procedures under 25 C.F.R. § 291. Id. These letters invited comments from the State and provided an opportunity to submit an alternative gaming

proposal, pursuant to 25 C.F.R. § 291.7. R. 00459. The State had sixty days to respond, but did not provide any comments or an alternative gaming proposal.

Because the State did not respond to the Department's solicitation of an alternative proposal, the mediation provisions at 25 C.F.R. § 291.9 were inapplicable, and the Department proceeded to review the Tribe's request for gaming procedures under the regulatory procedures established in 25 C.F.R. § 291.8. This provision provides an additional opportunity for the State to participate in the process once the Department has made the necessary determinations to evaluate the Tribe's gaming proposal. 25 C.F.R. § 291.8(a). Once the Department has made a preliminary review of the scope of gaming contemplated by the Tribe, if it has identified any unresolved issues or areas of disagreement, then it will offer the State the opportunity to attend an informal conference with the Department and the Tribe, at which point the State can raise any objections that it might have.[6]

On March 11, 2004, the State of Texas filed a complaint in the United States District Court for the Western District of Texas, alleging that the Secretarial Gaming Procedures were promulgated in violation of the Secretary's delegated authority. The State requested a preliminary injunction against the application of the Gaming Procedures to the Kickapoo Tribe's Class III gaming application, and

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6. It is the policy of the Department of the Interior not to publish final gaming procedures for any tribal application when litigation over that application is pending. R. vol. 6 at 87 (testimony of Paula Hart).

requested a stay of the administrative proceeding. The Kickapoo Traditional Tribe of Texas intervened as defendants in the suit. R. 00200. On April 20, 2004, the district court held a hearing on the preliminary injunction motion, and denied the preliminary injunction and stay of administrative proceeding in a ruling from the bench. R. vol. 6 at 107-08.

The parties then filed cross-motions for summary judgment. The State of Texas, in its summary judgment motion, alleged that the Gaming Procedures conflict with IGRA and therefore constitute an unconstitutional delegation of legislative authority to the Secretary in violation of the separation of powers doctrine. Additionally, the State alleged that the Gaming Procedures conflicted with the Secretary's role as "trustee" for the Indian Tribes under IGRA. On March 30, 2005, the district court denied the State's motion for summary judgment and granted summary judgment to the United States and to the Kickapoo Tribe.

In its Memorandum and Opinion accompanying its order on summary judgment, the district court found that the State of Texas's claims were not yet ripe for judicial review. R. 00978; ER Tab 2 at 13. The district court found that the State's claims "are contingent upon future events that may or may not occur (i.e., the Secretary's approval of the Kickapoo Tribe's Class III gaming application)." Id. at 12. Therefore, the State could demonstrate no cognizable harm from the regulations, as they had not yet been applied. The district court found that, despite the State's protestations to the contrary, the State had been given an opportunity to

negotiate with the Tribe and had suffered no harm in the process. Id. at 12-13. The district court also found that the State had not demonstrated that it would suffer any hardship if review of the Secretary's procedures was conducted after they had actually been applied against the State, if, in fact, that occurred. Id.

The district court also considered, apparently as an alternative holding, whether the Secretary had the authority to promulgate the Gaming Procedures, and found that IGRA did vest the Secretary with that authority. "Although Congress did not expressly grant authority to the Secretary to promulgate rules in the wake of the Supreme Court's Seminole Tribe decision, that grant of authority may be inferred from both the language in IGRA and the general-authority statutes." Id. The district court also found 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." Id. at 8 (citing Alaska Airlines v. Brock, 480 U.S. 678, 685 (1987)). To interpret IGRA otherwise would grant "a state veto over tribal gaming – a result directly at odds with Congress's intent in maintaining a balance of interests." Id.

The State filed a motion for rehearing on April 11, 2005. The district court denied this motion on April 27, 2005. The State of Texas timely filed this appeal.

SUMMARY OF THE ARGUMENT

The State of Texas challenges the validity of regulations that have not been

applied or enforced in any way against it. The regulations have imposed no legal or economic burden on the State, and any harms that it alleges will only occur if the Secretary issues a decision adverse to the State, an outcome which may never occur. The State has had several opportunities to negotiate with the Kickapoo Traditional Tribe, and at each opportunity has steadfastly refused to do so. While the State alleges that it has less rights and less leverage in negotiations as a result of the existence of the Secretarial Gaming Procedures, this argument is not supported by evidence in the record. The State has suffered no injury that is concrete and imminent as a result of the Procedures, and therefore has no standing to challenge them at this point. Furthermore, because the Secretary has not reached a final decision on the Tribe's Class III Gaming Application, the State's claims are not ripe for judicial review.

The procedures issued by the Secretary are a valid exercise of the Secretary's authority to promulgate regulations necessary for the implementation of IGRA, and they serve to close a loophole created by the Supreme Court's decision in Seminole Tribe that otherwise prevents IGRA from serving its purpose of facilitating the negotiation of gaming compacts with Indian tribes. The Secretarial Gaming Procedures are a reasonable interpretation of the statute's remedial scheme in the event that a State and a Tribe are initially unable to negotiate a compact. At the same time, the procedures serve to further protect the rights of States to have a voice in the proceedings by providing for additional

consultation with state governments even after they have invoked their Eleventh Amendment immunity to suit. Should this Court hold that the State has standing and that the State's claims are ripe, then it should find that the Secretarial Gaming Procedures are a reasonable interpretation of IGRA and should be upheld.

ARGUMENT

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo, applying the same legal standards as the district court. Amer. Home Assur. Co. v. United Space Alliance, LLC, 378 F.3d 482, 486 (5th Cir. 2004). Since the Court's determinations regarding ripeness were a mixture of findings of fact and conclusions of law, the standard of review is similarly mixed. 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," while the Court's conclusions of law are reviewed de novo. Ayers v. Thompson, 358 F.3d 356, 368 (5th Cir. 2004).

