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

STATE OF ALABAMA	*	
	*	
Plaintiff,	*	
	*	**CASE NO: C.A. 08-0182-WS-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,	*	
	*	
vs.	*	
	*	
POARCH BAND OF CREEK INDIANS	*	
	*	
Defendant – Intervenor	*	

PLAINTIFF'S RESPONSE TO UNITED STATES' MOTION TO DISMISS AND POARCH BAND OF CREEK INDIANS' MOTION TO DISMISS

The United States of America, the United States Department of Interior, and the Secretary of the Department of Interior Dirk Kempthorne (collectively referred to as "Department"), as well as the Poarch Band of Creek Indians ("Tribe") wrongfully base their separate motions to dismiss on two flawed arguments: (1) that the Plaintiff, the State of Alabama ("State"), has brought nothing more than a procedural challenge to 25 CFR Part 291 ("Regulations"), and (2) that the State has not suffered a concrete injury sufficient to institute and maintain an action. Both of these notions miss the mark. As evidenced by the Complaint, the action brought by the State is a substantive action challenging the Regulations' failure to comport with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710 *et seq*., and the Regulations are an unconstitutional grant of authority to the

Secretary of Interior in violation of the separation of powers doctrine.

Further, the State clearly has been injured by being compelled to participate in an invalid administrative process. *See Texas v. U.S.*, 497 F.3d 491, 496-497 (5th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3471 (U.S. Feb. 25, 2008)(No. 07-1109)(subjecting Texas to the identical invalid administrative procedures as here was sufficient injury). As such, the Motions to Dismiss filed by The Department, and the Tribe should be denied. This response addresses both motions as both seek dismissal of the State's Complaint on the grounds of statute of limitations, ripeness, and standing.[1]

I. FACTUAL BACKGROUND

The United States Court of Appeals, Fifth Circuit, found 25 CFR Part 291 to be invalid in August of 2007. In an apparent effort to avoid another adverse judicial determination of the validity the Regulations, the Department argues that the State is outside the limitation period for review. *See Texas v. U.S.*, 497 F.3d at 511 (declaring 25 CFR Part 291 be invalid and not a reasonable effectuation of the Indian Gaming Regulatory Act). The Department charges that the State failed to maintain an action challenging the Regulations' validity within six years of their promulgation. In 1999, the Department, in an action filed by the States of Alabama and Florida, argued to the United States District Court for the Northern District of Florida that an action challenging the validity of the

[1] The Tribe, but not the Department itself, offers an additional argument concerning exhaustion of administrative remedies claiming that "the agency ordinarily should be given the first opportunity to consider the challenge." Tribe's Brief at 22. Here the Department has considered and rejected the State's challenge to the Regulations as shown by the Complaint and attachments thereto. These Regulations contain no express condition precedent required to maintain suit in court. There are no additional facts or determinations that could impact the legal questions put forth by the State.

Regulations was not ripe for determination.[2] The District Court, based upon representations made by the Department that a final determination would be prompt, agreed to a Joint Scheduling Order in which all parties would present cross-motions for summary judgment 45 days after the Department's decision on Class III gaming in Florida. This action then languished for over eight years waiting on the Department to do what it represented to the court it would do. The court decided to dismiss the action without prejudice in 2007.

The Regulations at issue here were applied to State in 2006:

> 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. We have determined that this proposal is complete and that the Tribe meets the eligibility requirements in 25 CFR Part 291.3.

Letter to Honorable Troy King, Alabama Attorney General, April 13, 2006, attached to Complaint as Exhibit "D"; see also, *Letter to Alabama Attorney General*, March 4, 2008, attached to Complaint as Exhibit "G" (the Department notified the Tribe they met the eligibility requirements of 25 CFR 291.3 on April 4, 2006). The State replied to this initial request from the Department, but specifically reserved all claims and rights to challenge the actions of the Department. *See Letter to George Skibine*, July 28, 2006, attached to Complaint as Exhibit "E." These specific reservations were based on the *Texas v. U.S.* case that was pending before the Fifth Circuit, on the very issue central to this case, the validity of 25 CFR Part 291.

