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

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 08-cv-182
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
POARCH BAND CREEK INDIANS,	)	
	)	
Defendant-Intervenors.	)	
	)	

UNITED STATES' MOTION TO DISMISS

Pursuant to Fed. Rule Civ. Pro. 12, the Federal Defendants respectfully request this Court to dismiss the State of Alabama's complaint. The State of Alabama challenges a regulation issued by the Department of the Interior ("Interior"), which allows for Interior to set forth procedures allowing for an Indian tribe to conduct what is known as Class III gaming under the Indian Gaming Regulatory Act ("IGRA") in the absence of a compact between the Tribe and the State. First and foremost, the State's facial challenge to the regulation is barred by the applicable statute of limitations. Facial challenges to regulations must be brought within six years of the issuance of the regulation; Alabama did not file this action until nine years after the regulation was issued. Alabama must now wait to challenge the regulation until Interior has applied the regulation in such a manner that it would be ripe and as to give Alabama standing to sue. As

Interior has only taken preliminary action under the regulation on the Poarch Band's proposal, this Court must dismiss.

BACKGROUND

A. The Indian Gaming Regulatory Act and the Procedures Regulations, 25 C.F.R. Part 291

Congress enacted the IGRA, 25 U.S.C. 2701 et seq., in 1988 to provide a statutory basis for the operation and regulation of Indian gaming, finding that existing federal law did not "provide clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. 2701(3). See, e.g., United States v. Cook, 922 F.2d 1026, 1033 (2d Cir. 1991), cert. denied, 500 U.S. 941 (1991)("The congressionally declared purpose of the IGRA is to promote tribal economic development and self-sufficiency in addition to shielding the tribes from the influences of organized crime through the enactment of the statutory scheme regulating the operation of gaming by Indian tribes."); Spokane Tribe v. Washington State, 28 F.3d 991, 997 (9th Cir. 1994) ("The IGRA was passed to fill a void in Indian gaming regulation that arose from the states' dependence on Congress for any authority to regulate tribal affairs."); Seminole Tribe of Florida v. State of Florida, 11 F.3d 1016, 1019 (11th Cir. 1994) ("In an attempt to supply some much-needed regulation, and after contentious debate concerning the appropriate state role in the regulation of Indian gaming, Congress enacted the [IGRA].").

Prior to the enactment of IGRA, states were generally precluded from any regulation of gaming on Indian reservations. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987). IGRA establishes that "Indian tribes have the exclusive right to regulate gaming on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted

within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). The statute divides gaming activities into three classes, each subject to different rules and prohibitions. 25 U.S.C. § 2703 (6) - (8) (defining Class I, II and III). Class III gaming, the form of gaming at issue in this case, primarily includes slot machines, casino games, banking card games, dog racing, horse racing and lotteries. Id. at § 2703 (8).

In terms of regulation, IGRA envisions that Class III gaming will occur under the terms negotiated in a "compact" between an Indian Tribe and a state. 25 U.S.C. § 2710 (d)(1). When a Tribe requests a compact to conduct Class III gaming, "the State shall negotiate with the Indian Tribe in good faith to enter into such a compact." Id. at § 2710(d)(3)(A). Should those efforts fail, IGRA provides a comprehensive remedial process to prevent an impasse, triggered by the tribe filing suit against the state alleging that the state has refused to negotiate or has failed to negotiate in good faith. Id. at § 2710(d)(7)(B)(ii). Should a court find that the State did not negotiate in good faith, it may order the parties to conclude a compact, Id. at § 2710(d)(7)(B)(iii), and may order a mediator to administer the process and select from proposed compacts. Id. at § 2710(d)(7)(B)(iv). Ultimately, should the state refuse to consent to the compact chosen by the mediator, the mediator must notify the Secretary of the Interior ("Secretary"), who "shall prescribe . . . procedures . . . under which Class III gaming may be conducted." Id. at § 2710(d)(7)(B)(vii).

