IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

STATE OF ALABAMA	*	
	*	
Plaintiff,	*	
	*	**CASE NO: C.A. 08-0182-CB-C**
vs.	*	
	*	
UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, and DIRK KEMPTHRONE, in his official capacity as Secretary of the Department of Interior	*	
	*	
Defendants.	*	

COMPLAINT

COMES NOW the Plaintiff, the State of Alabama ("Alabama"), and sues the Defendants, United States of America, United States Department of Interior ("Department"), and Dirk Kempthrone, in his official capacity as Secretary of the Department of the Interior ("Secretary"), and state:

PARTIES, JURISDICTION AND VENUE

1. This is an action for declaratory and injunctive relief seeking a declaration that certain rules promulgated by the Secretary of the Department of the Interior are invalid and seeking preliminary and permanent injunctions against the implementation of those rules. In addition, Alabama seeks a stay of the application of those rules pending this review.

2. Plaintiff is the State of Alabama, one of the sovereign states of the United States of America. Alabama is aggrieved by the Department's action in adopting and implementing certain

rules that affect the State's ability to effectuate and/or safeguard its public policy with respect to gambling, a right granted to the States with regard to gambling on tribal lands within the State in the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq*. Alabama previously had been sued by the Poarch Band of Creek Indians under the statutory scheme established by IGRA to compel the State to enter into a compact. Alabama successfully invoked its sovereign immunity, as recognized by the Eleventh Amendment, as a defense to the Tribe's suit in the United States District Court. *Poarch Band of Creek Indians v. State of Alabama*, 776 F.Supp. 1549 (S.D. Ala. 1992). The United States Supreme Court upheld that position in *Seminole Tribe of Florida v. Florida* 517 U.S. 44, 116 S.Ct. 1114 (1996). The Department's action is designed, in part, to address future invocations of a State's sovereign immunity and override them. The State of Alabama is an aggrieved person under 5 U.S.C. § 702.

3. The Defendants are United States of America, United States Department of the Interior, and Dirk Kempthorne, in his official capacity as Secretary of the Department of Interior. Defendants are proper in this case because the rules under review in this action were promulgated by the Secretary of Interior on behalf of that agency. 5 U.S.C. § 703.

4. This court has subject matter jurisdiction pursuant to 28 U.S.C. §1331 as this case involves the Indian Gaming Regulatory Act, 25 U.S.C. § 2710 *et seq*. and 25 C.F.R. Part 291.

5. Venue is proper in the Southern District of Alabama pursuant to 28 U.S.C. § 1391(e) because the United States, one of its agencies, and one of its officers in his official capacity are Defendants, there is no real property involved in this action, and Alabama resides in this district.

FACTUAL ALLEGATIONS

6. Gaming conducted on Indian lands is governed by the Indian Gaming Regulatory Act. This act classifies various types of gaming into three classes, Class I includes "social games solely for prizes of minimal value or traditional forms of Indian games engaged in by individuals as a part of, or in connection with, tribal ceremonies"; Class II includes "the game of chance commonly known as bingo" and card games that are either "explicitly authorized by the laws of the State" or "are not explicitly prohibited by the laws of the State and are played at any location in the State"; and Class III includes "all forms of gaming that is not class I or class II gaming." 25 U.S.C. §2703(6) – (8).

7. Class I gaming on Indian lands conducted exclusively by the Indian tribes is not subject to regulation. 25 U.S.C. § 2710(a)(1). Class II gaming is permitted to be conducted by the Indian tribes if "such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity, and the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman." 25 U.S.C. § 2710(b)(1). Class III gaming is permitted only if it is authorized by an ordinance or resolution of the tribe, such gaming is "located in a State that permits such gaming for any purpose by any person, organization, or entity," ***and*** such gaming is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . ." 25 U.S.C. § 2710(d)(1).

8. Pursuant to IGRA, an Indian tribe can request that a State enter into negotiations regarding a compact for Class III gaming, and a State is required to "negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). If, after 180 days of

negotiation, no agreement has been reached, IGRA provides that the Tribe can bring suit in federal district court challenging the State's failure to negotiate or to negotiate in good faith. Id. § 2710(d)(7)(B)(i). If, and only if, the ***court*** finds that the State failed in its duty to negotiate in good faith, then IGRA provides a specific remedial procedure. Id. §§ 2710(d)(7)(B)(iii) – (vii).

9. In *Seminole Tribe of Florida v Florida*, 517 U.S. 44, 116 S.Ct. 1114 (1996), the Supreme Court held that Congress did not have the power to abrogate a State's sovereign immunity under the Indian Commerce Clause and that *Ex parte Young* could not be used to void that immunity.

10. After the *Seminole* decision, the Secretary of the Department of Interior published an Advance Notice of Proposed Rulemaking on May 10, 1996. 61 Fed. Reg. 21394. In this ANPR, the Secretary sought comment regarding its authority to promulgate rules or procedures to authorize Class III gaming on Indian lands when a State raised its sovereign immunity in response to an action brought under IGRA. Exhibit "A." Alabama joined a letter drafted by the Attorney General of the State of Florida which specifically addressed the procedure provided by IGRA, noting therein that IGRA did not grant the Secretary authority to deviate from that procedure, and therefore the Secretary had no authority to promulgate rules or procedures to authorize Class III gaming outside of the IGRA procedure. Exhibit "B."

11. On January 22, 1998, the Secretary published proposed regulations which purported to provide the Secretary authorization to grant Class III gaming on Indian lands without a Tribal-State compact. 63 Fed. Reg. 3289. Again, Alabama joined a letter drafted by the Attorney General of the State of Florida, and joined by 23 other States, which protested the proposed rules on the basis that the Secretary did not have the authority to adopt such a procedure. Exhibit "C."

12. Due to prohibitions placed in the 1998 Interior Appropriations bill, preventing the Secretary from going forward with the proposed rules, the Secretary was unable to publish the final rules until April 12, 1999. These rules became effective May 12, 1999. These rules have been codified under 25 C.F.R. Part 291 ("Procedures").

13. The State of Alabama and the State of Florida jointly filed an action on April 12, 1999, against the United States, the United States Department of Interior, and Bruce Babbitt, in his official capacity as Secretary of the Department of Interior, in the United States District Court for the Northern District of Florida seeking declaratory and injunctive relief against the implementation of the Procedures. The action was dismissed without prejudice on September 7, 2007. *State of Florida and State of Alabama v. United States of America, et al.*, Case No. 4:99cv137-RH/WCS.

14. On April 13, 2006, the Department of Interior acting by and through the Acting Deputy Assistant Secretary for Policy and Economic Development, George Skibine, informed the State of Alabama that the Poarch Band of Creek Indians ("PBCI") had contacted the Secretary regarding Class III gaming in accordance with 25 CFR § Part 291. The PBCI supplied a memorandum on the scope of gaming in Alabama. Skibine requested that the State, in accordance with 25 CFR 291.7(b), comment on the Tribe's proposal and, if the State disagreed with the proposal, to submit an alternative proposal pursuant to 25 CFR 291.7(c). Exhibit "D." The State has not submitted an alternative proposal.

15. On July 28, 2006, the State of Alabama responded by letter to the Department, specifically retaining the right to objections, defenses, and claims that the State may have with respect to the authority of the Department to promulgate and adopt the rules at issue in the present

case. Exhibit "E."

16. On November 18, 2006, the State of Alabama entered into an informal conference pursuant to 25 CFR § 291.8(b)(2) at the insistence of the Department. This conference was limited to the scope of gaming requested by the PBCI.

17. The informal conference was followed up by a letter to the Department dated January 3, 2007, which was directed towards questions raised in the conference.

18. Alabama attempted to contact the Department on numerous occasions, both by telephone and by letter, regarding the informal conference, but failed to get a response from the Department. On September 26, 2007, Alabama requested by letter that the Department dismiss the PBCI's petition for Class III gaming based upon the *State of Texas v. United States* decision in which the Fifth Circuit held that the rules promulgated by the Department of Interior, 25 CFR Part 291, regarding Class III gaming were invalid. *State of Texas v. United States*, 497 F.3d 491 (5th Cir. 2007). The Department, to date, has not responded to the State's September 26, 2007 request. Exhibit "F."

19. On March 4, 2008, the Department provided the State with its "preliminary determination" regarding the scope of gaming conference that was held on November 18, 2006. Exhibit "G." In the letter, the Department stated they would contact the State within 30 days to schedule the resumption of the informal conference. The Department failed to address, or acknowledge, the concerns raised by the State in the State's September 26, 2007 letter.

20. As detailed in the *State of Texas v. United States* decision, Congress crafted a specific remedial scheme in IGRA for a tribe to seek Class III gaming, and the Act provides no authority for

the Secretary to subvert that scheme through the adoption of rules or regulations. The Secretary cannot supplant his determination for that of Congress. Congress has had more than a decade to act regarding the Supreme Court's determination in *Seminole* that it had no authority to abrogate a State's sovereign immunity through the Indian Commerce Clause, and it has failed to do so. Congress, and Congress alone, has the authority to revise the remedial scheme put in place by Congress in IGRA. See, *State of Texas v. United States*, 497 F.3d 491, 503-504 (5th Cir. 2007); see also, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 75-76, 116 S.Ct. 1114, 1133 (1996).

21. Upon a finding by a United States District Court that a State has failed to negotiate, or has failed to negotiate in "good faith," Congress set out a specific remedial process in IGRA. This process is found in 25 U.S.C. § 2710(d)(7) and states as follows:

> (7)(A) The United States district courts shall have jurisdiction over--
>
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,
>
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and
>
> (iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).
>
> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).
>
> (ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--
>
> (I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause

> (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--
>
> (I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and
>
> (II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

22. Under the rules promulgated by the Secretary, the procedure for a tribe to obtain Class III gaming is in direct conflict with IGRA requirements set forth above. Specifically, the rules found in 25 CFR Part 291 establish a new procedure described as follows:

A. The Secretary's procedures apply when a Tribe makes a formal request with the Secretary after the Tribe and the State are unable agree upon a compact, the Tribe has sued the State in Federal District Court, and the State has asserted its sovereign immunity thus dismissing the case. 25 CFR §§ 291.1, 3.

B. Upon receiving the request, the Secretary has 30 days to notify the Tribe regarding whether its proposal meets the eligibility requirements of 25 CFR § 291.3. 25 CFR § 291.6.

C. If the Secretary finds that the Tribe's proposal meets the eligibility requirements, the Secretary contacts the Governor and the Attorney General of State in which the tribal lands are located and provides the State 60 days to comment on whether the State agrees with the Tribe's proposal, whether the proposal is consistent with State law, and whether the requested gaming is "permitted in the State for any purpose, by any person, organization or entity." The State is also requested to submit an alternate proposal. 25 CFR § 291.7.

D. If the State fails to submit an alternative proposal, the Secretary reviews the proposal and approves it or identifies unresolved issues. If unresolved issues are found, the Secretary invites the State and the Tribe to participate in an informal conference. Within 30 days of the informal conference, the Secretary is to supply a report summarizing the conference and stating the Secretary's final decision. 25 CFR § 291.8.

E. If the State does submit an alternative proposal, the Secretary appoints a mediator who reviews the proposals and selects the one that "best comports with the terms of IGRA and any other applicable Federal law." 25 CFR §§ 291.9, 10.

F. Within 60 days of receiving the mediator's selection, the Secretary must approve or reject the selection. If the Secretary rejects the selection, then the Secretary must prescribe appropriate procedures for the Tribe to conduct Class III gaming within 60 days. 25 CFR § 291.11.

G. Upon receiving the Secretary's approved procedures, the Tribe has 90 days to approve and execute those procedures. 25 CFR § 291.13.

23. The Procedures are in direct conflict with the procedures established by Congress in IGRA. The Procedures carve out the role that Congress set up for the courts to determine whether a State has acted in good faith. Instead, the Procedures provide the Secretary the authority to determine that by asserting its rights, the State has failed to negotiate in good faith, and the Secretary becomes the ultimate authority as to what type of gaming the Secretary believes the Tribe should be allowed to conduct. The Procedures fail to even bind the Secretary to the judgment of a neutral mediator, allowing him or her to create procedures "that comport with the mediator's selected proposal *as much as possible*, the provisions of IGRA, and the relevant provisions of the laws of the State." 25 C.F.R. § 291.11 (emphasis added). IGRA specifically requires the Secretary to implement the proposal selected by the mediator, in conformance with State law. 25 U.S.C. § 2710(d)(7)(vii).

24. The Procedures, by placing the Secretary as the final authority, have specifically undermined the objective interest-balancing procedure implemented by Congress in IGRA. See, *Texas*, 497 F.3d at 508. By placing the final authority in the Secretary, the States are left with a so-called "objective" arbiter who owes a duty to the Tribe attempting to conduct gaming to which the State does not agree.

25. The Secretary relies on 5 U.S.C. § 301, 25 U.S.C. §§ 2, 9, and 2701 as grounds for the authority to promulgate the Procedures. None of these sections, however, provides the Secretary the authority to supplant his judgment for that of Congress and rewrite procedures that Congress specifically put in place.

26. On March 4, 2008, the Secretary of Interior, acting through the Acting Deputy Assistant Secretary of Policy and Economic Development, George T. Skibine, reiterated the Department's desire to continue to implement the Procedures, despite the United States Court of Appeals for the Fifth Circuits clear ruling that the Procedures were invalid, and force the sovereign State of Alabama to continue informal conferences created by the invalid rules. The Procedures are unconstitutional and vastly exceed the scope of authority granted to the Secretary by Congress; therefore, there is an actual, substantial controversy between the State of Alabama as Plaintiff and the Secretary and Department of Interior as Defendants.

27. The State of Alabama has no adequate remedy at law to contest the application of the Procedures which could result in the Poarch Band of Creek Indians gaining new rights to Class III gaming on "Indian lands" located within the borders of Alabama. The State of Alabama will suffer irreparable injury unless the Defendants are enjoined from applying the procedures found in 25 C.F.R. Part 291 to the Poarch Band of Creek Indians application for Class III gaming in Alabama. The Procedures fail to provide, as required by IGRA, a consideration of the States public policy on gambling, and IGRA does not contain a mechanism for the State to challenge the Secretary's determination regarding Class III gaming under the Procedures as it is implemented.

28. The procedures being forced upon the State of Alabama by the Secretary will injure

the State because the procedures abrogate the specific protections established by Congress in IGRA that contain important Federal-State interest balancing protections, which include the role of the impartial federal district courts. These important protections were implemented by Congress and recognized by the Supreme Court in *Seminole*. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 75-76, 116 S.Ct. 1114, 1133 (1996). Application of the procedures will strip the State of its bargaining power that is provide under IGRA, forcing the State to be subjected to the determinations of the Secretary, who owes a fiduciary duty to the Tribes, thus causing irreparable injury to the State. The State would further be harmed because the Procedures ignore the States public policy regarding gambling, and ultimately authorizes illegal Class III gaming by the PBCI within the State of Alabama. Moreover, IGRA provides no remedies to contest the procedures established by 25 C.F.R. Part 291.

COUNT I
DECLARATORY JUDGMENT AND ADMINISTRATIVE REVIEW

29. Alabama reasserts and incorporates the allegations contained in Paragraphs one through twenty-eight as if fully set out herein.

30. Pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and pursuant to the Administrative Procedures Act, 5 U.S.C. § 701, et seq., Plaintiff seeks a declaration and a review that:

A. The procedures set forth in 25 C.F.R. Part 291 constitute an unconstitutional delegation of authority to the Secretary and violate the separation of powers doctrine;

B. Congress has not delegated authority to the Secretary to promulgate or

implement the procedures in 25 C.F.R. Part 291. The procedures exceed the scope of authority granted to the Secretary by Congress in 25 U.S.C. § 2710, and are thus *ultra vires*;

C. To the extent that 25 U.S.C. §§ 2 and 9 are relied upon as the authority to issue the procedures, those statutes are invalid attempts to delegate legislative authority to the Secretary in violation of the separation of powers doctrine; and

D. Since the procedures vest final authority with the Secretary to make both judicial and legislative determinations, including appointing a mediator, and then rejecting the mediator's determination, the procedures present an irreconcilable conflict of interest because the Secretary under IGRA acts as "trustee" for all Indian Tribes covered thereby.

31. Plaintiff requests that this action receive a speedy hearing and be advanced on the calendar in accordance with Fed.R.Civ.P. 57.

COUNT II
STAY OF ADMINISTRATIVE PROCEEDING

32. Alabama reasserts and incorporates the allegations contained in Paragraphs one through thirty-one as if fully set out herein.

33. Plaintiff seeks a stay of the administrative proceedings related to the Poarch Band of Creek Indians request for Class III gaming under the Administrative Procedures Act, 5 U.S.C. § 701, et seq., and 5 U.S.C. § 705. Administrative stays must meet the same standards as a Preliminary Injunction.

COUNT III
INJUNCTION

34. Plaintiff, State of Alabama, reasserts and incorporates the allegations contained in Paragraphs one through thirty-three as if fully set out herein.

35. For reasons set out above and in the Application for Preliminary Injunction, Plaintiff respectfully requests this Court to enter a preliminary injunction pursuant to Fed.R.Civ.P. 65, or in the alternative a stay pending review, to maintain the status quo during the pending litigation because:

A. A substantial likelihood exists that the Plaintiff, State of Alabama, will prevail on the merits;

B. There exists a substantial threat that irreparable injury will result if the injunction is not granted;

C. The threatened injury to the State of Alabama outweighs any potential harm the injunction may cause to defendants; and

D. Granting the preliminary injunction will not disserve the public interest.

36. A permanent injunction should be entered following trial on the merits of this case to prohibit the Secretary from implementing or enforcing the invalid procedures found in 25 C.F.R Part 291.

WHEREFORE, Plaintiff, the State of Alabama, respectfully requests that this Court grant the preliminary injunction requested; that the Court stay the administrative proceeding pending judicial review; that the Court following trial enter a prohibitory permanent injunction, a declaration that the procedures found in 25 C.F.R. Part 291 exceed the scope of authority granted to the Secretary under

the Indian Gaming Regulatory Act and/or constitute an unconstitutional delegation of legislative power to the Secretary; that the Court award to the Plaintiff its costs and attorneys' fees, and grant such other and further relief to which the Plaintiff may show itself entitled.