After the Fifth Circuit invalidated the Regulations, the State requested the Department to

[2] Interior stated in 1999, "Although we believe that plaintiffs have not shown that they have yet experienced any injury as a result of the regulation to satisfy Article III standing requirements, the Court, in our view, can most readily and appropriately resolve this case by holding the plaintiff's facial challenge to the relevant plan provisions is not ripe for review and staying proceedings." *State of Florida and State of Alabama v. United States of America, et.al.*, Case

reconsider its decision to apply the invalid Regulations to the State and to dismiss the Poarch Band of Creek Indians' request because the Regulations were invalid. *See*, *Letter to George Skibine*, September 26, 2007, attached to Complaint as Exhibit "F," and Complaint ¶ 18. The Department effectively denied the State's request by issuing their "preliminary determination" on the scope of gaming in Alabama almost six months after the State's request for dismissal. See, *Letter to Alabama Attorney General*, March 4, 2008, attached to Complaint as Exhibit "G." The decision to apply the invalid Regulations to the State and the refusal to dismiss the Tribe's proposal (after the Fifth Circuit determined the Regulations were invalid) are final actions of the Department.

Despite claiming that the State lacked the ability to maintain a suit against the Department in 1999, the Department now claims the statute of limitations has run. By making this argument, the Department and the Tribe are asserting that the State could have instituted and maintained a suit against the Department in 1999. The Department effectively stalled the District Court in the Northern District of Florida throughout the entire period of their interpretation of the statute of limitations period, and now the Department is changing arguments and claiming the State, in fact, did have standing to sue from 1999 to 2005. Defendants are not entitled to have it both ways in a self-serving attempt to prevent another judicial determination finding their Regulations invalid.

II. ARGUMENT

A. Standard of Review

The burden of establishing a federal court's jurisdiction, when challenged, lies with the party asserting jurisdiction. *Thomson v. Gaskill*, 315 U.S. 442, 446, 62 S.Ct. 673, 675 (1942). This burden, however, is not a heavy one. *Garcia v. Copenhaver, Bell & Associates, M.D.'s P.A.*, 104

F.3d 1256, 1260 (11th Cir. 1997)(it is extremely difficult to dismiss a claim for lack of subject matter jurisdiction). The standard of review for a motion to dismiss is, "[w]hen considering a motion to dismiss, all facts set forth in the plaintiff's complaint are to be accepted as true and the court limits its consideration to the pleadings and the exhibits thereto." *New Hampshire Insurance Company v. Blue Water OffShore, LLC*, 2008 WL 682400 *1 (S.D. Ala. 2008)(quoting *Grossman v. Nations bank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000)).

B. Statute of Limitations

The State's challenge to the Regulations is a substantive challenge and, as such, the statute of limitations on this claim has not run. Even if the Court finds that the statute of limitations has run, the limitation period should be tolled based upon the representations of the Department in the Northern District of Florida case, *State of Florida and State of Alabama v. United States, et al.*, Case No.: 4:99-CV137-RH.

1. Substantive Challenge

The Department and the Tribe both improperly attempt to define the State's challenge to the Regulations as a facial procedural challenge to the Regulations, and argue from this (mis)characterization that 28 U.S.C. § 2401(a) therefore bars this suit. However, the State's challenge is a substantive challenge because it alleges that the Regulations fail to comport with IGRA, and that the Regulations unconstitutionally delegate authority to the Secretary of Interior in violation of the separation of powers doctrine.[3] Complaint at ¶ 30.

Dismiss or, in the Alternative, to Stay Proceedings (June 17, 1999).

[3] The term facial does not incorporate the full body of case law regarding the statute of limitations for cases challenging regulations. The case law focuses more precisely on the terms substantive and procedural. A procedural challenge is one that focuses on an "agency's

According to the Eleventh Circuit, an action attacking the validity of the regulations as invalid because they are inconsistent with their parent statute "constitutes a substantive challenge to these regulations." *Legal Environmental Assistance Foundation, Inc. v. U.S. E.P.A.*, 118 F.3d 1467, 1473 (11th Cir. 1997). The State is doing just that, challenging the validity of the Regulations on the basis that they are inconsistent with IGRA. The Complaint specifically states, "The procedures exceed the scope of authority granted to the Secretary by Congress in 25 U.S.C. § 2710, and are thus *ultra vires* …." Complaint at ¶ 30. The Complaint further states, "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 …." *Id*. These statements represent the exact types of challenges that the Eleventh Circuit has found are substantive challenges to a regulation, therefore the statute of limitations for a substantive challenge does not necessarily begin to run on the date of the promulgation of the regulation. *Legal Environmental Assistance Foundation, Inc. v. U.S. E.P.A.*, 118 F.3d at 1473.

