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 THE INTERIOR; GALE NORTON, in her Official Capacity as Secretary of the Department of 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, Austin Division

BRIEF OF APPELLANT

GREG ABBOTT
Attorney General of Texas

BARRY R. McBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

EDNA RAMON BUTTS
Special Assistant Attorney General

JEFF L. ROSE
Chief, General Litigation Division

WILLIAM T. DEANE
Assistant Attorney General
General Litigation Division
Texas Bar No.
P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
Phone (512) 475-4054
Fax (512) 320-0667

July 11, 2005

ATTORNEYS FOR APPELLANT

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 THE INTERIOR; GALE NORTON, in her Official Capacity as Secretary of the Department of Interior,
Defendants - Appellees.

KICKAPOO TRADITIONAL TRIBE OF TEXAS
Intervenor-Defendant-Appellee

CERTIFICATE OF INTERESTED PERSONS

As a governmental party, the Appellant is not required by Fifth Circuit Local Rule 28.2.1 to furnish a Certificate of Interested Persons.

_____
WILLIAM T. DEANE
Attorney for Appellant

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that oral argument would aid the Court in resolving the legal issues in this appeal in light of the complexity of the issues and therefore respectfully requests oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations:

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 THE INTERIOR; GALE NORTON, in her Official Capacity as Secretary of the Department of Interior,
Defendants - Appellees.

KICKAPOO TRADITIONAL TRIBE OF TEXAS
Intervenor-Defendant-Appellee

BRIEF OF APPELLANT

TO THE HONORABLE COURT OF APPEALS:

NOW COMES the State of Texas and files this Appellant's Brief and in support thereof would respectfully show this Court the following:

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1291 as an appeal from the final judgment of the district court that disposes of all claims of Plaintiff State of Texas, Clerk's record ("C.R.") ___, Record Excerpts ("R.E.") 3, and from an Order denying Plaintiff's motion for new trial, C.R. ___, R.E.5. Prior to entry of a final judgment, the trial court entered its Memorandum and Order on Motions and Cross-Motion, R.E. 2, in which it denied Plaintiff State of Texas' Motion for Summary Judgment (Document #46) and granted the United States Motion for Judgment on the Pleadings or in the Alternative Cross-Motion for Summary Judgment and Defendant-Intervenor's Motion to Dismiss or in the Alternative for Summary Judgment "to they extent that they assert that Texas' cause of action is premature." Plaintiff State of Texas appeals from that Order as well as from the Order denying Plaintiff's motion for a new trial, R.E. 5. Plaintiff State of Texas' Notice of Appeal was timely given, R.E. 6.

STATEMENT OF THE ISSUES

1. Is this case ripe for determination by this Court because of the final adoption of the Secretarial Procedures as published in the federal register? Can the State of Texas challenge these remedial Secretarial Procedures where they are clearly contrary to IGRA in that the Secretarial Procedures do not require a

judicial finding of bad-faith negotiation prior to their implementation? Where the effect of the Secretarial Procedures on the State of Texas is to cause "...an immediate change in the daily affairs of (the Governor's) office in dealing with the Kickapoo Tribe (by causing) 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,"[1] is this case ripe for adjudication? Is a change in the State of Texas' behavior in negotiations with IGRA tribes sufficient harm to support ripeness of the controversy under Article III?

2. Can the Secretarial Procedures be inferred from IGRA when they violate the Separation of Powers doctrine since they form new legislation and a radical departure from IGRA since these remedial procedures can be applied to unconsenting states without meeting the IGRA precondition requirement of a judicial finding of bad-faith negotiation? Can the Secretary by regulation or rule change Congressional intent to provide the states a neutral judicial forum for determination of bad-faith negotiation?

---

[1]See Exhibit "A" p. 6 Affidavit of David Medina In Support of Plaintiff's Response to Defendants' Motion for Summary Judgment and Motions to Dismiss, R.E. 9.

3. Do the General Authority Statutes 25 U.S.C. §§ 2, 9 authorize the Secretarial Procedures where Congress has preempted the subject of Class III gaming by adoption of IGRA and where no delegation of Congress' legislative powers is present in the General Authority Statutes to issue the Secretarial Procedures?

