No. 14-2219 (consolidated with No. 14-2222)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Defendant-Appellant

PUEBLO OF POJOAQUE,
Defendant-Intervenor-Appellant.

On Appeal from the U.S. District Court for the District of New Mexico,
No. 1:14-cv-00695-JAP/SCY (Hon. James A. Parker)

OPENING BRIEF OF THE U.S. DEPARTMENT OF THE INTERIOR

ORAL ARGUMENT REQUESTED

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The United States is not aware of any related cases that require listing pursuant to Tenth Circuit Rule 28.2(C)(1).

GLOSSARY

IGRA	Indian Gaming Regulatory Act
NIGC	National Indian Gaming Commission

INTRODUCTION

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, allows Indian tribes to conduct certain kinds of gaming pursuant to a "gaming compact" with a State. IGRA requires States to negotiate gaming compacts in good faith. As Congress wrote IGRA, if a State refused to consent to a gaming compact, a tribe could sue in federal court, ask the court to order mediation, and if necessary seek gaming procedures from the Secretary of the Interior. But in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Supreme Court held that States may assert sovereign immunity from such suits – an act that renders Congress's grant of district court jurisdiction constitutionally ineffective. This created an unforeseen statutory gap: IGRA's mandate that States bargain in good faith became unenforceable in court.

The Secretary addressed this unforeseen situation by promulgating 25 C.F.R. Part 291, regulations that explain when the Secretary may exercise her statutory authority to prescribe gaming procedures for a tribe. In cases where a State avoids the district court process by asserting sovereign immunity, Part 291 establishes a similar, supplemental procedure that the State cannot veto. The district court here erroneously agreed with New Mexico that Part 291 is beyond the Secretary's authority. New Mexico's claims are nonjusticiable because the Secretary has not issued gaming procedures under Part 291 in New Mexico (or anywhere else). On the merits, Part 291 is a valid interpretation of IGRA within the Secretary's authority.

STATEMENT OF JURISDICTION

New Mexico's Complaint presents a federal question arising under IGRA, 25 U.S.C. § 2710. The district court has subject matter jurisdiction over such claims under 28 U.S.C. § 1331, but the United States disputes the district court's jurisdiction on the grounds that New Mexico lacks standing to challenge Part 291 at this time. *See infra* pp. 15-24. The district court entered final judgment on October 17, 2014, and the United States filed a timely notice of appeal on December 11, 2014. This court has jurisdiction under 28 U.S.C. § 1291 to review the district court's grant of summary judgment.

STATEMENT OF THE CASE

The Pueblo of Pojoaque has a gaming compact with the State of New Mexico that expires on June 30, 2015. Unable to reach agreement with New Mexico on a new gaming compact, the Pueblo sued New Mexico in federal dicourt under 25 U.S.C. § 2710(d)(7). New Mexico obtained dismissal of that action on sovereign immunity grounds, and the Pueblo sought to invoke Part 291. After the Secretary determined that the Pueblo was eligible to participate in the Part 291 process, but before she prescribed any gaming procedures for the Pueblo, New Mexico challenged Interior's eligibility determination on the grounds that Part 291 exceeds the Secretary's authority under the Act. On cross-motions for summary judgment, the district court rejected Interior's jurisdictional defenses and granted judgment in favor of New Mexico.

STATEMENT OF THE ISSUES

The district court's decision raises the following issues:

1. Has New Mexico demonstrated that the existence of the Part 291 process, before it culminates in a final decision, causes an injury to the State's concrete interests sufficient to support standing?
2. Is the State's challenge to Part 291 ripe for review, given that the Secretary has not prescribed any gaming procedures for the Pueblo and might not choose to do so?
3. Does the Secretary have the authority to promulgate Part 291 as a reasonable interpretation of IGRA's requirements in light of the statutory gap created by *Seminole Tribe*?