In 1996, the Supreme Court held that the Indian Commerce Clause did not provide authority for Congress to abrogate the sovereign immunity of states, and so federal courts do not have jurisdiction over suits brought by Indian Tribes against states under IGRA if a state raises

an Eleventh Amendment defense. Seminole Tribe of Florida v. State of Florida, 517 U.S. 44, 72-73 (1996). In response to this decision, the Secretary promulgated a regulation establishing the means by which the Secretary would proceed if a state does not consent to suit. 64 Fed. Reg. 17,535 (Apr. 12, 1999) (codified at 25 C.F.R. Part 291) ("Procedures regulation").[1/] This regulation provides that if a tribe files suit against a state for failure to negotiate in good faith, 25 U.S.C. § 2710(d)(7)(A)(i), and the state invokes its immunity to suit, the tribe may apply to the Secretary for Class III gaming procedures under which gaming in lieu of a compact may occur. 25 C.F.R. § 291.1. The process was intended to parallel that established in IGRA, whereby, when a court found that a state had negotiated in bad faith, and court-ordered mediation is unsuccessful, the Secretary "shall prescribe . . . procedures . . . under which class III gaming may be conducted." 25 U.S.C. § 2710(d)(7)(B)(vii).

No Class III gaming by a tribe is authorized by the Procedures Regulation unless and until the Secretary of the Interior publishes in the Federal Register the specific procedures by which a Tribe can engage in Class III gaming. 25 C.F.R. § 291.13. Prior to such publication, the regulation sets forth an administrative process that allows for tribal input and input from the State in which the proposed gaming would be conducted. See generally 25 C.F.R. Part 291. The process begins when an Indian Tribe submits a proposal to Interior setting forth facts and legal authority for the scope of gaming requested, along with procedures for the regulating and conducting the business of gaming. Id. at § 291.4. Once Interior receives a proposal, it notifies

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[1/]The Supreme Court's Seminole decision did not consider the 11th Circuit's opinion on the Secretary's authority to issue gaming procedures under IGRA, notwithstanding a State's refusal to enter into a compact. See Seminole Tribe of Florida v. State of Florida, 517 U.S. at 51, n. 4 - n. 5 and at 76, n. 18; Seminole Tribe of Florida v. State of Florida, 11 F.3d 1016, 1029 (11th Cir. 1994).

the Tribe if it is eligible to proceed under the regulation, and informs the State of the Tribe's proposal and offers the State the opportunity to submit an alternative proposal. Id. at § 291.6-291.7. If the State does not submit an alternative proposal, Interior will issue a preliminary decision on what the scope of gaming is that would be permissible, and the parties may decide to discuss unresolved matters or areas of disagreement at an informal conference. Id. at § 291.8. After hearing from the interested parties, Interior may issue a final decision setting forth Class III gaming procedures or disapproving the proposal. Id.

B. Previous Litigation and Poarch Band's Proposal under 25 C.F.R. Part 291

The Poarch Band of Creek Indians ("Poarch Band" or "the Tribe") sued the State of Alabama under the IGRA claiming the State had not negotiated a compact in "good faith." Poarch Band of Creek Indians v. State of Alabama, 776 F. Supp. 1549 (S.D. Ala. 1992). The State invoked its Eleventh Amendment immunity from suit as an affirmative defense, and subsequently the Supreme Court issued its decision in Seminole Tribe. The district court therefore dismissed the Tribe's suit.

Directly following the issuance of the Procedures Regulation in 1999, the States of Alabama and Florida jointly filed an action against the United States, the Department of the Interior and the Secretary of the Interior in the Northern District of Florida, challenging the Procedures Regulation as being "invalid." State of Florida and State of Alabama v. United States of America, et al., Case No. 4:99cv137-RH/WCS, Compl. ¶ 1 ("State of Florida"). After being given the opportunity to show cause as to why the case should not be dismissed, the State of Florida action was dismissed without prejudice on September 7, 2007. Id.; see also Pl.'s Compl.

at ¶ 13. In between the filing and dismissal of the State of Florida case, the State of Texas brought a facial challenge to the Procedures Regulation. See State of Texas v. United States, 497 F.3d 491 (5th Cir. 2007) (holding that the facial challenge was ripe and that IGRA did not give the Secretary of the Interior authority to issue the Procedures Regulation). The Kickapoo Traditional Tribe of Texas intervened in the State of Texas case, and have appealed the Fifth Circuit's decision to the Supreme Court. The Supreme Court has not yet granted nor denied certiorari.