I. The State of Texas Does Not Have Standing to Bring its Claim.

The State brings its challenge to the Secretary's authority to promulgate the Secretarial Gaming Procedures under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq ("APA"). R. 00397. To challenge agency action under the APA, a plaintiff must meet both the Constitutional standing requirements of Article III and prudential standing requirements. The State of Texas can establish neither in this

case.[7]

At an "irreducible constitutional minimum," the State must meet three requirements in order to establish its Article III standing to bring its challenge to the Secretary's gaming procedures. First, the State "must demonstrate injury in fact – a harm that is both concrete and actual or imminent, not conjectural or hypothetical." Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000) (citation and internal quotation marks omitted); see also Pub. Citizen v. Bomer, 274 F.3d 212, 217 (5th Cir. 2001). Second, the State must establish "causation – a fairly traceable connection between the alleged injury in fact and the alleged conduct" of the Department of the Interior. Id. (internal alterations and citation omitted). Finally, the State "must demonstrate redressability – a substantial likelihood that the requested relief will remedy the alleged injury in fact." Id. (internal quotations omitted). The State can establish none of these three constitutionally required factors.

A. THE STATE HAS SUFFERED NO INJURY IN FACT.

The Secretary of the Interior has reached no final decision on the Kickapoo Tribe's Class III gaming application. The district court held correctly that, until that time, "any hardship Texas could suffer is conjectural." R. 00978; ER Tab 2 at 13.

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7. Although the district court did not address standing in its Memorandum and Opinion, ER Tab 2, the State of Texas's lack of standing was briefed before the district court. Standing is a jurisdictional issue that must be addressed by this Court even if was not addressed by the court below. Johnson v. City of Dallas, 61 F.3d 442, 443 (5th Cir. 1995).

The State may not establish standing by alleging potential future harm. "A threatened injury must be certainly impending to constitute injury in fact." Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (quotation omitted). The State's complaint alleges harm that might result from the application of the Gaming Procedures, but if the Secretary were to deny the Tribe's gaming application, none of these harms would come about. R. 00396-97. Therefore, the State has not alleged a concrete or imminent harm to any of its cognizable interests, and the State's complaint does not satisfy the injury-in-fact test.

On appeal, the State alleges two harms. The State argues that the mere existence of the Secretarial Procedures has "changed the way the Plaintiff State of Texas negotiates with the Tribe." Br. at 14. The State alleges that it is placed in a lesser bargaining position as a result of the Secretarial Procedures, because, if it refuses to come to the table, then the Tribe and the Department of the Interior will proceed without them. The State also argues that previously, under IGRA, the Tribe and Department of the Interior could only enter into a compact without the State if a federal court first found that the State had refused to negotiate in good faith with the Tribe. Br. at 14-15. This "procedural safeguard" is somehow lost, according to the State, as a result of the existence of the Secretarial Procedures. Br. at 15.

The State refers to the affidavit of David Medina, General Counsel for the Office of the Governor of Texas, as evidence of the State's lesser bargaining power

under the Secretarial Gaming Procedures. ER Tab 9 at 5 (quoted in Br. at 16); R. 00851. The only indication that Mr. Medina's affidavit gives of an actual effect that the existence of the Secretarial Procedures has is the following: "The possibility that the Secretarial Procedures can circumvent federal protections granted the State in IGRA causes the State of Texas to negotiate from a less secure position, with the thought of possibly giving up key points if necessary to avoid the potential of being eliminated from the approval process altogether." Id.

Although this hints at the possibility of a strategic concession on the part of the State in negotiating with the Tribe, this can hardly be said to be a necessary result of the existence of the Secretarial Procedures. While testifying at the preliminary injunction hearing before the district court in April, 2004, Mr. Medina admitted that the Secretarial Procedures had not required the State to change any conduct or legally forced it to take any action contrary to the State's interests. R. vol. 6 at 51. He testified that the existence of the Procedures had imposed no financial or legal burden on the State. Id. at 52. Indeed, when asked whether there was any action the State was required to take as a result of the regulations which would impose a legal burden on the State, Mr. Medina responded "not yet," id., further demonstrating the importance of waiting until injury is imminent and concrete before granting standing:

Q. . . . What actions have you had – what conduct have you had to change in regards to negotiating with the tribes as a direct result of these regulations?

A. None. There have been no negotiations.

* * *

Q. Have you been legally forced to take any action that is contrary to the State's interests in respect to these regulations?

A. Not yet.

* * *

Q. Are you – is there any action that the State has been required to take that would impose any type of financial burden on the State in regards to these regulations?

A. Not that I'm aware.

Q. Is there any legal action that the State is required to take that would pose any legal burdens on the State as regards these regulations?

A. Not yet.

R. vol. 6 at 51-52.

The State of Texas accuses the district court of "ignoring" Mr. Medina's written affidavit, but after hearing the testimony transcribed above, the district court correctly weighed the evidence and found that there was no demonstration of injury (nor has the State demonstrated hardship, for similar reasons, as discussed infra at 29-31).

Even if this Court was to accept Mr. Medina's affidavit at face value and disregard his testimony to the district court, the State of Texas's claim that it has lost some bargaining power in the negotiation process under IGRA still does not allege sufficient injury to establish standing or to make judicial review of the Secretarial Procedures ripe. The courts have occasionally found that an alleged reduction in bargaining power was sufficient to establish injury in fact, and thus granted standing to challenge legislative or regulatory action, but this has only happened where a plaintiff has demonstrated economic injury, see, e.g., Clinton v.