STATEMENT OF THE CASE

This suit was brought by the Plaintiff State of Texas seeking relief under the Administrative Procedures Act, 5 U.S.C. § 701, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 and for injunctive relief. C.R. __. R.E. 1. A hearing on preliminary injunction occurred on April 20, 2004, R.E. 1, and the trial court denied the Plaintiff State of Texas' application for injunction. R.E. 1. Thereafter, the parties entered a Joint Stipulation of Facts, C.R. ___, R.E. 1, and then filed cross motions for summary judgment. C.R. ___, R.E. 1. After an oral argument of the summary judgment motions on October 26, 2004, R.E. 1, the trial court issued a Memorandum Opinion and Order on Motions and Cross-Motion, R.E. 2 on March 30, 2005 denying all the pending motions of the parties except for the Defendants' motions "to the extent that they assert that Texas' cause of action is premature." R.E. 2, p. 13. A Final Judgment dismissing the case was entered the same day, R.E. 3. Thereafter, Plaintiff State of Texas filed its motion for new trial on April 11, 2005, R.E. 4 and the

same was denied by Order of April 27, 2005, R.E. 5, for which Plaintiff State of Texas gave its Notice of Appeal, R.E. 6.

STATEMENT OF FACTS

The Indian Gaming Regulatory Act ("IGRA") was enacted on October 17, 1988. 102 Stat. 2467, PL 100-497 (codified at 25 U.S.C. § 2701 *et seq*.). It controls the issue of Class III gaming for IGRA tribes and preempts all conflicting state regulations.

In 1995, representatives of the Kickapoo met with the Governor of Texas' staff to discuss the possibility of negotiating a compact to conduct Class III gaming in Texas. See Joint Stipulations, FOF No. 4. (hereinafter "FOF") The Kickapoo's offer to negotiate a compact with the State was rejected in 1995. FOF No. 5. By its Complaint filed October 13, 1995, and First Amended Complaint filed November 8, 1995, the Kickapoo sued the State of Texas alleging that the State failed to negotiate in good faith. FOF No. 6. Before the lawsuit was concluded, the United States Supreme Court decided *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114 (1996), which held that the state's Eleventh Amendment immunity was not waived by the adoption of IGRA. *Seminole*, 116 S.Ct. at 1131-32. As a result of the *Seminole* decision, the State's motion to dismiss the Kickapoo lawsuit was granted on April 2, 1996. FOF No. 8.

The Secretary of the Interior ("Secretary") published an Advanced Notice of Proposed Rulemaking on May 10, 1996, seeking "comment on its authority under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710, to promulgate 'procedures' to authorize Class III gaming on Indian lands when a State raises an Eleventh Amendment defense to an action brought against it pursuant to Section 11 of the Act, 25 U.S.C. § 2710(d)(7)...." 61 Fed. Reg. 21394 (May 10, 1996). FOF No. 9.

The United States Congress in November 1997 adopted an amendment to the 1998 Interior Appropriations bill which temporarily prohibited the Secretary from approving a Compact that had not been approved by the State. Pub. L. 105-83; § 129 (1998). FOF No. 10.

After the comment period on the proposed Rule expired, the Secretary issued a Proposed Rule for Class III Gaming Procedures on January 22, 1998. 63 Fed. Reg. (Jan. 22, 1998). The Secretary sought further comments on the Proposed Rule FOF No. 11.

On April 16, 1998, the Texas Governor wrote a letter to Bruce Babbitt, Secretary of Interior and voiced the State of Texas' opposition to the proposed Secretarial Procedures. See FOF No. 12.

The amendment to the 1998 Interior Appropriations bill which temporarily prohibited the Secretary from approving a Compact that had not been approved by the

State expired on October 1, 1998, and a new provision was adopted in the 1999 Omnibus Act which stated that no funds would be available under the Act before March 31, 1999, to publish final regulations based on the regulations proposed at 63 Fed. Reg. 3289 (Proposed Rule for Class III Gaming Procedures). See P.L. 105-277, § 137 (1998). FOF No. 13.

Thereafter, the Secretary published the Final Rule for Class III Gaming Procedures on April 12, 1999. 64 Fed. Reg. 17535 (Apr. 12, 1999) (codified at 25 C.F.R. Part 291). This is the final and now published "Secretarial Procedures" which is the subject of this appeal. No other revisions or modifications to these Secretarial Procedures have been proposed or implemented.

Since the *Seminole* decision, legislation to amend the compact negotiation provisions in IGRA has been introduced at least three times, but no legislation has been enacted. S. 1077, 105th Cong. (1997); S. 1870, 105th Cong. (1998); S. 985, 106th Cong. (1999).