LEGAL BACKGROUND AND STATEMENT OF FACTS

A. IGRA, *Seminole Tribe*, and the promulgation of Part 291

States generally lack regulatory authority over tribes in Indian country unless "Congress has expressly so provided." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). In *Cabazon Band*, the Supreme Court affirmed this principle in the context of Indian gaming, holding that Congress had not given the States authority to regulate gaming activities on reservations. *Id.* at 208-14. Following this decision, Congress enacted IGRA to "provide a statutory basis for the operation of

gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702.

IGRA divides gaming activities into three classes. Class III, the type of gaming at issue here, includes some card games, casino games, slot machines, and horse racing. *Id.* § 2703(8). Under Section 2710 of IGRA, 25 U.S.C. § 2710, a tribe may be authorized to conduct Class III gaming activities in two ways. First, gaming may be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." *Id.* § 2710(d)(1)(C). The Senate Select Committee on Indian Affairs preferred this method, believing that "the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met." S. Rep. No. 100-446 at 13 (1988). The problem the Committee faced was how to "provide some incentive for States to negotiate with tribes in good faith." *Id.* Congress accomplished this by placing an affirmative duty of good faith negotiation on States. 25 U.S.C. § 2710(d)(3)(A).

Second, if the State and the tribe are unable to agree on a compact, IGRA provided a process for the Secretary of the Interior to prescribe gaming procedures for the tribe. Congress recognized that the State's ability to refuse a compact created an "unequal balance" between States and tribes, S. Rep. 100-446 at 14, and it knew that "tribal-state cooperation has often proved elusive." *Ponca Tribe v. Oklahoma*, 37 F.3d 1422, 1425 (10th Cir. 1994), *vacated*, 116 S.Ct. 1410 (1996). Therefore, Congress

provided that a tribe could sue a State that refused to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(A). Under that provision, if a district court were to find that the State had failed to negotiate in good faith, it could order the tribe and the State to conclude a gaming compact within 60 days. *Id.* § 2710(d)(7)(B)(i)-(iii). If those efforts failed, the court could appoint a mediator who would examine each party's last proposal and select one for the parties' approval. *Id.* § 2710(d)(7)(B)(iv)-(vi). Finally, if a State refuses to consent to that proposal, Congress directed that the Secretary "shall prescribe . . . procedures . . . under which class III gaming may be conducted." *Id.* § 2710(d)(7)(B)(vii)(II). By providing this alternative to the compacting process, Congress ensured that States could not prevent Indian tribes from conducting Class III gaming activities simply by refusing to participate.

With its decision in *Seminole Tribe*, the Supreme Court upset the balance that Congress struck. That case arose when the Seminole Tribe sued the State of Florida, alleging a failure to negotiate in good faith under Section 2710(d)(7) of IGRA. *See* 517 U.S. at 51-52. Florida asserted that such claims were barred by the State's immunity from suit under the Eleventh Amendment. *See id.* at 52. The Supreme Court agreed, holding that Congress had intended to abrogate States' sovereign immunity in Section 2710(d)(7), but that it lacked the constitutional power to do so under the Indian Commerce Clause. *See id.* at 59, 76. "The Eleventh Amendment," the Court held, "prevents congressional authorization of suits by private parties against unconsenting

States." *Id.* at 72. Although *Seminole Tribe* only established a defense to Section 2710(d)(7) suits, and did not generally strike that section from IGRA, other courts have recognized that *Seminole Tribe* effectively held that the grant of jurisdiction in Section 2710(d)(7)(A) was unconstitutional.[1] *See New York v. Oneida Indian Nation*, 90 F.3d 58, 60 n.1 (2d Cir. 1996); *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 50 (D.D.C. 1999). This revealed a statutory gap in IGRA: In some Section 2710(d)(7) cases, Congress cannot validly grant district court jurisdiction, so IGRA cannot work as intended in those cases.

