IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE STATE OF NEW MEXICO,
Plaintiff,

v.

DEPARTMENT OF THE INTERIOR, *et al*.,
Defendants.

No. 14-cv-695-JAP/SCY

OPPOSITION TO FEDERAL AND INTERVENOR DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

Defendants, individually and jointly, reiterate many of the same legal arguments they put forward in response to New Mexico's request for a preliminary injunction. They offer little in the way of new legal support for their contention that this Court does not have jurisdiction to resolve the present challenge and they fail to provide a compelling rationale for upholding the present regulatory scheme as in accord with IGRA and the decision in *Seminole Tribe*. The Court should deny Defendants' motions for summary judgment, as set forth below.

A. The Court Has Correctly Determined that It Has Jurisdiction to Resolve the State's Claims.

This Court previously concluded that it has jurisdiction to resolve the State's claims. Mem. Op. and Order 7–16, Sept. 11, 2014, ECF No. 31. The Secretary reasserts the same arguments the Court rejected before, namely, that (1) the Secretary's eligibility determination is not a final agency action, (2) the United States has not waived its sovereign immunity, (3) the case is not ripe, and (4) the State cannot establish Article III standing. Fed. Defs.' Mot. Summ. J. 8–16, Sept. 29, 2014, ECF No. 37. The Court's earlier determination was correct, and nothing the Secretary has argued warrants reconsideration.

1. The Secretary's eligibility determination is final agency action.

As this Court explained, the Secretary's determination that the Pueblo is eligible for Part 291 procedures is a final agency action because (1) "the Secretarial Procedures themselves say that the eligibility determination is final;" and (2) "the Pueblo likely *will* receive the legal authority to conduct Class III gaming on its lands" as a result of the Secretary's eligibility determination. Mem. Op. & Order 13-14. In other words, the Secretary's eligibility determination marks "the consummation of the agency's decisionmaking process" with respect to the Pueblo's eligibility for "Secretarial Procedures," and it impacts the State's rights by establishing that Secretarial Procedures will be imposed instead of the compact IGRA requires. Mem. Op. and Order 11-14; *see also id.* at 11 (citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

The Secretary urges the Court to ignore the plain language of 25 C.F.R. § 291.6(b) and adopt a "pragmatic" view of her eligibility determination. Fed. Defs.' Mot. Summ. J. at 8–9. But the Secretary identifies no case in which a court has ignored a regulation that explicitly designates a decision as "final for the Department" and instead concluded that the decision was not final. To the contrary, an agency's authority to govern its own proceedings includes the power to designate particular decisions as final. *Cf. Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt*, 107 F.3d 667, 671 (8th Cir. 1997) (noting that, "when the Secretary intends a decision to be final for the Department of the Interior, the phrase 'final for the Department' often appears"). For that reason, the D.C. Circuit has held that "the agency's own characterization of its action" is an important factor in assessing finality. *Am. Petroleum Inst. v. U.S. E.P.A.*, 216 F.3d 50, 68 (D.C. Cir. 2000). The Secretary cites cases stating that the agency's

view of its action is not determinative, but all of those cases involved actions that an agency had *not* designated as final. Fed. Defs.' Mot. Summ. J. 8-9 (citing *Cody Laboratories, Inc. v. Sebelius*, 446 Fed. App'x 964, 968-69 (10th Cir. 2011); *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 241 (1980); *Mobil Exploration & Producing U.S., Inc. v. Dep't of Interior*, 180 F.3d 1192, 1198 (10th Cir. 1999)).

The Secretary suggests that, under Section 291.6(b), an eligibility decision is final only when the applicant tribe is denied eligibility. Fed. Defs.' Mot. Summ. J. 11 n.3. But nothing in the regulation distinguishes between decisions finding eligibility and decisions denying eligibility, nor is such a distinction supported by the rule's history. *See* Class III Gaming Procedures Proposed Rule, 63 Fed. Reg. 3289 (Jan. 22, 1998); Class III Gaming Procedures Final Rule, 64 Fed. Reg. 17543 (Apr. 12, 1999). Section 291.6(b) provides, simply, that "[t]he Secretary's eligibility determination is final for the Department." Section 291.6(b) thus differs from other regulations in which the Secretary limited the finality of a decision to certain parties or decisions. *See*, *e.g.*, 25 C.F.R. § 83.10 ("The determination to decline to acknowledge that the petitioner is an Indian tribe shall be final for the Department."); 25 C.F.R. § 224.185 ("Decisions under this part, other than those in paragraph (a) of this section, that adversely affect a tribe and for which an appeal is pending are not final for the Department and are not effective while the appeal is pending[.]"). The Court should apply the regulation according to its plain terms.

Even if the Secretary's eligibility determination were viewed in the "pragmatic way" the Secretary suggests—without regard to language of Section 291.6(b)—the practical import of the Secretary's eligibility determination would nonetheless support the conclusion that the determination is final agency action. As this Court held, because of the eligibility determination

"the Pueblo likely *will* receive the legal authority to conduct Class III gaming on its lands unless the State strikes a compact agreement with the Pueblo beforehand." Mem. Op. and Order 14. The decision thus marks "the consummation of the agency's decisionmaking process" with respect to the Pueblo's eligibility for procedures, and it sets rights, obligations, and legal consequences because the Pueblo will receive legal authority to conduct class III gaming without a compact. *Bennett v. Spear*, 520 U.S. at 178.