On December 11, 2003, the Kickapoo submitted their Class III gaming application to the Department of the Interior under the Secretarial Procedures. FOF No.16.

On January 12, 2004, the Defendant Secretary of Interior gave the Plaintiff State of Texas and the Defendant Kickapoo Tribe notice that the Secretary determined

the Tribe's proposal was complete and met the eligibility requirements in 25 C.F.R. Part 291 and invited the State to comment on the proposal and to submit an alternative proposal. See FOF No. 17. With the dismissal of this underlying lawsuit, there is now no impediment to the continuation of these Secretarial Procedures vis-a-vis the pending application of the Defendant Kickapoo Tribe.

SUMMARY OF THE ARGUMENT

At its core, this case turns on the power of the Secretary to promulgate regulations (the "Secretarial Procedures") which the Supreme Court has previously held to be a legislative function and which conflict with current federal IGRA legislation. In particular, this is a separation of powers case about the limits of executive power exercised by the Secretary to alter the federal-state-tribe relationship for negotiations to permit Indian gaming under IGRA[2] to a new federal-tribe relationship for negotiations (which 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) to permit gaming under the new Secretarial Procedures. In *Seminole Tribe*, the Supreme Court declined to exercise any legislative authority to "fill the gap" created by the Eleventh Amendment immunity defense available to the

[2] "IGRA" is the Indian Gaming Regulatory Act , 25 U.S.C. §§ 2710-21.

states. Likewise, Congress never delegated such legislative authority to the Secretary. 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, however, and the Secretary decides when to apply the remedial procedures, with or without the State's or any Court's participation or input, and the Secretary may then proceed to administer her own Secretarial Procedures. This new process substantially decreases the rights and interests of the public expressed through the sovereign States which they previously held under the federal IGRA.

Here, the trial court's finding of lack of ripeness is error because the Secretarial Procedures, 25 C.F.R. Part 291 allow the Secretary to apply these final, published remedial Secretarial Procedures to the State of Texas without a judicial finding of bad-faith negotiation as required by the IGRA statute, and there is considerable evidence in the summary judgment record below from Plaintiff State of Texas to show the significant changes in the behavior of the State as well as to the bargaining power of the tribe vis-a-vis the State of Texas.

Likewise, the trial court's finding that the Secretarial Procedures may be inferred from IGRA is error because the promulgation of the Secretarial Procedures

violates the Separation of Powers doctrine and is manifestly contrary to IGRA in that they allow the Secretary to apply these remedial Secretarial Procedures to the State of Texas without a prior judicial finding of bad-faith negotiation. There is no authority for severance and the filling of a "gap" by the Secretarial Procedures where the actual Procedures exceed the authority of and conflict with Congress' own action in adopting IGRA

Likewise, the argument that the General Authority Statutes 25 U.S.C. §§ 2, 9 authorize the promulgation of the Secretarial Procedures fails because Congress has preempted the subject of class III gaming by Tribes with the adoption of IGRA and there has been no delegation of Congress' own legislative authority to the Secretary to issue these Secretarial Procedures.

STANDARD OF REVIEW

"We examine a district court's grants of both a motion to dismiss and a motion for summary judgment under a *de novo* standard of review. In the former, the central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief. In the latter, we go beyond the pleadings to determine whether there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Copeland v. Wasserstein, Perella & Co., Inc.,* 278 F.3d 472, 477 (5th Cir. 2002).

ARGUMENT

1. This case is ripe for determination because the Secretarial Procedures, 25 C.F.R. Part 291 allow the Secretary to apply these remedial Secretarial Procedures to the State of Texas without a judicial finding of bad-faith negotiation as required by IGRA.

The trial court found at pages 12-13 of the Memorandum Opinion, R.E. 2, that the State of Texas' claims "are not ripe for judicial review at this time because Texas' 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)." That finding is error because nothing in the Secretarial Procedures nor in IGRA would permit the Secretary to exercise judicial authority and make constitutional determinations of whether or not the Secretarial Procedures can pass constitutional muster. The Secretary by applying the Secretarial Procedures to the Class III gaming application of the Kickapoo Tribe will not decide any of the issues pending in the Plaintiff's Motion for Summary Judgment.

IGRA created the statutory balance of a federal-State-tribe relationship.