IGRA contains a severability provision that preserves portions of the statute that are not specifically held invalid. 25 U.S.C. § 2721; *see Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994). Due to that provision, States still have a good-faith bargaining obligation under Section 2710(d)(3), and the Secretary may still prescribe gaming procedures under Section 2710(d)(7)(vii) "if the State does not consent . . . to a proposed compact." But after *Seminole Tribe*, the State can break the procedural link between those two steps by depriving the district court of jurisdiction that Congress intended to confer. As Interior noted, "[c]laiming immunity will, if no further action is taken, create an effective State veto over IGRA's dispute resolution

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[1] *Seminole Tribe* superseded this Court's holding to the contrary in *Ponca Tribe*, 37 F.3d at 1432. *See* 116 S.Ct. 1410 (vacating and remanding for further consideration in light of *Seminole Tribe*).

system and therefore will stalemate the compacting process." Class III Gaming Procedures, 64 Fed. Reg. 17,535, 17,536 (April 12, 1999).

In 1999, Interior acted to fill the newly-recognized statutory gap by promulgating 25 C.F.R. Part 291. *See* 64 Fed. Reg. 17,535. Part 291 does not purport to abrogate or supersede the dispute resolution procedure that Congress established in Section 2710(d).[2] Instead, Part 291 describes a separate process through which the Secretary may exercise her authority under Section 2710(d)(7)(B)(vii) – undisturbed by *Seminole Tribe* – to prescribe gaming procedures for a particular tribe. It applies only in the previously unforeseen class of cases in which a State asserts its sovereign immunity from a tribe's Section 2710(d)(7) suit. 25 C.F.R. §§ 291.1, 291.3. If the tribe sues the State under Section 2710(d)(7), and if the State obtains dismissal of the suit on Eleventh Amendment grounds rather than consenting to district court jurisdiction and defending its bargaining activity, then the Secretary must determine whether the tribe may participate in the Part 291 process. *See id.* §§ 291.3, 291.6.

The Part 291 process "tracks IGRA's negotiation and mediation process, adjusted only to the extent necessary to reflect the unavailability of tribal access to

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[2] After *Seminole Tribe*, some States have consented to tribal suits under IGRA. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1101 & n.9 (9th Cir. 2003). The remedial provisions of Section 2710 can work as Congress envisioned in those cases, and Part 291 does not apply.

Federal court." 64 Fed. Reg. at 17,536. The Secretary considers the tribe's own gaming proposal and invites the State to comment on that proposal or to submit an alternative. 25 C.F.R. § 291.7; *cf.* 25 U.S.C. § 2710(d)(7)(B)(iv). If the State chooses not to submit a proposal, then the Secretary may, after a conference with both the tribe and the State, issue gaming procedures. 25 C.F.R. § 291.8. If the State does submit a proposal, then Part 291 prescribes a process of mediation before a neutral mediator. That process parallels the court-ordered mediation that can take place when a State consents to jurisdiction. 25 C.F.R. §§ 291.9, 291.10; *cf.* 25 U.S.C. § 2710(d)(7)(B)(v)-(vi). At the end of that process, the Secretary may choose to approve or modify the mediator's selected proposal. 25 C.F.R. § 291.11; *cf.* 25 U.S.C. § 2710(d)(7)(B)(vii). In either scenario, the Secretary may only prescribe or approve gaming procedures that meet specific criteria, ensuring that those procedures will be consistent with IGRA, other federal law, State law, and the federal government's trust obligations toward Indian tribes. *See* 25 C.F.R. §§ 291.8, 291.11. If the Secretary were to prescribe gaming procedures, the State could seek judicial review of those procedures under the Administrative Procedure Act. *See* 5 U.S.C. § 706.

Since promulgating Part 291, the Secretary has received seven requests from tribes to issue gaming procedures (including the one at issue here), but she has never done so. In some cases, the State and tribe ultimately reached agreement on a

compact, but in one case, the Secretary simply chose not to approve the tribe's application. *See* Declaration of Paula Hart (App. 33-34).