The Secretary objects that she might not promulgate Secretarial Procedures under Part 291, in which case, she says, no legal consequences would flow from her eligibility determination. Fed. Defs.' Mot. Summ. J. 9–10. In particular, she suggests that she could disapprove proposed procedures. Fed. Defs.' Mot. Summ. J. 9. As the Court observed, however, "[o]nce the determination is made, the Secretary's discretion to either approve or disapprove Class III gaming procedures for the tribe is constrained." Mem. Op. and Order 14. Furthermore, though the Secretary could disapprove the mediator's proposed procedures, she must then herself "prescribe appropriate procedures within 60 days under which Class III gaming may take place[.]" 25 C.F.R. § 291.11(c). Thus, the legal consequence of the Secretary's eligibility determination *necessarily* is the promulgation of Secretarial Procedures *of some sort*, whether selected by a mediator or imposed by the Secretary. That the Pueblo and the State could settle on a compact while the Secretary implements the Part 291 regulations does not mean that the eligibility determination is not a final agency action—the possibility of settlement is true in almost any case.

2. There is an applicable waiver of federal sovereign immunity.

Because the Secretary's eligibility determination is a final agency action, the State's claims are subject to the waiver of sovereign immunity in 5 U.S.C. § 704. Mem. Op. and Order 14 n.2. In addition, the general waiver of sovereign immunity set out at 5 U.S.C. § 702 allows a plaintiff to bring an action "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity," whether or not it is challenging final agency action. *Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006). Aside from arguing that no final agency action exists, the Secretary offers no theory of why that general waiver would be inapplicable here.

3. The State's challenge is ripe.

This Court correctly held that this case is ripe because (1) the Secretary's eligibility determination immediately affects the State by preventing it from maintaining its immunity without being disadvantaged in the negotiating process, and (2) a ruling now will assist the Secretary by providing clarity as to her authority. Mem. Op. and Order 14-17. The Secretary's arguments to the contrary lack merit.

The Secretary argues that the Court erred when it concluded that the State suffers any "hardship" as a result of her eligibility determination. Fed. Defs. Mot. Summ. J. 13. The potential availability of Secretarial Procedures, however, can and does affect how tribes negotiate with the State and has inevitably altered the respective negotiating positions of these parties. It is simply illogical to argue, as the Secretary does, that those effects on the State are derivative of the actions of third parties; that theory overlooks the practical impact and inevitable consequences of an eligibility determination. Moreover, it is unrealistic of the Secretary to suggest that "Part 291

does not do anything to or require anything of New Mexico." Fed. Defs. Mot. Summ. J. 13. The State can hardly be expected simply to ignore a process that will culminate in the imposition of gaming procedures on it. *Cf. Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012).

In any event, "the approach to the third prong of the ripeness doctrine is a broader one, focusing on financial and operational impacts as well as on legal ones." *Mobil Exploration & Producing U.S., Inc.*, 180 F.3d at 1203.[1] Consistent with *Mobil Exploration*, this Court appropriately considered how the Secretary's eligibility determination alters the relationship between the parties and reasoned that the potential availability of Secretarial Procedures altered the State's negotiating leverage:

> *Seminole Tribe* and its effect on the compact negotiations process cannot be ignored in determining whether the Secretarial Procedures have impacted New Mexico. . . . The Secretarial Procedures, which seek to prevent New Mexico from using its immunity from suit to its advantage in the negotiations process, have a direct impact on New Mexico's position and therefore satisfy this element of the ripeness inquiry.

Mem. Op. and Order 15–16. The cases the Secretary cites to challenge the Court's conclusion are inapposite because, in those cases, the impact of the challenged agency action did not alter the relevant legal or factual position.[2] Here, by contrast, the issues presented are necessarily fit for

[1] *Mobil Exploration & Producing*, cited extensively by Federal Defendants in their discussion of the final ripeness factor, involved requests by letter and administrative subpoena for documents. 180 F.3d at 1203. The court there emphasized the very minimal impact the plaintiffs suffered due to the requests for information, clarifying that these requests "do not constitute direct and immediate impacts because they do not impose any appreciable obligations upon [the plaintiff's] daily business." *Id.* New Mexico, conversely, faces direct consequences because of the eligibility determination that include the loss of its negotiating ability and the immediate alteration of the respective relationship between New Mexico and, most directly, the Pueblo.

[2] In *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, the Court held that the governing regulation was no more than a "general statement of policy" with no adverse effects that could demonstrate hardship—indeed, the Court emphasized that there were no impacts upon the conduct of the plaintiffs traceable to the regulation itself. 538 U.S. 803, 809–10 (2003). In *Ohio Forestry Ass'n, Inc. v. Sierra Club*, the relevant forest plan did not alter any aspect of the forest itself. 523 U.S. 726, 733 (1998) ("Thus, for example, the Plan does not give anyone a legal right to cut trees, nor does it abolish anyone's legal authority to object to trees being cut."). Finally, in *Toilet Goods Association, Inc. v. Gardner* a regulation allowing "the Commissioner [to] authorize inspectors to examine certain processes or

judicial resolution because of the "immediate and significant change in the plaintiffs' conduct of their affairs" that the regulations effect. *Abbott Labs.*, 387 U.S. at 153.