Because the State is not bringing a facial procedural challenge, the statute of limitations has not run in this case. Even the Department recognizes that a substantive challenge is not barred based upon the date of promulgation of the regulations: "Unlike procedural or facial attacks, a cause of action challenging the substantive application of a regulation (an "as-applied" challenge) may accrue well after the regulation was issued." Defendant's Motion to Dismiss, p. 9. The Plaintiff's instant action is postured as a substantive challenge. As such, the statute of limitations for a substantive action does not accrue until the Regulations are applied. The cases cited by both the Department and

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compliance with rulemaking requirements such as notice and comment." *Dunn-McCampbell Royalty v. National Park Service*, 112 F.3d 1283, 1289 (5th Cir. 1997)(Jones, J., dissenting), citing *N.L.R.B. Union v. FLRA*,834 F.2d 191, 195-97 (D.C. Cir. 1987). Substantive challenges

the Tribe regarding the facial challenge all concede this point. *See P & V Enterprise v. U.S. Army Corps of Engineers*, 516 F.3d 1021, 1026 (D.C. Cir. 2008)("If Corps applies the rule to P & V's property, or denies its petition to amend or rescind the rule, then P & V would be able to challenge the rule notwithstanding that the limitations has run."); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 714 (9th Cir. 1991)("Other circuits have concluded that an agency regulation or other action of continuing application may be challenged after a limitations period has expired if the ground for challenge is that the issuing agency acted in excess of its statutory authority."); and *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv*, 112 F.3d 1283, 1287 (5th Cir. 1997)("It is possible, however, to challenge a regulation after the limitations period has expired, provided that the ground for the challenge is that the issuing agency exceeded its constitutional or statutory authority.")

2. Applied Action / Final Agency Action

The statute of limitations found in 28 U.S.C. § 2401(a) cannot begin accruing until a party can "institute and maintain a suit in court." *Spannaus v. DOJ*, 824 F.2d 52, 56 (D.C. Cir. 1987). This concept requires an action by the agency that completes the decision making process, and the results of that process "*directly affect the parties*." *Franklin v. Massachusetts*, 505 U.S. 788, 797, (1992)(emphasis added). To put it another way, the statute of limitations cannot begin to run until a party has standing to bring an action and the action is ripe. In all instances, these concepts require both an action and a result of that action that affects or harms a party. The Department has performed two final actions in this case, both of which wrongfully subjected the State to the invalid Regulations. First, the Department decided to apply the Regulations to the State under 25 CFR §

"attack the regulations compliance with statutory authority or other substantive deficiency. *Id.*

291.6(b), which is described in the regulation itself as a "final determination." Second, the Department denied the State's request to reconsider its decision to apply the invalid Regulations to the State.

Under 25 CFR Part 291, the Regulations cannot apply or begin to harm a state until the Secretary makes a final determination under 25 CFR § 291.6 that a tribe is eligible to utilize the Regulations to seek Class III gaming: "Within 30 days of receiving a complete proposal, [the Secretary must] notify the Indian tribe in writing whether the Indian tribe meets the eligibility requirements in § 291.3. **The Secretary's eligibility determination is final for the Department.**" 25 CFR §291.6(b) (emphasis added). According to the regulations themselves, the Secretary's determination is a final decision. 25 CFR § 291(b). In other words, it is not until the Secretary makes the final decision that the Tribe is eligible for the application of the Regulations that a State has a cause of action that it can institute and maintain in court.[4] Prior to this final decision, it is only speculative that the Regulations would even apply to the State. These Regulations require a specific determination by the Secretary of the Department of Interior, based upon a set of facts or events that must occur prior to eligibility, finding that the regulations are to be applied to the State and the tribes. *See* 25 CFR 291.6. Only upon such a determination by the Secretary can a state institute and maintain a substantive action against the Department of Interior, and, therefore, the statute of limitations begins to run only upon that decision. *See Trafalgar Capital Associates, Inc. v. Cuomo*, 159 F.3d 21, 35 (1st Cir. 1998)(quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 241 (1980))(statute of limitations begins to run on final agency action, action is final when it is a "definitive statement"