New York, 524 U.S. 417, 432-33 (1998), Investment Co. Inst. v. Camp, 401 U.S. 617, 620 (1971), or asserted a claim under the Equal Protection Clause, see, e.g., Northeastern Fla. Chapter, Associated Gen. Contractors v. Jacksonville, 508 U.S. 656, 666 (1993). Neither of these situations applies here. There is no Equal Protection Clause question at issue, of course, and the State has alleged no economic injury that it has actually suffered.[8] To the extent that the State's claim of reduced bargaining power suggests that the Secretary may eventually issue gaming procedures that place the State in a worse economic position than it would prefer, this claim is far too attenuated to be considered harm that is "imminent." Vermont Agency of Natural Resources, 529 U.S. at 771.

The second harm that the State alleges is that the Secretary may approve gaming procedures based on a tribe's application without a federal court first finding that the state refused to negotiate in good faith. Br. at 14. However, that circumstance is entirely of the State's own making. The State asserted its sovereign immunity and deprived the federal court of jurisdiction to adjudicate the good faith issue. The possibility of concrete harm to the State is merely conjectural at this point. The most the State presently can assert is that the

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8. Mr. Medina did state, in his testimony, that the current lawsuit brought by the State of Texas imposes a financial burden on the State. R. vol. 6 at 59-60. However, it cannot be that the cost of filing suit to challenge a regulation constitutes sufficient economic injury to establish standing, because this would automatically establish standing for all litigants. Assoc. of Community Organizations for Reform Now v. v. Fowler, 178 F.3d 350, 358 (5th Cir. 1999).

Secretary has adjusted IGRA's procedure for resolving disputes between a tribe and state. Until that procedure is applied to the State and results in an outcome to which the State objects, the State has suffered no harm. Just as the State's potential claim for economic injury depends on future events that have not happened (and may not happen), any injury to the State resulting from the lack of a judicial finding of good-faith negotiations has not yet occurred, might never occur, and is certainly not imminent.

B. THE STATE CANNOT DEMONSTRATE CAUSATION AND REDRESSABILITY

Were this Court to find that the State has suffered an injury-in-fact, the State still must demonstrate that "the injury is fairly traceable to the defendant's actions and the injury will likely . . . be redressed by a favorable decision." Energy Management Corp. v. City of Shreveport, 397 F.3d 297, 302 (5th Cir. 2005) (citation and internal quotation omitted). The attenuated injuries the State alleges it will suffer are not "fairly traceable" to the promulgation of the Secretarial Gaming Procedures or any subsequent action by the Secretary.

The harm that the State of Texas alleges can be summarized as a concern that the Secretarial Procedures remove the State from the negotiating process by making possible a scenario where the Secretary and a Tribe negotiate a gaming compact despite the State's objections. Br. at 20. However, Texas already removed itself from the negotiating process by voluntarily refusing to engage in

discussions with the Tribe.

Texas argues that the existence of the Secretarial Procedures "virtually eliminates the State of Texas' participation without any finding of lack of good-faith negotiation by a court of law as required by IGRA." Br. at 8; see also Br. at 9 ("In fact, under IGRA, the States are guaranteed a neutral forum in that a federal trial court must first determine in a judicial proceeding that the State failed to negotiate in good faith before any remedial procedures under IGRA apply * * * No such neutral forum is provided in the Secretarial Procedures."). As discussed above, this lack of judicial forum in IGRA's remedial procedures under the regulations has not caused the State any concrete and imminent harm at this stage.

Any harm caused to Texas by a lack of participation in the process in this case is not "fairly traceable" to the Secretarial Gaming Procedures; rather, it is the result of Texas' steadfast refusal to enter into negotiations with the Tribe. Texas cannot claim that it would have benefited from the "procedural safeguard" of having a district court determine whether Texas had negotiated in good faith, since it refused to negotiate with the Tribe at all and asserted its Eleventh Amendment immunity to suit.

The State of Texas claims on appeal that, under IGRA, "the States are guaranteed a neutral forum" in a federal trial court. Br. at 9. Texas retains the availability of this forum under IGRA even now. The Secretarial Gaming Procedures with which the State takes issue come into effect only after the State

chooses not to allow itself to be sued in federal court, and therefore not avail itself of that neutral forum. This is precisely what Texas did in this case. When the Kickapoo Tribe sued the State of Texas, asking a federal trial court to determine whether the State negotiated in good faith, the State claimed that it was immune from suit under the Eleventh Amendment. For the State to claim now that it has lost this "guarantee" through the existence of the Secretary's gaming procedures is disingenuous.

The State cannot now argue that it has lost the chance to negotiate with the Tribe when it has done so only as the result of its own actions. Furthermore, the State still has an additional opportunity to negotiate with the Tribe. 25 C.F.R. § 291.7(b). The existence of the Secretarial Gaming Procedures does not deprive the State of any meaningful procedural safeguard. The causal factor that triggers the application of the Secretarial Procedures is the State's own refusal to take advantage of that very procedural safeguard. 25 C.F.R. § 291.3(d). Were this Court to reverse the district court and hold the Secretary's Gaming Procedures unconstitutional, it would not give the State an additional opportunity to negotiate with the Tribe or alter the Tribe and State's relationship at the negotiating table. Rather, it would give the State a veto over any gaming compact with the Tribe, in direct contravention of the intent of Congress in passing IGRA. See discussion infra at 32-33.

Additionally, no decision has yet been made by the Secretary from which

legal consequences will flow. None of the harms alleged by the State indicate that the State has been required to take any action, legal or otherwise, as a result of the Secretary's actions thus far. The Secretarial Gaming Procedures themselves require nothing new of the State and the State has identified no legal burdens imposed on it.