The Secretary also objects that the present challenge will impede the effectiveness of the Department's enforcement. Fed. Defs.' Mot. Summ. J. 13–14. Although the Secretary admits that the Court correctly determined that ruling substantively on the Part 291 regulations will provide "'necessary clarity to the Secretary's authority to use the procedures,'" the Secretary argues that without any true hardship, no benefit is achieved through the (arguably) premature adjudication of these strictly legal issues. Fed. Defs.' Mot. Summ. J. 14 (quoting Mem. Op. and Order 17). That argument ignores this Court's explanation of the direct and immediate impacts of the eligibility determination on the State and conflates judicial review of a request for documents through an administrative process—which was deemed to "cause substantial disruption to [that] process" in *Mobil Exploration & Producing*—with a challenge to a regulatory scheme that conflicts with the statutory requirements and has present repercussions for the parties involved. *Cf. Utah v. U.S. Dep't of Interior*, 535 F.3d 1184, 1197–98 (10th Cir. 2008) ("[T]he cases where we have afforded significant weight to the hardship element generally fall into one of two categories. In one set of cases, the parties would have faced significant costs, financial or otherwise, if their disputes were deemed unripe for adjudication. In others, the defendant had taken some concrete action that threatened to impair—or had already impaired—the plaintiffs' interests." (citations omitted)); *see also Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990). The present dispute is precisely the type of case that is appropriate for review.

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formulae" altered no legal relationship as the plaintiffs were under an existing obligation to provide for the reasonable inspection of their facilities. 387 U.S. 158, 164 (1967).

4. The State has Article III standing.

The State suffers an injury in fact sufficient to satisfy Article III because the Secretarial Procedures "circumvent[] a State's statutory right to negotiate a compact or to have a bad faith determination made in federal court[.]"[3] Mem. Op. and Order 10. Despite conceding that the State "likely would have standing to challenge the issuance of final procedures," Fed. Defs.' Mot. Summ. J. 14-15, the Secretary objects to the Court's conclusion that the State has suffered a concrete injury *now*, arguing that it was "the State's assertion of its Eleventh Amendment immunity, not any action of the Secretary that has 'deprived' the State of any right it has to a bad faith determination in federal court." Fed. Defs.' Mot. Summ. J. 15. That argument suffers from three independent flaws.

First, the Secretary cannot explain why the State's injury would be self-inflicted now—thereby defeating Article III standing—but would cease to be self-inflicted once the Secretary promulgates Secretarial Procedures. The Secretary's concession that there will be standing once Secretarial Procedures are issued is effectively a concession that there is standing today.

Second, the State has not argued that it is being deprived of the right to have a bad-faith determination in federal court. *See* Fed. Defs. Mot. Summ. J. 15. Instead, the State has articulated an injury resulting from the *Secretary's action* of treating the State's assertion of a sovereign right as equivalent to the judicial finding of bad faith IGRA requires and determining that the Pueblo may operate class III gaming without a compact. *See, e.g.*, Pl.'s Mem. in Support

[3] The Secretary argues that "[t]his Court . . . observed that New Mexico *likely could* demonstrate standing." Fed. Defs.' Mot. Summ. J. 14–15 (emphasis supplied). Nothing in the Court's opinion suggests that its threshold jurisdictional determination was tentative. To the contrary, the Court's holding was unequivocal: "This Court agrees that by circumventing a State's statutory right to negotiate a compact or to have a bad faith determination made in federal court, the Secretarial Procedures cause New Mexico to suffer an injury in fact." Mem. Op. and Order 10.

of Mot. for Prelim. Injunction to Stay Administrative Proceedings 12–15, Aug. 27, 2014, ECF No. 13.

Third, the Secretary's argument that the State's injury is self-inflicted because the State refused to waive its immunity ignores not only the State's constitutional prerogative to assert its immunity from suit but also the structure of the Part 291 regulations. *See* Fed. Defs.' Mot. Summ. J. 15 ("[T]he State's own action causes the alleged injury here and a self-inflicted injury breaks the causal chain necessary to establish standing."). As to the former, a law or regulation that discourages the exercise of constitutional rights creates a cognizable injury. *See Rhode Island Med. Soc. v. Whitehouse*, 66 F. Supp. 2d 288, 302 (D.R.I. 1999), *aff'd*, 239 F.3d 104 (1st Cir. 2001) ("The standard is such that actual injury exists where a regulation would have a chilling effect on the exercise of a constitutional right."). As to the latter, the regulations are triggered only by a state's exercise of Eleventh Amendment sovereign immunity. *See* 25 C.F.R. §§ 291.3, 291.6(b) (predicating an eligibility determination on a state's assertion its immunity from suit brought by an Indian tribe under 25 U.S.C. 2710(d)(7)(B)). In other words, a state's assertion of the Eleventh Amendment in a suit under section 2710(d)(7) is prerequisite for a tribe to resort to these regulations. Because application of the Part 291 regulations to a state following an eligibility determination is necessary for a state to establish Article III injury, and because the Part 291 regulations are not triggered unless a state asserts its sovereign immunity in a section 2710(d)(7) suit, the state's assertion of its constitutional right cannot break the causal chain between the regulations and the state's injury. Rather, it is an essential link in that causal chain. Apart from penalizing the State for exercising its constitution right, the Secretary's approach

would render the Part 291 regulations unreviewable, contrary to the Administrative Procedure Act.[4] *See generally Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57–60 (1993).