Respectfully submitted,

TROY KING
ATTORNEY GENERAL OF ALABAMA

CHEAIRS PORTER
SPECIAL ASSISTANT ATTORNEY GENERAL
11 South Union Street
Montgomery, Alabama 36130

s/Kenneth S. Steely
KENNETH S. STEELY (STEEK4183)
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United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D C 20240

MAY - 3 1996

Honorable Jeff Sessions
Attorney General
State of Alabama
11 South Union Street
Montgomery, Alabama 36130

Dear Mr. Attorney General:

This is in response to your letters to Secretary Babbitt dated April 3 and April 15, 1996. I have checked the Secretary's schedule, and to date no meeting with Chairman Tullis has been scheduled.

The Department has submitted to the Federal Register for publication an Advance Notice of Proposed Rulemaking, requesting comments on various issues relating to Secretarial Procedures. Until this rulemaking proceeding has concluded, the Department will not accept requests for procedures from individual tribes.

I enclose for your information a copy of the Advance Notice, and I invite your participation.

Sincerely,

John J. Duffy
Counselor to the Secretary

cc: Chairman Eddie Tullis

EXHIBIT
A

4210-02

DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

25 CFR Section 525

RIN 1076-AD67

Request for Comments on Establishing Departmental Procedures To Authorize Class III Gaming on Indian Lands when a State Raises an Eleventh Amendment Defense to Suit under the Indian Gaming Regulatory Act.

AGENCY: Bureau of Indian Affairs, Interior

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Department of the Interior seeks comments on its authority under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. Section 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. Section 2710(d)(7), and on other related matters. This advance notice is the result of the Supreme Court decision

in Seminole Tribe of Florida v. State of Florida, 116 S.Ct. 1114 (1996).

DATES: Written public comment is invited and will be considered in the development of a proposed rule. Comments on this advance notice of proposed rulemaking must be received no later than July 1, 1996, to be considered.

ADDRESSES: Any comments concerning this notice, including sections regarding conformance with statutory and regulatory authorities, may be sent to: George Skibine, Director, Indian Gaming Management Staff, 1849 C Street, N.W., MS-2070 MIB, Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: George Skibine, Director, Indian Gaming Management Staff, (202) 219-4066.

SUPPLEMENTARY INFORMATION:

Background

Congress enacted IGRA to provide a statutory basis for the operation and regulation of Indian gaming and to protect Indian gaming as a means of generating revenue for tribal governments. 25 U.S.C. Section 2702; Seminole, at 1119. Since its passage in 1988, more than 140 compacts in more than 20 States have been successfully negotiated, entered

United States Department of the Interior

OFFICE OF THE SECRETARY
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MAY - 3 1996

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Attorney General
State of Alabama
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Sincerely,

John JJ Duffy
Counselor to the Secretary

cc: Chairman Eddie Tullis

4210-02

DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

25 CFR Section 525

RIN 1076-AD67

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ACTION: Advance notice of proposed rulemaking.

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Background

Congress enacted IGRA to provide a statutory basis for the operation and regulation of Indian gaming and to protect Indian gaming as a means of generating revenue for tribal governments. 25 U.S.C. Section 2702; Seminole, at 1119. Since its passage in 1988, more than 140 compacts in more than 20 States have been successfully negotiated, entered

into by States and Tribes and approved by the Secretary. Today, Indian gaming is a successful industry generating significant governmental revenue for Indian tribes, which provides funding for essential government services such as roads, schools, and hospitals. Prior to enactment of IGRA, States generally were precluded from any regulation of gaming on Indian reservations. See California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). IGRA, by offering States an opportunity to participate with Indian tribes in developing regulations for Indian gaming, "extends to States a power withheld from them by the Constitution." Seminole, at 1124.

IGRA requires an Indian Tribe that wants to conduct casino type ("Class III") gaming on its Indian lands to negotiate a "compact" of terms and conditions for such gaming with the State in which the Indian lands are located. IGRA also provides that if the State fails to bargain, or to do so in good faith, the Tribe may sue the State in Federal court to enforce the remedial provisions provided by the statute. Under these provisions, if a court found a State not to be bargaining in good faith, it would "order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. Section 2710(d)(7)(B)(iii). If thereafter a State and Tribe fail to conclude a compact within this 60-day period, they "shall each submit to a

mediator appointed by the court a proposed compact that represents their last best offer for a compact." Id. Section 2710(d)(7)(B)(iv). The mediator shall then "select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court," id., and submit his or her selection to the State and Tribe, id. Section 2710(d)(7)(B)(v). If, within 60 days from the mediator's submission of his or her selection, the State consents to a proposed compact, such a compact authorizes Indian gaming pursuant to IGRA. Id. Section 2710(d)(7)(B)(vi). If the State does not consent to a compact within 60 days of the mediator's submission, the Secretary of the Interior shall:

> prescribe, in consultation with the Indian tribe, procedures --
>
> (I) which are consistent with the proposed compact selected by the mediator under [25 U.S.C. Section 2710(d)(7)(B)(iv)], the provisions of [the Act] and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

25 U.S.C. Section 2710(d)(7)(B)(vii). In practice, only a handful of cases have required resort to IGRA's judicial enforcement mechanism.

In Seminole Tribe of Florida v. Florida, the Supreme Court affirmed a decision by the Eleventh Circuit Court of Appeals holding that Congress may not abrogate State Eleventh Amendment immunity under the Indian Commerce Clause. The decision raises questions about the process now to be followed by Tribes who cannot secure State cooperation in the compacting process.

The Supreme Court's Seminole decision does not affect the validity of existing class III gaming compacts, but it does require the United States to consider the effect of a State's refusal to engage in remedial litigation designed to oversee the compacting process. In its decision below, the Eleventh Circuit suggested that the compacting process could proceed as prescribed by IGRA (including litigation) so long as a State did not assert its Eleventh Amendment immunity. In light of IGRA's severability clause, the Eleventh Circuit further expressed the view that if a State pleads an

Eleventh Amendment defense and the suit is dismissed, the Tribe may then notify the Secretary and the Secretary may prescribe the terms of the particular compact. The Supreme Court expressly declined to consider the validity of this part of the Eleventh Circuit's opinion, and Florida's cross-petition for review of this issue was denied by the Supreme Court. By contrast, the Ninth Circuit, in its pre-Seminole decision rejecting an Eleventh Amendment challenge, Spokane Tribe of Indians v. Washington, 28 F.3d 991 (9th Cir. 1994), expressed disagreement with the Eleventh Circuit's views on that issue. Id. at 997.

In these circumstances, and because of the importance of the issues to the Tribes, the States, and the general public, the Department seeks comments regarding the manner in which the compacting provisions of IGRA may operate following the Supreme Court's Seminole Tribe decision.

SUBJECT MATTER OF POTENTIAL RULEMAKING

The Department seeks comments on the following specific issues, and on other issues directly related to the subject matter of this notice.

1) The effect of the Supreme Court's decision in

Seminole Tribe on the operation of other provisions in 25 U.S.C. Section 2710(d)(7) when a State does not waive its Eleventh Amendment immunity to suit;

2) Whether, and under what circumstances, the Secretary of the Interior is empowered to prescribe "procedures" for the conduct of Class III gaming when a State interposes an Eleventh Amendment defense to an action pursuant to 25 U.S.C. Section 2710(d)(7)(B);

3) What is an appropriate administrative process for the development of Secretarial procedures;

4) What procedures should be followed if a State interposes an Eleventh Amendment defense to an action filed under 25 U.S.C. Section 2710(d)(7)(B);

5) What procedures can be, and should be, utilized for determining legal issues that may be in dispute, such as the "scope of gaming" permitted under State law. The scope of gaming issue arises when a State takes the position that it is not required to bargain with a Tribe with respect to

certain Class III games because IGRA does not authorize such games on the ground that such games are not permitted by the State "for any purpose by any person," see 25 U.S.C. Section 2710(d)(1)(B)1; and

6) How any procedures promulgated by the Secretary may, and should, provide for appropriate regulation of Indian gaming.

Public Review

Comments on this notice may be submitted in writing to the address identified at the beginning of this rulemaking by July 1, 1996. Comments received by that date will be considered in the development of any proposed rule.

Executive Order 12866 - This advance notice of proposed rulemaking has been reviewed by the Office of Management and Budget under Executive Order 12866.

Drafting Information – This Notice was drafted by the Office of the Solicitor, 1849 C Street, N.W., Washington, D.C., 20240.

List of Subjects

25 CFR Section 525

Date: April 30, 1996

Ada E. Deer

Ada E. Deer

Assistant Secretary, Indian Affairs

CERTIFIED TO BE A TRUE COPY OF THE ORIGINAL.

4/30/96

JOHN STRZYLOWSKI

STATE OF FLORIDA

OFFICE OF ATTORNEY GENERAL
ROBERT A. BUTTERWORTH

June 28, 1996

Honorable Bruce Babbitt
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW Room 6151
Washington, D.C 20240

Re: Comments on Establishing Departmental Procedures To Authorize Class III Gaming on Indian Lands When a State Raises an Eleventh Amendment Defense To Suit Under the Indian Gaming Regulatory Act, Vol 61 Fed Reg No. 92, pg 21394 (5/10/96)

Dear Secretary Babbitt:

Please accept this letter as the comments of the undersigned Attorneys General relating to the above referenced Advance Notice of Proposed Rulemaking. The undersigned, on behalf of our respective states, have a vital interest in the proper execution of the Indian Gaming Regulatory Act and in gambling activities in our states generally. In *Seminole Tribe v. Florida*, 116 S.Ct. 1114 (1996), the Supreme Court upheld the Eleventh Circuit's opinion that Congress had no authority to abrogate the Eleventh Amendment immunity of the States in the passage of IGRA and that the doctrine of *Ex parte Young* could not be used to circumvent the States' immunity. The court did not however address the issue raised by Part V of the lower court opinion regarding the remaining remedy for Tribes faced with States allegedly not bargaining in good faith, as required by IGRA.

Introduction and Background

It is uniformly the legal view of the undersigned state Attorneys General that, absent congressional authorization, the Secretary of Interior has no authority to prescribe class III tribal gaming procedures when a state raises an Eleventh Amendment bar to a "bad faith" lawsuit under IGRA. Further, there is no legal question but that if the Secretary were to assume such power, without congressional authorization, the Secretary would be constrained by existing federal law, including the federal Gambling Devices (Johnson) Act, 15 U.S.C. 1175, from prescribing procedures that include any form of electronic or electro-mechanical gambling devices.

EXHIBIT
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> The Eleventh Circuit was concerned by the regulatory void that it might leave by invalidating the IGRA's provisions for federal judicial enforcement. Those concerns illustrate the problem caused when state sovereignty is injected into the federal scheme. The Eleventh Circuit reasoned that a void was not necessary because the provisions of the statute authorizing the Secretary of Interior to impose regulations would come into effect once a state asserted immunity from suit
> When that occurred the Secretary of the Interior would, in the Eleventh Circuit's view, remain authorized to impose regulations for Class III gaming Seminole Tribe, 11 F.3d at 1029 *In our view, however, such a result would pervert the congressional plan* This is because the Secretary of the Interior under the statute is to act only as a matter of last resort, and then only after consulting with the court appointed mediator who has become familiar with the positions and interests of both the tribes and the states in court directed negotiations 25 U.S C. Sec. 2710(d)(7)(B)(iv)-(vii) *The Eleventh Circuit's solution would turn the Secretary of the Interior into a federal czar, contrary to the congressional aim of state participation.*

Spokane Tribe of Indians v. Washington State, 28 F.3d 991, 997 (C A 9 (Wash.) 1994)(emphasis added)

Any proposal to allow a direct by-pass to the Secretary is inconsistent with Congressional intent for two reasons: 1) it allows the tribes to circumvent State participation, thereby not recognizing a legitimate interest of the States; and 2) it ignores IGRA's design to include the states. It should be clearly understood that the proposed remedy has the effect of taking the states completely out of the IGRA process. A Tribe would be able to request a compact with a demand it knows the State cannot accede to, thereby guaranteeing that there will be no compact within 180 days, and providing the "predicate" for a "bad faith" lawsuit. This is possible because IGRA does not require that the *Tribe* negotiate in good faith. At the end of 180 days, with no progress toward a compact, the Tribe may file suit. If the State raises its Eleventh Amendment defense, the Tribe will petition directly to the Secretary of the Interior, undoubtedly for the gaming activities it knew the State could not agree to, including, in most cases, gambling devices and activities criminally prohibited in the state. State participation has thereby been rendered meaningless.

The proposed Secretarial remedy is inconsistent with the plain language of the statute and is an effort to grant a remedy to the Tribes not found in IGRA. The Eleventh Circuit erroneously stated that the new remedy is consistent with the intent of Congress. By creating the remedy, the Eleventh Circuit sacrificed the States' role in an effort to effectuate its notion of the broad intent of Congress

Even under current law, it is clear that the application of a state "regulatory" law is not barred automatically, but should be measured against the interest-balancing test applied in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) The *Cabazon* Court quoted *Mescalero* as follows:

> '[s]tate jurisdiction is pre-empted [by the operation of federal law] if it interferes or is incompatible with federal and tribal interests reflected in federal law, *unless the state interests at stake are sufficient to justify the assertion of state authority*.'

480 U S at 216, quoting from *Mescalero*, 462 U.S. at 333-34, emphasis added. While the *Cabazon* Court found significant interests for the tribe in that case, it left open that states might demonstrate sufficient state interests to justify the assertion of state authority in other cases.

In IGRA, Congress did offer states a role in the *regulation* on Indian lands of that same gaming permitted by the state for any purpose. It is important to note that it was the Federal government which played a significant role in convincing the Congress to permit state involvement When a Federal regulatory agency was proposed in S. 555, federal

> Justice Department officials were opposed to this approach, arguing that the expertise to regulate gaming activities and to enforce laws related to gaming could be found in state agencies, and thus that there was no need to duplicate those mechanisms on a Federal level

Senate Report No 446, 100th Congress, 2d Session, at 5.

Indeed, this latter point, set forth in the Senate Report, explains why states did not expect to be forced to negotiate for that gaming which the states did <u>not</u> permit If the tribal-state negotiations are designed to focus on that gaming which the state permits for some purpose, the Congress appears to have expected it would be gaming for which the state *already has some regulatory mechanism in place*. Again, taking he states out of the process thwarts Congress' intent to take advantage of the regulatory structure already existing in the states.

The legislative history of IGRA shows that in criticizing H.R. 1920, the leading bill of the 99th Congress, Senator Inouye, the prime sponsor of S.555, and Senator Gorton, stated:

> We oppose H.R. 1920 as reported. The bill allows Indian tribes to engage in, or to allow other persons to engage in, high stakes commercial gaming free from any meaningful control by the states or federal government.

> [I]t is simply not realistic for any but a few tribes to set up regulatory systems Nor did the Select Committee on Indian Affairs view as meritorious any suggestions for the establishment of a Federal regulatory mechanism to duplicate what already exists at the State level. . .
>
> Thus, the best option available is the approach taken by the committee on S.555 and that is the tribal-State compact approach.

Congressional Record, September 15, 1988, S 12650, col 2 (Emphasis added)

Thus, the legislative history of the IGRA, and the final provisions which were adopted into the Act make clear that with regard to the class III gambling, the principal function of the IGRA was to eliminate such operations unless certain restrictive conditions were met State participation in the compacting and regulatory processes was essential, according to the Congress Neither the federal government nor the Tribes alone have the ability to regulate this type of gambling Clearly, the proposed remedy which eliminates state participation is contrary to the Congressional scheme and intent.

The process set forth in part V of the Eleventh Circuit's opinion and proposed for implementation by the Secretary is not found in the provisions of IGRA The proposed remedy would delegate to the Secretary of the interior both the determinations of good faith and of the scope of gambling permitted in the State. Congress, however, granted the Secretary only limited regulatory discretion in § 2710(d)(7)(B)(vii) - the power to prescribe regulations consistent with a mediator's choice of compact. This subsection does not grant the Secretary the legislative discretion to decide what class III gambling to permit or not permit. See *American Federation of Gov. Employees v. Pierce*, 697 F. 2d 303, 306 (D.C. Cir. 1982). While a such a broad delegation might be upheld, see *Mistretta v. U.S.*, 488 U.S. 361, 373-74 (1989), IGRA, by contrast, grants only a limited regulatory discretion. *See, Panama Refining Co. v. Ryan*, 293 U.S. 388, 415-30 (1935).

It is inappropriate for a federal executive official to make these determinations where Congress left them to the States and Tribes as equal partners at the bargaining table. Also under part V of the Eleventh Circuit's opinion and the proposed Secretarial remedy, there is no need for a finding of lack of good faith on the part of the state, which is the condition precedent for all of the mediation and Secretarial involvement under the terms of the IGRA. All subsections after § 2710(d)(7)(B)(I) are inextricably entwined with the preceding subsections. Clause (vii), upon which the court below depended for its remedy and which this proposal seeks to implement, by its very terms depends on the preceding clauses for its meaning, to wit:

The same is true of the "Secretarial remedy" suggested by the proposed rulemaking If the Supreme Court's reinvigoration of the States' Eleventh Amendment defense upsets the balance constructed by Congress in IGRA, then it is up to Congress to fix it

The Secretary has no inherent authority outside of the powers granted to him in IGRA to prescribe regulations for class III gambling His authority in IGRA is predicated on completion of the entire remedial scheme starting with the filing of suit against the State and a finding of lack of good faith on behalf of the State Without statutory authority, the Secretary cannot act In *Metlakatla Indian Community v. Egan*, 369 U S 45 (1962), the Secretary prescribed regulations allowing the use of fish traps by the Metlakatla Community in contravention of Alaskan law The Secretary argued that the White Act and the Alaska Statehood Act gave him the requisite authority, the Supreme Court held that there was no such authority to be found in those acts. *See also, Organized Village of Kake v. Egan*, 369 U S 60 (1962) Since there is no authority to be found in IGRA, the Secretary is not free to engage in the proposed rulemaking as advertised

The only premise upon which the Secretary may prescribe regulations for class III gambling is if a State fails to negotiate in good faith There must be a finding by someone that this is the situation It is entirely inappropriate for that person to be the Secretary of Interior. When a disputed issue, such as the good faith bargaining of a party, must be decided, it is essential that the decision maker be impartial; this is a basic requirement of due process In this situation it is inappropriate to have the Secretary make determinations of good faith and to determine the parameters of state law for scope of gaming determinations The Secretary, and in fact the the entire executive department of the federal government, act as a trustees for the Indian tribes Someone in that position cannot sit in judgment of such a dispute For that reason alone, the Secretary cannot proceed in this case without specific authority from Congress Under current law, that authority does not exist; Congress made no provision for the Secretary of Interior to substitute his discretion for that of the state regarding difficult issues of state gambling law. *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991 (9th Cir. 1994)

The following points address the specific questions presented in the Advanced Notice of Proposed Rulemaking

1. *The effect of the Supreme Court's decision in Seminole Tribe on the operation of other provisions in 25 USC Section 2710(d)(7) when a State does not waive its Eleventh Amendment immunity.*

When a State declines to waive its sovereign immunity, the *remedial* process set forth in § 2710(d)(7) has no legal effect That remedial process is triggered only by a finding of a federal court that the State had failed to negotiate in good faith IGRA does not entitle any tribe to a compact If a State and Tribe, in good faith negotiations, cannot agree to a compact, there is no remedy If a Tribe alleges bad faith, and the State raises the Eleventh Amendment, there is no remedy in federal court following *Seminole*.