[4] For the statute of limitations to begin to accrue there must be a final action the results of which directly affect the parties. *Franklin v. Massachusetts*, 505 U.S. at 797. The promulgation of the Regulations in 1999 was a final agency action. The results of that action did not directly affect

concerning the agency's position with "direct and immediate consequences").

Because of the unique nature of these Regulations, no immediate, direct harm results from these Regulations until the Secretary of the Interior decides to apply them. 25 CFR § 291.6. Once the decision has been made to apply the Regulations, harm occurs and an action challenging the application of the Regulations is proper.

The principle that the harm or injury under 25 CFR Part 291 begins at the moment the Secretary decides to apply the invalid Regulations to the State was explained in detail by the Fifth Circuit:

> Contrary to Appellees' suggestion that Texas faces nothing more than the possibility that the Secretary might someday approve of gaming procedures for Kickapoo land, Texas is presently being subjected to an administrative process involving mediation and secretarial approval of gaming procedures even though no court has found that Texas negotiated in bad faith. Because Texas challenges the Secretary's authority to undertake this process, Texas has alleged a sufficient injury for standing purposes. … The alleged injury is not hypothetical because the Secretarial Procedures have already been applied to Texas: The Kickapoo Tribe submitted a Class III gaming application to the Department of the Interior, the Secretary notified Texas and the tribe that the application met the relevant eligibility requirements, and the Secretary invited Texas to comment on the proposal and submit an alternative proposal. Texas's only alternative to participating in this allegedly invalid process is to forfeit its sole opportunity to comment upon Kickapoo gaming regulations, a forced choice that is itself sufficient to support standing. … We are satisfied that Texas has alleged an injury in this case.

Texas v. U.S., 497 F.3d at 497-498. What Texas faced in *Texas v. U.S.* is precisely what the State of Alabama now faces. The State respectfully suggests that this Court follow the Fifth's Circuit's analysis.

As detailed in the State's Complaint, and the attached Exhibits, the Tribe submitted a Class III gaming application to the Department. Complaint at ¶ 14. The Department then notified the

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the State until 2006. Therefore the statute of limitations could not have begun until 2006.

State and the Tribe that the Tribe met the relevant eligibility requirements and requested the State to respond and submit an alternative proposal. Complaint at ¶ 14, and Exs. "D" and "G" thereto. The State refused to submit an alternative proposal, but responded to the request with the specific reservation that the State was reserving all rights to seek judicial action concerning the invalid Regulations. Complaint at ¶ 15, and Ex. "E" thereto. As such, the first date upon which the State was injured and could institute and maintain a substantive action was April 4, 2006, the date that the Department made the determination that the Tribe met the eligibility requirements of the Regulations, and applied the Regulations to the State. Complaint Ex. "E."

The Department also refused the State's request to reconsider the application of the invalid Regulations. The State requested by letter dated September 26, 2007, that the Department reconsider its decision to apply the invalid Regulations to the State and dismiss the Tribe's application. Complaint at ¶ 18, and Ex. "F" thereto. On March 4, 2008, the Department effectively denied the State's request by continuing to apply the invalid Regulations to the State. Complaint at ¶ 19, and Ex. "G" thereto. This denial of the State's request continued to subject the State to the invalid Regulations, thereby harming the State. *See Texas v. U.S.*, 497 F.3d at 497-498. The action by the Department is a final agency action reviewable by this Court.