II. The State's Claims Are Not Yet Ripe for Judicial Review.

Should this Court find that the State of Texas has standing to bring its claim, then it should find that the State's claims are not yet ripe for judicial review. The "ripeness doctrine is drawn both from Article III limitations on judicial power and from judicial reasons for refusing to exercise jurisdiction." Reno v. Catholic Social Serv., Inc., 509 U.S. 43, 58 at n.18 (1993) (internal citations omitted). The rule that agency action may only be reviewed once claims are ripe serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967); Central & South West Serv., Inc. v. United States Envtl. Protection Agency, 220 F.3d 683, 690 (5th Cir. 2000), cert. denied, 532 U.S. 1065 (2001).

In order to pursue its claims against the Secretary, the State must first overcome this strong presumption against preenforcement review. Id. "Absent [a

statutory provision providing for immediate judicial review], a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [APA] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." Lujan v. Nat'l Wildlife Federation, 497 U.S. 871, 891 (1990).

A. THE STATE OF TEXAS' CLAIMS ARE NOT FIT FOR JUDICIAL REVIEW.

A claim is not ripe for adjudication if it 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). The district court in the present case correctly held that the State of Texas's claims rest on allegations of future harm that may or may not occur. R. 00977; ER Tab 2 at 12. In particular, until the Secretary issues a decision on the Tribe's gaming application, it is unknown whether the Secretary's decision will be adverse to the State.

To determine whether an agency action is ripe for judicial review, the Court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs., 387 U.S. at 149. The State of Texas argues that its claims present a "purely legal question" that challenges "final agency action." Br. at 14 (citing Abbott Labs., 387 U.S. at 151-

52). This does not mean, however, that the State's claims are ripe.

In Toilet Goods Assoc. v. Gardner, 387 U.S. 166 (1967), the plaintiffs brought a pre-enforcement challenge to regulations of the Food and Drug Administration, claiming that the regulations exceeded the Commissioner's statutory authority. 387 U.S. at 159. Applying Abbott Labs., the Supreme Court held that, although the challenged regulation constituted "final agency action" for purposes of standing under the APA, and although the question of the Commissioner's authority to promulgate the regulation was "a purely legal question," the case was still not fit for judicial review. Id. at 162-163. "The test of ripeness, as we have noted, depends not only on how adequately a court can deal with the legal issue presented, but also on the degree and nature of the regulation's present effect on those seeking relief." Id. at 164. The Supreme Court held that the plaintiffs could not know the regulation's effect until it had been applied, and until that time the case was not ripe. Id.

The cases cited by the State of Texas to support its position are wholly inapposite. Br. at 16-17. In Lauderbaugh v. Hopewell Township, 319 F.3d 568 (3d. Cir. 2003), a homeowner was forbidden from siting a modular home on her property due to zoning regulations. When her building permit was revoked, she appealed the decision to the township's Zoning Hearing Board, which then continued her appeals indefinitely. Meanwhile, the township threatened state court litigation to remove her home. Id. at 575. When she sued the township in federal

court, the township argued that her claim was not ripe because the decision was not final until the zoning hearing board reached a decision on her appeal. The Third Circuit disagreed, because "Hopewell's threat to institute state court litigation to remove Lauderbaugh's home and tax any costs against her is clearly a definitive position that threatens a concrete injury." Id.

The State of Texas claims that the affidavit of Judge Medina "shows the concrete injury inflicted upon the State of Texas," but there is no concrete injury in the sense described by the Third Circuit in Lauderbaugh. The State is under no imminent legal obligation or economic burden of any kind as the result of the Secretarial Gaming Procedures, as demonstrated above in the discussion of the State's lack of injury-in-fact. Supra at 17-22.

The Secretary's decision-making process is still ongoing. As indicated, the Department has not yet issued a scope-of-gaming determination as described by 25 C.F.R. § 291.8(a)(3). That regulation requires the Department to determine whether the gaming requested by the Tribe in its application would violate any applicable state laws. Only then will the Secretary begin to issue gaming procedures for the Tribe, the details of which are still undetermined, and which the Tribe may or may not accept. 25 C.F.R. §§ 291.8, 291.13. The Department of the Interior can certainly not be said to have consummated its decision-making process. Exxon Chemicals America v. Chao, 298 F.3d 464, 466 (5th Cir. 2002).

The State of Texas claims that "the mere existence of the regulations on the

books subjects them to an immediate and significant burden." Br. at 17 (citing Nat'l Park Hospitality Assoc. v. Dep't of Interior, 538 U.S. 803 (2003)).[9] Again, the only evidence of this burden that the State points to is the affidavit of Judge Medina. Br. at 17. As described above, supra at 22-24, to the extent that the State is able to demonstrate any burden, this is not directly traceable to the existence of the regulations but is instead the State's strategic choice in response to offers of negotiation from the Tribe.

The State's reliance on Alaska Dep't of Environmental Conservation v. EPA, 540 U.S. 461, 483 (2004), for the proposition that the Secretarial Procedures are a "final agency action," Br. at 19, despite having not been applied in this case, does not render their challenge to the procedures ripe. In Alaska Dep't, the government *did not dispute* the finality of its regulations before the Supreme Court. 540 U.S. at 483. Additionally, the regulations in that case amounted to the agency's "last word" on the best available control technology for a specific power generator, and the generator's operator "would risk civil and criminal penalties" if it violated the agency's directive. Id. This level of finality is not analogous to the present case, in which the Secretary has reached no decision with respect to the Kickapoo Tribe's Class III Gaming Application, and therefore the consequences of

9. Although the State cites Nat'l Park Hospitality Assoc. in support of its argument for ripeness, the Supreme Court held in that case that a preenforcement challenge to a National Park Service regulation was not ripe for judicial review. Id., 538 U.S. at 812.

a Secretarial decision have not been applied to the State of Texas.