After *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, (1987) was decided, Congress adopted the Indian Gaming Regulatory Act, ("IGRA") Pub. L. No. 100-497, 102 Stat. 2467 (1988) codified at 25 U.S.C. §§ 2710-

2721 ("IGRA"). In *Cabazon,* the Supreme Court rejected the State of California's attempt to enforce criminal laws on the reservation, *id.* at 1094-95. The effect of *Cabazon* was to change the status of the parties relating to Indian gaming from a federal-state-tribe relationship to a *federal-tribe relationship*, and that was reversed by the adoption of IGRA which restored the relationship to a *federal-state-tribe relationship*. IGRA was passed directly in response to the states' concerns about the *Cabazon* decision, see S.REP. NO. 446, 100th Cong., 2d Sess. (1988) *reprinted in* 1988 U.S. C.C.A.N. 3071. With the adoption of IGRA, Congress sought to protect the states' rights vis-a-vis Indian gaming. S.REP. NO. 100-446, 1988 U.S.C.C.A.N. 3071, 3076. With respect to the state interests that are served by the IGRA compact requirement, the Report further states:

> [A] State's governmental interests with respect to Class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens.

id. at 3083.

Thus the compact requirement of IGRA balances the respective interests of the Tribe and State regarding Class III gaming and mandates a negotiation between the sovereigns to address these interests. This is a right and a power extended to the

states by IGRA which was otherwise withheld from them by the Constitution. *Seminole Tribe v. Florida,* 116 S.Ct. 1114, 1124 (1996).

State of Texas meets the hardship requirements for ripeness.

In *Abbott Lab. v. Gardner*, 387 U.S. 136 (1967), the Supreme Court enunciated the often cited standards for determining whether a cause is ripe in the context of a challenge to an agency rule under the Administrative Procedures Act. The court stated:

> [The] basic rationale [of the ripeness doctrine] is 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. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship of the parties of withholding court consideration.

id. at 148-49. Finding the regulations at issue there to be ripe for challenge, the court applied an analysis that, when applied to the case at bar, yields the same result.

The Court looked at the issues presented and found them to be purely legal, *i.e.*, "Whether the statute was properly construed by the Commissioner." *id.* In this case, the complaint raises a purely legal issue, *i.e.* whether the Secretary has the legal authority to promulgate the subject regulations and if so, whether they are consistent with the statutory design.

In *Abbott Lab.*, "the regulations in issue [are] 'final agency action' within the meaning of S. 10 of the Administrative Procedures Act, 5 U.S.C. § 704." 387 U.S. at 149. Likewise, in the instant case, the Secretarial Procedures were promulgated in a formal manner after announcement in the Federal Register and consideration of comments. They are not informal or tentative. *id*. at 151.

The impact of the Secretarial Procedures are "sufficiently direct and immediate as to render the issue[s] appropriate for judicial review." *id*. at 152. The Court in *Abbott Lab.* found that the regulations put the lab in a "dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *id.* That is, the lab was faced with a choice of complying with the requirement of the rule, thereby incurring substantial costs, or risking prosecution.

In the present case, the Secretarial Procedures changed the way the Plaintiff State of Texas negotiates with the Tribe. It has the legal effect of reversing the outcome envisioned by IGRA where the state negotiates in good faith and, now, under the Secretarial Procedures, the State of Texas is subject to a new compact being entered, with or without the State's participation. The Secretarial Procedures require an immediate change in the conduct of the State, *i.e*. the new requirement to participate in the Secretarial Procedures process. In the Exhibit "A" Affidavit of David Medina In Support of Plaintiff's Response to Defendants' Motion for

Summary Judgment and Motions to Dismiss, R.E. 9, the State's witness, then General Counsel to the Governor, outlines very clearly the hardship encountered by the State of Texas being subjected to the *existence* of the Secretarial Procedures, rather than their final determination for the Kickapoo Tribe. In particular, he recites the statutory procedural safeguards available to the State of Texas which are now lost under the existence of the Secretarial Procedures, viz., "the 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." R.E. 9, ¶ 6, p. 3. He goes further to state that the balance between federal-State-tribe relationship is now changed by the existence of the Secretarial Procedures in that current and future negotiations with the tribe are now opened

> with the threat that notwithstanding the prohibition of the use of the remedial Secretarial Procedures under IGRA, they intend to use these Secretarial Procedures to circumvent the requirements of federal law for a finding by a court of failure to negotiate in good faith. The existence of the Secretarial Procedures causes severe harm to the State of Texas and every other state that has any federally recognized tribes since we now know that the protections afforded the states under IGRA can be lost by the very existence of the Secretarial Procedures. This is an immediate threat, a plea to give the Tribe what it seeks, "or else" they circumvent the State and seek help in the Secretarial Procedures. This immediate threat is enduring and changes the relative bargaining positions of the parties. The existence of the Secretarial Procedures causes an immediate change in the daily affairs of my office in dealing with the Kickapoo Tribe. For example, the State of Texas is very aware that in devising any bargaining

> strategy to deal either with the original offer or the renewed April 29, 2004, offer, that just bargaining in good faith is not enough. 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. A number of strategy discussions on this topic are currently underway in my office as a result of the existence of the final, published Secretarial Procedures which have now been fully implemented by the Department of Interior." R.E. 9, p. 5.