Congress provided for a federal court mechanism to determine the state's good faith, and absent that statutory mechanism, the law is provides no power to any federal official to proceed as if it were the final arbiter and regulator. The plain meaning of the statutory language must guide all the parties, *United States v. Burns*, 725 F.Supp 116, 121 (NDNY 1989) *aff'd sub nom. United States v. Cook*, 922 F.2d 1026, 1032 (2d Cir 1991), and here, the statute affords no other reading than that the remedial "secretarial procedures" follow a federal-court process Each element of section 2710(d)(7)(B) is a condition precedent leading to each subsequent element of the process. There are no "doubtful" or "ambiguous" aspects of these provisions Without a federal-court process, then, the existing secretarial remedy cannot be reached

2 *Whether, and under what circumstances, the Secretary of the Interior is empowered to prescribe "procedures" for the conduct of class III gaming when a State interposes an Eleventh Amendment defense to an action pursuant to 25 U.S.C. Section 2710(d)(7)(B)?*

As stated, the Secretary of the Interior has no authority to prescribe regulations for the conduct of class III gaming until the petitioning Tribe has been through the entire remedial process outlined in sections 2710(d)(7)(B)(I - vii). If a State refuses to waive its immunity, then that process cannot continue and the Tribe is barred from relief from the Secretary. The remedial process in IGRA now only operates if a State consents to be sued. If this process needs changing to reestablish the balance of interests initially arrived at by Congress, then it is up to Congress to re-evaluate IGRA in light of the *Seminole* decision

If this question is designed to ask whether the Secretary has power to prescribe procedures independent of 25 U.S.C. § 2710(d)(7)(B), then the answer is "no." Congress clearly occupied the field of Indian gaming. As the Senate Report governing the legislation set forth: "S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 100-446, at 6. While the Secretary might assume powers to prescribe regulations in enforcing treaties or in matters not comprehensively covered by Congress, the trust responsibilities of the Secretary to the Tribes may well empower him to do so. Here, however, even the *Seminole* court noted that IGRA provided a detailed and "intricate remedial scheme," which the Court itself was unwilling to re-write. ___ U.S. ___, 116 S.Ct. at 1132-1133. Certainly, then, the Secretary cannot re-write it

3 *What is an appropriate administrative process for the development of Secretarial procedures?*

We do not believe there can be an appropriate process. First, the remedy proposed is not found in IGRA, but was created by the Eleventh Circuit in *dicta*. This being the case, there is no legal authority for the Secretary to act Second, even if there was some basis for action, it is inappropriate for the Secretary to make decisions concerning the good faith actions of the States and the scope of gambling allowed under state law. The secretary's position as trustee for the Tribes makes him uniquely inappropriate for this task. An independent decision maker is the only one who could make such determinations None is available here

CONCLUSION

The undersigned Attorneys General strongly believe that it is clearly contrary to law and inappropriate for the Secretary of the Interior to take action to promulgate regulations allowing class III gambling as suggested If Congress determines that there needs to be a change in IGRA based on the Supreme Court's holding in *Seminole*, then *it* is the appropriate forum for discussion of the balancing of interests among the state, federal and tribal governments

> 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 (1987).

Thank you for the opportunity to comment on the proposed rulemaking.

Sincerely,

Robert A Butterworth
Attorney General of Florida

Daniel E Lungren
Attorney General of California

Jeff Sessions
Attorney General of Alabama

Grant Woods
Attorney General of Arizona

Winston Bryant
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cc: George Skibine, Director
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1849 C Street, N W.
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STATE OF FLORIDA

OFFICE OF ATTORNEY GENERAL

ROBERT A. BUTTERWORTH

June 19, 1998

Honorable Bruce Babbitt
Secretary of the Interior
U.S. Department of the Interior
Room 6151
1849 C Street, NW
Washington, D.C. 20240

Re: Comments on Proposed Rule Allowing Procedures To Permit Class III Gaming on Indian Lands When a State Raises Its Sovereign Immunity From Suit Brought By An Indian Tribe Under the Indian Gaming Regulatory Act, 63 Fed. Reg. 3289 (January 22, 1998)

Dear Secretary Babbitt:

Please accept this letter as the comments of the undersigned Attorneys General relating to the above-referenced Proposed Rule. The undersigned, as the chief legal officers of our respective states, have a vital interest in the proper execution of the Indian Gaming Regulatory Act and in gambling activities in our states generally. On June 28, 1996, several state Attorneys General, under this letterhead, provided comments to the Advanced Notice of Proposed Rulemaking ("ANPR") on the same subject, issued by your Department on May 10, 1996 (61 Fed. Reg. 21394). On July 1, 1996, the Conference of Western Attorneys General also submitted comments that incorporated the legal conclusions of the June 28th letter. Those comments included our view that any assumption of power by the Secretary to prescribe class III procedures outside of the congressional scheme in the Indian Gaming Regulatory Act of 1988 ("IGRA") is unsound as a matter of law and policy. This letter incorporates the comments of the June 28, 1996, letter, but responds further to new points of law and policy set forth in the Proposed Rule.

This letter will address two principal areas: (1) the lack of legal authority for the Secretary to circumvent the IGRA process through the Secretary's general regulatory powers found in 25 U.S.C. §§ 2 and 9, and (2) the failure of the proposed regulation to adhere to the bypass authority that *does* exist in IGRA and thereby removing any incentive for a Tribe to negotiate with a State. These rules are triggered by impasse in the negotiations which IGRA contemplated would *not* entitle a Tribe to bypass the State. Under IGRA, the Secretary's authority only arises after a judicial finding of bad faith and a refusal to accept the mediator's choice of compacts. 25 U.S.C.

EXHIBIT C

§2710(d)(7)(B)(vii). Fundamentally, the undersigned believe the Proposed Rule improperly allows the Secretary, who has a trust responsibility to the Tribes, to pass on a sovereign State's good faith in negotiations, a role heretofore left to the judicial branch. Based on these legal and policy deficiencies, the undersigned strongly urge the Secretary to abandon the Proposed Rule.

A. Introduction and Background

In the ANPR of May 10, 1996, the Department of Interior asked for comments in response to the U.S. Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), which upheld the Eleventh Circuit's opinion that Congress had no authority to abrogate the Eleventh Amendment immunity of the States in the passage of IGRA and that the doctrine of *Ex Parte Young* could not be used to circumvent the States' immunity, but declined to address *dicta* in the lower court's opinion suggesting a Secretarial remedy under IGRA. That this was *dicta* is confirmed by the brief submitted by the Solicitor General to the Supreme Court in *Seminole*. ("That discussion in the opinion below is *dicta*, since the court ordered the case dismissed on sovereign immunity grounds[.]") The ANPR suggested the Secretary might be able to prescribe procedures in lieu of a tribal-state compact whenever an Eleventh Amendment bar was raised. Several State Attorneys General provided comments disputing that the Secretary has any legal authority to circumvent IGRA through regulatory power. The Attorneys General also noted that any such rule (allowing the prescription of gaming procedures without a federal court having passed on the state's "bad faith") would provide a powerful incentive for Tribes *not* to negotiate with states, but instead to raise allegations of bad faith and go straight to the Secretary, contrary to the intent of the Congress. As will be seen, this Proposed Rule does nothing to overcome these objections.

The undersigned Attorneys General strongly believe that the Proposed Rule is predicated on a faulty legal understanding that the Secretary has the authority to prescribe class III tribal gaming procedures when a state raises an Eleventh Amendment bar to a "bad faith" lawsuit under IGRA. It is uniformly their view that, absent specific congressional authorization, the Secretary has no legal authority to prescribe class III gaming procedures for an Indian tribe other than as provided for in section 11(d)(7) of IGRA, which provides for a federal court to appoint a mediator only after the court has made a determination that the State has failed to negotiate in good faith. In contrast to the specific authorization mentioned above, Congress only provided for secretarial procedures in IGRA (sec. 11(d)(7)(B)(vii)) when a State was adjudged by a federal court to have failed to negotiate in good faith (i.e., in "bad faith"). The States strongly object to the Secretary of Interior replacing the federal court and determining whether a sovereign State has or has not negotiated in good faith, as allowed to the Secretary in Proposed Rule section 291.8(a)(8). The authority that the Secretary arrogates to himself in the Proposed Rule is fundamentally *judicial* in character, not executive. The Secretary's role is triggered by the State's raising of the Eleventh Amendment bar, and then, as if that were nothing more than a "change in venue," the Secretary is substituted for the court to adjudicate what is essentially a Tribal legal complaint that the State has not negotiated in good faith.

Of particular concern, not only does the Proposed Rule substitute the Secretary of Interior for a federal court, but it allows the Secretary to serve as a mediator *and* final decision-maker between two parties -- the Indian Tribe and the State -- where the Secretary has a trust responsibility and obligation (upon which he relies for his authority to promulgate this Rule) running to one of the two parties, the Indian Tribe. This is a patent and unavoidable conflict of interest sufficient to militate strongly against going forward with this Rule. In addition to the good faith determination, the Rule requires the Secretary to decide what gambling activities are permitted under State law. Once again, this is a judicial decision, and it is uniquely the province of the States to determine what their various laws permit.

In what appears to be a technical drafting error, the Proposed Rule allows the Secretary to adopt a tribal proposal as gaming procedures only when a State has negotiated in *good* faith, not *bad* faith, thereby penalizing the State for bargaining in good faith and disallowing a Tribe's proposal from the secretarial remedy if the State truly bargained in "bad faith." (Proposed Rule sec. 291.(8)(b).) Of course, as noted above, the States object to the Secretary passing on the good *or* bad faith of the State in the exercise of its sovereign discretion in government-to-government negotiations.

Ultimately, Congress intended a "secretarial remedy" to be triggered only when there had been an adjudication that a State failed to negotiate in good faith, and the resulting court ordered and supervised mediation failed to result in an agreement. Even then, the Secretary's "remedy" is essentially ministerial, adopting as procedures the compact selected by a federal court-appointed mediator. The trigger in the Proposed Rule, however, is not the State's bad faith, but the raising of sovereign immunity in federal court. The Proposed Rule then arrogates to the Secretary all the powers of the federal court to adjudicate the State's good faith and to mediate between the parties, powers Congress never vested in the Secretary. While Congress may not have anticipated the decision in *Seminole Tribe*, it did not suggest in IGRA or anywhere else that the Secretary should serve as an adjudicator of Tribal-State disputes and the mediator between them.

B. Legal Impediments in the Proposed Rule

As set forth in the Attorneys General comments of June 28, 1996, the arrogation of power to the Secretary to prescribe gaming procedures in lieu of a tribal-state compact without a court determining the State's bad faith has no legal basis and runs contrary to congressional intent. As we noted then, the Secretary cannot legally "fuzz" the statutory distinction between a tribal-state compact and post-mediator secretarial procedures -- the Congress gave these matters legally distinct and meaningful definitions. Congress intended secretarial procedures in lieu of a compact to occur only when a state has been *adjudged* to have negotiated in "bad faith." Certainly, the raising of Eleventh Amendment sovereign immunity by a State is not itself "bad faith." Indeed, the Constitution permits it, as the Supreme Court has noted. Yet, the Proposed Rule is triggered by the

raising of Eleventh Amendment sovereign immunity *as if it were bad faith*. The Proposed rule effectively circumvents the *Seminole* decision, nullifying the State's constitutionally guaranteed sovereign immunity, by allowing the Secretary to become a substitute federal court that can hear the dispute brought by a Tribe against the State. In allowing this circumvention, the Proposed Rule accomplishes administratively what the Supreme Court ruled Congress could not do legislatively.

The Supreme Court in *Seminole* made it clear that only the Congress could rectify the imbalance. The Secretary cannot re-write the statute to provide for a new form of "secretarial procedures," designed to be triggered without a judicial finding of the State's "bad faith." If that were the law Congress intended, it could have simply provided for the Secretary of Interior to provide for tribal gaming procedures and regulations in all cases as a matter of federal law.

***1. The Proposed Rule's Reliance on the Eleventh Circuit's Decision in* Seminole Tribe.**

The Proposed Rule relies in part on language in Part V of the decision of the Eleventh Circuit Court of Appeals in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1029 (1994), *aff'd on other grounds*, 116 S. Ct. 1114 (1996), where that court said that if a State raises Eleventh Amendment immunity to a suit brought by a Tribe under IGRA in federal court, the Tribe need only go to the Secretary, who may then prescribe procedures under IGRA, 25 U.S.C. 2710(7)(d)(B)(vii). The reliance is flawed. First, section 2710(7)(d)(B)(vii) of IGRA provides no such authority for the Secretary to prescribe procedures. That section provides only that if a State does not consent during the 60 day period described in clause (vi) to a proposed compact submitted to the Secretary by the court-appointed mediator under clause (v), the *mediator* shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian Tribe, procedures: (I) which are consistent with the proposed compact *selected by the mediator* under clause (iv), the provisions of IGRA; and the relevant provisions of the laws of the State. 25 U.S.C. § 2710(d)(7)(B)(vii) *(emphasis added)*. It is the court-appointed *mediator* who approaches the Secretary of the Interior and the Secretary is constrained by the terms of the *compact chosen by the mediator and State law. 25* U.S.C. § 2710(d)(7)(B)(vii). The Secretary's only authority to prescribe regulations is not independent of, but is inextricably tied to, the process set forth in §§ 2710(d)(7)(A)(ii) through 2710(d)(7)(B)(vi).

Additionally, and as previously stated, the statement in Part V of the Eleventh Circuit's *Seminole* opinion is *dicta*, acknowledged as such by the Solicitor General in his brief to the Supreme Court in *Seminole*, and by the Secretary in the Proposed Rule, and addressed by the Ninth Circuit in *Spokane Tribe of Indians v. Washington:*

> The Eleventh Circuit was concerned by the regulatory void that it might leave by invalidating the IGRA's provisions for federal judicial enforcement. Those concerns illustrate the problem caused when state sovereignty is injected into the federal scheme. The Eleventh Circuit reasoned that a void was not necessary because the provisions of the statute authorizing the Secretary of Interior to impose regulations would come into effect once a state asserted immunity from suit. When that occurred the Secretary of the Interior would, in the Eleventh Circuit's view, remain authorized to impose regulations for Class III gaming. *Seminole Tribe*, 11 F.3d at 1029. *In our view, however, such a result would pervert the congressional plan.* This is because the Secretary of the Interior under the statute is to act only as a matter of last resort, and then only after consulting with the court appointed mediator who has become familiar with the positions and interests of both the tribes and the states in court directed negotiations. 25 U.S.C. Sec. 2710(d)(7)(B)(iv)-(vii). *The Eleventh Circuit's solution would turn the Secretary of the Interior into a federal czar, contrary to the congressional aim of state participation.*

Spokane Tribe of Indians v. Washington State, 28 F.3d 991, 997 (C.A.9 (Wash.) 1994)*(emphasis added)*.

The Proposed Rule nonetheless suggests that when the Congress has not "directly spoken to the precise question at issue," courts "must sustain the Secretary's approach so long as it is based on a *reasonable* construction of the statute," citing, *inter alia*, *Auer v. Robbins*, 117 S. Ct. 905, 909 (1997), quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). This observation fails to support the Proposed Rule, and, if anything, suggests the opposite conclusion. While Congress did not speak to the raising of sovereign immunity in federal courts, it did directly speak to the powers and the role of the Secretary of Interior in IGRA, *sharply curtailing* that role he or she can play, even when a State is adjudged to be in bad faith. The Congress was careful not to interject the Secretary anywhere in the adjudicatory process that examines a State's good or bad faith or the resulting mediation process. Even the selection from the "last best offers" was left to the federal court-appointed mediator, and not to the Secretary, who has a trust obligation to the Tribes in all cases. Congress also directly spoke to the limited nature of the Secretary's powers and duties in adopting procedures -- they are essentially ministerial, as noted above in 25 U.S.C. section 2710(d)(7)(B)(vii). If Congress believed the Secretary to be an impartial agency capable of the power of adjudicating the good faith of States, it could have said so; clearly it did not. Further, the assumption of any such power goes beyond the clear intent of Congress in light of the whole statute.

As the Proposed Rule correctly states, Congress intended the participation of the States in the formulation of legal class III tribal gaming activity. However, it suggests that because the raising of sovereign immunity is akin to a State's veto over the Tribe, these secretarial procedures fulfill

other important congressional purposes that would be thwarted by the state's immunity, namely that of allowing Tribes to engage in class III gaming. In that suggestion, it overlooks that the secretarial procedures go far beyond fulfilling certain congressional purposes, and, in fact, ignore IGRA's design to include the States. By doing so, the Secretary would be choosing which competing values will or will not be sacrificed to the achievement of a particular objective. The Supreme Court in *Rodriguez v. U.S.*, 480 U.S. 522, 526 (1987), recognized this as a uniquely legislative choice and Congress has recently spoken on this issue.