On March 3, 2006, Poarch Band submitted its application for Class III gaming procedures pursuant to 25 C.F.R. § 291.6 to Interior. Pl.'s Compl., Exhibit G at 1. On April 13, 2006, in accordance with 25 C.F.R. § 291.7, Interior invited the Governor and Attorney General of Alabama to comment on (1) whether the State is in agreement with the Poarch Band'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, and (4) to submit an alternative proposal to the Tribe's submission. Id. On July 28, 2006, the Governor and Attorney General jointly responded disagreeing with the Tribe's proposal, and stated 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. Pl.'s Compl., Exhibit E. The State did not submit an alternative proposal. Id.

On October 19, 2006, in accordance with 25 C.F.R. § 291.8(b)(2), Interior invited the Tribe and the State to participate in an informal conference to discuss the scope of gaming. Both the Tribe and the State participated in an informal conference on November 18, 2006. Id. On March 4, 2008, Interior issued a preliminary determination on the scope of gaming that would be

allowed under the Procedures Regulations. See generally Pl.'s Compl., Exhibit G. At the conclusion of the scope of gaming, Interior sought to reopen the informal conference with both the Tribe and the State. Id. at 13.

C. Plaintiff's Complaint in this Litigation

The State of Alabama seeks "a declaration that certain rules promulgated by the Secretary of the Interior are invalid ... ." Pl.'s Compl. ¶¶ 1, 30 ("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*."). Plaintiff also requests that this Court stay any administrative proceedings related to the Poarch Band, Pl.'s Compl. ¶¶ 32-33, and enjoin Interior from implementing or enforcing the Procedures Regulation. Pl.'s Compl. ¶¶ 34-36.

ARGUMENT

A. Motion to Dismiss Standard of Review

Rule 12(b)(1) allows the Court to dismiss a complaint based upon a "lack of jurisdiction over the subject matter." Fed. Rule Civ Pro. Rule 12(b)(1). Once challenged, the burden of establishing a federal court's subject matter jurisdiction rests on the party asserting jurisdiction. Thomson v. Gaskill, 315 U.S. 442, 446, 62 S.Ct. 673, 675, 86 L.Ed. 951 (1942). Rule 12(b)(6) permits the Court to dismiss a complaint when the complaint fails "to state a claim upon which relief can be granted." Fed. Rule Civ. Pro. Rule 12(b)(6). Under this standard, the Court "generally assume[s] the factual allegations to be true." W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). At the same time, "[w]e do not, however, necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." Id.

(citations omitted). Therefore, the Court should dismiss Plaintiff's Complaint if, assuming the facts as alleged by Plaintiff are true, the Complaint fails to state any claim upon which relief can be granted.

B. Plaintiff's Facial Challenge to the Procedures Regulations is Barred by the Statute of Limitations.

Civil actions brought against the U.S. government are subject to a six-year statute of limitations: "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). This statute of limitations applies to challenges of agency action. See Geyen v. Marsh, 775 F.2d 1303, 1307 (5th Cir. 1985). Section 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed. Spannaus v. U.S. Dep't of Justice, 824 F.2d 52, 55 (D.C. Cir. 1987).

As Section 2401(a) indicates, the point at which the statute of limitations begins to run depends on when the plaintiff's cause of action first accrues. A cause of action against an administrative agency accrues within the meaning of Section 2401(a) as soon as the person challenging the agency action can institute and maintain a suit in court. Id. at 56. A facial challenge to agency rulemaking accrues for purposes of the statute of limitations when the regulation becomes final agency action and is published in the Federal Register. 5 U.S.C. § 704; P & V Enterprises v. U.S. Army Corps of Engineers, 516 F.3d 1021 (D.C. Cir. 2008) (upholding the dismissal of a facial challenge to a regulation brought nineteen years after the publication of the regulation); see also Florida Keys Citizens Coal., Inc. v. West, 996 F.Supp. 1254, 1254 (S.D. Fla. 1998) (holding that plaintiff's claim that a regulation was inconsistent with its underlying

statute was time barred). The reasoning behind this rule is simple: "The grounds for such challenges will usually be apparent to any interested citizen within a six-year period following promulgation of the decision ... . The government's interest in finality outweighs a late-comer's desire to protest the agency's action as a matter of policy or procedure." Florida Keys, 996 F. Supp. at 1256 (quoting Wind River Mining Corp. v. United States, 946 F.2d 710, 715 (9th Cir. 1991).