In order to grant the motions to dismiss and the summary judgments on the issue of lack of ripeness for the Plaintiff's claims, the trial court erred in ignoring this highly probative summary judgment evidence submitted by Plaintiff State of Texas. There was confusion between exhaustion of remedies and finality in the determination of the ripeness issue.

In *Lauderbaugh v. Hopewell Township,* 319 F.3d 568 (5th Cir. 2002) this Court distinguished exhaustion of remedies procedures from the finality required for ripeness determinations and held that plaintiff's case was ripe even though no final zoning determination had been made by the city because "the finality rule allows a suit whenever a 'decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury...This case is therefore ripe for adjudication." *Lauderbaugh id.* at 575. Just as the city treated "its own zoning decision as final

enough to inflict a concrete injury on Lauderbaugh" while the zoning appeal was pending, the evidence in the summary judgment Affidavit of Judge David Medina described above shows the concrete injury inflicted upon the State of Texas. A change in Plaintiff's and Defendant Tribe's behavior was directly caused by the existence of the Secretarial Procedures.

Likewise, in *National Park Hospitality Assoc. v. Department of Interior,* 538 U.S. 803, 123 S. Ct. 2026 (2003) the court held that plaintiff cannot make a facial challenge to regulations without showing "that the mere existence of the regulations on the books subjects them to an immediate and significant burden." That is precisely what the evidence set forth in the Affidavit of Judge Medina R.E. 9 shows. Ripeness is present when there is an attack on a "substantive rule which as a practical matter requires the plaintiff to adjust his conduct." *Id.* at 2032. In this case, no second level of administrative decision is necessary before there is injury sufficient for ripeness. The State's behavior is changed by the Secretarial Procedures in more subtle ways because, by perverting the statutory scheme for negotiation of a compact, the State's behavior in response to changes in Tribal negotiating posture must change. Contrary to the Secretarial Procedures, in IGRA, in order for a Tribe to invoke the remedial process of § 2710(d)(7)(B)(iii) - (vii), a federal judge *must* find that the State has failed to negotiate in good faith. The current regulations remove that requirement.

64 Fed Reg. 17537 ("The final regulation eliminates the requirement that the Secretary make a finding on the good faith issue.") Removing the good faith requirement perverts the statutory scheme and renders the negotiating process meaningless. 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. These immediate effects make this case ripe for adjudication.

Alternatively, the State of Texas need not show hardship for ripeness:

Since this case is fit for adjudication, hardship is not an issue. In *Florida Power & Light v. EPA*, 145 F. 3d 1414, 1421 (D.C. Cir. 1998), the court indicates that the hardship prong of the test only comes into play when a claim is not "fit."

> The Supreme Court established the framework for reaching this balance in *Abbott Laboratories v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed. 2d 681 (1967), where the Court set forth a two-pronged test that requires a reviewing court first to evaluate the "fitness of the issues for judicial decision." *id*. at 149, 87 S.Ct. 1507. When a challenged decision is not "fit" for review, the petitioner must show "hardship" in order to overcome a claim of lack of ripeness. See *id*.; *City of Houston v. HUD*, 24 F.3d 1421, 1430-31 & n. 9 (D.C. Cir. 1994). The claims of Florida P&L fail the test of ripeness.
>
> Under the fitness prong, we inquire into whether the disputed claims raise purely legal, as opposed to factual, questions and whether the court or the agency would benefit from postponing review until the policy in question has sufficiently 'crystalized.'"

> In light of the lack of fitness of its claims, Florida P&L must demonstrate that postponing review will cause the company "hardship" in order to overcome a claim of lack of ripeness and obtain review of the challenged rule at this time. *See City of Houston*, 24 F.3d at 1431 n. 9.