While post-enactment statements of legislative intent are not conclusive in court, it is especially telling that after the ANPR was issued by the Secretary, Congress moved to halt the Secretary from acting to circumvent the States by regulatory means. In Senate Amendments to the FY 98 Interior Appropriations bill, Congress passed (and the President signed into law) restrictions on the Secretary from issuing the regulations he proposes here. *See Sen. Amends. 2133, H.R. 5033* (Nov. 14, 1997). Similar proposals are before the Congress for the succeeding fiscal year. The passage of the FY 98 restriction demonstrates the clear resolve of the Congress not to allow what the Secretary proposes and strongly suggests that it was not the view of the Congress that the Secretary should pass on a State's good faith and thereafter to prescribe class III gaming procedures.

It should be clearly understood that the Proposed Rule has the effect of eliminating tribal-state negotiations as envisioned by the Congress. A Tribe would be able to request a compact with a demand it knows the State cannot accede to, thereby guaranteeing that there will be no compact within 180 days, and providing the "predicate" for a "bad faith" lawsuit. This is possible because IGRA does not require that the *Tribe* negotiate in good faith. The Proposed Rule allows secretarial action to be triggered upon the assertion of sovereign immunity, not bad faith, as Congress intended. At the end of 180 days, with no progress toward a compact, the Tribe may file suit. Moreover, a Tribe may sue on any stalemate brought about by its own unreasonable demands upon a State, such as insisting upon gaming activities which are in violation of that State's laws, or on any minor disagreement. Yet the Proposed Rule allows secretarial action to be triggered upon the assertion of sovereign immunity, not bad faith, as Congress intended. If the State raises its Eleventh Amendment immunity, the Tribe may petition directly to the Secretary of the Interior, undoubtedly for the gaming activities it knew the State could not agree to, including, in most cases, gambling devices and activities criminally prohibited in the state. While the Proposed Rule allows State comment and counter-proposals, and purports to follow the "game-specific" decision in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1995) (or more accurately, the Solicitor General's "class of gaming" brief in that case on petition for certiorari), State participation is rendered meaningless. Congress intended the Tribe and the State to work out the differences and agree to a tribal-state compact. The Proposed Rule allows a Tribe to avoid tribal-state negotiations, and transform the negotiations into one between the Tribe and the federal government, entirely contrary to the intent of the Congress in IGRA.

In their June 28, 1996, comments, the Attorneys General provided detailed background on the congressional debates and subsequent enactment of S. 555, the bill that became IGRA, as focused on the Congress' effort to accommodate Tribal *and* State interests. In the wake of *Seminole*, it should be left to the Congress to reevaluate the balance of interests and purposes of the Act in fashioning a new remedy, if one is needed. The courts have stated that they are not free to fashion remedies that Congress has specifically chosen not to extend, and the same should apply to the Secretary. *Landgraf v. U.S.I. Film Products*, _ U.S. _, n. 36, 62 U.S.L.W. 4255, 4267 n.36 (April 26, 1994); *see, Northwest Airlines, Inc. V. Transportation Workers*, 451 U.S. 77, 97 (1981).

2. The congressional delegation of regulatory power does not include power to prescribe class III gaming.

The Proposed Rule suggests that it is within the delegated powers to the Secretary that he or she may prescribe procedures in lieu of a compact whenever a State relies on its sovereign immunity from suit in federal court. Yet, it is precisely and *only* when a State has been adjudged to be in bad faith that Congress authorized the Secretary to take certain, limited, virtually ministerial actions. Congress granted the Secretary only limited regulatory discretion in § 2710(d)(7)(B)(vii) -- the power to prescribe regulations that conform with a mediator's choice of compact and with state and federal law. This subsection does not grant the Secretary the legislative discretion to decide what class III gambling to permit or not permit. *See American Federation of Gov. Employees v. Pierce*, 697 F. 2d 303, 306 (D.C. Cir. 1982). Nor does it grant him or her authority to adjudicate on a State's good faith or bad faith while sitting as a sovereign entity in negotiations with a Tribe. While a broad delegation of regulatory authority might be upheld in certain cases, see *Mistretta v. U.S.*, 488 U.S. 361, 373-74 (1989), IGRA, by contrast, grants only a limited regulatory discretion. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 415-30 (1935).

Clearly, the Secretary's authority in IGRA is predicated on the *completion* of the entire remedial scheme starting with the filing of suit against the State and a finding of lack of good faith on the part of the State. Without statutory authority, the Secretary cannot act.

We noted in our June 28, 1996, comments that in *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), the Secretary prescribed regulations allowing the use of fish traps by the Metlakatla Community in contravention of Alaskan law. The Secretary argued that the White Act and the Alaska Statehood Act gave him the requisite authority; the United States Supreme Court, however, held that there was no such authority to be found in those acts. *See also Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). We concluded that since there is no authority to be found in IGRA, the Secretary is not free to engage in the proposed rulemaking as advertised in the ANPR. The Proposed Rule takes issue with our view by suggesting that (a) because Tribes have a federal common law right to engage in gaming (recognized in *California v. Cabazon*, 480 U.S. 202 (1987)) and (b) because the Secretary has authority to adopt regulations to carry into effect those rights (in

25 U.S.C. §§ 2 and 9), then the Secretary's Proposed Rule is justified. The undersigned Attorneys General disagree. First, *California v. Cabazon*, 480 U.S. 202 (1987), did not recognize an unfettered federal common law right of Tribes to engage in gambling anywhere for any purpose, free of state regulation or law. Indeed, the application of a state "regulatory" law is not barred automatically, but is to be measured against the interest-balancing test applied in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). The *Cabazon* Court quoted *Mescalero* as follows:

> [S]tate jurisdiction is pre-empted [by the operation of federal law] if it interferes or is incompatible with federal and tribal interests reflected in federal law, *unless the state interests at stake are sufficient to justify the assertion of state authority.*

480 U.S. at 216, quoting from *Mescalero*, 462 U.S. at 333-34 *(emphasis added)*. While the *Cabazon* Court found significant interests for the tribe in that case, namely, the ability to operate high-stakes bingo games free of state regulation, it left open that states might demonstrate sufficient state interests to justify the assertion of state authority in other cases.

Secondly, the Proposed Rule's analysis conveniently overlooks that Congress stepped in to the field and provided a comprehensive scheme governing every aspect of Indian gaming. Absolutely *no* tribal gaming may be conducted lawfully without being in compliance with IGRA. In S. 555, Congress provided for a balance of interests in the tribal-state negotiation, and it rejected federal-tribal and federal-only solutions. Whatever "federal common law rights" Tribes may have had in gaming, they have been severely circumscribed by federal statutory law, which the Secretary must respect.

Finally, the suggestion that sections 2 and 9 of Title 25 gives the Secretary the ability to "carry into effect" federal common law rights of the Tribes must be viewed in the context of the nondelegation doctrine. As clearly stated in *Trouby v. United States*,

> Congress may not constitutionally delegate its legislative power to another branch of government.

500 U.S. 160, 165 (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, *Yakus v. United States*, 321 U.S. 414, 426 (1994). And in all cases, courts will rein in a delegated-lawmaking scheme to ensure the exercise of power remains within statutory bounds. *See Trouby*, 500 U.S. at 170. The doctrine

> . . . guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion.

Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685-86 (1980). We believe that 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 re-fashion other congressional statutes, such as IGRA, those sections are beyond his delegated authority or are simply overbroad. If they can be used to justify the regulatory "re-writing" 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. As such, reliance upon sections 2 and 9 is ill-founded and circular. Once the Secretary assumes broad powers of delegation under sections 2 and 9 to "effectuate" certain tribal rights, then he can negate or re-arrange statutes that grant him limited delegated powers with respect to the Tribes, thereby expanding his powers far beyond the intentions of the Congress. Additionally, it allows him to engage in purely legislative functions, in violation of the nondelegation doctrine. 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 statute's primary objective must be the law. *Rodriguez v. United States*, 480 U.S. 522, 526 (1987).

In sum, for the reasons stated here and in the June 28, 1996, letter, the Department's Proposed Rule has no proper legal justification; operates beyond the Secretary's statutorily delegated powers; and arrogates to the Secretary legislative and judicial functions that Congress did not intend to delegate, nor, perhaps, cannot delegate in any case. The Supreme Court, in commenting on the use of the *Ex parte Young* remedy in the *Seminole* case, held,

> Nor are we free to rewrite the statutory scheme in order to approximate what we think Congress would have wanted had it known that § 2710(d)(7) was beyond its authority. If that effort is to be made, it should be made by Congress, and not by the federal courts.

Seminole, 116 S.Ct. at 1133. The same is true of the Proposed Rule. If the Supreme Court did not believe it or other courts could re-fashion the statute, and that its "fix" is for the legislative branch, then the reasoning applies even more so to the Secretary. As we noted in the response to the ANPR, if the Supreme Court's reinvigoration of the States' Eleventh Amendment immunity upsets the balance constructed by Congress in IGRA, then it is up to Congress to fix it.

C. The Proposed Rule Improperly Allows the Secretary to Adjudicate the Good Faith of States and Fails to Protect the Tribal-State Negotiation Process

The undersigned Attorneys General strongly believe that the Proposed Rule, while providing for certain "protections" for the States, such as the ability to make comments and counter-proposals to tribal proposals, still fails to respect the role of States and constitutes bad policy. As set forth in

the June 28 letter, Congress envisioned State involvement in class III gambling regulation, not Tribal self-regulation or federal regulation. The proposed rule, by allowing impasse to be the trigger for action, provides all the wrong incentives for filing bad faith lawsuits and disincentives for the Tribes to fully engage in the tribal-state process.

Second-guessing a State's Good Faith When the Department Has a One-Sided Obligation

Of the most concern to States, the Proposed Rule grants a *judicial* power to the Secretary to pass on the good faith of States in the tribal-state negotiations. *See* Proposed Rule, §§ 291.8(a)(8) and (b). The States view such an action by a federal agency head as tantamount to the commandeering and second-guessing of the sovereign discretion of a State government, which is unwarranted, unwise and provocative. Where Congress mandates the federal courts to pass on the actions of a State, and where it is constitutionally permissible to do so, States have no choice but to appear and defend their actions, notwithstanding that they are the sovereign entities that make up the United States. In that situation, the States can be assured of being in a neutral forum; appearing before the Secretary for a determination of good/bad faith is decidedly not a neutral forum given the overriding trust responsibility of the Secretary to the Tribes. Congress has not provided to the Secretary of Interior the power to act as a federal court to pass on the facts and law as they relate to the conduct of a State during tribal-state negotiations.

Needless to say, questions abound about how the Secretary can even perform the task. How is the Secretary to adjudicate on disputes between sovereign Tribes and sovereign States? Congress did not provide for *tri-partite* federal-state-tribal negotiations. The federal government is not a party, cannot know the intricacies of the negotiation between the State and Tribe, and cannot substitute its judgment for one party or the other. Significantly, how can the Secretary properly adjudicate or mediate between two parties when he has a trust responsibility to further the interests of one party – the Indian tribe? The very sections upon which the Department relies, 25 U.S.C. §§ 2 and 9, purportedly to provide the authority for the Department to adopt the Proposed Rule, are also the sections which establish the Secretary *will always have a conflict of interest in adjudicating or mediating* disputes under IGRA. Congress undoubtedly had this in mind when it limited the Secretary's discretion to one of prescribing regulations that conformed with a compact selected by another, *disinterested* party, and only following the finding that the State was in "bad faith," again a finding made by another, *disinterested* party, charged with judicial impartiality. The States find unacceptable the suggestion in the Proposed Rules that the Secretary of Interior, charged with protecting Indian Tribes, can impartially adjudicate the conduct of States and then mediate between States and his charges, the Indian Tribes.

As noted in the Introduction, the Proposed Rule contains what appears to be a technical drafting error. Under Proposed Rule section 291.8(a), the Secretary shall disapprove a tribal gaming proposal when it fails to meet the several conditions, including subdivision (a)(8), which reads:

"Whether the State has negotiated in good faith." Read in context with the other conditions of section 291.8(a), it appears then that the Secretary may then not approve a tribal gaming proposal except when a State has negotiated in *good* faith, not *bad* faith, as originally envisioned by the Congress in 25 U.S.C. § 2710(d)(7). More fundamentally, the good faith/bad faith determination is only one of several factors identified by the rules that the Secretary must consider if the State fails to provide an alternative proposal. Rather than being an absolute condition precedent, the finding on good faith appears to be part of a balancing test by the Secretary in deciding whether to proscribe procedures proposed by the Tribes. This is a serious departure from the statutory scheme and the intent of Congress. In addition, the rule does not instruct the Secretary to consider the comments of the Governor or Attorney General of the affected state unless those comments contain an alternative proposal, in which situation § 291.9 would govern the Secretary's actions.

It is true that the Proposed Rule does allow for mediation between the State and the Tribe when the Secretary has received tribal objections to a state counter-proposal. Again, however, it is the Secretary who appoints the mediator and who makes the final decision, based in part upon his trust responsibility to the Tribe. Proposed Rule, §§ 291.12 and 13. The States are at a general disadvantage throughout this process. The underlying problem with IGRA from the State's perspective was that it placed a good faith bargaining obligation only upon the States, and not the Tribes. This led, in no small part, to the flurry of litigation from 1989 to the present, and the raising of the Eleventh Amendment by States sued in federal court for bad faith negotiations. The upholding of the States' sovereign immunity has served partially to rectify an imbalance that States suffered under IGRA, but it is up to the Congress to re-balance the interests of the Tribes and the States in IGRA. The Secretary cannot impartially and properly fix it.

D. Circumvention of the Seminole *Decision and Disincentive for Tribes to Negotiate*

The States believe that the Proposed Rule serves impermissibly to circumvent the *Seminole* decision. While the decision may not sit well with federal officials, the immunity goes precisely to provide an important check and balance in our federal system of government. The *Seminole* decision was less about Indian tribes and their relationship with the States and more about the Federal-State relationship. The integrity of the States as sovereign entities that joined to make the Union, granting only limited and enumerated powers to the Union, is carefully crafted in the Constitution. Significantly, *Seminole* recognized that integrity and denied the Federal Congress a power to subject States to suit in its forums without their consent. The Proposed Rule simply sidesteps that recognition and treats States as if they were nothing more than municipal governments or political subdivisions to be consulted as needed.

Additionally, as IGRA was constructed by the Congress, a Tribe that brings a federal court action against a State runs the risk of protracted and expensive litigation before a federal court, which is expected to be neutral and impartial in reviewing the good faith of the State. IGRA

provides guidance on how a State's good faith is to be evaluated. 25 U.S.C. 2710(d)(7)(B)(iii(I) and (II). The Tribe runs the risk of losing its claim and having the matter returned to negotiations. This process serves as a practical disincentive for Tribes to sue on unsettled matters and instead to negotiate. The Secretary's proposal removes this subtle incentive to negotiate and clearly removes the risks of litigation. The Secretary is a friendly forum, where tribal arguments as to "categories" of gaming or "infringements of Tribal sovereignty" will be heard by an "adjudicator" who has a trust responsibility for the tribe and who looks out for tribal interests as a general matter. The Proposed Rule, then, serves as a disincentive for a Tribe to negotiate and an incentive to force the State to raise sovereign immunity in court and go instead to the Secretary.

E. Conclusion

Accordingly, the undersigned Attorneys General urge the Department to abandon the Proposed Rule and engage the States in a meaningful discussion about legislative alternatives which will properly and adequately resolve class III Indian gaming disputes.

Sincerely,

Robert A. Butterworth
Attorney General of Florida

Bill Pryor
Attorney General of Alabama

Grant Woods
Attorney General of Arizona

Daniel E. Lungren
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Gale A. Norton
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Attorney General of Wisconsin

William U. Hill
Attorney General of Wyoming

United States Department of the Interior

ASSISTANT SECRETARY – INDIAN AFFAIRS
Washington, DC 20240

TAKE PRIDE IN AMERICA

APR 13 2006

Honorable Troy King
Office of the Attorney General
Alabama State House
11 South Union Street, Third Floor
Montgomery, Alabama 36130

Dear Mr. King:

On April 12, 1999, regulations governing the submission of Class III gaming procedures for Indian tribes under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, were published in the Federal Register and became effective on May 12, 1999. On March 7, 2006, the Poarch Band of Creek Indians of Alabama (Tribe) submitted Class III gaming procedures pursuant to the new regulations in 25 CFR Part 291 (copy enclosed). We have determined that this proposal is complete and that the Tribe meets the eligibility requirements in 25 CFR § 291.3. Enclosed please find a copy of the Tribe's proposal.

In accordance with 25 CFR § 291.7(b), we invite you to comment on (1) whether the state of Alabama (State) is in agreement with the Tribe's proposal; (2) whether the proposal is consistent with relevant provisions of the laws of the State; (3) whether contemplated gaming activities are permitted in the State for any purposes, by any person, organization, or entity. Pursuant to 25 CFR § 291.7(c), we also invite you to submit an alternative proposal to the Tribe's proposed Class III gaming procedures.

Please submit your comments or alternative proposal within 60 days of receipt of this letter to the Office of Indian Gaming Management, 1849 C Street, MS-3657-MIB, Washington, D.C. 20240.

Sincerely,

George T. Skibine
Acting Deputy Assistant Secretary
for Policy and Economic Development

Enclosure

Similar Letter sent to : Honorable Bob Riley
Governor, State of Alabama

EXHIBIT
D

POARCH BAND OF CREEK INDIANS

MEMORANDUM ON THE SCOPE OF GAMING PERMITTED BY THE STATE OF ALABAMA

MARCH 2006

I. INTRODUCTION

The Indian Gaming Regulatory Act ("IGRA") establishes that Indian tribes may operate class III games that a state permits "for any purpose by any person, organization, or entity" provided that such gaming is authorized under a Tribal-State Compact ("Compact").[1] States that permit such gaming are expected to negotiate a Compact. Despite the fact that the State of Alabama permits a broad range of games that, if offered by the Poarch Band of Creek Indians ("Tribe") would be class III, the State has thus far refused to negotiate a Compact with the Tribe. The State's refusal to negotiate has prevented the Tribe from operating games that others within the State are operating lawfully.