B. Judicial interpretations of IGRA after *Seminole Tribe*

Several courts have considered the authority of the Secretary to prescribe gaming procedures where a State asserts sovereign immunity from a tribe's Section 2710(d) suit, although only one court of appeals has directly considered the validity of Part 291. Those courts have reached different conclusions.

The Eleventh Circuit originally considered this question in *Seminole Tribe*, after it had held that the Eleventh Amendment provides a sovereign immunity defense to States (the holding later affirmed by the Supreme Court). The Eleventh Circuit did not see its holding as a problem for the administration of IGRA, because if the State's assertion of sovereign immunity resulted in a tribe's failure to negotiate a compact, the Secretary could simply prescribe gaming procedures under Section 2710(d)(7)(B)(vii). *See Seminole Tribe*, 11 F.3d at 1029. In the court's view, such an action "conforms with IGRA and serves to achieve Congress's goals." *Id.* In *United States v. Spokane Tribe*, 139 F.3d 1297, 1301-02 (9th Cir. 1998), the Ninth Circuit approved the Eleventh Circuit's suggestion, noting that it "is a lot closer to Congress's intent than mechanically enforcing IGRA against tribes even when states refuse to negotiate."

The Ninth and Eleventh Circuits made these statements before the Secretary promulgated Part 291. The only appellate decision that has directly considered the

validity of Part 291 is *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007). A divided panel of the Fifth Circuit invalidated Part 291, but the three judges on the panel reached three widely divergent conclusions. Judge Jones, announcing the court's result but writing only for herself on this issue, would have held that Section 2710(d) unambiguously establishes the only permissible remedy for a State's failure to negotiate, regardless of the State's potential immunity from that remedy. *See* 497 F.3d at 501. Judge King, concurring in the result, would have held that a statutory gap exists, but that Interior had exceeded its authority in filling that gap with Part 291. *See* 497 F.3d at 512. Judge Dennis wrote a detailed and forceful dissent, contending that Congress would have expected Interior to have the authority to address *Seminole Tribe* and that the Part 291 regulations "are the most reasonable regulations that could be administratively prescribed to carry the IGRA into effect." 497 F.3d at 515.[3]

C. The Pueblo's need to invoke Part 291 procedures

The Pueblo has conducted Class III gaming since 2001 under a compact with the State of New Mexico. That compact will expire on June 30, 2015. The Pueblo

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[3] Other than the decision below in this case, district court challenges to Part 291 have generally failed. *See Santee Sioux Nation v. Norton*, 2006 WL 2792734 (D. Neb. 2006) (unpublished) (holding that Part 291 is a valid exercise of the Secretary's authority); *Alabama v. United States*, 630 F. Supp. 2d 1320, 1328-31 (S.D. Ala. 2008) (holding that the State's challenge was not ripe); *Texas v. United States*, 362 F. Supp. 2d 765, 771-72 (holding that the State's challenge was not ripe and that Part 291 is valid), *rev'd*, 497 F.3d 491.

began attempting to replace that compact in early 2012, and negotiated with the State for months. However, those negotiations were unsuccessful, and the Pueblo filed a complaint in the district court in December 2013, alleging that the State had failed to negotiate in good faith. After the tribe initially obtained a default judgment due to New Mexico's failure to appear or to answer the Complaint, New Mexico sought to have the judgment set aside on sovereign immunity grounds. This Court had previously held that New Mexico has not waived its sovereign immunity from suit in federal court, *see Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379, 1384 (10th Cir. 1997), and the district court therefore dismissed the complaint. *See Pueblo of Pojoaque v. State of New Mexico*, No. 1:13-cv-1186 (D. N.M. Mar. 3, 2014).

The Pueblo asked the Secretary to initiate the Part 291 process and issue gaming procedures to replace its expiring compact with New Mexico. On June 17, 2014, the Secretary informed New Mexico of her determination under 25 C.F.R. § 291.6 that the Pueblo had met the eligibility requirements of Part 291, and she invited New Mexico to comment on the tribe's proposal or to submit an alternative proposal within 60 days.[4]

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[4] The Secretary has since extended that deadline several times and allowed New Mexico to participate in the Part 291 process "under protest."