The Court correctly identified this tension between IGRA and the regulations, characterizing the injury New Mexico has suffered as the ability of "the Pueblo to continue Class III gaming activities without first negotiating a compact with New Mexico or obtaining a declaration from a federal district court that New Mexico has acted in bad faith if those negotiations fail," in contravention of 25 U.S.C. § 2710(d)(1)(C). Mem. Op. and Order 10. The regulations expressly require a State's assertion of the Eleventh Amendment in a preceding lawsuit as a condition precedent; thus, a State's assertion of that right neither diminishes nor negates the injury the State later suffers as a direct result of the attempt of a tribe to bypass the statutory requirements of IGRA through procedures made available by the Federal Defendants.

B. The Part 291 regulations exceed the Secretary's authority and are not a permissible interpretation of IGRA.

1. *Seminole Tribe* did not create a gap in IGRA that the Secretary has authority to fill.

As the Supreme Court explained in *Seminole Tribe*, Section § 2710(d)(7) is unusually clear: "Congress has prescribed a detailed remedial scheme for the enforcement against a State of

[4] The cases on which the Federal Defendants rely are inapposite. First, in *Pennsylvania v. New Jersey*, the Court held that tax credits states provided to in-state residents who pay income taxes to non-resident states did not amount to a cognizable injury. 426 U.S. 660, 663–64 (1976). The affirmative legislative decision to shape a state's tax law in a manner that may benefit a neighboring state but ultimately impact a home-state's fisc does not establish, for the latter, a cognizable injury for standing purposes; nor does it equate to the forced choice New Mexico faces here. Similarly unpersuasive is *Brotherhood of Locomotive Engineers & Trainmen v. Surface Transportation Board*, 457 F.3d 24, 28 (D.C. Cir. 2006). In that case, the relevant union had agreed in a collective bargaining agreement that it would not challenge an exemption decision of the Surface Transportation Board as it pertained to transfers of rail. *Id.* at 28. Therefore, when the Union later brought a challenge to just such a decision, the court held that "the Union [wa]s not entitled to bargain over the effects of the transaction only because the Union agreed to that limitation in its CBA." *Id.* This affirmative decision on the part of the union to limit its ability to bargain in certain situations was fatal to its later challenge to the very chip it had given away. The State, in this case, cannot be characterized as having bargained away any of its rights, and neither can the invocation of the Eleventh Amendment in a prior case be equated to such a circumstance.

a statutorily created right." 517 U.S. at 74. The Secretary likewise concedes that Section 2710(d)(7) is unambiguous. Fed. Def. Summ. J. Mot. 17 ("If not for *Seminole*, the intent of Congress would be clear and there would have been no need for the Department to promulgate the Part 291 regulations."). That concession is sufficient to resolve this case because, "unambiguous language" constitutes "a clear sign that Congress did not delegate gap-filling authority to an agency." *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012). As *Chevron* itself established, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. The parties agree that Congress intended Section 2710(d)(7) to be the sole mechanism for enforcing the requirement that a state negotiate with tribes in good faith. Under *Chevron*, "that is the end of the matter."[5] *Id.* at 842.

The Secretary asserts that Section 2710(d)(7)(B) does not operate as expected when a state asserts its sovereign immunity. As explained in the State's motion for summary judgment, however, it is far from clear that the availability of sovereign immunity was unanticipated by Congress, and in any event the cases in which a state has invoked immunity have been rare. *See* N.M. Summ. J. Mot. 14–15; Declaration of Paula Hart, Dkt. 37-1 (noting that the Part 291 regulations have been invoked only seven times).[6] Moreover, even in those cases, the mechanism

[5] The Pueblo argues that this Court should apply the Indian canon of construction. Pueblo Joinder and Mem. Mot. Summ. J. 1 n.2. The Indian canon of construction does not apply, however, in this case "because IGRA unambiguously defines the scope of secretarial authority and the conditions under which such authority may be lawfully exercised." *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007) (citing *Negonsott v. Samuels*, 507 U.S. 99, 110 (1993) (courts do not "resort to [the Indian] canon of statutory construction" when a statute is unambiguous (citation omitted)); *Cabazon Band of Mission Indians v. Nat'l Indian Gaming Comm'n*, 14 F.3d 633, 637 (D.C. Cir. 1994) ("When the statutory language is clear, as it is here, the [Indian] canon may not be employed.").

[6] The Declaration of Paula Hart also indicates that "[t]he Department has yet to issue class III gaming procedures

prescribed in Section 2710(d)(7)(B) could be fully effective if the United States were to bring suit on behalf of tribes that believe states have negotiated in bad faith. *See Chemehuevi Indian Tribe v. Wilson*, 987 F.Supp. 804, 1997 WL 769275 (N.D. Cal. 1997) (citing *Arizona v. California*, 460 U.S. 605, 614 (1983); *United States v. Mississippi*, 380 U.S. 128, 140 (1965), and *United States v. Minnesota*, 270 U.S. 181, 194–95 (1926)).