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. "[A] substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's application of that decision to that specific challenger." Wind River, 946 F.2d at 716; see also P & V, 516 F.3d at 1026 ([O]ur conclusion that [the plaintiff's] facial challenge to [the rule] is untimely does not immunize the rule from all challenge."). Thus, while procedural and facial challenges to agency regulations must be brought within six years of the regulation's issuance, substantive as-applied challenges may be brought up to six years after the regulation was allegedly unlawfully applied to the plaintiff filing suit.

Here, the State of Alabama's complaint brings a facial challenge to the Procedures Regulation by claiming that the Regulation is inconsistent with the underlying statute, namely IGRA, nine years after the Regulation was published in the Federal Register. Compare 64 Fed. Reg. 17,535 (Apr. 12, 1999) (codified at 25 C.F.R. Part 291) with Pl.'s Compl. (April 7, 2008). As such, Plaintiff's claims are time barred and this case must be dismissed.

Moreover, the State of Alabama is not filing its case late because it didn't know about the regulation. In fact, Alabama filed an action against the government in 1999 - directly following

issuance of the regulation.[2/] That case was not dismissed until 2007, and in fact, was not dismissed until after the Fifth Circuit decided the State of Texas case, which held the Procedures Regulation was not consistent with IGRA. Compare Pl.'s Compl. ¶ 13 (noting that the State of Florida case was dismissed on September 7, 2007) with State of Texas v. United States, 497 F.3d 491 (5th Cir. 2007) (deciding case August 17, 2007). Plaintiff could have brought the State of Texas case to the attention of the court in which it already had a pending facial challenge to the regulation. As discussed below, Plaintiff must now wait until Interior has issued a final agency action, which is ripe for review.

C. Plaintiff's Premature Challenge to the Procedures Regulation Falls Outside the Administrative Procedure Act's Waiver of Sovereign Immunity Because the Threshold Requirement of a Final Agency Action Clearly Is Not Met When the Department of the Interior Has Not Made a Final Determination on Poarch Band's Proposal.

As established above, Plaintiff's suit is properly characterized as a facial challenge to the Procedures Regulations. If Plaintiff moves to amend its complaint to challenge Interior's actions on the Poarch Band proposal to date, the case must still be dismissed, as any as-applied challenge is not yet ripe nor does any such challenge present a final agency action or proper waiver of the federal government's sovereign immunity.

Before Plaintiff can bring an as-applied challenge against the government, Plaintiff must point to an applicable waiver of sovereign immunity. "It is elementary that '[t]he United States,

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[2/]Of note, paragraph one of the State of Florida complaint is virtually identical to the Plaintiff's complaint here. Compare State of Florida Compl. ¶ 1 ("[t]his 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 implementation of those rules.") with Pl.'s Compl. ¶ 1. In other words, both cases are properly characterized as facial challenges to the Procedures Regulation.

as sovereign, is immune from suit save as it consents to be sued ..., and the terms of it consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Navajo Nation, 537 U.S. 488 (2003); State of Florida, Dept. of Regulation v. U.S. Dept. of the Interior, 768 F.2d 1248, 1251 (11th Cir. 1985) ("The United States' sovereign immunity operates as a complete bar to lawsuits, even those filed by states."). Moreover, "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed," see United States v. Mitchell, 445 U.S. 535, 538 (1980), and must be strictly construed. See United States v. Sherwood, 312 U.S. 584, 590 (1941).