3. Substantive Action Not Barred by Statute of Limitations

As stated above, and set forth in detail in the Complaint, the State has brought a substantive challenge to the Department's authority to subject the State to the invalid Regulations. The statute of limitations on a substantive challenge does not run at the expiration of six years from the date of promulgation of the regulations, but rather six years from the date of application or harm caused by the regulations. The State has demonstrated two agency actions that are reviewable by this Court:

the decision to apply the invalid Regulations to the State and the denial of the request to reconsider that action. As such, the statute of limitations has not run, nor does it apply to this substantive challenge brought by the State here. *See Legal Environmental Assistance Foundation, Inc. v. U.S. E.P.A.*, 118 F.3d 1467, 1473 (11th Cir. 1997)(in the course of reviewing an agency order, the court has jurisdiction for substantive challenge to regulations); *P & V Enterprise v. U.S. Army Corps of Engineers*, 516 F.3d 1021, 1026 (D.C. Cir. 2008)(court can review substantive challenge to regulations notwithstanding that the limitations has run); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 714 (9th Cir. 1991)(substantive challenge not barred by limitations when the ground for challenge is that the agency acted in excess of it statutory authority); and *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) (substantive challenge based on agency exceeding its statutory authority is not barred by limitations period).

4. Equitable Tolling

Strictly in the alternative, should the Court find that the statute of limitations applies (it does not) and that the State could have brought this action before April 2005, in the interests of justice, the actions by the Department warrant that such limitations period be tolled for the duration of the action that was pending in the United States District Court for the Northern District of Florida from 1999 to 2007. *State of Florida and State of Alabama v. United States of America, et al.*, Case No.: 4:99-CV137-RH. The United States Supreme Court has noted that statutes of limitations were designed to "assure fairness to defendants," but this protection can be "outweighed, however, where the interests of justice require vindication of the plaintiff's rights." *Burnett v. New York Central Railroad Company*, 380 U.S. 424, 428 (1965).

The same parties in this present action were present in the Florida case, and in that action, the

Department represented to the court that the action was not ripe for review, thereby necessarily positioning that no limitations period was applicable. *State of Florida and State of Alabama v. United States of America, et al.*, Case No.: 4:99-CV137-RH, *Federal Defendants' Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative, to Stay Proceedings* (June 17, 1999). Relying on the representations of the Department, the Court issued a Joint Scheduling Order requiring the parties to file cross motions for summary judgment 45 days after the Secretary of Interior issued the proposed Class III gaming procedures. The State of Florida case remained in this posture until the court dismissed the action without prejudice in August 2007.

The same party that stated in 1999 that the State could not maintain an action against the invalid Regulations, now argues that the statute of limitations for this challenge has run. A statute of limitations cannot begin to run until a party can maintain and institute an action. *Spannaus v. DOJ*, 824 F.2d 52, 56 (D.C. Cir. 1987). In order to maintain an action, by definition, requires the party to have standing and to have an action that is ripe. By arguing that the statute of limitations has now run, the Department is taking the exact opposite legal position it took in the Florida case. The Department should not be allowed to use the statute of limitations to defeat the State's claims when the Department itself maintained that the Florida case was not ripe, and that no claim had accrued for purposes of the statute of limitations. *See Stephens v. Tolbert*, 471 F.3d 1173, 1177 (11th Cir. 2006) (court can prevent a party from making inconsistent claims in subsequent proceedings). As a matter of equity, the statute of limitations should be tolled for the entire period in which the Department maintained that the limitations period could not even have begun to accrue. *See Burnett v. New York Central Railroad Company*, 380 U.S. 424, 428 (1965).

III. RIPENESS

Both the Department and the Tribe argue that the State's claim is not ripe for review. Just as both mischaracterized the State's challenge as a facial procedural challenge, both also make a shallow attempt to mischaracterize the harm or injury to the State in order to facilitate their arguments. Both argue that the Department has not made an agency action that is reviewable. Both argue that the State will only be injured upon a decision by the Department to promulgate Class III gaming procedures for the Tribe. Both argue that until such procedures are issued the State has not been injured, and as such the action is not ripe for review. Both of the arguments turn on whether the State has been injured. As specifically stated in *Texas v. U.S.*, the State has been injured. *Texas v. U.S.*, 497 F.3d at 496-497. The State has been injured, in fact, by the Department's continued application of the invalid Regulations. This action is properly before this Court, as the State continues to suffer the hardship of being subjected to invalid, unconstitutional procedures.