More fundamentally, the Secretary's argument fails because even though "[t]he power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration," it emphatically "does not include a power to revise clear statutory terms that turn out not to work in practice." *Utility Air Resources Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). Thus, whether or not the remedy in Section 2710(d)(7) is occasionally ineffective, the Court must conclude that the provision is unambiguous because it is bound by the Court's decision in *Seminole Tribe*. And this Court must *also* follow the rule that "unambiguous language [is] a clear sign that Congress did not delegate gap-filling authority to an agency." *Home Concrete & Supply, LLC*, 132 S. Ct. at 1843. The only legally supportable conclusion is that Congress did not grant the Secretary the "gap-filling" authority she claims.

The Secretary argues that she "is obliged to fill gaps in the statute whether intended by Congress or not and whether discovered by judicial decisions of the Court or by some other means." Fed. Defs.' Mot. Summ. J. 17. She relies on *National Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005), but that case does not support her argument. In *Brand X*, the Court held that a "court's prior judicial construction of a statute trumps an agency

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under Part 291." The fact that procedures have never actually been imposed on an unwilling state undermines the Secretary's suggestion that Congress has somehow acquiesced in the regulations. Fed. Defs.' Summ. J. Mot. 23 n.8.

construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute." *Id.* at 982. Stated differently, if a court's construction of a statute is based on its unambiguous terms, a conflicting agency interpretation is *not* given *Chevron* deference. The Secretary invokes *Brand X* for the proposition that "agencies may also fill gaps created by the judiciary," but the Court did not reach that conclusion in the case, nor did it even suggest it. *See* Fed. Defs.' Mot. Summ. J. 20 (citing *Brand X*, 545 U.S. at 982); *see also* Pueblo Joinder and Mem. Mot. Summ. J. 2–3 (relying on *Brand X*). *Brand X* does not support the view that a judicial decision invalidating one provision of a statute renders the rest of the statute ambiguous.[7]

Nor do *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), and *Pittston Co. v. U.S.*, 368 F.3d 385, 392–93 (4th Cir. 2004), support the Secretary's argument. *Eastern Enterprises* involved a challenge to the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), which required employers to pay premiums into a combined fund to cover retiree benefits. 524 U.S. at 503–04 (plurality opinion); *see* Fed. Defs.' Summ. J. Mot. 22. The statute provided a mechanism for determining which employer was responsible for paying premiums for a given retiree. In *Eastern Enterprises*, the Supreme Court invalidated a provision of the Coal Act that assigned liability to an employer that had transferred its coal operations to a subsidiary and ceased to be involved in the industry decades before Congress passed the Act. 524 U.S. at 516. A

[7] The Pueblo cites a Tenth Circuit decision to support its reliance on *Brand X*, but that case only underscores the inapplicability of *Brand X* to this case. Pueblo Joinder and Mem. Mot. Summ. J. 3. In *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1244-45 (10th Cir. 2008), the Tenth Circuit deferred to an agency's interpretation of a statute, despite contrary Supreme Court interpretation, *because* the statute was ambiguous. The court explained that it "need not wrestle long with whether [the statutory language] is ambiguous. The Supreme Court has twice explicitly found the statute to be ambiguous." *Id.* at 1245. By contrast, the Secretary and the State agree that section 2710(d)(7) is unambiguous.

plurality of the Court determined that the statute's allocation scheme effected an uncompensated taking because of the severe retroactive liability it imposed on the employer. *Id*. at 532–34.

In response to *Eastern Enterprises*, the Commissioner of Social Security, who was charged with enforcing the statute, had to determine how to reassign retirees who would have been assigned to employers like Eastern (as to whom application of the statute would be unconstitutional). She chose to follow the terms of 26 U.S.C. § 9706(a), "[t]he provision of the Coal Act [that] provides the method of assigning retirees to signatory coal operators." *Pittston*, 368 F.3d at 402. Recognizing that assignments to Eastern-like companies "were invalid from the beginning, she had to start over to assign the beneficiaries to comport with the terms of the statute as well as the Constitution," and she did so "exactly as she was instructed to do by § 9706(a) of the Coal Act." *Id.* at 403. The Fourth Circuit upheld the Commissioner's approach after concluding the Commissioner had "followed the Coal Act's assignment structure to the letter." *Id.* As the Fifth Circuit explained in *Texas*, the decision in *Pittston* "does not support the creation of a novel remedial scheme never envisioned by Congress and specifically contradictory of Congress's expressed intent concerning the scope of secretarial rulemaking." 497 F.3d at 505 n.13.

The Secretary's arguments appear to proceed from the premise that IGRA somehow guarantees every tribe the ability to engage in Class III gaming. That is incorrect. Under the statute, a tribe may not engage in gaming at all if gaming is not permitted by the laws of the state. 25 U.S.C. § 2710(d)(1)(B). And it may not engage in Class III gaming if the state negotiates with it in good faith but simply fails to reach an agreement on a compact. As the Senate Report put it:

> Under this act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than opt for a compact that may involve State jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated.