In this case, Plaintiff's complaint claims it is entitled to relief based on the Administrative Procedures Act (APA). Pl.'s Compl. at ¶ 30. The APA does provide a waiver of sovereign immunity for actions seeking judicial review of agency actions, but the waiver is limited, absent a specific statutory remedy, to "final agency action for which there is no other adequate remedy in court... ." 5 U.S.C. § 704; Gallo Cattle Company v. United States Department of Agriculture, 159 F.3d 1194 (9th Cir. 1998). An action becomes "final" under the APA only when (1) the agency's decision-making process is consummated and (2) when rights and obligations have been fixed. See Bennett v. Spears, 520 U.S. 154, 178 (1997); see e.g., Franklin v. Massachusetts, 505 U.S. 788, 798 (1992) (census report not reviewable as it was "more like a tentative recommendation than a final and binding determination"); Dalton v. Specter, 511 U.S. 462, 469 (1994) (report not reviewable as it "'carr[ied] no direct consequences' for base closures."). Furthermore, a plaintiff invoking the APA is not permitted to make generalized attacks upon a federal agency. "Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm." Norton v. Southern Utah Wilderness Alliance,

542 U.S. 55, 64-65 (2004).

Clearly, any attempt by Plaintiff to employ the APA to challenge the scope of gaming decision would fail to satisfy the first prong of the Bennett test for final agency action. Indeed, the very nature of the scope of gaming decision is tentative and interlocutory; and is merely a step in the process toward the ultimate decision regarding whether procedures should issue. As the Supreme Court has clarified in determining finality under the APA, "the core question is whether the agency has completed it decisionmaking process and whether the result of that process is one that directly affect[s] the parties." Franklin, 505 U.S. at 788. The finality of a decision is measured by "whether its impact 'is sufficiently direct and immediate' and has a 'direct effect on ... day to day business.' An agency action is not final if it is ... tentative.'" Id. at 797 (quoting Abbott Labs v. Gardner, 387 U.S. 136, 152 (1967)). In this case, Interior has not completed its decisionmaking process, but has only issued a scope of gaming decision on the Poarch Band proposal. Before the issuance of a final decision on the Poarch Band proposal, several steps must take place, including: (1) the informal conference will be resumed; (2) Interior will review and consider all comments; and (3) Interior will issue a final decision on whether procedures should issue.

Similarly, under the second Bennett criterion, no binding legal consequences flow from the scope of gaming decision. The status of whether Poarch Band can engage in Class III gaming is no different from their status the moment before the scope of gaming decision was issued; they cannot. At the current stage of the process, Poarch Band is not entitled to open a Class III gaming facility, nor has Interior predisposed the results of the final decision. Interior can still set forth gaming procedures or disapprove the proposal. Plaintiff, by bringing this suit at a

premature stage, is attempting to expand this Court's jurisdiction in a manner that neither the APA nor the Supreme Court allows by challenging the sufficiency of an ongoing process before any final decision having legal effect is made.

In determining whether a challenged action is final, the court also must consider whether subsequent agency proceedings may obviate the need for judicial review. FTC v. Standard Oil Co., 449 U.S. 232, 244 n. 11 (1980); Sierra Club v. U.S. Nuclear Regulatory Comm'n, 825 F.2d 1356, 1362 (9th Cir.1987). In the instant case, because the decision on Poarch Band's proposal is not final, subsequent actions could resolve the need for judicial review. First, the Plaintiff may find it is no longer in their interest to pursue a judicial remedy based upon the final decision. Second, the State of Alabama and the Tribe may agree to a compact before Interior issues a final decision. In fact, that is exactly what happened in Florida, and the situation presented in the State of Florida case; Florida entered into a compact with the Seminole Nation. See Notice of Deemed Approved Tribal-State Class III Gaming Compact, 73 Fed. Reg. 1229-01 (Jan. 7, 2008); Gale Courey Toensing, Seminoles Sign State Gaming Compact, Indian County Today, November 26, 2007, http://www.indiancountry.com/content.cfm?id+1096416157. If, following the issuance of a final decision on Poarch Band's proposal, Alabama decides to still pursue judicial review, it can do so at that time.