The Court will not benefit from further factual development of the issues. No extrinsic facts are necessary for the Court to either determine whether the Secretary has authority to promulgate these Secretarial Procedures or whether they are consistent with the statute. Simply reading the statutes and legislative histories will suffice to answer these questions. As a result, this case is ripe for adjudication In *Alaska Dep't of Envtl. Conservation v. EPA,* 124 S.Ct. 983, 998-99 (2004), the Supreme Court rejected the federal defendant's contention that until the regulation was applied, it was not subject to review. It held instead that the "final agency action" was the published regulations–just as are found in this case in the final Secretarial Procedures, published at 29 CFR Part 291. R.E. 8.

The Secretarial procedures violate the separation of powers doctrine.

The Secretarial Procedures purport to apply when the State and the Tribe are unable to agree on a compact and where the State "has asserted its immunity from suit brought by an Indian tribe." Secretarial Procedures Rules § 291.1. Under IGRA, in contrast, the Secretary plays no role unless or until a federal court first finds that the State failed to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(B). IGRA does not

delegate to the Department of Interior or the Secretary, the right to force a compact on a State that negotiated in good faith. It is significant that neither summary judgment motion filed by Defendants addresses the possibility of the State negotiating in good faith and how, under IGRA, there is no Congressional intent expressed nor requirement that all negotiations end in a compact permitting Class III gaming. To the contrary, under IGRA, without a finding against Plaintiff State of Texas of lack of good-faith negotiation, the entire process would stop at that level. No compact and no authorized Class III gaming could occur in those circumstances. See IGRA 25 U.S.C. § 2710(d)(7)(B)(iii). Congress had no difficulty creating a "gap" where good-faith negotiations by the State simply ends the entire process, without issuance of a Class III license to the Tribe. Likewise, as evidenced by the three amendment attempts described above, Congress has not acted to amend IGRA in the wake of the *Seminole Tribe* opinion. By taking on this responsibility contrary to IGRA, the Secretarial Procedures violate the Separation of Powers Clause and are *ultra vires*. As a result, this Court should reverse and render on the ripeness issue.

2. The Secretarial Procedures may not be inferred from IGRA because they violate the Separation of Powers doctrine and are manifestly contrary to the statute in that they allow the Secretary to apply these remedial Secretarial Procedures to the State of Texas without a prior judicial finding of bad-faith negotiation.

At page 10 of the Memorandum Opinion and Order, the Court found that "Although Congress did not expressly grant authority to 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." That finding is incorrect because the Secretary's interpretation cannot be "manifestly contrary to the statute" and nothing in IGRA permits the Secretary to apply any remedial procedures to the State of Texas without a judicial finding of bad-faith negotiation. Moreover, as shown above, this interpretation violates the Separation of Powers doctrine because the Secretary (Executive Branch) has no authority to write new laws (reserved to the Legislative Branch) nor to interpret its own new laws (reserved to the Judicial Branch).

Supreme Court failed to approve 11th Circuit dicta on Gap theory.

At page 7 of the Memorandum Opinion, the trial court correctly found that the Supreme Court in S*eminole Tribe* did not address the dicta holding in the Eleventh Circuit's decision in the same case that the Secretary can in effect fill the gap created by the states' Eleventh Amendment immunity decision by promulgating the Secretarial Procedures.

Severance does not apply to IGRA outcome of good-faith negotiation.

In *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004) the Social Security Commissioner assigned beneficiaries to various employers, including plaintiff, based on the assignment order contained in the Coal Act, *Pittston Co. id.* at 390-391. When the Supreme Court in *Eastern Enterprises v. Apfel,* 524 U.S. 498, 118 S.Ct. 2131 (1998) held a portion of the Coal Act was unconstitutional "insofar as it imposed severe retroactive liability on a coal company that had not signed a labor agreement since 1964" *i.d.,* the *Pittston* court found that the Coal Act had a severability clause, *id.* at 400, and that simply removing the 95 retirees from the plaintiff employer and reassigning them would meet the Congressional intent to "minimize the number of unassigned beneficiaries by assigning each retiree to a coal operator most responsible for providing benefits."