S. Rep. 100-446, 14 (1998). To the extent that the *Seminole Tribe* decision allows for rare disputes like the one involved here, Congress obviously was aware of the possibility that a tribe may not be able to conduct class III gaming. Thus, if "impasses" such as this are to be resolved, Congress, not the Secretary, must specify how to resolve them.[8]

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[8] The Pueblo relies on the Eleventh Circuit's decision in *Seminole Tribe v. Florida*, 11 F.3d 1016 (11th Cir. 1994), and the Ninth Circuit's decision in *United States v. Spokane Tribe*, 139 F.3d 1297 (9th Cir. 1998), which both suggested that the Secretary might adopt regulations to address the situation in which a state invokes sovereign immunity to bar an action under Section 2710(d)(7)(B). The Ninth Circuit expressly avoided interpreting IGRA; rather, the court explained,

> We bypass this controversy [regarding the use of legislative history] because *we do not use legislative history to interpret IGRA*; rather, we are evaluating a counter-factual: What would have happened if Congress had known that the provision for suing states was invalid? To answer this question we must understand the political process underlying IGRA's passage, and legislative history is a legitimate source of enlightenment on that issue.

United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1300 n.3 (9th Cir. 1998); *see also id.* at 1300 n.4 (stating that "we seek to determine not what the statute means but whether it would have passed without the invalid provision").

The Eleventh Circuit neither found that section 2710(d)(7) was ambiguous nor expressly stated that there was a gap in the statute. *Seminole Tribe of Florida v. State of Fla.*, 11 F.3d 1016 (11th. Cir. 1994). Admittedly, the court stated in dicta that the solution to a state's assertion of its immunity was to ask the Secretary to prescribe regulations, *id.* at 1029. The court, however, made that comment without the benefit of having the issue squarely presented, briefing addressing the specific question, or having made any effort at analyzing the specific statutory language. The precedential relevance of such statements is minimal. *See, e.g.*, *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994) ("This seems to us a prime occasion for invoking our customary refusal to be bound by dicta[.]" (citing *McCray v. Illinois*, 386 U.S. 300, 312 n.11 (1967))).

Furthermore, any reliance on the Supreme Court's decision in *Seminole Tribe*, 517 U.S. at 76, is patently in error. *See id.* n.18 ("We do not here consider, *and express no opinion upon*, that portion of the decision below that provides a substitute remedy for a tribe bringing suit." (emphasis supplied)). The court clearly invoked the doctrine of judicial restraint to limit its review to those issues before it; reliance on this footnote for anything other than an acknowledgement that the court would not address the issue that day is misplaced. *See, e.g.*, *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them.").

2. The Secretary does not have broad discretion to implement IGRA, and her interpretation is not entitled to deference.

Even if *Seminole Tribe* did create a "gap" in IGRA, the Secretary's regulations would not be entitled to deference. Contrary to the Secretary's assertion, the Department of the Interior is not "the agency tasked with implementing IGRA." Fed. Defs.' Mot. Summ. J. 17. Instead, Congress created the National Indian Gaming Commission ("NIGC") as an "independent Federal regulatory authority for gaming on Indian lands," 25 U.S.C. § 2702(3), and it expressly granted rulemaking authority to NIGC, not the Secretary, *id.* § 2706(b)(10) (identifying the powers of the Commission to include "promulgat[ing] such regulations and guidelines as it deems appropriate to implement the provisions of this chapter"). *See also Amador County, Cal. v. Salazar*, 640 F.3d 373, 376 (D.C. Cir. 2011) (noting that NIGC is the a regulatory body created by IGRA with rulemaking and enforcement authority).[9]

The unambiguous language of the Act not only assigns rulemaking authority to NIGC but also demonstrates that Congress intended to limit the Secretary's role once the NIGC was established:

> Notwithstanding any other provision of this chapter, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before [the date of enactment of this Act, Oct. 17, 1988], relating to supervision of Indian gaming *until such time as the Commission is organized and prescribes regulations*. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

25 U.S.C. § 2709 (emphasis supplied). The legislative history confirms that Congress intended NIGC to oversee gaming, limiting the Secretary to a very specific role. *See also*

[9] The Secretary cites *Miami Tribe of Oklahoma v. United States*, 656 F.3d 1129 (10th Cir. 2011), to argue that "'Congress has delegated' IGRA to the 'care' of the Secretary – delegating authority to fill gaps in the statute and requiring deference from the courts to her efforts," but *Miami Tribe* does not support that proposition. Fed. Defs.' Mot. Summ. J. 19 (citing *Miami Tribe*, 656 F.3d at 1142). *Miami Tribe* interpreted the Indian Land Consolidation Act and regulations governing land transfers at 25 C.F.R. Part 152; it did not interpret IGRA.