The ripeness doctrine prevents courts from reviewing "abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Texas v. U.S.*, 497 F.3d at 498 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515 (1967)). Accordingly, "a ripeness inquiry gauges 'whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decision making by the court.'" *Bill Salter Advertising, Inc. v. City of Brewton*, 2007 WL 2409819, * 3 (S.D. Ala., 2007)(quoting *Beaulie v. City of Alabaster*, 454 F.3d 1219, 1227 (11th Cir. 2006)). To determine if a case is ripe, the courts must consider two factors, "'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Id.*, *see also National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808, (2003). These two prongs, fitness

and hardship, "must be balanced and a case is generally ripe if any remaining questions are purely legal ones," and the plaintiff can show sufficient hardship. *Texas v. U.S.*, 497 F.3d at 498 (internal cites omitted).

A. Fitness for Review

An action by an agency is fit for review when three factors are met, "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Beaulie v. City of Alabaster*, 454 F.3d 1219, 1227 (11th Cir. 2006)(quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733, 118 S.Ct. 1665, 1670 (1998)). The State's Complaint satisfies each of these factors.

The State is being subjected to a process that is invalid and unconstitutional. Complaint at ¶ 23. Delaying review of this process will cost the State additional time, money, and resources by requiring it to devote its attention to procedures that have already been determined by the Fifth Circuit to be invalid. *Texas v. U.S.* 497 F.3d at 511. Without court intervention, the State stands to continue to suffer the injury of being subjected to an invalid process.

The Court would not be interfering with further administrative actions regarding the Department's decisions applying the invalid Regulations to the State. The decisions, both to subject the State to the Regulations and the denial of the State's request to reconsider, were sufficient to complete the decision making process and directly affect the State's rights. These decisions were made in April of 2006 and in March of 2008, when the Department made (1) the decision to apply the invalid Regulations to the State in accordance with 25 CFR § 291.6, and (2) deny the State's request to reconsider the application of the invalid Regulations to the State. Complaint at ¶ 26, and

Exhibit "G." These decisions have subjected the State to a process that is invalid and unconstitutional, thereby causing injury to the State. *Texas v. U.S.*, 497 F.3d at 496-97. The decisions are final, reviewable, and require no further administrative action.

Lastly, no further factual development is necessary to aid Court in further understanding the issues presented in this case. The questions presented are clearly purely legal. The State seeks only a legal determination that the regulations in 25 CFR Part 291 exceed their statutory authority, and that the regulations provide an unconstitutional grant of authority to the Secretary of Interior in violation of the separation of powers doctrine. Complaint at ¶ 30. No additional facts could provide any greater insight or understanding regarding the purely legal questions raised by the State. No amount of additional time could make these Regulations valid and constitutional.

The State will continue to suffer hardship by being subjected to invalid Regulations; the Court will not improperly interfere with further agency action because no further action is necessary to directly affect the State; and the questions presented are purely legal and not dependent on additional factual development. The State's Complaint is fit for review.

B. Hardship

The second prong of the test for ripeness asks whether the parties will suffer hardship if the court withholds consideration. *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808 (2003). As stated above, the State has been harmed by being subjected to invalid Regulations that fail to comport with IGRA. Hardship has been found in "legal harms, such as the harmful creation of legal rights or obligations; practical harms on the interests advanced by the party seeking relief; and the harm of being 'force[d] … to modify [one's] behavior in order to avoid future adverse consequences.'" *Texas v. U.S.*, 497 F.3d at 499 (quoting *Ohio Forestry Ass'n v. Sierra*

Club, 523 U.S. 726, 734 (1998)).

The Fifth Circuit found that Texas, facing the exact same situation as the State here, was harmed because Texas was forced to modify its behavior to avoid future adverse consequences. *Texas v. U.S.*, 497 F.3d 499. The State is subject to this same harm by being required to participate in a process that is invalid and unconstitutional. The State submitted to the process with the express reservation that it would pursue its rights against the Department. Complaint at ¶ 15. The State, after the Fifth Circuit's opinion invalidating these Regulations, requested to be relieved of this harm. Complaint at ¶ 18. The Department rejected the State's request and continued to subject the State to the invalid Regulations. Complaint at ¶ 26. Therefore, the State has been harmed and will continue to be harmed if the Court withholds consideration of the Complaint.