A wide range of class III activities are being conducted in the State of Alabama. For example, pari-mutuel wagering on both live[2] and simulcast[3] horse and greyhound races is specifically authorized and regulated extensively.[4] All games, including card and dice games, are permitted in the context of a "social game in a private place," without regard to the specific game involved or the size of the wager.[5] "Games of chance" are specifically authorized – also without limitation – in connection with street fairs or carnivals,[6] and casino games, such as blackjack and roulette, are played widely throughout the State in connection with casino night events.[7] In 2004, the Alabama Constitution was amended to authorize electronic bingo games that, if operated in Indian country, would be class III games.[8] And most recently, an electronic sweepstakes promotion was found lawful under Alabama law.[9] These activities, both permitted and regulated, exemplify a state policy that clearly permits gaming. Irrespective of this legal climate, the State has remained unwilling to negotiate a Compact, making it increasingly difficult for the Tribe to compete or even keep pace with the rapid expansion of gaming in the State.

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[1] 25 U.S.C. § 2710(d)(1)(B) (2001).
[2] Ala. Code § 11-65-28.
[3] *Id.* § 11-65-32.
[4] *Id.* §§ 11-65-1 to -47.
[5] *See id.* § 13A-12-21.
[6] *Id.* § 40-12-163.
[7] *See* Letter from William R. Perry, Esquire, Sonosky, Chambers, Sachse & Endreson, to Honorable Bruce Babbitt, Secretary of the Interior, and attached exhibits (Apr. 22, 1994) (requesting assistance in resolving dispute between tribe and state over class III gaming). *See also* advertisements and news accounts of statewide casino nights. A copy of these items are attached hereto as Exhibit 1.
[8] Ala. Const. of 1901, amend. 743, 744 (2004).
[9] *See Jefferson County Racing Assoc., Inc v. Hale*, Civil Action No. CV 05-7684 JSV (Jefferson County Circuit Court Jan. 31, 2006). A copy of this opinion, which we understand is being appealed, is attached hereto as Exhibit 2.

Nonetheless, it is not the Tribe's intent to request, at this time, Secretarial intervention with regard to the full gamut of class III gaming permitted in the State.[10] Instead, we respectfully request immediate relief with regard to three particular types of activities: pari-mutuel wagering, electronic games (including electronic sweepstakes promotions and certain electronic bingo games), and non-banking card games. Our rationale in making such a request is discussed below.

II. THE INDIAN GAMING REGULATORY ACT

Under IGRA, class III gaming is lawful on Indian lands only when certain requirements are satisfied. Among these is the limitation that a tribe may operate class III games only if those games are "located in a State that permits such gaming for any purpose by any person, organization, or entity."[11] This requirement has led to perhaps the greatest disagreement between tribes and states since the passage of IGRA as the two seek to determine the appropriate scope of gaming over which a state must negotiate.

The litigation resulting from these disagreements has led federal courts to develop two separate tests for determining the scope of gaming subject to Compact negotiation. These two approaches, which stem from differing interpretations of IGRA, go by various names. Most recently, the Tenth Circuit Court of Appeals labeled them the "Wisconsin," or "categorical," approach, and the "Florida," or "game-specific," approach.[12]

Under the Wisconsin approach, if the state permits *any* form of class III gaming, the tribe has a right to negotiate for *all* forms of class III gaming.[13] The rationale behind this approach is that by picking and choosing which class III games to prohibit, the state is *regulating* class III gaming rather than *prohibiting* it. Conversely, under the Florida approach, the state is not required to negotiate over prohibited class III games just because some class III gaming is authorized. "If the state allows a particular game for any purpose, it must negotiate with the tribe over that specific game."[14]

On a related note, in 1999, the Department of the Interior adopted the position expressed in the United States' 1997 *amicus curiae* brief in *Rumsey Indian Rancheria of Wintun Indian v Wilson*.[15] The Department maintains that if state law completely prohibits a class III game such that it is prohibited "to all persons for all purposes," a state is not required to negotiate for that

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[10] The Tribe hereby reserves the right to revisit these other forms of class III gaming at a later date.
[11] 25 U.S.C. §§ 2710(d)(1)(B) (2001).
[12] *See Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1311 (10th Cir. 2004). At least one circuit follows the "Wisconsin" approach. *See Mashantucket Pequot Tribe v. Conn.*, 913 F.2d 1024, 1031-32 (2d Cir. 1990). At least two circuits follow the "Florida" approach. *See Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257-58 (9th Cir. 1994); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 278-79 (8th Cir. 1993).
[13] *Id.*
[14] *Id.*
[15] *See* 64 Fed. Reg. 17,543 (Apr. 12, 1999). The brief was filed *Amicus Curiae* on the petition for *certiorari* in *Sycuan Band of Mission Indians v. Wilson, cert. denied*, 521 U.S. 1118, 117 S. Ct. 2508 (1997) (No. 96-1059) (hereafter "*Sycuan* brief").

form of gaming.[16] If, however, a form of class III gaming is permitted "'for any purpose by any person, organization or entity,' a Tribe's operation of that form of gaming does not violate the State's public policy in the relevant (statutory) sense, and the State must negotiate over that form of gaming."[17]

The Tribe maintains that regardless of which of the three approaches is applied, the scope of games for which the State of Alabama is required, but has failed, to negotiate is broad.

III. GAMING IN ALABAMA

A. Gaming in Private Places

The Alabama Code defines "gambling" broadly, to include any activity where a person "stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome."[18]

A key component in determining the scope of gaming under Alabama law is the provision within the Alabama Code that allows a player to escape prosecution for engaging in any form of gambling as long as the activity occurs in a private place. This provision states:

> "(a) A person commits the crime of simple gambling if he knowingly advances or profits from unlawful gambling activity as a player.
>
> "(b) It is a defense to a prosecution under this section that a person charged with being a player was engaged in a social game in a private place."[19]

Simply stated, Alabama law provides that "[t]hose who 'advance' a private social game have a defense" to *any* prosecution for simple gambling.[20]

As the Commentary to sections 13A-12-21 and 13A-12-22 explains, because of the broad manner in which the Alabama Code defines "gambling," the need for reference to any particular game is eliminated.[21] When a person "stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome,"[22] he or she has committed the activity intended to fall within the broad

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[16] *Sycuan* brief at 8, 12; 63 Fed. Reg. 3289, 3292-3293 (Jan. 22, 1998).
[17] *Sycuan* brief at 12 (internal citations omitted).
[18] Ala. Code § 13A-12-20(4).
[19] *Id.* at § 13A-12-21.
[20] *Id.* § 13A-12-21 and § 13A-12-22 Commentary, *Relationship to Existing Law*. Copy attached hereto as Exhibit 3.
[21] *Id.* at § 13A-12-21 and § 13A-12-22 Commentary, *Relationship to Existing Law*.
[22] *Id.* at § 13A-12-20(4).

prohibition against "gambling." It follows that the exception must be read in an equally broad manner. Where an activity that fits within the definition of "gambling" is conducted in private, a defense to prosecution applies. Consequently, a person in the State of Alabama may engage in *any form of gambling* without fear of prosecution as long as the conduct occurs in a private place.

The State's courts have repeatedly noted that gambling is lawful in private places.[23] For example, the Court of Appeals stated that "[t]he act of card playing is not a vice or crime in itself[,]" and that the Alabama statutes do not "prohibit gaming in a private home."[24] Alabama has always allowed one to "spend a social hour at cards, or dice, with [one's] friends."[25] Thus, even a city's attempts to prohibit private gaming were struck down as inconsistent with the state's authorization of such gaming.[26] The court reiterated that "the act of card playing itself is not denounced as a vice or crime in itself."[27] The statute was clear: "when the gaming is in a private home . . . then the ordinance cannot have effect upon the parties."[28]

For purposes of IGRA, the distinction between public and private gambling is immaterial. As the Tenth Circuit held recently, IGRA simply requires that the activity be authorized for *any* purpose.[29] Whether that purpose is limited to a social or non-profit one is without consequence.[30] Because a player in the State of Alabama may – without fear of prosecution – engage in any form of gambling as "a social game in a private place," an exceptionally broad scope of gambling is authorized "for any purpose by any person, organization, or entity."[31] The scope of gaming for which the Tribe is entitled to negotiate is, therefore, equally broad. Regardless, the Tribe's current request focuses on only three particular types of activities, each of which is discussed below.

B. Pari-Mutuel Wagering on Horse and Dog Racing

The Alabama Constitution prohibits the state legislature from authorizing "lotteries or gift enterprises" and instructs that the legislature "shall pass laws to prohibit the sale in this state

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[23] *See, e.g., Clarke v. State*, 12 Ala. 492 (1847) (holding that playing cards in a physician's office at night did not violate the statute); *McCauley v. State*, 26 Ala. 135 (1855) (holding that playing cards in an attorney's office did not violate the statute because it was not in a "public place"); *Phillips v. State*, 51 Ala. 20 (1874) (holding that a private bedroom above a liquor store was not a "public place" without proof of a business connection between the two, and thus, the playing of cards therein was lawful);); *Id.* ("The general assembly of this State has not yet seen fit to denounce card-playing as a public offense, unless it is engaged in in certain named places."); *Brogden v. State*, 44 So. 403 (Ala. 1907) (holding that a dice game played in a private storage room did not violate the statute); *City of Birmingham v. Richard*, 203 So. 2d 692 (Ala. App. 1967) (holding that gambling that took place in a private home could not be prohibited by the City because of the state's authorization of private gambling).

[24] *Ingram v. State*, 226 So. 2d 169, 171 (Ala. App. 1969).

[25] *Clarke v. State*, 12 Ala. 492, 493 (1847).

[26] *See City of Birmingham v. Richard*, 203 So. 2d 692 (Ala. App. 1967).

[27] *Id.* at 694.

[28] *Id.*

[29] *See, e.g., Northern Arapaho v. Wyoming*, 389 F.3d 1308 (10th Cir. 2004).

[30] *See, e.g., Northern Arapaho v. Wyoming*, 389 F.3d 1308 (10th Cir. 2004).

[31] *See* 25 U.S.C. § 2710(d)(1)(B) (2001).

of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery."[32] While seemingly broad, this provision – originally adopted in 1875 – has, over time, been read to permit games that, if conducted in Indian country, would be categorized as class III gaming.

In Alabama, case law has defined a "lottery" as a game comprised of three elements: prize, chance, and consideration.[33] All three must be present for the constitutional prohibition to apply. However, the Constitution does not prevent the legislature from approving games or activities that do not constitute lotteries or schemes in the nature of a lottery. "The Constitution does not restrict the legislature in its authority to authorize gambling. It merely says that the legislature shall not authorize a lottery."[34] Thus, the legislature has full power to authorize games and activities that, while gambling, fall outside the definition of a lottery.

For example, in a set of opinions from the 1970's, the Alabama Supreme Court Justices opined that horse and greyhound racing are not lotteries. The justices reasoned as follows:

> "[T]he winner of a dog race is not determined by chance. A significant degree of skill is involved in picking the winning dog, such factors as weight, paternity, trainer, position, past record, wet or dry track, etc. all must be considered by successful bettor. The fact that the parimutuel system of betting is used is not determinative of the winner, but the amount of the purse."[35]

Because horse and dog racing were determined to be dominated by skill, the element of chance was lacking, and the activity, therefore, did not satisfy the definition of a "lottery."[36] Consequently, the legislature's statutory authorization of pari-mutuel wagering on such activities was deemed sufficient, and four separate racetracks are now operating in the State of Alabama.[37] Pari-mutuel wagering on both live[38] and simulcast[39] horse and greyhound races is specifically authorized and regulated extensively within the State.[40]

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[32] Ala. Const. of 1901, art. IV, § 65.
[33] *Ex Parte Ted's Game Enters.*, 893 So. 2d 376, 378 (Ala. 2004). Note that the Alabama Code defines "lottery" more narrowly. *See* Ala. Code § 13A-12-20(6).
[34] *Opinion of the Justices No. 205*, 251 So. 2d 751, 754 (Ala. 1971); *see also Opinion of the Justices No. 373*, 795 So. 2d 630, 641 (Ala. 2001) ("As this Court has repeatedly made clear, § 65 does not prohibit the Legislature from authorizing gambling.") (citations omitted).
[35] *Opinion of the Justices No. 205*, 251 So. 2d 751, 753 (Ala. 1971); *see also Opinion of the Justices No. 260*, 373 So. 2d 278 (Ala. 1979) (similarly opining that §65 does not prohibit the Legislature from authorizing horse racing with a pari-mutuel system of wagering).
[36] Alabama has adopted the so-called "American Rule" for defining a lottery. This rule differs from the "English Rule" where "only a scheme that exhibits or involves 'pure chance' is a lottery." *Opinion of the Justices No. 373*, 795 So. 2d 630, 635 (Ala. 2001).
[37] The VictoryLand Greyhound Track is located in Shorter, Alabama; the Greenetrack Greyhound Racing facility is located in Greene County; the Birmingham Race Course is located in Birmingham, Alabama; and the Mobile Greyhound Park is located in Theodore, Alabama.
[38] Ala. Code § 11-65-28.
[39] *Id.* § 11-65-32.
[40] *Id.* §§ 11-65-1 to -47.

C. Electronic Sweepstakes Games

Other gambling activities in the State have also been found to fall outside the definition of a lottery, including a number of sweepstakes promotions.[41] In 1988, Pepsi's "Instant Cash" promotion, which allowed customers to collect caps with different letters necessary to spell "Pepsi Instant Cash," was determined to fall outside the definition of "lottery." During this campaign, Pepsi heavily advertised that no purchase was necessary in order to play, and distributed 25,000 game cards to participating stores, which were given out free upon request. Because participants were not required to purchase cards in order to play, consideration was found to be lacking, and thus one of the three elements of a "lottery" missing.[42]

Late last year, the Birmingham Race Course, located in Birmingham, Alabama, began operating its own sweepstakes promotion utilizing electronic machines. This promotion was recently found lawful under Alabama law.[43] The court's ruling contained a lengthy description of the electronic sweepstakes promotion.[44] In short, after opening an account and receiving an account access card called a "Qcard," a player purchases internet time from a point of sale terminal. The purchase of internet time "triggers the system to give the customer promotional Sweepstakes entries. For each $1.00 spent the patron receives four minutes of Internet time and is given 100 MegaSweeps entries, each of which represents a separate chance to win a cash prize. ... There is no separate charge for the Sweepstakes entries."[45] The player may then determine whether his or her Sweepstakes entries are winners or losers in several ways, the most popular by far being use of one of the facility's electronic "Readers." When a player swipes his or her Qcard, the Reader displays the results of the player's sweepstakes entries. When all entries have been read, the player's Qcard is updated and any winnings are paid in cash.

The court's determination that this electronic sweepstakes promotion is lawful under Alabama law was based on two key findings. First, the court found that the promotion lacked consideration.[46] While consideration was paid in exchange for internet time, none was paid for the sweepstakes entries. Second, the court found that "neither the Sweepstakes nor the individual components thereof fit the current definition of illegal 'gambling' or 'gambling devices'" found in Alabama law.[47] The court determined that "the outcomes of the Sweepstakes entries are predetermined before they are given to the purchasers of Internet time. After the

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[41] *See Pepsi Cola Bottling Co. v. Coca-Cola Bottling Co.*, 534 So. 2d 295, 296 (Ala. 1988).
[42] *Id.* at 297. In analyzing this sweepstakes, the court compared it to an earlier promotion where free bottle tops could be requested by mail. In the litigation over the earlier promotion, the trial court found that only 60 people had actually requested free entries through the mail and thus declared the free participation option to be a sham.
[43] *See Jefferson County Racing Assoc., Inc. v. Hale*, Civil Action No. CV 05-7684 JSV (Jefferson County Circuit Court Jan. 31, 2006). While operation of the sweepstakes promotion was temporarily halted during litigation, the operation reopened on February 16, 2006, with 1,320 video card machines. William C. Singleton III, *Sweepstakes to Reopen Today McGregor Says Machines Tested, Ready to Go*, The Birmingham News, Feb. 16, 2006, at 1B.
[44] *See Jefferson County Racing Assoc., Inc. v. Hale*, Civil Action No. CV 05-7684 JSV (Jefferson County Circuit Court Jan. 31, 2006) at 4-6.
[45] *Id.* at 5.
[46] *Id.* at 13.
[47] *Id.*

purchase, there is no contest of chance or future contingent event impacting whether the customer wins or loses."[48] The Readers are merely displaying these predetermined outcomes, and thus, are "dumb terminals." Lacking both consideration and chance, the electronic sweepstakes promotion was found to fall within "a loophole in the patchwork of Alabama's anti-gambling laws."[49]

D. Electronic Bingo

While the Legislature is inherently without power to authorize lotteries and schemes in the nature of a lottery, it can be granted the authority to do so by constitutional amendment. Such action has enabled the Alabama Legislature to authorize the game of bingo[50] nearly 20 times since 1980.[51] Most recently, the operation of bingo games was legalized in Greene and Macon Counties by Constitutional Amendments 743 and 744, respectively.[52]

Macon County, which is a mere 30 miles from the Tribe's Wetumpka facility, is home to the Victoryland Racetrack. In accordance with the authorization of Constitutional Amendment 744, Victoryland Racetrack now operates bingo games on approximately 3,000 electronic player stations – bingo games that are currently forbidden to the Tribe because they possess characteristics that, if operated on Indian lands, would make them a class III game.

In general terms, bingo is a class II game when played in Indian country. For a game to be deemed "bingo," however, it must satisfy IGRA's definition of class II gaming.[53] If the game fails to satisfy this definition, it cannot remain within the category of class II gaming, and thus, by default, is deemed class III.

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[48] *Id.*

[49] *Id.* at 14.

[50] Alabama courts have determined bingo to be a game dominated by chance rather than skill, and consequently, a "lottery." *See, e.g., City of Piedmont v. Evans*, 642 So. 2d 435 (Ala. 1994).

[51] *See* Amendments 386 (Jefferson County), 387 (Madison County), 413 (Montgomery County), 440 (Mobile County), 506 (Etowah County), 508 (Calhoun County), 542 (St. Clair County), 549 (all areas outside of the corporate limits of the City of Jasper in Walker County), 550 (corporate limits of the City of Jasper in Walker County), 565 (Covington County), 569 (Houston County), 599 (the Cities of Hartselle and Falkville and that area of the City of Decatur located within the boundaries of Morgan County), 612 (Russell County), 674 (The Town of White Hall in Lowndess County), 692 (Limestone County), 732 (legalizing "media bingo" in the Town of White Hall in Lowdness County), 743 (Greene County), 744 (Macon County).