D. District court proceedings

Before the 60-day period had passed, New Mexico sued the Secretary in the underlying action here. The State challenged the Secretary's authority to issue gaming procedures and asked the district court to declare Part 291 contrary to IGRA and to enjoin the Secretary from prescribing gaming procedures. After denying the State's motion for a preliminary injunction, the district court granted summary judgment in the State's favor. *State of New Mexico v. U.S. Dep't of the Interior*, No. 1:14-cv-695 (D. N.M. Oct. 17, 2014) ("Order") (App. 39). In doing so, the court made three rulings that Interior contests on appeal.

First, the court held that New Mexico has standing based on two distinct, cognizable interests: an interest in "preventing mediation" without a judicial finding of bad faith, and an interest in preventing Class III gaming except "under a negotiated gaming compact." Order at 12 (App. 50). In the court's view, the Secretary's eligibility determination "is intimately connected with the harm to New Mexico's statutory interests under IGRA if the Secretary of the Interior adopts regulations permitting the Pueblo to conduct Class III gaming activities." *Id.* at 13 (App. 51).

Second, the court held that New Mexico's challenge is ripe for judicial review. Even though the Secretary has not yet issued gaming procedures (and might choose not to do so in this case), the district court held that the Secretary's eligibility determination under 25 C.F.R. § 291.3 changes the relative bargaining positions of the

State and the tribe. *See* Order at 19-20 (App. 57-58). This change, in the court's view, warranted immediate review regardless of whether the Secretary ultimately issues gaming procedures.

Finally, the court held that Section 291 is not a valid exercise of the Secretary's powers under IGRA, and that those regulations "are invalid." *Id.* at 26 (App. 64). The Secretary had argued that, under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Secretary had the authority to fill that gap with Section 291. The Court applied *Chevron*, but it found Congress's unambiguous intent to be that "the Secretary may only adopt [gaming] procedures after a federal court finds the State has failed to negotiate in good faith and ordered mediation." Order at 24 (App. 62). In the court's view, Congress intended States and tribes to negotiate gaming compacts without interference from the federal government, and the *Seminole Tribe* decision did not eliminate this structural feature of IGRA. *Id.* at 25 (App. 63). Based on this reasoning, the district court "bar[red] Defendants from taking any further action to enforce 25 C.F.R. § 291 *et seq.*" *Id.* at 28 (App. 66).

SUMMARY OF ARGUMENT

Each of the district court's three holdings was erroneous. The district court should have found that this case is not presently justiciable, or in the alternative, that Part 291 is a valid exercise of the Secretary's authority to administer IGRA.

New Mexico's lawsuit is premature. The State therefore lacks standing and its claim is unripe. New Mexico may one day be injured by Part 291, if the Secretary ultimately authorizes the Pueblo to conduct Class III gaming that the State opposes. But that has not happened here. Instead, the Secretary has agreed to consider the tribe's proposed gaming procedures, without yet making any further decision, and she has invited the State to participate voluntarily in that process of consideration. The State is not compelled to do anything, nor has the Secretary authorized the Pueblo to do anything. The State therefore suffers no present injury from the Secretary's actions and has no standing to challenge them. Furthermore, the Secretary has never issued gaming procedures under Part 291 in the past, and has made no decision on the Pueblo's request. The prudent course is to hold that New Mexico's claims are not ripe for review.

If the Court finds that this case is justiciable, it should uphold Part 291 as a valid exercise of the Secretary's authority. As Judges King and Dennis found in *Texas*, *see supra* p. 10, the Supreme Court's decision in *Seminole Tribe* created a procedural gap in IGRA's remedial scheme. The good faith bargaining duty that Congress imposed on States is unenforceable, and the equal bargaining position that Congress intended to establish is now tipped sharply in favor of the States. Congress did not consider the precise question whether the Secretary could authorize gaming procedures under such circumstances, but it did give her the authority to prescribe gaming procedures

when the State refused to agree to a compact. As Judge Dennis recognized in his dissent in *Texas*, Congress would have expected Interior to step in and prevent States from exercising a unilateral veto over Indian gaming. Part 291 is reasonable because it establishes a supplemental procedure to accomplish that goal that is as consistent as possible with the procedure that Congress originally established, prior to the unforeseen disruption of *Seminole Tribe*.