The *Pittston* decision however would have no application to the instant appeal because there is no similar Congressional intent expressed in IGRA that all cases must be resolved in either of only two possible alternatives, viz., through negotiation of a compact and/or through the application of the remedial Secretarial Procedures. In fact, Congress expressed its intent in IGRA to provide for yet a third alternative, viz., where the state negotiates in good faith and a court in a judicial proceeding fails to find lack of good faith, that is the end of the IGRA process. This third alternative

under IGRA actually contemplates that the Tribe does not get a compact to allow Class III gaming as the end product. IGRA, unlike the Coal Act in *Pittston id.* at 404, does not contain any injunctive clauses ordering the Secretary to see that Class III tribal gaming occurs all over the United States wherever recognized tribes exist. As a result, the severance procedures and gap-filing procedures in *Pittston* do not control the resolution of this appeal. By negotiating in good faith, the states have always had through IGRA a "state veto over tribal gaming" which contrary to the trial court's finding at page 8 of the Memorandum Opinion, is actually in keeping with Congress' intent in "maintaining a balance of interests." IGRA preempts any attempt to "fill the gap" with the Secretarial Procedures because Congress stepped into the field and provided a comprehensive scheme governing every aspect of Indian gaming. Absolutely no Class III Tribal gaming may be conducted lawfully without being in compliance with IGRA. Congress provided for a balance of interests in the federal-state-tribal negotiation, and it rejected the federal-tribal solution now mandated by the Secretarial Procedures. As a result, the summary judgment sought by Plaintiff State of Texas finding the Secretarial procedures to be without authority to be inferred from IGRA should be granted.

3. The General Authority Statutes 25 U.S.C. §§ 2, 9 do not authorize the promulgation of the Secretarial Procedures because Congress has preempted the subject of Class III gaming by adoption of IGRA and no

delegation of Congress' legislative powers is present in the General Authority Statutes to issue the Secretarial Procedures.

At page 10 of the Memorandum Opinion and Order, the Court found that "Although Congress did not expressly grant authority to 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." The General Authority Statutes 25 U.S.C. §§ 2 and 9 do not authorize the issuance of the Secretarial Procedures as is hereinafter shown.

Secretarial Procedures are not authorized by 25 U.S.C. §§ 2 and 9.

To the extent that the Secretary relies on 25 U.S.C. §§ 2 and 9 to assert that the trust responsibility to the Indian tribes gives the Secretary authority to refashion other Congressional statues, such as IGRA, those sections are an invalid delegation of legislative authority. If they can be used to justify the regulatory "rewriting" of other statutes to expand the Secretary's power, where Congress has in those statutes *limited* the Secretary's power, then they are merely blank checks for the Secretary to engage in legislating. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statutes' primary objective must

be the law. *Rodriguez v. United States,* 480 U.S. 522, 526, 107 S.Ct. 1391, 1393 (1987).

Moreover, 25 U.S.C. §§ 2 and 9 do not authorize the Secretary to issue regulations that conflict with the express provisions of IGRA and which attempt to lessen the rights of States in negotiating Indian Tribal compacts. *Seminole,* 116 S.Ct. at 1124 ("It is true enough that the Act extends to the states a power withheld from them by the Constitution"). The Supreme Court refused to "... rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that 25 U.S.C.§ 2710(d)(7) was beyond its authority" and that "[i]f that effort is to be made, it should be by Congress, and not by the federal courts." *Seminole,* 116 S.Ct. at 1133. It is clear that the Secretary exceeded his authority by attempting to do just that in these Secretarial Procedures. As evidenced in the Joint Stipulations of Fact. FOF No. 15, "Legislation to amend the compact negotiation provisions in IGRA has been introduced at least three times, and none of this legislation has been enacted." Thus, both the Supreme Court and Congress are aware of the *Seminole* decision, and neither have fully acted to make any significant changes to that outcome. In fact, when the Secretary first attempted to "fill the gap" with the advanced notice of rule making, Congress did enact legislation to delay the imposition of the Secretarial Procedures, see FOF 9, 10 and 13 in the Joint Stipulations of Fact.

The non-delegation doctrine prohibits the Secretarial Procedures.

Sections 2 and 9 of Title 25 cannot give the Secretary the ability to issue the Secretarial Procedures, because of the non-delegation doctrine. Congress may not constitutionally delegate its legislative power to another branch of government. *Touby v. United States*, 500 U.S. 160, 165, 111 S.Ct. 1752 (1991). A delegation is said to be overbroad if there is an absence of standards for the guidance of the agency's actions such that it is impossible to ascertain whether the will of Congress has been obeyed, but in all cases, courts will rein in a delegated-lawmaking scheme to ensure the exercise of power remains within statutory bounds. *See Touby, supra;* 500 U.S. at 170. The 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. *Pittston Co. v. U.S.*, 368 F.3d 385 (4th Cir. 2004). In *Pittston,* the court held 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." *id.* at 394. Clearly the legislative power to revise IGRA which the Supreme Court acknowledged in *Seminole*[3] was exclusively in Congress, prohibits the Secretary