B. THE STATE WILL ENDURE NO UNDUE HARDSHIP.

The district court correctly held that, "[e]ven where an issue presents a purely legal question, the plaintiff still must show some hardship in order to establish ripeness." R. 00977; ER Tab 2 at 12 (citing American Forest & Paper Ass'n v. United States Envtl. Protection Agency, 137 F.3d 291, 296-97 (5th Cir. 1998)); see also Central & South West Servs., Inc. v. United States Envtl. Protection Agency, 220 F.3d 683, 690 (5th Cir. 2000). The State relies on case law from the United States Court of Appeals for the District of Columbia Circuit to argue that it need not show any hardship if the question is a purely legal one. Br. at 18-19 (citing Florida Power & Light Co. v. EPA, 145 F.3d 1414 (D.C. Cir. 1998)). This argument is not consistent with the established test for ripeness in this Court, which requires a plaintiff to demonstrate both that a claim is fit, and that it would incur hardship if consideration were delayed. See Abbott Labs., 387 U.S. at 149; Merchants Fast Motor Lines v. Interstate Commerce Commission, 5 F.3d 911, 919-20 (5th Cir. 1993). Simply put, the State's challenge to the Secretarial Gaming Procedures cannot be ripe for judicial review if the regulations have imposed no hardship on the State. American Forest & Paper Ass'n, 137 F.3d at 296.

The State of Texas claims that the hardship it suffers from the existence of the Secretarial Gaming Procedures prior to their enforcement is its lost "right to a finding of lack of good faith negotiation by the court before the Secretarial

Procedures can be applied to the State of Texas." Br. at 15 (citing ER Tab 9 at 3). This is a mischaracterization of the operation of IGRA and the Secretarial Gaming Procedures. The State of Texas has demonstrated no hardship on the record before this Court, as discussed above. Supra at 17-22.

The Secretarial Gaming Procedures merely establish a process for negotiation between the Tribe and the State in the event that a State refuses to negotiate with the Tribe, is sued by the Tribe, and raises an Eleventh Amendment immunity defense rather than consent to that suit. Only when the Secretary actually applies the procedures and concludes that process for a particular gaming application is there a possibility that the Procedures may result in some type of gaming being conducted by the Tribe on Indian lands. Before that point, however, they impose no hardship on the State. "[T]hey do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations." Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998).

III. Alternatively, if this Court concludes that Texas has standing and this suit is ripe, this Court should hold that the Secretary had the authority to promulgate the Secretarial Gaming Procedures, which are a reasonable interpretation of IGRA.

The district court entered judgment for the United States, dismissing the State's claims without prejudice on ripeness grounds. R. 00979; ER Tab 3.

Nevertheless, the district court also addressed the State's claims on the merits of the case in the court's Memorandum and Opinion issued with the case. R. 00971-75; ER Tab 2 at 6-10. Because the district court already fully examined the merits, no purpose would be served by remanding to the district court were this Court to determine that the State has standing and its claims are ripe. Therefore, should this Court find that the State has standing to bring its claims and that the State's claims are ripe for judicial review, it should proceed to decide the merits and find that the Secretary has the authority to promulgate the Secretarial Gaming Procedures, and that those procedures are a reasonable interpretation of IGRA.

A. THE SECRETARIAL GAMING PROCEDURES FULFILL RATHER THAN CONFLICT WITH THE PURPOSES OF IGRA.

IGRA was designed to provide a mechanism for negotiating tribal-state compacts. See S. Rep. No. 100-446, at 6, 1988 U.S.C.C.A.N. 3071, 3076; R. 00734. While the statute provides States with protections they did not previously enjoy, see Cabazon Band, 480 U.S. at 207, the overall purpose of the statute was to prevent an impasse in the negotiation of gaming compacts. Although the statute does give the States a voice in the process, the statute's remedial schemes are clearly designed to prevent states from exercising a veto over tribal gaming compacts. Yet as a result of the Supreme Court's decision in Seminole Tribe,

states could veto compacts by refusing to negotiate and then refusing to be sued.[10] In order to properly implement IGRA, the Secretary saw it necessary to promulgate, after notice and comment, the Secretarial Gaming Procedures to address such an impasse. As the Eleventh Circuit has held, allowing the Secretary to authorize Class III gaming on Indian lands when a state has used the Eleventh Amendment to block IGRA's judicial review provision "conforms with IGRA and serves to achieve Congress's goals." Seminole Tribe, 11 F.3d at 1029.

The Secretarial Gaming Procedures are wholly consistent with the language and statutory scheme of IGRA, and with Congress' intent to balance the interests of the states and the tribes. Final Rule, 64 Fed. Reg. at 17,537 ("Congress' intent was to ensure a role for the States in developing the terms and conditions under which Class III gaming would take place. The approach taken in the regulation is consistent with that intent."). The Procedures preserve the rights of states to protect their interests. The Final Rule requires that all gaming procedures be consistent with state law. See, e.g., 25 C.F.R. §§ 291.4(h)-(i), 291.8(a)(3)-(4), 291.8(c)(2), 291.11(b). States that have opted out of the statutory scheme are given an additional opportunity to participate in the Secretary's process. 25 C.F.R. §§ 291.7(b), 291.8(a)(7), (b)(2), (c), 291.9.

The State characterizes Congress's intent in passing IGRA as solely to protect "states' rights vis-a-vis Indian gaming." Br. at 12. The State ignores,

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10. See a more extensive discussion of history of the regulations supra at 7-13.

however, the statute's comprehensive cause-of-action and remedy provisions that are clearly designed to resolve negotiation impasses between the State and the Tribe. See, e.g., 25 U.S.C. § 2710(d)(1)(C), (d)(3)(A)-(B), (d)(7)(A)(i)-(iii), (d)(7)(B)(i)-(vii). As described above, IGRA and the Secretarial Gaming Procedures balance the interests of the states with those of the tribes, and both are intended to achieve some final resolution in the negotiations between those two sovereign entities. IGRA, and in particular § 2710(d)(7)(B), is "designed to ensure the formation of Tribal-State Compact." Seminole Tribe, 517 U.S. at 50. This purpose cannot be served absent the Secretarial Gaming Procedures, because states will otherwise have a method for foreclosing all negotiations and preventing any compact from being reached.