D. Plaintiff's Claims Do Not Pass the Article III Test for Ripeness.

Because Plaintiff fails to satisfy the APA's requirement of a final agency action, the Court need go no further in dismissing Plaintiff's action. However, several other arguments bar the Court's jurisdiction here. Regardless of the availability of jurisdiction under the APA, Article III of the United States Constitution requires that Plaintiff establishes that their claims are ripe for

judicial review in order to establish jurisdiction. See Reno v. Catholic Social Services, 509 U.S. 43, 57 n.18 (1993) ("We have noted that the ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction."). The ripeness doctrine exists:

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 732-33 (1998) (quoting Abbot Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967)); Alabama Power Co. v. F.E.R.C., 685 F.2d 1311, 1315 (11th Cir. 1982).

A claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998) (citing Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 580-581) (internal quotations omitted). The Eleventh Circuit, for example, has rejected as unripe the challenge to a forestry plan where "no 'injury' can occur, until after the second-stage decisions are made." Wilderness Soc'y v. Alcock, 83 F.3d 386, 390 (11th Cir. 1996). Here, no final decision has been made regarding Poarch Band's proposal or whether Class III can occur without a compact in the State of Alabama. Plaintiff's present fear that Interior ultimately may issue Class III gaming procedures for the Poarch Band is, as the Supreme Court has stated in Texas, entirely contingent upon several other developments, including further review and consideration by Interior.

Courts also have acknowledged the existence of an additional element of the ripeness

doctrine--if the Court does not need to decide it now, it may never need to. See Wilderness Soc'y, 83 F.3d at 390; Nat'l Treasury Employees Union v. United States, 101 F. 3d 1423, 1431 (D.C. Cir. 1996). As the United States Court of Appeals for the District of Columbia Circuit noted in determining that a challenge to the yet unavailable veto power created by the Line Item Veto Act was not ripe for judicial review, "[n]ot only does this rationale protect the expenditure of judicial resources, but it comports with our theoretical role as the governmental branch of last resort.... Article III courts should not make decisions unless they have to." Id. The Court similarly should not intervene prematurely in Interior's process until a final decision is made and administrative remedies are exhausted. As noted above, it is not a given that a final decision will comport with the scope of gaming decision, and Plaintiff may find it unnecessary to pursue a legal challenge depending on the nature of the final decision or a change in circumstances, such as agreement among the parties regarding controversial issues.

Finally, the Supreme Court further has clarified that injury is an element of establishing ripeness. Even a claim that a procedural requirement has been breached is ripe only for a "person with standing who is injured." Ohio Forestry, 523 U.S. at 737. At this preliminary stage in the acknowledgment process, Plaintiff has realized no injury. Plaintiff accordingly fails to meet the Ohio Forestry tests for ripeness.

E. Plaintiff Cannot Establish Standing.

In addition to failing to meet the requirements of the APA and Article III's ripeness requirement, Article III further bars jurisdiction over Plaintiff's present action as Plaintiff presents no current injury, and therefore lacks standing. In Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), the Supreme Court stated that the elements of standing are "not mere pleading

requirements but rather an indispensable part of [plaintiff's] case." Id. at 561. The question of standing involves both Constitutional limitations on a federal court's jurisdiction and prudential limitations on its exercise. See Warth v. Seldin, 422 U.S. 490, 498 (1975). Article III of the Constitution confines the jurisdiction of the federal courts to actual "cases" and "controversies." This requirement serves to identify those disputes that are appropriately resolved through the judicial process. See Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). Plaintiff's lack standing under both the Constitutional and prudential inquiries.

As to the Constitutional requirements for standing, the Supreme Court in Lujan reiterated that a plaintiff seeking to invoke a federal court's jurisdiction must establish: (1) that it has suffered an "injury in fact" -- an "invasion of a legally-protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical," 504 U.S. at 560; (2) that its injury is fairly traceable to the challenged action of the defendant and not the result of the "independent action of some third party not before the court," Id. (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)); and (3) that it is "'likely' as opposed to merely 'speculative'" that the plaintiff's injury will be "'redressed by a favorable decision,'" Lujan, 504 U.S. at 561 (citing E. Ky. Welfare Rights Org., 426 U.S. at 38). These three elements constitute the "irreducible minimum" required by Article III of the Constitution. Valley Forge Christian Coll. v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982). Plaintiff, however, cannot satisfy any of the three requirements.