S. Rep. 100-446, 11 (1998) (noting that "section 10 of the bill requires the Secretary of the Interior to continue to exercise his trust responsibility for Indian tribes in supervising gaming activities on Indian lands until the Commission is fully functioning"). The Secretary is therefore wrong to suggest that Congress granted her broad authority to "facilitate Class III gaming." Fed. Defs.' Mot. Summ. J. 19

The Tenth Circuit has held that because "neither the Secretary nor the Department of the Interior in general is charged with administering IGRA," the Secretary's interpretations of the statute are not entitled to deference. *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1265 (10th Cir. 2001). Instead, because the NIGC has been granted rulemaking authority under the statute, its "authority also includes interpreting any ambiguous phrases or terms contained in IGRA." *Id.* Significantly, while Congress responded to *Sac and Fox Nation*, it did so in a limited way that addressed only the Secretary's authority to determine whether a parcel of land is a "reservation" under IGRA (the specific issue presented in the case). In the Department of the Interior and Related Agencies Appropriations Act, 2002, Congress provided that "the authority to determine whether a specific area of land is a 'reservation' for purposes of [IGRA] was delegated to the Secretary of the Interior." Pub. L. No. 107-63, § 134, 115 Stat. 414 (2001). And in a subsequent statute, Congress clarified that that "[n]othing in section 134 of the Department of the Interior and Related Agencies Appropriations Act, 2002 . . . affects the decision . . . in Sac and Fox Nation v. Norton, 240 F.3d 1250 (2001)." Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, § 131, 117 Stat. 1241 (2003). Those acts demonstrate congressional acquiescence in the Tenth Circuit's holding that the Secretary

does not otherwise enjoy interpretive authority under IGRA. No court has held to the contrary in the context of section 2710(d)(7).[10]

The Secretary argues that Congress has delegated to the Secretary rulemaking authority in the form of two general authority statutes, 25 U.S.C. §§ 2 and 9. Fed. Defs.' Mot. Summ. J. 18. Section 9 grants authority to the President to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs," 25 U.S.C. § 9, and Section 2 sub-delegates that authority to the Commissioner of Indian Affairs, *id.* § 2. Whatever significance those statutes might have in other contexts, in the context of IGRA they are trumped by the specific allocation of rulemaking authority to the NIGC. *See Gozlon–Peretz v. United States*, 498 U.S. 395, 407 (1991) ("A specific provision controls one of more general application[.]"). When Congress has expressly assigned rulemaking to an entity other than the Secretary, the Secretary's continued reliance on Sections 2 and 9 is misplaced.

3. The Part 291 regulations violate IGRA.

Contrary to the Secretary's argument, the Part 291 regulations "do not adhere[] to Congressional intent"—which is apparent in the plain language of the statute—and they do not "provide a voluntary mediation process which provides states an opportunity to resolve differences with their tribal negotiating partners." Fed. Defs.' Mot. Summ. J. 24. To the contrary, the "voluntary mediation process" is voluntary only to the extent that if a state refuses to

[10] *See Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295, 322 (W.D.N.Y. 2007) ("There is no deference owed to the Secretary's interpretation of the IGRA's terms on such review, however, because neither the Secretary nor the Department of the Interior is charged with that statute's administration."); *but cf. Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 465 (D.C. Cir. 2007) (disagreeing with *Sac and Fox Nation of Missouri* and according deference to the Secretary's interpretation of "initial reservation" exception); *Redding Rancheria v. Salazar*, 881 F. Supp. 2d 1104 (N.D. Cal. 2012) (according the Secretary deference with respect to 25 U.S.C. § 2719, which relates to land status).

participate, the Secretary will impose Secretarial Procedures that do not reflect a state's input—effectively, a default judgment. *See* 25 C.F.R. § 291.8.

In fact, there are fundamental differences between that remedial regime Congress enacted and the Part 291 regulations the Secretary promulgated. Those differences mean that the Secretary's regulations fail at step one of *Chevron*; at a minimum, they make the regulations an unreasonable interpretation of the statute at *Chevron* step two.

First, Congress required that, before any remedial process can begin, a state must be found to have violated its obligation to negotiate in good faith. 25 U.S.C. § 2710(d)(3) ("the State shall negotiate with the Indian tribe in good faith to enter into such a compact"); *id.* § 2710(d)(7) (requiring a judicial finding of bad faith before a court can order the parties to negotiate). The Part 291 regulations, by contrast, do not require any such finding; rather, they circumvent a state's right to negotiate a compact without Secretarial interference. The Secretary effectively punishes states for exercising their sovereign immunity by using that assertion as automatic qualification for Secretarial Procedures. *See* 25 C.F.R. § 291.3.

Remarkably, in her briefing in this Court, the Secretary is unapologetic about the coercive effect of her regulations; indeed, she embraces it. *See* Fed. Defs.' Mot. Summ. J. 24 (stating that the Part 291 regulations "come into play only if a state chooses to short circuit IGRA's judicially managed remedial scheme by asserting its sovereign immunity"). But by stripping a state of a statutory right simply because the state has asserted a constitutional right, the Secretary's regulations offend not only IGRA but also the Constitution. *Contra* Fed. Defs.' Mot. Summ. J. 25 (arguing that "[b]ecause a State remains free to avail itself of a judicial determination of whether it acted in good faith, the Secretary's regulations take nothing from the

states and do not offend IGRA"). The Secretary again makes the strawman argument that the Part 291 regulations "do not deny the State any right to a judicial determination of good faith that it has under IGRA," ignoring the real problem—namely, that the Part 291 regulations deny the State the right of having a judicial determination of bad faith as a condition precedent to the imposition of any remedial provisions.