B. THE SECRETARIAL GAMING PROCEDURES ARE A REASONABLE INTERPRETATION OF IGRA.

To determine whether the Final Rule is a reasonable interpretation of IGRA, this Court must engage in the familiar two-step inquiry described in Chevron, USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). First, it should inquire whether Congress has spoken directly to the issue in question, by "employ[ing] traditional tools of statutory construction," id. at 843 n.9, reviewing the statutory language, the wording and design of the statute as a whole, and pertinent legislative history. Dengel v. Bank One, 340 F.3d 300, 308 (5th Cir. 2003). The Court must look to the plain language of the statute and ask whether

the agency's interpretation conflicts with the text. Supreme Beef Processors, Inc. v. United States Dept. of Agriculture, 275 F.3d 432, 438 (5th Cir. 2001). If there is no conflict, then the Court must defer to the agency's interpretation, id., rejecting it "only where [it] is contrary to clear Congressional intent." Sierra Club v. United States Fish & Wildlife Serv., 245 F.3d 434, 440-441 (5th Cir. 2001).

In this case, Congress did not speak directly to the question at issue. IGRA is silent as to whether the Secretary has authority to establish procedures for circumstances in which IGRA's cause of action provision is rendered inapplicable by a state's Eleventh Amendment immunity. The State construes IGRA to mean that "no remedial measures can be undertaken without an express adjudication by an impartial federal district court that the State failed to negotiate in good-faith." Br. at 28. No such categorical rule exists in the statute, however. IGRA provides the rules where a state does not invoke its Eleventh Amendment immunity. However, it gives no clear direction as to what remedial measures might be available to a tribe that cannot adjudicate its claims against a state in federal court where the state has invoked its Eleventh Amendment immunity.

The legislative history provides no additional guidance. The State claims that "Congress had no difficulty creating a 'gap' where good-faith negotiations by the State simply ends [*sic*] the entire process, without issuance of a Class III license to the Tribe." Br. at 20. However, no references to the legislative history support this alleged Congressional intent. Quite simply, nothing in IGRA's history

suggests that Congress considered the possibility that states would avoid the remedial provisions of § 2710(d)(7)(B) by asserting their Eleventh Amendment immunity. In fact, Senator Daniel K. Inouye (the initial sponsor of IGRA) commented in a later hearing that the Eleventh Amendment defense of states had not been considered by Congress during the debates on the passage of IGRA. "During all that time, I do not recall the [Eleventh] Amendment being discussed as something with which we should be concerned." Oversight Hearing on Status of the Activities Undertaken to Implement the Gaming Regulatory Act, Hearing Before the Select Committee on Indian Affairs, S. Hrg. 102-660, Pt. 2 (Mar. 18, 1992), p. 20 (Statement of Sen. Inouye); R. 00799.

Since Congress has not spoken directly to the issue of how IGRA's remedy provisions should function if a State invokes an Eleventh Amendment defense to suit, this Court must turn to the second prong of Chevron. If the agency's interpretation of IGRA is reasonable, then this Court must defer to that interpretation. The interpretation is reasonable if it is not manifestly contrary to the statute or congressional intent. Sierra Club, 245 F.3d at 440-441.

Under the statutory scheme of IGRA, the Secretary is the final decision-maker for Class III Gaming Applications. The Secretary's primary role is to independently review and decide whether a Tribe will conduct Class III gaming. Congress has directed the Secretary to prescribe Class III gaming procedures where a State has refused to negotiate or did not negotiate in good faith and a

compact cannot be reached through IGRA's remedy provisions. 25 U.S.C. § 2710(d)(7)(B)(vii). The Secretary has statutory authority to review and approve negotiated Class III gaming compacts. 25 U.S.C. § 2710(d)(8)(A). Even if a Tribe and State successfully negotiate a compact, the Secretary may disapprove the compact if it violates IGRA, other federal law, or the trust obligations of the United States to Indians. 25 U.S.C. § 2710(d)(8)(B). Once a Tribal-State compact has been reached, it cannot take effect until the Secretary publishes notice that the compact is approved. 25 U.S.C. § 2710(d)(8)(D). The statute clearly reflects the Congressional grant of authority to the Secretary to facilitate Class III gaming, to ensure it is conducted consistent with IGRA and Congressional intent, to fulfill the trust obligations to the Indian tribes, and to deny Class III gaming rights to tribes when appropriate.

IGRA's legislative history supports this statutory interpretation. Congress intended Secretarial review and approval of Class III gaming as a backstop to protect tribal, state and federal interests, and to fulfill the United States' trust obligation to tribes. The process of negotiating compacts was a "means by which differing public policies of governmental entities can be accommodated and reconciled," S.Rep. No. 100-446, at 6, and IGRA "should not be construed as a departure from established principles of the legal relationship between the tribes and the United States." Id. at 35. Congress recognized that some States might "opt out" of the compact process, and authorized the Secretary to prescribe gaming

procedures as part of the remedy provisions to prevent the States from having a veto over the Tribe. 25 U.S.C. § 2710(d)(7)(B)(vii). See 134 Cong. Rec. at 25,377-78 (Statement of Rep. Vucanovich); R. 00769. This role is consistent with Congressional intent that "[t]he Act should not be construed to relieve the Secretary, or any other Federal officer, of trust obligations to the tribes." S. Rep. No. 100-446, at 36; R. 00763.

The State claims that "removing the requirement perverts the statutory scheme and renders the negotiating process meaningless" because tribes have the opportunity to wait 180 days and then apply to the Secretary for application of the Gaming Procedures without negotiating with the State. Br. at 18. This mischaracterizes the process by omitting one very crucial component – the Tribe only has the option to apply for the Secretarial Gaming Procedures if it has sued the State and the State has refused to consent to suit, raising an Eleventh Amendment immunity defense. 25 C.F.R. § 291.3.