[52] Copies of these Amendments, as well as the Second Amended and Restated Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County, Alabama, are attached hereto as Exhibit 4.

[53] Class II gaming is defined in relevant part to include: "(A)(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) – (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations, (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo[.]" 25 U.S.C. § 2703(7)(A) (2001).

While the responsibility of determining whether an activity is lawful in the State of Alabama falls to those within the State, in Indian country, this responsibility falls to the National Indian Gaming Commission ("NIGC"). Because the laws under which the State and the NIGC review the legality of certain activities differ, the outcome of their analyses may also differ. That is indeed the case here and, as a result, while the bingo games authorized for use in Macon County are being operating lawfully under State law, they contain features that, the Tribe contends, would, in the eyes of the NIGC, cause the games to fall outside the definition of class II gaming if operated on Indian lands.[54]

The most obvious of these features is "auto-daub." While nothing in IGRA or judicial interpretations of IGRA prevents a game of bingo from employing a feature that assists players of an electronic bingo game by automatically covering numbers on their card(s), the current NIGC has stated that games utilizing such a feature – a feature the NIGC terms "auto-daub" – are not "bingo."[55] Because these bingo games are authorized and being played lawfully within the State, the Tribe has a clear right to operate these same games within its gaming facilities. Because, as the Tribe contends, these games would be found by the NIGC to fall outside the definition of "bingo," and thus, within the category of class III gaming, they are proper for inclusion in the Tribe's class III gaming procedures.

E. Non-Banking Card Games

As part of its request, the Tribe is seeking authorization to operate non-banking card games, such as poker. As with bingo, non-banking card games are often assumed to be class II games. However, in order to be so classified, the game must satisfy IGRA's definition of class II gaming. Otherwise, the game, by default, is a class III game.

Under IGRA, non-banking card games are only class II games when they: "(I) are explicitly authorized by the laws of the State, or (II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitation on wagers or pot sizes in such card games."[56]

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[54] *See* Affidavit of Teresa B. Poust, (February 25, 2006), attached hereto as Exhibit 5.

[55] *See, e.g., NOVA Gaming Bingo System Game Classification Opinion*, National Indian Gaming Commission, April 4, 2005, (The criterion of bingo would not be satisfied where a player "could, in one motion, start the game, win, and claim their prizes"); and *Rocket FastPlay Bingo 1.0 Advisory Opinion*, National Indian Gaming Commission, October 18, 2004, (footnote 4: "An automatic daub in the context of this type of game would not qualify as an aid as it would play the game for the player rather than assist the player."); *see also Draft Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through Electronic Medium Using "Electronic, Computer or Other Technological Aids." Fifth Draft (Version 5.5)*, National Indian Gaming Commission, April 15, 2005, Issued May 9, 2005, at § 546.5(e)("To 'cover,' a player in a game must take overt action after numbers or designation are released. A player covers (daubs) by touching either the screen or a designated button on the player station at least one time in each round after a set of numbers or other designations is released.") and at § 546.5(g)("Games may not include a feature whereby covering (daubing) after a release occurs automatically or without overt action taken by the player following the release.").

[56] *Id.* § 2703(7)(A)(ii).

While no formal opinion has been issued, the NIGC has suggested to the Tribe that poker is a class III game when played in the State of Alabama. While the Tribe strongly disagrees with this inference, the Tribe has refrained from operating such games despite the fact that their play is clearly "permitted" for the purposes of IGRA under Alabama's broad private place exemption, that poker is played in private clubs in accordance with this exemption,[57] and despite the fact that public games have become common statewide.[58] Though the classification of non-banking card games under federal law when played in Alabama is a matter of dispute, such games are being played legally within the State and are thus appropriate for inclusion in gaming procedures issued by the Secretary.

IV. CONCLUSION

IGRA establishes that an Indian tribe may operate class III games that a state permits "for any purpose by any person, organization, or entity."[59] As illustrated above, the State of Alabama permits a broad range of activities that, if offered on Indian lands, would be found to fall within the category of class III gaming. Nonetheless, the State has refused to negotiate a Compact with the Tribe, ignoring the fact – regardless of which analysis is applied – that the scope of gaming over which the State must negotiate is broad.

Despite the broad authorization of gambling within the State of Alabama, it is not the Tribe's present intent to request Secretarial intervention with regard to the full gamut of class III gaming permitted in the State. Instead, we respectfully request immediate relief with regard to pari-mutuel wagering, electronic games (including electronic sweepstakes promotions and certain electronic bingo games), and non-banking card games. Alabama's scope of gaming is sufficient to support the Secretary's issuance of class III gaming procedures with regard to these activities.

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[57] *See, e.g.*, materials relating to the Southern Heritage Poker Club in Montgomery, AL, www.shpoker.org (password "poker"), copies of which are attached hereto as Exhibit 6.
[58] *See* advertisements and news accounts of statewide poker games. A copy of these items are attached hereto as Exhibit 7. For a website listing home games that need additional players, see http://www.homepokergames.com/alabama.php (last visited 2-26-2006).
[59] 25 U.S.C. § 2710(d)(1)(B) (2001).

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July 28, 2006

Via Facsimile & U.S. Mail
Mr. George T. Skibine
Acting Deputy Assistant Secretary
for Policy and Economic Development
United States Department of the Interior
Washington, DC 20240

Re: The Request by the Poarch Band of Creek Indians for authorization to offer Class III in Alabama.

Dear Mr. Skibine:

This letter is the response of the Governor and me to the Poarch Band of Creek Indians' (PBCI) latest efforts to expand gambling within the borders of this state. This letter is filed pursuant to 64 F.R 17535 which has been promulgated by this agency. In filing this response neither the Governor nor I intend to waive any objections, defenses and/or claims, however described, which the State of Alabama may have with respect to the authority of this agency to promulgate and adopt the aforementioned regulation and/or the regulations proposed by the PBCI and/or we specifically reserve the right to assert any such objections, defenses and/or claims subsequent to any decision by this agency.

The PBCI has asked this agency to allow it to operate certain gambling operations, namely pari-mutuel wagering, sweepstakes and poker, and to permit it to alter the manner in which it offers bingo. In so doing, PBCI has mischaracterized the state of the law in Alabama regarding gambling. The PBCI request is ostensibly made pursuant to 25 U.S.C.A. 2710(d)(1). The PBCI is correct when it states that it has demanded that Alabama to enter into negotiations with respect to a compact that would allow the PBCI to offer the Class III games set forth in its current proposal. Alabama would note that this demand included a proposed compact which would have allowed PBCI to offer substantially more Class III games than are included in the current proposal. The Governor of Alabama has and continues to refuse to negotiate with PBCI to allow the expansion of gambling within the borders of Alabama. The PBCI now seeks to have

EXHIBIT
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your agency implement a compact by virtue of the procedure set up by the Court of Appeals for the Eleventh Circuit in the *Seminole* decision. *Seminole Tribe of Florida v. State of Florida*, 11 F. 3d 1016 (11th Cir. 1994). Without conceding that the Eleventh Circuit Court of Appeals "got it right", the threshold question before this agency remains whether Alabama "permits [the games which PBCI seeks to offer] for any purpose by any person, organization, or entity ... ." 25 U.S.C.A. § 2710(d)(1)(B).

The PBCI correctly notes that federal courts have taken two approaches in determining what the phrase "permits such gaming for any purpose by any person, organization, or entity" means, namely the "Wisconsin" approach (which takes the position that if any Class III gaming is permitted in the state then the Indian tribes must be allowed to offer all Class III gaming) and the "Florida" approach (under which this agency must look to whether the specific Class III game which the Indian tribe wants to offer is permitted in the state in question). The PBCI contends that under either analysis, it is entitled to offer pari-mutuel wagering, poker and certain "sweepstakes". PBCI's analysis is flawed.

At the outset, let us be clear regarding the public policy of the State of Alabama as it relates to gambling: "This construction is in full harmony with the policy of the constitution and laws of Alabama *prohibitory* of the vicious system of lottery schemes and the evil practice of gaming, in *all* their protean shapes, tending, as centuries of human experience now fully attest, to mendicancy and idleness on the one hand, and moral profligacy and debauchery on the other. No state has more steadfastly emphasized its disapprobation of all these gambling devices of money-making by resort to schemes of chance than Alabama. ... [T]he voice of [the] legislature has been loud and earnest in its condemnation of these immoral practices, now deemed so enervating to the public morals." *Try-Me Bottling Co. v. State*, 178 So. 231, 234-235 (Ala. 1938)(quoting with approval from *Johnson v. State*, 3 So. 790, 791 (Ala. 1888) with emphasis added.).

Section 65 of Article III of the Alabama Constitution provides: "The Legislature shall have no power to authorize lotteries[1] or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; and all acts, or parts of acts heretofore passed by the legislature of the state authorizing a lottery or lotteries, and all acts amendatory thereof or supplemental thereto, are hereby avoided." ALA. CODE § 13A-12-21(a) (1975 as amended) provides that "[a] person commits the crime of simple gambling if he knowingly advances or profits from unlawful gambling activity as a player."

[1] A lottery in Alabama consists of three elements: (1) the payment of consideration; (2) for a chance; (3) to win a prize. *Pepsi Cola Bottling Company of Luverne, Inc. v. Coca-Cola Bottling Company of Andalusia*, 534 So. 2d 295, 296 (Ala. 1988).

Despite this clear and unequivocal language, the PBCI maintains that "an exceptionally broad scope of gambling" is authorized in Alabama. *See:* PBCI's Memorandum on the Scope of Gaming Permitted by the State of Alabama, p. 4. This argument is premised upon ALA. CODE § 13A-12-21(b) (1975 as amended), a reference in ALA. CODE § 40-12-163, several cases which pre-date the adoption of the predecessor of Section 65 of the Constitution and antidotal evidence of instances in the state where Class III gaming has allegedly occurred without prosecution by the state. As set forth below, PBCI misstates the law and draws illogical and impermissible inferences from the statutes cited above.

I. ALA. CODE § 13A-12-21(b) (1975 as amended).

ALA. CODE § 13A-12-21(b) (1975 as amended) provides that "[i]t is a defense to a prosecution under this section [*i.e.* for simple gambling] that a person charged with being a player was engaged in a social game in a private place." This language and quotes taken primarily from cases which pre-date the 1875 Constitution, which for the first time included language which made lotteries illegal, are the basis for the PBCI to conclude that all forms of Class III games are "permitted" in Alabama provided that they are played in "a private place." *See: Opinion of the Justices*, 795 So. 2d 630, 634 (Ala. 2001). However, such a conclusion ignores the plain language of Section 65 of the Alabama Constitution, ALA. CODE § 13A-12-21(b) (1975 as amended) and 25 U.S.C.A. § 2170(d).

First, such a broad grant of authority is contrary to the express provisions of the Alabama Constitution. Second, that construction ignores the language of the statute and the purpose of a criminal defense. In determining whether poker or any other Class III game is "permitted" within the borders of Alabama it is important to be mindful of what 25 U.S.C.A. § 2710 says and what it does not say. Congress specifically required that the Class III game be "permitted", *i.e.* there must be an affirmative grant of authority to engage in the activity in question, as opposed to "not being prohibited" which would be indicative of the fact that the gambling in question must not be specifically disallowed.

"Permit" has been defined in the Oxford English Dictionary as "to consent to expressly or formally; to grant leave for or the privilege of" and as "to suffer, allow, consent, let; to give leave or license" by Black's Law Dictionary. The fact that a criminal defendant has available to him defenses which may reduce or preclude any sanctions all together does not mean that the defendant has permission or license to engage in conduct which is prohibited by criminal statutes.

For instance, pursuant to ALA. CODE § 13A-3-1 (1975 as amended), a murderer may be declared not guilty due to a mental disease or defect. ALA. CODE § 15-3-1 and 3 (1975 as amended) provides for statutes of limitations with respect to the prosecution of certain crimes. If the state fails to indict, bind over or the issue a warrant for the arrest of a defendant within the proscribed period, the charges must be dismissed. A dismissal of

a felony charge for theft by deception for failing to commence the criminal proceeding within the prescribed period does not mean that the underlying conduct is "permitted" by the state. Instead, these restraints upon prosecution and/or the imposition of criminal liability represent decisions by the state that other policy concerns mandate the withdrawal of certain criminal sanctions in the furtherance of those policy considerations. For instance, the statute of limitations defense represents a number of policy considerations including concerns by the Legislature that delays in prosecutions may prejudice the defendant's ability to properly defend his self at trial and this concern outweighs the need to punish all criminal conduct.[2] "Such a limitation [a statute of limitations] is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far distant past." *Toussie v. United States*, 397 U.S. 112, 116 (1970).

Similarly, the defense provided in Ala. Code § 13a-12-21(b) does not mean that the conduct encompassed by this defense is "permitted". Instead, this defense, like those mentioned before, represents a balancing act between competing interests. Decisions by the appellate courts of this state make it clear that the defense was intended to protect the sanctity of the home and not "permit" gambling.[3] "It (being the defense in question) has been construed to mean that the invasion of a private home in furtherance of this type of prohibition is not allowed by statute ... ." *City of Birmingham v. Richard*, 203 So. 2d 692 (Ala. App. 1967). Again when speaking of this defense, the appellate court cited to Art. 1 § 5 of the Alabama Constitution which provides "That the people shall be secure in their persons, houses, papers and possessions from unreasonable seizure or searches." *Town of Boaz v. Jenkins*, 25 So. 2d 394, 396 (Ala. App. 1946). These cases are, thus, instructive regarding whether ALA. CODE § 13A-12-21(b) permits gambling to occur or simply restrains prosecutions and/or the imposition of criminal sanctions in service/deference to another policy consideration.[4] Thus, gambling, such as poker is not "permitted" as that term is used in 25 U.S.C.A. § 2710(d) in Alabama.

Likewise, the fact that business establishments and/or charities may have conducted poker tournaments and not been prosecuted does not mean that this form of gambling is permitted. First, as the materials which the PBCI submitted shows, some of these tournaments do not require a "buy-in". *See:* Attachment 7 to PBCI's Memorandum on the Scope of Gaming Permitted by the State of Alabama, October 14, 2004 story in the

[2] Similarly, the Legislature has determined that given the nature of some crimes, such as murder, the State's interest in punishing these particularly heinous acts overrides these concerns.

[3] The broad prohibition against lotteries found in § 65 of the Constitution includes language which prohibits the Legislature from authorizing any such actions. Thus, if the game being played in the home involves consideration for a chance to win a prize, the Legislature cannot authorize such a contest and any legislation that would seek to do so would be void.

[4] The prohibition against lotteries was not added until the adoption of the 1875 Constitution. Thus, any cases decided prior to that date must be considered in light of the significant change to the Constitution.

Tuscaloosa News. Thus, the participants are not wagering any consideration and, arguably, would not be gambling. Moreover, the failure to prosecute could be the result of several things including the fact that neither the local district attorney nor the Attorney General was aware of the existence of the gambling activity or the lack of prosecution may simply be a matter of allocation of scant resources. Not every speeder is ticketed by the law enforcement. This does not mean that speeding is legally permitted. Indeed, speeding continues to be against the law. Similarly, the fact that every instance of gambling is not prosecuted does not mean that some of the forms of gambling are "permitted".

Further, even if ALA. CODE § 13A-12-21(b) (1975 as amended) could be construed as authorizing gambling in a private place, which is denied, to the extent those activities constituted a lottery, this statute would be unconstitutional.

II. ALA. CODE § 40-12-163 (1975 as amended).

ALA. CODE § 40-12-163 includes the phrase "games of chance" in describing some of the activities which may occur at a street fair or carnival. From the single use of this undefined term, the PBCI determines that Class III gaming is "permitted" in Alabama. The first problem with that analysis is that there is no mention that participants in these "games of chance" will be required to pay to participate. It is black letter law that statutes are to be construed *in pari materia* and in such a way as to be constitutional if at all possible. *Opinion of the Justices No.* 334, 599 So. 2d 1166, 1168 (Ala. 1992); *Bynum v. Campbell*, 419 So. 2d 1370, 1374 (Ala. 1982); *Monroe v. Harco, Inc.*, 762 So. 2d 828, 831 (Ala. 2000).

In this instance, both of these principles require that the term "games of chance" be construed as not involving consideration flowing from the participants to the operator of the game. Otherwise the statute would conflict with ALA. CODE § 13A-12-21 and Section 65 of the Constitution. Thus, ALA. CODE § 40-12-163 (1975 as amended) cannot stand for the idea that Class III gaming is "permitted" in Alabama.

III. Poker

The only basis that the PBCI has for asserting that poker is "permitted" in Alabama is ALA. CODE § 13A-12-21(b). However, as set forth above, this subsection does not, and indeed cannot, stand for the proposition that poker, a form of gambling, is "permitted" in Alabama.

IV. Sweepstakes

With respect to sweepstakes, the PBCI relies upon a decision by the Circuit Court of Jefferson County finding that a particular contest constitutes a "sweepstakes" as a

basis for seeking authority to offer similar "sweepstakes" on its reservation. First, this assertion ignores the fact that the operator of contest in question was allowed to move forward with the contest because of the fact that it was not gambling but was a "sweepstakes". In that case, the Court correctly noted that lotteries are not permitted in Alabama but that sweepstakes are. The difference between the two is that in a true "sweepstakes", the participant is not purchasing his/her sweepstakes entry. Instead, the entry is free and is provide incidental to the purchase of some good or service. If the entry is purchased, it represents a person paying consideration for a chance to win a price, *i.e.* a lottery. The Jefferson County case hinges upon a determination by the trial court that the participants were not paying for their "sweepstakes" entries. Thus, if PBCI is conducting a true "sweepstakes" it will not be engaged in gambling such that it needs approval from this agency.

The State would note that it has, through the Jefferson County District Attorney, appealed the trial court's determination that the contest in question was not gambling, but was, in fact, a "sweepstakes". I have filed an amicus brief with the Alabama Supreme Court in support of the appeal. The District Attorney has requested expedited review of this matter and it is respectfully submitted that the most prudent and proper course of action would be for this agency to await the Alabama Supreme Court's decision before ruling on this portion of PBCI's request. A copy of the District Attorney's initial brief will be included with the original of this letter.