Second, whereas IGRA requires a court to order the state and Tribe to conclude a compact in 60 days, 25 U.S.C. § 2710(d)(7)(b)(iii), the Secretary instead can approve a tribe's proposed procedures if the state does not participate in the Secretary's process, 25 C.F.R. § 291.8(b), invite the parties to an informal conference and then decide to approve or deny the proposal, *id.* § 291.8(c), or appoint a mediator and convene a process to resolve the differences between state's and a tribe's proposal, § 291.9. The Secretary points out that her regulations require the mediator not to have a technical conflict of interest, while ignoring the difference between a mediator selected by an Executive Branch official owing a trust obligation to one party and one selected by an impartial Article III judge. Fed. Defs.' Summ. J. Mot. 26.

Third, as the Secretary acknowledges, she has authority to reject a mediator's proposed procedures, a power that Congress did not grant her. Fed. Defs.' Mot. Summ. J. 26; *see* 25 U.S.C. § 2710(d)(7)(B)(vi) (requiring the Secretary to treat the mediator's selection as the compact, if the state consents); *id.* § 2710(d)(7)(B)(vi) (requiring the Secretary to prescribe procedures that "are consistent with the proposed compact selected by the mediator . . . , the provisions of this Act, and the relevant provisions of the laws of the State). Although the Secretary notes that she may disapprove the mediator's selection "only under specific enumerated circumstances which largely parallel similar IGRA provisions regarding the

Secretary's authority to approve gaming compacts [in 25 U.S.C. § 2710(d)(8)]," the fact remains that the Part 291 regulations do not comport with the requirements Congress specified in the remedial provisions in Section 2710(d)(7). *Id.*

While the Secretary points out some similarities between the remedial provisions and the regulations, it is the difference between the two that is relevant, and the difference is substantial. While Congress authorized the Secretary (*only* in the event the state rejected the mediator's selected compact) to prescribe procedures that are consistent with the proposed compact selected by the mediator, the provisions of IGRA, and the relevant provisions of the laws of the State, under Part 291 the Secretary gave herself more expansive authority to reject a mediator's selection for violating "the trust obligations of the United States to Indians." 25 C.F.R. § 291.11(b)(5). The "trust obligations of the United States" are extraordinarily broad and ill-defined. *See generally United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323–25 (2011). By adding that term to the regulations, the Secretary provided for herself far more discretion to disapprove a mediator's compact than Congress provided for in IGRA. While the statutory remedial provisions favor the state by allowing it to accept the mediator's selected compact, and only allowing the Secretary to amend those terms if the state finds them unacceptable and rejects the mediator's compact, the regulations permit the Secretary to reject and amend the mediator's compact based on her trust obligation to the tribe, regardless of whether the state is satisfied with the mediator's compact.

Fourth, as the State argued in its Motion for Summary Judgment, a tribe can legally operate slot machines—typically the most lucrative gaming at any casino—only pursuant to a tribal-state compact. *See* Pl.'s Mem. in Support of Mot. Sum. J. 20–21. The Johnson Act, 64 Stat.

1135, makes it unlawful "to manufacture, recondition, repair, sell, transport, possess, or use any gambling device . . . within Indian country[.]" 15 U.S.C. § 1175. IGRA states that the Johnson Act "shall not apply to any gaming conducted under a Tribal-State compact that—(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and (B) is in effect." 25 U.S.C. § 2710(d)(6). The Part 291 regulations do not establish a compact, but rather Secretarial Procedures, nor are Secretarial Procedures "entered into under" section 2710(d)(3). Operating gambling devices under Secretarial Procedures promulgated pursuant to the Part 291 regulations would violate the Johnson Act.

Finally, for related reasons, if the Court determines that Part 291 either exceeds the Secretary's authority or is inconsistent with IGRA, the Court should not heed the Pueblo's suggestion that "Court must completely sever the compacting provisions." Pueblo Joinder and Mem. Mot. Summ. J. 10. Such an approach is not only inconsistent with Congress's indisputable intent to have class III gaming conducted only pursuant to a tribal-state compact, it also would leave the Pueblo in violation the Johnson Act, the penalties for which include fines and up to two years of imprisonment. 15 U.S.C. §§ 1175, 1176. Because IGRA exempts tribes from the application of the Johnson Act only if they conduct gaming pursuant to an extant compact with the state, the Court cannot sever the compact provision in its entirety. In any case, the Court in *Seminole Tribe* has already addressed the application of § 2710(d)(7) by striking the abrogation of state sovereign immunity.

Congress contemplated the possibility that some tribes may not be able to conduct class III gaming if "they opt for a compact and, *for whatever reason*, a compact is not successfully negotiated." S. Rep. 100-446, 14 (1998) (emphasis supplied). The Pueblo, of course, can

continue to conduct class I and II gaming without interruption, but Congress unmistakably intended to require a tribal-state compact for class III gaming to be legal. Neither the Part 291 regulations nor the Pueblo's request that the Court sever the compact requirement are consistent with IGRA.

CONCLUSION

The Court should deny the Federal and Intervenor Defendants' motions for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jessica M. Hernandez, hereby certify that the forgoing Plaintiff's Memorandum In Opposition to the Pueblo of Pojoaque's Motion To Intervene was served electronically to all counsel of record via the CM/ECF system on October 6, 2014.

/s/ Jessica M. Hernandez
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