The State of Texas argues that the previous good-faith negotiation requirements of IGRA provided an important safeguard for the State that has since been withdrawn. However, the Kickapoo Tribe approached the State, yet the State refused to negotiate. Thus, the protective safeguard of negotiating in "good faith" would not have affected the State and Tribe's relationship, since the State refused to negotiate at all with the Tribe. "[W]hen a state wholly fails to negotiate * * * it obviously cannot meet its burden of proof to show that it negotiated in good faith."

Northern Arapaho Tribe v. Wyoming, 389 F.3d 1308, 1313 (10th Cir. 2004) (quoting Mashantucket Pequot Tribe v. Conn., 913 F.2d 1024, 1032 (2d Cir. 1990)).

Both the Ninth and Eleventh Circuits have endorsed the agency's interpretation of IGRA. In the Eleventh Circuit's opinion in Seminole Tribe, that court applied the severability test and held that a tribe could request the Secretary to prescribe gaming procedures pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii).[11] Seminole Tribe, 11 F.3d at 1029. In United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1301 (9th Cir. 1998), the Ninth Circuit adopted this view, recognizing that the Eleventh Circuit's "suggestion is a lot closer to Congress' intent" than allowing states to raise their Eleventh Amendment immunity and leaving tribes no recourse. See also New York v. Oneida Indian Nation, 78 F.Supp. 2d 49, 57 (N.D.N.Y. 1999) (following the Ninth and Eleventh Circuits).

A severability analysis also supports the reasonableness of the Secretary's interpretation of IGRA. IGRA includes a severability provision, 25 U.S.C. § 2721,

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11. The Supreme Court did not reach this issue, Seminole Tribe, 517 U.S. at 76 n.18, having denied certiorari on this point. Florida v. Seminole Tribe, 517 U.S. 1133 (1996). The State of Texas appears to argue that this means that the Supreme Court disapproves of the Eleventh Circuit's decision on this issue. See Br. at 21. One may not infer anything, however, from the Supreme Court's silence on an issue. "Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." Md. v. Baltimore Radio Show, 338 U.S. 912, 919 (1950).

so there is a presumption of severability for §§ 2710(d)(7)(A)(i) and (B)(i)-(vi). Seminole Tribe, 11 F.3d at 1029. The Court should "refrain from invalidating more of the statute than is necessary," to ensure the statute will "function in a manner consistent with the intent of Congress." Alaska Airlines v. Brock, 480 U.S. 678, 684-85 (1987); Koog v. United States, 79 F.3d 452 (5th Cir. 1996). The district court was correct 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." R. 00973; ER Tab 2 at 8 (citing Alaska Airlines, 480 U.S. at 685).

C. THE GENERAL AUTHORITY STATUTES OF IGRA PROPERLY GRANT THE SECRETARY AUTHORITY TO PROMULGATE THE SECRETARIAL GAMING PROCEDURES.

In promulgating the Final Rule, the Secretary relied, in part, on her authority as granted by the general authority statutes, 25 U.S.C. §§ 2 and 9. Proposed Rule, 63 Fed. Reg. at 3,290. Section 9 grants authority to the President to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs." 25 U.S.C. § 9. Section 2 sub-delegates this authority to the Commissioner of Indian Affairs. See also 25 U.S.C. 2706(b)(10) (the National Indian Gaming Commission "shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.").

These statutes have consistently been upheld as valid statutory grants of authority to the Executive to manage Indian affairs and promulgate regulations. See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979); Morton v. Ruiz, 415 U.S. 199 (1974).

Even though Sections 2 and 9 obviously do not specifically state that the Secretary's authority includes the power to promulgate regulations to resolve ambiguities or gaps in IGRA, the authority of the Secretary encompasses this power. "Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be 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) (citing Chevron, 467 U.S. at 844).

When Congress grants an agency authority to promulgate any regulations it deems necessary to implement the provisions of an Act, it necessarily grants broad discretion. See Mourning v. Family Publications Service, Inc., 411 U.S. 356, 365 (1973); Coal Employment Project v. Dole, 889 F.2d 1127, 1129 (D.C. Cir. 1989). The State ignores this well-established principle in arguing that the Secretary, acting through the Commissioner of Indian Affairs, lacks the authority to

implement IGRA through the promulgation of regulations. Given that Congress has delegated express authority to develop regulations it deems necessary to implement the provisions of the IGRA, the Secretarial Gaming Procedures must be upheld if they are "reasonably related to the purposes of the enabling legislation." Mourning, 411 U.S. at 369 (citing Thorpe v. Housing Auth. of City of Durham, 393 U.S. 268, 280-81 (1969)) (internal quotations omitted); see also American Trucking Assns. v. United States, 344 U.S. 298 (1953).

As described above, the purpose of IGRA in facilitating the negotiation of gaming compacts is thwarted by the loophole created by the Supreme Court's opinion in Seminole Tribe. Allowing the negotiation process to end whenever states invoke their Eleventh Amendment immunity would result in a statutory scheme that does not function in a "manner consistent with the intent of Congress" because there would be no "protection for tribes in the process of achieving a compact." 134 Cong. Rec. at 25,377 (Statement of Rep. Vucanovich); R. 00769. The district court correctly held 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." R. 00973; ER Tab 2 at 8. The Secretarial Gaming Procedures are necessary to allow for the negotiation of a gaming compact, and are therefore "reasonably related to the purposes of the enabling legislation." Mourning, 411 U.S. at 369.