V. Pari-mutuel Wagering on Horse and Dog Racing.

Pari-mutuel wagering on horse and dog racing is permitted by statute in limited locations in Alabama. Even so, I strongly object to any further expansion of this type of activity within the borders of Alabama. If the agency elects to allow PBCI to engage in this gambling, which we ask it not to do, the State of Alabama urges this agency to apply those same restrictions to the PBCI that are applicable to other engaging in such gambling in Alabama. The State of Alabama would also state for the record that should this agency permit pari-mutuel wagering to occur on the PBCI's reservation and the PBCI or any entity operating the pari-mutuel operation accept any wager from outside the confines of the reservation, the State of Alabama will prosecute them to the fullest extent allowed under state law.

In conclusion, Alabama, by and through its Governor and its Attorney General, reiterates its opposition to any expansion to the limited gambling permitted in this state and urge this agency to deny in whole or in part the tribe's request. Should you decide to permit some limited form of gambling, it is respectfully submitted that the proposal

submitted by the tribe lacks sufficient restrictions upon the scope of the proposed activities and those activities ought to be on the same footing as any enterprise off of the reservation. Indeed, this is the exact treatment which the tribe contends is appropriate in this instance.

Sincerely,

Troy King
Attorney General

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

TROY KING
ATTORNEY GENERAL

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MONTGOMERY, AL 36130
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September 26, 2007

Via Facsimile and U.S. Mail

Mr. George T. Skibine
Acting Deputy Assistant Secretary
for Policy and Economic Development
United States Department of the Interior
Washington, DC 20240

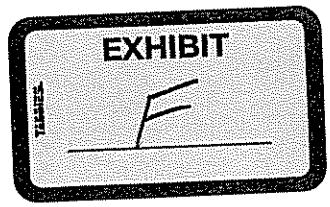
Re: The Request by the Poarch Band of Creek Indians for authorization to offer Class III gambling in Alabama.

Dear Mr. Skibine:

On March 3, 2006, the Poarch Band of Creek Indians (PBCI) sought authority from the Department of the Interior to conduct Class III gambling operations within the borders of Alabama ostensibly pursuant to 25 U.S.C.A. § 2710(d)(1). The State of Alabama objected to this agency adopting the regulations proposed by the PBCI. It is our understanding that this request is still pending before your agency.

The State of Alabama's initial response to the PBCI's request included a reservation by the State of the right to object to the authority of this agency to promulgate and/or adopt the regulations proposed by the PBCI. During the pendency of the PBCI's application, the United States Court of Appeals for the Fifth Circuit has released a decision in the matter of *The State of Texas v. The United States of America, et al.* on April 17, 2007, which specifically held that this agency lacks the authority to promulgate regulations such as the PBCI proposes absent a judicial determination that the State of Alabama has failed to negotiate in good faith. A copy of said decision is enclosed herewith for your convenience. No such determination has been made relative to Alabama. Under the rationale set forth by the United States Court of Appeals for the Fifth Circuit, however, the PBCI's petition would be due to be denied.

Alabama is prepared to seek relief from the federal court, if necessary, but would prefer to avoid the time and expense associated with such a course of action, if possible. To that end, we propose the following agreement: if your agency does not intend to seek further appellate review of the Fifth Circuit's decision, we ask that you dismiss the PBCI's petition immediately. If, however, your agency intends to seek a *writ of certiorari* to the United States Supreme Court, we ask that the PBCI's petition be held in abeyance and/or placed on the



administrative docket until a ruling by the United States Supreme Court. If the United States Supreme Court affirms the Fifth Circuit's decision or denies the petition for a *writ of certiorari*, we ask that your agency dismiss the PBCI's petition. Such an agreement would avoid duplicitous litigation and unnecessary time and expense on the part of your agency and the State of Alabama.

Please let me hear from you as soon as possible regarding whether this proposal is acceptable.

Sincerely,

Troy King
Attorney General

TK:jaf

Enclosure

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

TAKE PRIDE IN AMERICA

MAR 0 4 2008

The Honorable Bill H. Pryor, Jr.
Attorney General, Office of the Attorney General
State House
Montgomery, Alabama 36130

Dear Attorney General Pryor:

On March 3, 2006, the Poarch Band of Creek Indians ("Tribe") submitted a proposal for Class III gaming procedures pursuant to 25 CFR Part 291. In accordance with 25 CFR § 291.6, we notified the Tribe, by letter dated April 4, 2006, that their application had been received, was complete and that they had met the eligibility requirements in 25 CFR § 291.3.

On April 13, 2006, in accordance with 25 CFR § 291.7, we invited the Governor and the Attorney General of the state of Alabama (State) to comment on (1) whether the State is in agreement with the Indian Tribe's proposal; (2) whether the proposal is consistent with relevant provisions of the laws of the State; (3) whether contemplated gaming activities are permitted in the State for any purposes, by any person organization, or entity. Pursuant to 25 CFR § 291.7(c), we also invited the State to submit an alternative proposal to the Tribe's submission. On July 28, 2006, the Governor and the Attorney General jointly responded disagreeing with the Tribe's proposal, stating that the proposal is not consistent with the relevant provisions of the laws of the State yet acknowledging some type of gaming exists in the State. The State did not submit an alternative proposal.

On October 19, 2006, in accordance with 25 CFR § 291.8(b)(2), we invited the Tribe and the State to participate in an informal conference limiting the topic of discussion to the scope of gaming. The informal conference was held in Washington, DC on November 18, 2006. At the end of the day the parties agreed that the informal conference would be recessed pending a preliminary scope of gaming determination. We now issue that preliminary determination.

Preliminary Remarks

In sum, the Tribe argues that it is entitled to three specific kinds of Class III gaming that are permitted under the State's laws: 1) electronic bingo in the format that is played at racetracks in Macon and Greene Counties, Alabama,[1] 2) pari-mutuel wagering, including betting on live horse and dog races as well as satellite broadcasts thereof occurring at other locations and beamed to the Tribe's reservation, both of which are expressly permitted in the State and

[1] These electronic games are called "bingo" by the state and the racetracks which operate them and are arguably Class II under the IGRA, but the Tribe notes that NIGC has taken the position that these games are, in fact, Class III so the Tribe has included them in its Request for Procedures. *See* Tribe's *Memorandum on the Scope of Gaming Permitted by the State of Alabama* at p. 7-8 of 9 *and* Levine Letter at p. 6 of 24.

EXHIBIT
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conducted at tracks in Macon and Green Counties,[2] and 3) non-banked card games played with playing cards, such as poker (e.g., draw, stud, Texas hold'em and Pai Gow) and other non-banking card games typically played in jurisdictions that permit such games but prohibit non-Tribal banking games, based upon the State's statutory provision that an affirmative defense may be raised to any prosecution for illegal gambling on the grounds that the gaming was being conducted in a "private place" for "social purposes."[3]

The State responds by arguing that the State's public policy as it relates to gambling is that the "...constitution and law of Alabama are prohibitory of the vicious system of lottery schemes and the evil practice of gaming, in all their protean shapes, tending, as centuries of human experience now fully attest, the mendicancy and idleness on the one hand, and moral profligacy and debauchery on the other. No state has more steadfastly emphasized its disapprobation of all these gambling devices of money-making by resort to schemes than Alabama. . . . [T]he voice of [the] legislature has been loud and earnest in its condemnation of these immoral practices, now deemed so enervating to the public morals."[4]

The State goes on to take issue with the Tribe's assertion that all forms of Class III gaming are permitted in Alabama, specifically non-banked card games such as poker and its derivations, provided they are played in a private place, by claiming that such a conclusion ignores the plain language of Section 65 of the Alabama Constitution and § 13A-12-21(b) of the Alabama Code, which together prohibit such activities. The State acknowledges that pari-mutuel wagering on dog and horse racing is permitted "in limited locations in Alabama," noting that the presence of live racing is a condition required to permit "off-track" or simulcast wagering at such locations.[5] Finally, while neither the *King Letter* nor the *Steely Letter* directly addresses electronic bingo, the Chief Deputy Attorney General agreed at the informal conference that bingo is permitted and that there are no State laws prohibiting the electronic form of bingo.[6]

Moreover, neither the State in its submissions thus far, nor the State's code or court decisions, address casino nights yet these activities appear to be common as fund raising tools for benevolent organizations across the State.

In sum, the State goes from saying that its gaming laws and public policy are prohibitory in all respects to conceding that pari-mutuel wagering, electronic bingo and card games for apparently unlimited stakes, provided the card games are played in a private place for a social purpose, are all permissible.

Standard to be Applied in Determining the Scope of Gaming

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[2] *See* Tribe's *Memorandum on the Scope of Gaming Permitted by the State of Alabama* at p. 4-5 of 9

[3] *See* Ala. Code 1975 § 13A-12-21(b).

[4] *Try-me Bottling v. State*, 178 So. 231, 234-235 (Ala. 1938), citing *Johnson v. State* 3 So. 790 791 (Ala. 1888).

[5] *See* Letter from Alabama Attorney General Troy King, dated July 28, 2006 ("King Letter"), pg. 6; and Steely Letter, pg. 5.

[6] *See* Transcript of Informal Conference, November 18, 2006, pg. 92, Lines 1-4: "Mr. Miller: Bingo is permitted in certain limited circumstances in the State of Alabama. There's nothing within State law that prohibits and electronic form of that game from occurring."

IGRA provides that tribes may conduct Class III gaming on Indian lands ". . . only if such activities are . . . located in a State that permits such gaming for any purpose by any person, organization or entity."[7] Under the circumstances presented here, 25 C.F.R. Part 291.8 (3) – (4) requires the Secretary to review the Tribe's proposal to determine whether 1) the contemplated gaming activities are permitted in the State for any purpose for any person, organization or entity, and 2) whether the proposal is consistent with the relevant provisions of the laws of the state.

Accordingly, when examining what Class III games will be permitted and whether the activities are consistent with the relevant provisions of state law, the United States has evaluated the circumstances that arise when a state's law prohibits a type of gaming and when the state regulates the distinct form in which a permitted gaming may be played. In its briefing in the *Rumsey Indian Rancheria of Wintun Indians v. Wilson* litigation, the United States offered the following hypothetical:

> "If State prohibits five-card stud poker but permits seven-card draw poker (or prohibits pari-mutuel wagering on dog racing, but not on horse racing) a question could arise as to whether State law prohibits a distinct form of gaming known as "five card stud poker" (or "dog racing") or instead regulates the manner in which the permitted form of gaming known as "poker" (or "animal racing") may be conducted. If characterized in the former way, the State would have to negotiate concerning only seven-card draw poker (or horse racing); if characterized in the latter way the State would have to negotiate over all poker games (or all animal racing).[8]

The United States concluded that the relevant question in such a case would be whether, in light of traditional understandings and the text and legislative history of IGRA, a state has reasonably characterized its relevant laws as completely prohibiting a distinct form of gaming. If a state has not reasonably so characterized its law, it would have a duty to negotiate with respect to that gaming.

Thus we determine the scope of gaming for the Tribe through an examination of the following questions:

1. Is the distinct form of gaming activity proposed by the Tribe permitted in the State for any person, organization or entity? If yes, then that distinct form of gaming is permitted under IGRA in the State.

If the distinct form of gaming activity is neither specifically prohibited nor permitted, does the State "reasonably characterize" its laws as completely prohibiting that distinct form of gaming for every person, organization or entity? If the characterization is reasonable, then the gaming

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[7] 25 U.S.C. 2710 (d) (1) (B).

[8] Brief of Amici Curiae United States at 15, fn. 9, *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, see also, *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994), *cert den sub nom Sycuan Band of Mission Indians v Wilson*, 117 S. Ct. 2508 (1997).

is outside the permitted scope of gaming in the State. If the characterization is unreasonable, then the gaming is within the scope of gaming permitted in the State.

Overview of State Statutory Scheme

We begin with the Alabama Constitution which prohibits "lotteries and gift enterprises" as follows:

> "The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; and all acts, or part of acts authorizing a lottery or lotteries, and all acts amendatory thereto, are hereby avoided."[9]

A lottery or policy is defined as an "unlawful gambling scheme" in which the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other medium, one or more of which chances are to be designated by the winning one, where the winning chances are to be determined by a drawing or by some other fortuitous method and the holders of the winning chances are to receive something of value.[10] Alabama's courts have interpreted the statutory definition of "lottery" as gaming involving the elements of prize, chance and consideration.[11]

In the context of Alabama's gambling-related statutes, "unlawful" means not specifically authorized by law.[12] Alabama defines "gambling" as staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the control or influence of the player, upon an agreement or understanding that the player or someone else will receive something of value in the event of a certain outcome.[13] "Something of value" is defined as any money property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer or money or property or of any interest therein, or involving extension of a service, entertainment or privilege of playing at a game or scheme without charge.[14]

The State defines a "contest of chance" as any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.[15] Pari-mutuel, mutual or "the numbers game" are defined as a form of lottery in which the winning chances or plays are not determined upon the basis of a drawing or other act on the part of persons

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[9] Constitution of Alabama, § 65, as amended.
[10] Ala. Code § 13A-12-20 (6).
[11] *Ex Parte Ted's Game Enters.*, 893 So. 2d 376 (Ala. 2004).
[12] Ala. Code § 13A-12-20 (12) In other words, if a particular form of gambling is *not* specifically authorized by statute, then it is "unlawful."
[13] Ala. Code § 13A-12-20 (4).
[14] Ala. Code § 13A-12-20 (11).
[15] Ala. Code § 13A-12-20 (3).

conducting or connected with the scheme, but upon the basis of the outcome of a future contingent event or events otherwise unrelated to the particular scheme.[16]

A gambling device is defined as any device, machine, paraphernalia or equipment that is normally used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine.[17] Possession of a slot machine is a crime, as is possession of any other gambling device with the intention that it be used in the advancement of unlawful gambling.[18] Lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes are not gambling devices within the prior definition, apparently because they are declared unlawful under a different statute dealing with possession of "lottery paraphernalia."[19]

Alabama also has what is colloquially known as a "Chuck E. Cheese" exception for electronic, electro-mechanical or mechanical devices used for bona fide amusement purposes if the device rewards merchandise prizes, toys or novelties not exceeding five dollars in wholesale value, or a representation of value (e.g., ticket or token) redeemable for those items.[20] The device cannot reward a player with cash or an equivalent to cash, and cannot be a device which requires a federal gaming tax stamp under the Internal Revenue Code.[21]

The State may prosecute a person for the misdemeanor offense of "simple gambling" if the person knowingly advances or profits from unlawful gambling activity *as a player*.[22] A "player" is defined as a person who engages in any form of gambling solely as a contestant or bettor, without receiving or becoming entitled to receive any profit therefrom other than personal gambling winning, and without rendering any material assistance to the establishment, conduct or operation of a particular gambling activity.[23]

A person "advances gambling activity" if he or she:

"engages in conduct that materially aids any form of gambling activity. Conduct of this nature includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefore, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases or toward any other phase of its operation. A person advances gambling activity if, having substantial proprietary control or other authoritative control over premises

[16] Ala. Code § 13A-12-20 (7).
[17] Ala. Code § 13A-12-20 (5)
[18] Ala. Code § 13A-12-27. Possession of either a slot machine or other gambling device raises a *prima facie* presumption of knowledge of its character. *See* Ala. Code 13A-12-28. However, possessing "any other gambling device" also requires proof that the possessor intended "that it be used in the advancement of unlawful gambling activity." *See* § 13A-20-27 (a) (2).
[19] Ala. Code § 13A-12-70.
[20] Ala. Code § 13A-12-76.
[21] Ala. Code § 13A-12-76.
[22] Ala. Code § 13A-12-21 (a) and (c)
[23] Ala. Code § 13A-12-20 (8)

being used with his knowledge for purposes of gambling activity, he permits that activity to occur or continue or makes no effort to prevent its occurrence or continuation."

Lastly, a person commits the crime of promoting gambling if he knowingly advances or profits from unlawful gambling activity otherwise than as a player, and a person commits the crime of conspiracy to promote gambling if he conspires to advance or profit from gambling activity otherwise than as a player.[24]

Private Place and Social Purpose Defense

Notwithstanding Alabama's apparently broad prohibition against gambling, State law permits a person accused of simple gambling to assert an affirmative defense to the charge by claiming that they were engaged in a social game in a private place.[25] Therefore, whether someone is participating and profiting from gambling as a "player" in a "private place," rather than acting as the "house" (as the term is used in the gaming industry) and profiting as such, is a critical distinction under the State's gambling laws.