[3] *Seminole Tribe of Florida v. Florida* 517 U.S. 44, 116 S.Ct. 1114 (1996).

from also exercising this legislative authority reserved to Congress. IGRA itself supports this conclusion. IGRA provides a comprehensive scheme governing every aspect of Indian gaming. 25 U.S.C. § 2702(3) ("The purpose of this chapter is – to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands ..." Absolutely no Class III Tribal gaming may be conducted lawfully without being in compliance with IGRA. *id.* In IGRA, Congress provided for a balance of interests in the tribal-state negotiation, and it rejected federal-tribal and federal-only solutions. Pursuant to Article I, Section 1 of the Constitution, "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Only Congress can exercise legislative powers and there is no authority to delegate its own power to the Secretary or any other agency of the executive branch. *Loving v. United States,* 517 U.S. 748, 757, 116 S.Ct. 1737, 1744 (1996). In *Whitman v. American Trucking Ass'n, Inc.* 531 U.S. 457, 472, 121 S.Ct. 903 (2001), the court found that in ". . . a delegation challenge, the constitutional question is whether the statute has delegated legislative power to an agency...when Congress confers decision-making authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which a person or body authorized to (act) is directed to conform.'" *id.* No such language appears in 25 U.S.C. §§ 2 and 9.

The Secretarial Procedures fail the *Chevron* test.

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, then the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, then the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 104 S.Ct. 2778, 2781-82 (1984). Here, IGRA is quite clear that in the area of Indian gaming, 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. No other powers or duties are delegated to the Secretary by IGRA to allow the Secretary to take any action without that crucial finding of lack of good-faith. Yet, under the Secretarial Procedures today, the Secretary has taken the legal position that she has authority to proceed on the Kickapoo application for Class III gaming

notwithstanding the absence of a judicial determination against the State of Texas on the issue of good-faith negotiation. As a result, Plaintiff's motion for summary judgment should be granted on the issue of lack of delegated legislative authority to issue the Secretarial Procedures.

CONCLUSION

IGRA sets forth Congress' intent that an impartial forum, *viz.*, the federal courts, must first determine if the State failed to negotiate with the Tribe in good faith. IGRA § 2710(d)(7)(iii). Without that finding, there can be no remedial process under IGRA. *id.* As shown above, however, that process is drastically altered by the Secretarial Procedures that allow the remedial process to continue where the state merely asserted its Eleventh Amendment immunity. Secretarial Procedures § 291.3.

Here, the trial court's finding of lack of ripeness and the finding that the Secretarial Procedures are authorized by IGRA is clearly in error and this Court should reverse and render a decision affirming the State of Texas' motion for summary judgment, and deny the Defendants' motions on their ripeness challenge.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

EDNA RAMON BUTTS
Special Assistant Attorney General

JEFF L. ROSE
Chief, General Litigation Division

_____

WILLIAM T. DEANE
Assistant Attorney General
Texas Bar No. 05692500
General Litigation Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-4054
Fax: (512) 320-0667

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via electronic mail and via U.S. Certified Mail, return receipt requested, on July 11 2005 to:

Mr. Lane McFadden
United States Department of Justice
Environmental & Natural Resources Division
P.O. Box 23795
L'Enfant Station
Washington, D.C. 20026

Mr. Gaines West
West, Webb, Allbritton, Gentry & Rife
1515 Emerald Plaza
College Station, Texas77845

Ms. Jennifer P. Hughes
Hobbs, Straus, Dean & Walker, L.L.P.
2120 L Street, N.W., Suite 700
Washington, D.C. 20037

Ms. Gloria Hernandez
Kickapoo Traditional Tribe of Texas
545 Quarry Street
Eagle Pass, Texas 78852

_____

WILLIAM T. DEANE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of Fed R. App. P. R. 32(a)(7).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5th Cir. R. 32.2, THE BRIEF CONTAINS:

   A. 7807 words.

2. THE BRIEF HAS BEEN PREPARED:

   A. in proportionally spaced typeface using:

      Wordperfect 8 in Times New Roman, 14 point.

3. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE- VOLUME LIMITS IN Fed. R. App. P. 32(a)(7), MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

_____

WILLIAM T. DEANE
Assistant Attorney General