D. THE GENERAL AUTHORITY STATUTES DO NOT VIOLATE THE NON-DELEGATION DOCTRINE.

The State argues that the general authority statutes on which the Secretary relied, Sections 2 and 9 of Title 25, violate the non-delegation doctrine. Br. at 26-27. These statutes do not purport to delegate legislative authority, however, and the decision-making power granted to the Secretary is constrained by intelligible principles. The district court did not reach this issue, but should this Court reach the issue, it should find that the general authority statutes do not violate the non-delegation doctrine.

The issue in a constitutional delegation challenge is whether the statute in question has delegated legislative powers to the agency. Whitman v. American Trucking Assoc., Inc., 531 U.S. 457, 472 (2001). The general authority statutes at issue here do not purport to give the Secretary legislative power, but rather grant the Secretary the power to manage Indian affairs consistent with the statutes passed by Congress. Sections 2 and 9 of Title 25 have long been upheld as an appropriate and valid grant of authority from Congress to the Executive to manage Indian affairs. Ruiz, 415 U.S. at 231 ("In Indian affairs, the Executive has long been empowered to promulgate rules and policies.").

A delegation of authority to the Executive must be constrained by an "intelligible principle." American Trucking, 531 U.S. at 472 (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928)). The State alleges that

"[t]he legislative authority to revise IGRA to change the outcome of good faith negotiation by a state and make it nevertheless subject to the remedial Secretarial Procedures, or to exercise judicial powers assigned under IGRA to appoint a mediator, is far beyond the scope of permissible delegation." Br. at 26 (citing Pittston Co. v. United States, 368 F.3d 385 (4th Cir. 2004), cert. denied, 125 S.Ct. 1589 (2005)). What the State characterizes as a "legislative authority" is not in fact an impermissible delegation of legislative authority, but rather a proper delegation of authority to conduct Indian affairs consistent with the statutes passed by Congress, including (but hardly limited to) IGRA. This is a very real constraint on the Secretary's authority. See, e.g., Organized Village of Kake v. Egan, 369 U.S. 60 (1962) (holding that the Secretary did not have authority under 25 U.S.C. §§ 2 and 9 to promulgate fishing regulations in direct violation of another statute). This requirement of consistency with the "various provisions of any act relating to Indian affairs" is the guiding intelligible principle constraining the authority of the Secretary. 25 U.S.C. § 9.

The Secretary's authority to make decisions regarding Class III gaming compacts is more particularly constrained by the various provisions of IGRA. The Secretary's review of tribal-state compacts and promulgation of gaming procedures must follow clear statutory guidelines. See, e.g., 25 U.S.C. §§ 2710(d)(8)(B) and (d)(7)(B)(vii).

The State cites Pittston Co. v. United States, 368 F.3d 385 (4th Cir. 2004),

for the proposition that "core governmental power must be exercised by the Department on which it is conferred and must not be delegated to others in a manner that frustrates constitutional design." Br. at 26. This proposition is of course not one that the government would dispute. The present case is in fact analogous to Pittston. After the Supreme Court's decision in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), that certain provisions of the 1992 Coal Industry Retiree Health Benefits Act ("Coal Act") were unconstitutional when applied to certain companies, the Social Security Commissioner took certain actions to correct the result of the partially severed statute. After finding that Congress had not spoken directly to the issue of what the Commissioner should do in that event, the Fourth Circuit found that Congress had intended to achieve certain results which could not be achieved because of the Supreme Court's ruling. Pittston, 368 F.3d at 403. The situation was "thus the kind of 'case unprovided for' that allows [the Commissioner] to engage in gap-filling." Id. (citing Barnhart v. Peabody Coal Co., 537 U.S. 149, 169 (2003)).

Similarly, the Supreme Court's decision in Seminole Tribe left a "case unprovided for" by Congress in the event that a State invokes its Eleventh Amendment immunity. Congress intended certain results by passing IGRA – namely, the resolution of impasses in negotiation of gaming compacts and preventing states from having a veto over Class III gaming – which cannot be accomplished as a result of the Supreme Court's decision. In filling this gap, the

Secretary has not rewritten the statute, Br. at 25, but is exercising her authority consistent with the rulings of the Supreme Court and the Eleventh Circuit.

CONCLUSION

The State of Texas has no standing to bring its current claims, as it has suffered no injury in fact from the mere existence of the Secretarial Gaming Procedures. Additionally, the case is not ripe for judicial review, as the State's claims of injury are contingent on indeterminate future events. Alternatively, if this Court determines that the State has standing and its claims are ripe, this Court should uphold the Secretarial Gaming Procedures as a valid exercise of the Secretary's delegated authority to implement the Indian Gaming Regulatory Act, and as a reasonable interpretation of that act.

For the foregoing reasons, the district court's dismissal of the case for lack of jurisdiction should be affirmed or, in the alternative, the case should be remanded with instructions to the district court to enter judgment on the merits in favor of the federal defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury, that two copies of the above Brief of Federal Appellees, as well as a diskette containing one copy of the Brief of Federal Appellees in Adobe Acrobat format, were served via First Class Mail on the counsel listed below on this day, the 21st of September, 2005. One copy of the above Brief of Federal Appellees was also served on the counsel listed below via electronic mail on this day, the 21st of September, 2005.

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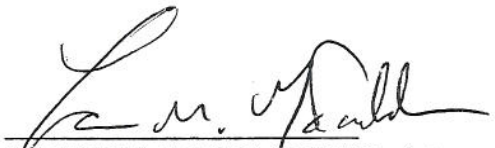

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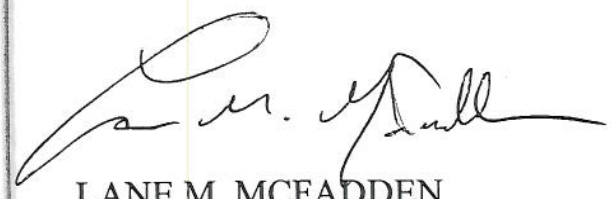

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