IV. STANDING

While ripeness determines the proper timing of an action, standing determines if the right parties have brought the action. *See Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir. 2006). The State clearly is the proper party to bring this action. The State has suffered the concrete injury of being subjected to the invalid, unconstitutional Regulations. Complaint at ¶ 26. The Department caused this harm by deciding that the Tribe was eligible to proceed with the invalid Regulations, and the Department continued to cause this harm when it denied the State's request to reconsider the application of the invalid, unconstitutional Regulations to it. Complaint at ¶s 13, 26. This Court can redress this harm by finding, as the Fifth Circuit did, that the Regulations are "invalid and constitute an unreasonable interpretation of IGRA." *Texas v. U.S.*, 497 F.3d at 511.

In order to prove standing, a party must show an "injury in fact, causation, and redressibility." *Elend v. Basham*, 471 F.3d at1205. To demonstrate injury in fact, requires a party to

prove that there is a "concrete and particularized" invasion of a legally protected interest that is "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136 (1992). To demonstrate causation, the party must show "there is a casual connection between the injury and the conduct complained of, such that the injury is fairly traceable to the challenged action of the defendant." *Id.* Redressability is demonstrated by showing that "it must be likely, not merely speculative, that the injury will be redressed by a favorable decision." *Id.*

A. Injury in Fact

Both the Department and the Tribe argue that the State has not incurred a concrete harm, and that any harm at this point is speculative. This assertion is based on the misguided attempt to define the State's harm or injury as the promulgation of Class III gaming procedures for the Tribe. This is not the State's harm. Instead, the State, as stated above, is harmed by being subjected to the invalid administrative process created by the invalid Regulations. Complaint at ¶s 14, 18, 19, 26, 27, and 28. The Department determined that the Tribe was eligible to proceed under the invalid Regulations, the State requested the Department to reconsider its decision to subject the State to invalid administrative procedures, and the Department denied the State's request. The injury in the instant matter is the precise type of injury that the Fifth Circuit found was being suffered by the State of Texas under the same Regulations: "Texas has suffered the injury of being compelled to participate in an invalid administrative process, and we agree that standing exists on this basis." *Texas v. U.S.*, 497 F.3d at 496-497. Because the State is being subjected to the same invalid administrative process as the State of Texas suffered in *Texas v. U.S.*, the State has suffered sufficient injury in fact to show that standing exists.

B. Causation

Causation, although briefly addressed by the Department based on its incorrect assumption that no final agency action has occurred, is not seriously disputed. First, as stated above, there are two final agency actions sufficient to cause harm to the State. The first action is the initial decision by the Department to subject the State to the invalid procedures. The Department determined that the Tribe was eligible for the application of the invalid Regulations. Complaint at ¶ 14. This decision is defined by the Regulations themselves to be a final decision for the Department. 25 CFR § 291.6(b). The result of this decision caused the State to be subjected to the invalid Regulations. The second action that caused harm to the State was the Department's denial of the State's request to reconsider its decision to apply the invalid Regulations to the State. Complaint at ¶s 18, 19, and 26. This decision continues to subject the State to the invalid Regulations. It is clear that these harmful actions are directly traceable to the Department.

C. Redressability

As with the causation argument, the Department bases its argument against redressability on the misguided assumption that the harm in this case is the promulgation of Class III gaming procedures. Redressability requires the plaintiff to show that it is likely that the court can redress the concerns of the plaintiff with a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). It is clear from the relief requested by the State in the Complaint, that a favorable decision holding the Regulations invalid would redressed the harm caused to the State because the Department will be unable to further subject the State to the invalid Regulations.

V. CONCLUSION

Based on the foregoing, this action is not barred by the statute of limitations, and the action is

ripe, and the State has standing to pursue its claims based upon the specific harm of being subjected to invalid, unconstitutional Regulations. Accordingly, the State respectfully requests that this Court deny the Defendants' Motion to Dismiss and deny the Defendant-Intervenor's Motion to Dismiss. The State requests such other, further and different, relief as justice may require.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6th day of June, 2008, electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and request the Court to serve the same electronically on the following:

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