Alabama's courts distinguish a "public house" from a "public place." A public places does not necessarily admit the general public at their pleasure, and a public place is any house a gambler devotes to gaming, and in which he keeps the appliances of his occupation, open to all who will engage in his sports, no matter with what privacy he may invest it.[26] A public house is typically a location other than the gambler's home in which she conducts the type of social gambling permitted under § 13A-12-21.[27] Where a public house is used in lieu of a public establishment it is likely the courts will hold the gambling activity unlawful.[28]

Pari-mutuels, Bingo and Casino Nights

In the early 1970s, the State legislature requested an advisory opinion from the State Supreme Court regarding pending pari-mutuel legislation. The court answered that pari-mutuel wagering on dog and hors racing is permitted in Alabama because skill, rather than chance, is the significant factor in picking the winning dog (or horse).[29] The State's law eventually allowed Class 1 municipalities to authorize dog and horse tracks by referendum and today Alabama has four pari-mutuel racetracks operating within the State, each offering wagering on live and simulcast horse and greyhound racing.[30]

As to bingo, the State's Supreme Court ruled in 1994 that bingo is a game dominated by chance rather than skill, and therefore the court held it was a lottery prohibited by § 65 of the State's constitution.[31] Nonetheless, acting under the State constitution's "home rule"

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[24] Ala. Code § 13A-12-23.
[25] Ala. Code § 13A-12-21 (b)
[26] *Smith v. State*, 52 Ala. 384, 388 (1875).
[27] See *McCauley v. State*, 26 Ala. 135 (1855) (lawyer's office excluded); *McDaniel v. State*, 35 Ala 390 (1860) (public school privy during vacation excluded).
[28] See *Town of Boaz v. Jenkins*, 25 So. 2d 394 (Ala. Ct. App. 1946).
[29] *Opinion of the Justices No. 205*, 251 So. 2d 751 (Ala. 1971).
[30] Ala. Code § 11-65-1-to-47
[31] See *City of Piedmont v. Evans*, 642 So. 435 (Ala. 1994).

provisions, since 1980 voters in eighteen counties have approved local amendments to the State's constitution that supersede § 65's prohibition on lotteries to permit charitable bingo on a county-wide or municipality-specific basis, or both.[32] Over time, these "charitable bingo" enterprises have improved their appeal, efficiency and profitability by using electronic or video gaming devices to play bingo. Today, facilities such as Quincy's 777 Casino at the Victoryland Racetrack in Macon County offer over 3,500 gaming positions as well as all the amenities found at a modern commercial casino such as stage entertainment, lodging, dining and convention spaces.[33]

Alabama law is silent about what is colloquially termed a "casino night." Often used as a fund raiser for non-profit organizations in many jurisdictions across the United States, Alabama's laws and administrative rules do not appear to acknowledge or address casino nights. The State does address and requires licenses for "street fairs" or "carnivals" that include "games of chance," and permits them for *de minimus* prizes.[34]

Tribe's Proposed Gaming Activities

The Tribe's proposal would authorize the Tribe to conduct the following types of Class III gaming activities without regard to the restrictions on such activities, which may be otherwise applicable under Alabama law:[35]

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[32] The State's constitution contains a provision allowing amendments that apply to local jurisdictions rather than the more common statewide applicability. *See* Alabama Constitution, Article XVIII, § 248.01. The following local amendments authorizing bingo have been ratified: Amendments 386 and 600 (Jefferson County – 1980 and 1996, respectively), 387 (Madison County – 1980), 413 (Montgomery County – 1982), 440 (Mobile County – 1983), 506 (Etowah County – 1989), 508 (Calhoun County – 1989), 542 (St. Clair County – 1992), 549 and 550 (Walker County and the City of Jasper in Walker County – 1992), 565 (Covington County – 1994), 569 (Houston County – 1994), 599 (Morgan County, affecting the Cities of Hartselle, Falkville and part of Decatur – 1996), 612 (Russell County – 1996), 674 and 732 (Lowndes County affecting the Town of White Hall – 2000 and 2002), 743 (Greene County – 2003) and 744 (Macon County – 2004).

[33] Under each of the local constitutional amendments listed above, the sheriff is responsible for regulation and oversight of the bingo facilities, and has "authority to regulate the type of equipment used in bingo games, so long as the equipment falls within the definition provided in the Act." *See* Alabama Attorney General Opinion, October 22, 1998. We have attempted to obtain, without success, a copy of the Macon County Sheriff's rules and regulation that apply to Quincy's 777 Casino, primarily because that facility appears to offer the most sophisticated electronic gaming machines. *See also* www.quincys777casino.com.

[34] § 40-12-163. Street fairs. Each person operating or conducting an exhibition termed a "street fair" or "carnival" shall pay to the state a license tax as follows: for an exhibition operating or composed of or controlling or embracing not more than 10 exhibits, devices or concessions, $50; but where more than 10 and not exceeding 20 exhibits, devices or concessions, $75; and where more than 20 and not exceeding 35 $100; and where more than 35 exhibits, devices or concessions, $150. This license shall entitle the street fair or carnival to be operated for a period not exceeding two weeks in any one place at any one time. For the purpose of this action, a "street fair" or "carnival" shall mean a combination of exhibitions, also called sideshows, rides, games of chance, tests of skill or strength, concessions and any other devices generally associated with a "street fair" or "carnival," regardless of ownership, when operated as a combination or a group, and regardless of whether or not an admission is charged to the midway or grounds. A licensee under this section shall not be required to purchase licenses under the provisions of Sections 40-12-69, 40-12-95, 40-12-103, 40-12-140, 40-12-153 and 40-12-157.

[35] As noted in its submission and the *Levine Letter*, the Tribe believes that all Class III games are permitted under Alabama law but, while the Tribes reserves its right to seek other games later, its request is limited at this time to the games specified.

1. Electronic games, including:

   a. Electronic bingo, as authorized and played elsewhere in Alabama, where the player may enter and play the game using no more than one press of a button or other singular act; and
   b. any other game, device machine or equipment permitted by Alabama law that allows a player to play a game of chance or game of skill.

2. Pari-mutuel wagering on:

   a. live horse and/or dog racing occurring on the Tribe's lands; and
   b. simulcast horse and/or dog racing occurring off the Tribe's lands, also known as off-track betting or simulcasting.

3. Non-banked card games, including any variation of poker using playing cards such as:

   a. draw poker;
   b. Texas hold 'em
   c. five and seven card stud;
   d. pai gow poker; and
   e. jackpots;
   f. and any variation based thereon.

In its initial application, the Tribe also requested an "electronic sweepstakes" game of the kind allowed in Alabama but the Tribe has since withdrawn its request in light of the Alabama Supreme Court's decision in *Barber v. Jefferson County Racing Assoc., Inc.*[36] There, the court held the electronic sweepstakes game is a prohibited form of lottery, thus causing the Tribe to withdraw its request for this game, but the Tribe does not concede the correctness of the decision and reserves its rights with respect thereto.[37] We now proceed to examine each of the proposed games through an analysis of the State's statutes and relevant case law in order to determine the reasonableness of the State's characterization of its laws permitting or prohibiting the distinct forms of gaming the Tribe proposes to conduct.

Electronic Bingo or Electronic Games of Chance or Skill

Under IGRA, the Tribe needs neither a gaming compact nor Secretarial procedures to offer bingo, whether electronically-aided or not, and it is our understanding does so today at its

[36] See *Levine Letter* and *Barber v. Jefferson County Racing Assoc., Inc.*, 960 So. 2d 599 (Ala. 2006), *re'hrg denied*, 2007 Ala. Lexis 147, *cert denied*, 127 S. Ct. 2975 (2007).
[37] See *Levine Letter*.

gaming facilities.[38] The Tribe does not require Secretarial procedures to continue offering this form of Class II gaming, but there appears to be a conflict between the type of electronically-aided bingo offered in Alabama and NIGC's classification of the same games. Therefore, in order to avoid this conflict, the Tribe requests Secretarial procedures for the same type of electronic bingo games offered elsewhere in Alabama.

The Tribe seeks gaming procedures for electronic bingo in the form played in Alabama which "allows a player to enter and play the game by requiring one press of a button or other singular act."[39] Additionally, the Tribe seeks gaming procedures for "any game, device, machine or other equipment permitted by Alabama law that allows a player to play a game or chance or game of skill." While reserving its rights to argue that electronic bingo as played in Alabama is Class II, for purposes of its application for gaming procedures the Tribe stipulates that these games may be considered Class III under NIGC's interpretation of IGRA's game classification scheme.

The State does not directly address the electronic bingo question in its written submissions. The only reference to bingo is found in the *King Letter* where the Attorney General uses the word once by referring to the Tribe's request to offer electronic bingo as "permit[ting] it to alter the manner in which it offers bingo,"[40] and otherwise takes the position that games of chance, or Class III gaming, are simply not permitted in Alabama under its Code and § 65 of the State's constitution. The Attorney General's characterization of Alabama's laws here is not reasonable when considered against the eighteen local amendments to the State's constitution whose purpose is to escape § 65's broad prohibition on lotteries and authorize the playing of bingo – a game of chance, according to the State's Supreme Court.[41]

At the informal conference, Mr. Miller of the Alabama Attorney General's office confirmed the obvious and conceded that bingo "is permitted in Alabama under certain circumstances," and "there is nothing within state law that prohibits an electronic form of that game from occurring."[42] Mr. Miller's statements are consistent with Alabama law and the facts on the ground in the State, at least in Macon and Greene Counties, where "charitable bingo" has developed into its penultimate form, Quincy's 777 Casino in Macon County, a $100 million per year operation that offers over 3,500 electronic bingo machines as well all the related amenities of a modern Class III gaming facility.

We conclude that the Tribe should be permitted to offer electronic bingo, including specifically electronic games of chance in which a player may enter and play the game using no more than one press of a button or other singular act.

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[38] Apparently, the Tribe's bingo offerings are profitable, as evidenced by its recent announcement and groundbreaking on a $250 million expansion of its gaming facilities in Atmore, Alabama. *See Pensacola News-Journal*, Dollars & Change, by Michael Stewart, December 23, 2007, attached below.

[39] The Tribe has submitted an affidavit by Teresa A. Poust, a former member of the NIGC, describing the method of play, from a player's perspective, of the electronic bingo games offered at the Victoryland Racetrack in Macon County, Alabama. See *Affidavit of Teresa A. Poust*, at Tab 5 of the Tribe's application.

[40] See *King Letter*, pg. 1.

[41] See *City of Piedmont v. Evans*, 642 So. 435 (Ala. 1994).

[42] *See* Informal Conference transcript, pg. 92-93.

Pari-mutuel Wagering

The Tribe requests that it be permitted to offer pari-mutuel wagering on live and simulcast horse and dog racing. Pari-mutuel wagering on live races is expressly permitted in Alabama. Similarly, pari-mutuel wagering is also permitted on races held outside of Alabama televised via satellite to the tracks in the State, otherwise known as simulcasting or off-track betting (OTB).[43] The Attorney General's response also acknowledges that these forms of pari-mutuel wagering are permitted in Alabama. Therefore, the Tribe should be permitted to offer both on and off-track pari-mutuel wagering.

Non-banked Card Games

The Tribe requests permission to offer non-banked card games, including any variation of the game of poker, such as draw poker, Texas hold'em, five and seven card stud, pai gow poker, jackpots, and any variation based thereon. The State responds that the express statutory availability of a "private place/social purpose" affirmative defense to the charge of simple gambling does not mean that otherwise unlawful gambling is "permitted" in Alabama.[44] The State then contends that Congress required that the Class III gaming be "permitted," i.e., there must be an affirmative grant of authority to engage in the activity in question, as opposed to "not being prohibited."[45]

The social purpose/private place defense to simple gambling or possessing certain gambling devices appears in the statutes of other states and the Department has previously addressed the question in Texas, Wyoming and Nebraska. When determining whether a Tribe may conduct any gaming activity that is permitted for any purpose by any person, organization or entity,[46] the Department's analysis under IGRA is guided by the Tenth Circuit's most recent holding in *Northern Arapaho Tribe v Wyoming*.[47]

In *Northern Arapaho*, the provision at issue excluded from its definition of gambling "any game, wager or transaction which is incidental to a bona fide social relationship, is participated in by natural persons only, and in which no person is participating, directly or indirectly, in professional gambling."[48] There, the district court held that the State of Wyoming failed to negotiate in good faith with regard to calcutta and pari-mutuel wagering, but also held that casino-style gaming and slot machine wagering were against Wyoming public policy, and thus, were not subject to negotiation.[49]

Both the Northern Arapaho Tribe and Wyoming appealed the district court's decision. The Northern Arapaho Tribe argued that it was entitled to operate gaming machines such as video

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[43] Ala. Code §§ 11-65-28 and 11-65-32.1.
[44] See *King Letter*, pp. 3-5; Ala. Code § 13A-12-21 (b) which provides that "[i]t is a defense to a prosecution under this section (for simple gambling) that a person charged with being a player was engaged in a social game in a private place."
[45] *King Letter*, p. 3.
[46] 25 U.S.C. §2710 (d) (1) (B).
[47] 389 F.3d 1308 (10th Cir. 2004).
[48] Wyo. Stat. § 6-7-01 (a) (iii) (E).
[49] *Northern Arapaho Tribe v. Wyoming*, 389 F.3d at 1310.

poker, video keno, video blackjack, video pull tabs, etc., because Wyoming law permitted an unlimited variety of gaming under its gambling statutory scheme. Wyoming responded that the exceptions to its broad criminal prohibition against gambling are narrowly drawn. Therefore, Wyoming argued, IGRA required the state to negotiate only regarding games that its laws specifically permit for commercial purposes.[50] The State of Alabama advances a similar argument in its response here.

In its ruling, the Tenth Circuit determined that the conflict between what Wyoming "permitted" under IGRA stemmed from § 2710 (d) (1) (B)'s language "located in a State that permits such gaming for any purpose by any person, organization or entity."[51] After engaging in an analysis of whether to apply Wyoming law under IGRA using either the "Wisconsin" analysis, or "categorical" approach, or the "Florida" analysis, or "game-specific" approach,[52] the court held that it did not need to decide which approach to use to determine the scope of gaming under IGRA because Wyoming's broadly-worded law permitting "any game, wager or transaction," required the State to negotiate with the Tribe under either approach.[53]

The court explained that Wyoming allowed casino-style Class III gambling, including slot machines, for a social and non-profit purpose. Furthermore, Wyoming had to negotiate regarding the broad category of "any game, wager or transaction" because the state permitted and regulated "such gaming" by certain people and organizations.[54] Significantly, the court relied on the Texas district court's opinion in *Ysleta del Sur Pueblo v. Texas* when finding that "courts have rejected states' attempts to limit negotiation with tribes due to state law restrictions against commercial gaming."[55] According to the Tenth Circuit's reasoning, a Tribe should not be precluded from commercial gambling under IGRA even if a state only grants limited permission for occasional charitable gaming.[56] If a state permits any specific games "in any fashion" that state must negotiate a gaming compact for the Tribe's proposed games even if "state law restricts the sponsors or purposes of such gaming."[57]

Against this backdrop, we determine whether the Tribe may offer poker and its variations through an examination of the following questions:

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[50] *Id.*
[51] *Id*
[52] Under the "categorical" approach, the court is required to first review the general scope of gaming permitted by a state. If the state permits *any* form of Class III gaming, the state must negotiate to offer *all* forms of Class III gaming because the state is merely regulating rather than prohibiting Class III gambling. See *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991 (emphasis added); see also *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1031-32 (2nd Cir. 1990). Under the "game specific" approach, the court is required to review whether state law permits the specific game at issue. If a state allows a particular game for any purpose, it must negotiate with the tribe over that specific game, but if the state prohibits a particular game, the state is not required to negotiate over that specific game, even if there are other games within the same category that are permitted. See *Rumsey Indian Rancheria of Wintun Indians v Wilson*, 64 F.3d 1250, 1257-58 (9th Cir. 1994); see also *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 278-79 (8th Cir. 1993).
[53] *Id.* at 1311.
[54] *Id.* at 1312-13.
[55] *Id.* at 1313.
[56] *Id.*
[57] *Id*

1. Is the distinct form of gaming activity proposed by the Tribe permitted in the State for any person, organization or entity? If yes, then that distinct form of gaming is permitted under the IGRA in the State.

2. If the distinct form of gaming activity is neither specifically prohibited nor permitted, does the State "reasonably characterize" its laws as completely prohibiting that distinct form of gaming for every person, organization or entity? If the characterization is reasonable, then the gaming is outside the permitted scope of gaming in the State. If the characterization is unreasonable, then the gaming is within the scope of gaming permitted in the State.

Unlike bingo and pari-mutuel wagering, Alabama law does not specifically authorize the play of poker or other card or dice games. Alabama's Supreme Court has ruled that poker is a game of luck, not skill, and thus may not be played outside of a private place for social purposes. Both the Tribe and the State agree on this point.[58]

The State's statutes and courts also distinguish between private place/social purpose and commercial gambling by examining whether the house is profiting, or advancing, the gambling in question. The 10th Circuit's *Northern Arapahoe* decision instructs that as long as the gambling is permitted by a state "for any purpose by any person," restrictions on the sponsors or purposes of the permitted gambling cannot overcome the fact that gambling is indeed "permitted" under IGRA.[59] Therefore, such gaming is lawful on Indian land without the restrictions otherwise imposed on non-Indian gaming as a matter of state law.[60]

The Tribe contends that the availability of a statutory affirmative defense claiming that the simple gambling offense charged was being conducted in a private place for social purposes effectively permits virtually all forms of gambling in Alabama. The State responds that no gambling other than bingo and pari-mutuels are permitted in Alabama and the private place/social purposes defense is not enough to overcome the "permitted" threshold under IGRA because the State's laws consider any gaming to be unlawful except as authorized by the legislature.

We conclude that the private place/social purpose affirmative defense does not change the fact that the State prohibits gambling beyond its version of bingo and pari-mutuels. Put another way, permitting a defendant to raise an affirmative defense to the criminal complaint of simple gambling does not change the fact that he is a defendant, charged with committing a criminal act, not a forfeiture offense or other civil tort. While we are sympathetic to the Tribe's arguments, we similarly cannot ignore the State's public policy as expressed in its

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[58] See *King Letter*, pp. 3-4 and *Levine Letter*, p. 9.

[59] "In sum, if a state permits Class III gaming under the "Wisconsin" approach, or if a state permits any specific games (here, all games) in any fashion under the "Florida" approach, that state must negotiate a compact for those games even if state law restricts the sponsors or purposes of such gaming. *Northern Arapahoe Tribe v Wyoming*, 389 F.3d at 1312.

[60] *Id.* at 1312.

constitution, statutes and case law that any form of gambling not authorized by statute or the constitution is, in fact, unlawful in Alabama.

Therefore, answering the first prong of our test, we determine that the distinct form of gambling requested by the Tribe, non-banking card games, is not permitted in the State for any person, organization or entity. As a result, we need not proceed to addressing the second prong of our test. Accordingly, the Tribe should not be permitted to offer or conduct non-banked poker and its variations as requested in the Tribe's application.

Conclusion

The Tribe should be authorized to engage in the following activities under Class III gaming procedures pursuant to 25 U.S.C. 2710 (d) (7) (B) (vii) (I), subject to the requirements discussed in this memo: (1) Electronic forms of bingo or electronic games of chance which may be considered Class III gaming by the NIGC, and (2) on-track pari-mutuel wagering, including pari-mutuel betting through simulcasting on any gaming activity occurring off Tribal lands. We decline the Tribe's request to offer non-banked card games, including any variation of the game of poker, such as draw poker, Texas hold'em, five and seven card stud, pai gow poker, jackpots and any variation based thereon.

Within 30 days of the date of this preliminary determination on the scope of gaming in the State of Alabama, we will contact representatives of the Governor, the Attorney General, and the Tribe, to schedule the resumption of the informal conference under 25 CFR § 291.8(b)(2).

Sincerely,

Acting Deputy Assistant Secretary –
Policy and Economic Development

cc: State Governor
Tribal Chairman