1. Plaintiff Has Failed To Allege a Cognizable Injury-in-Fact.

Because, as described above, no final decision has been made altering the status of whether the Poarch Band can engage in Class III gaming, Plaintiff's alleged injuries necessarily

are strictly procedural in nature. The generalized allegations that the Interior is not in compliance with the law are insufficient to provide a basis for standing. Indeed,

> In order to make out constitutionally cognizable injury, plaintiffs must demonstrate that the *allegedly deficient procedures implicate distinct substantive interests as to which Article III standing requirements are independently satisfied.*

Freedom Republicans, Inc. v. Fed. Election Comm'n, 13 F.3d 412, 416 (D.C. Cir. 1994) (emphasis added) (internal citations omitted).

A plaintiff asserting a violation of a procedural right must satisfy the constitutional requirement of a "concrete harm." Lujan, 504 U.S. at 573 n. 8. The Supreme Court has stressed that a plaintiff can assert such a procedural injury only where "the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." Id. at 573, n. 8. It is essential that a plaintiff establish a concrete interest that goes beyond its mere interest in having a particular procedure observed. Id.; Freedom Republicans v. Fed. Election Comm'n, 13 F.3d at 416 (in order to make out a constitutionally cognizable injury, plaintiff must demonstrate that the allegedly deficient procedures implicate distinct substantive interests by which Article III requirements are independently satisfied).

In scenarios analogous to the present case, "[t]he Supreme Court has repeatedly emphasized that an injury must be concrete in both a qualitative and temporal sense. . . ." Boyle v. Anderson, 68 F.3d 1093, 1100 (8th Cir. 1995) (emphasis added). An injury cognizable under Article III must also be: "distinct and palpable," Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 342 (1977); a "particular concrete" injury, United States v. Richardson, 418 U.S. 166, 177 (1974); or a "specific present objective harm or a threat of specific future harm," Laird v. Tatum, 408 U.S. 1, 13 (1972). Courts have clarified that a plaintiff may not rely

on a potential future injury or one that is hypothetical. See Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir.1994) (plaintiffs must show that future injury is "certain to ensue"); see also Mausolf v. Babbitt, 85 F.3d 1295, 1301 (8th Cir. 1996).

Similarly here, Plaintiff cannot rely on a hypothetical or potential future injury. The State cannot challenge what is in effect an advisory opinion regarding Interior's decision on whether to issue gaming procedures for the Poarch Band as it has recognized no harm to date from the issuance of the scope of gaming decision. They also fail to establish that a future injury is "certain to ensue." Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir. 1994). In this case, Plaintiff's interests cluster around an administrative process that has many remaining contingencies and has not yet generated a final agency action. The contingent nature of Plaintiff's alleged injuries relating to the potential future granting of Class III procedures means that its claims do not meet the requirements for standing. See Pl.'s Compl. at ¶ 27. Thus, Plaintiff does not face an "imminent" injury sufficient for standing in this action. See Lujan, 504 U.S. at 560.

2. Plaintiff Has Not Satisfied the Causation and Redressability Requirements of Standing.

The question of whether a plaintiff has alleged an injury cognizable under Article III is only the first inquiry in assessing constitutional standing. The existence of an injury does not alone provide standing. Plaintiff also must demonstrate that the alleged injury was caused by the action complained of and that the requested relief would redress that alleged injury. Here, as there is no final action, the Federal Defendants have not taken any actions which could cause Plaintiff any injury. Interior has not made its final decision. Similarly, reversing the scope of gaming decision will not redress any harm as no harm to Plaintiff has occurred. See Lujan,

504 U.S. at 560-561 (quoting E. Ky. Welfare Rights Org., 426 U.S. at 41-42). Plaintiff must offer more than mere speculation to support a finding of redressability. See Cmty. for Creative Non-Violence v. Pierce, 814 F.2d 663, 669-70 (D.C. Cir. 1987). Where, as here, Plaintiff has not offered averments to show with "some specificity and concreteness" how they meet the causation and redressability requirements, their complaint must be dismissed. McKinney v. U.S. Dept. of Treasury, 799 F.2d 1544, 1558 (Fed. Cir. 1986).

Conclusion

For the aforementioned reasons, the Federal Defendants request the Court to dismiss this action in its entirety.

Respectfully submitted this 19th day of May 2008,

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