STANDARD OF REVIEW

The issues in this case are purely legal. This Court exercises *de novo* review over the district court's jurisdictional holdings and its application of the substantive law at issue. *See Citizen Center v. Gessler*, 770 F.3d 900, 909 (10th Cir. 2014); *Anderson v. Commerce Const. Servs.*, 531 F.3d 1190, 1193 (10th Cir. 2008).

ARGUMENT

I. NEW MEXICO DOES NOT HAVE STANDING TO CHALLENGE PART 291 BECAUSE IT HAS NOT SUFFERED AN INJURY IN FACT.

"Injury in fact" is one of the three elements of the doctrine of standing, the "irreducible constitutional minimum" for jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish injury in fact, a plaintiff must allege "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks and citations omitted). When a plaintiff is not itself the object of government action, it is "substantially more difficult" to establish this jurisdictional requirement. *Summers v.*

Earth Island Inst., 555 U.S. 488, 493 (2009); *see also Lujan*, 504 U.S. at 561-62. To meet the requirements of Article III, an injury must be "more than a possibility"; it must be "certainly impending." *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1282 (10th Cir. 2002); *see Citizen Center*, 770 F.3d at 910; *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Moreover, the alleged deprivation of the right to a particular procedure is insufficient to confer standing unless there is "some concrete interest that is affected by the deprivation." *Summers*, 555 U.S. at 496; *see Susan B. Anthony List v. Dreihaus*, 134 S. Ct. 2334, 2341-42 (2014). The requirement of an injury is unwavering, even where a State's sovereign interests might otherwise entitle it to "special solicitude" in standing analysis. *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1238 (10th Cir. 2012).

New Mexico cannot contend that it suffers an "actual or imminent" harm from any gaming procedures that the Secretary may ultimately prescribe for the Pueblo. The Secretary has not issued any such procedures. New Mexico's Complaint is based only on the Secretary's determination that the Pueblo is eligible for the Part 291 process, in which the State may participate on a voluntary basis. New Mexico's standing, therefore, must be based on a showing of injury from the mere *existence* of this process, regardless of its potential outcomes.

New Mexico argued to the district court that the Part 291 process causes it injury in several distinct ways. *See* Summary Judgment Motion (Docket #39) at 9

(App. 37). The district court rejected some of these arguments but found others a sufficient basis for standing. *See* Order at 9-14 (App. 47-52). The district court erred because none of New Mexico's alleged injuries supports standing.

A. Alleged injury to New Mexico's bargaining power cannot support standing.

New Mexico contends that "the Secretary's ongoing process is undermining its bargaining position in negotiations with other tribes." Summary Judgment Motion at 9 (App. 37); *see* Compl. ¶ 42 (App. 20). The district court did not consider this possible basis for standing, and the Fifth Circuit observed that "it is unclear whether a reduction in bargaining power unaccompanied by economic injury can constitute an injury in fact." *Texas*, 497 F.3d at 496 n.1. The Supreme Court held in *Clinton v. City of New York*, 524 U.S. 417, 432-34 (1998), that the loss of a "bargaining chip" can constitute injury if it "inflict[s] a sufficient likelihood of economic injury," but the United States is aware of no Supreme Court or Court of Appeals case in which injury to bargaining power alone conferred standing.[5] And New Mexico has not attempted to demonstrate such an injury beyond the bare allegations of the Complaint. Because this case was decided on motions for summary judgment, New Mexico has the

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[5] This case is unlike *Clinton*, in which the Court found standing to challenge the President's authority to cancel a tax benefit that Congress intended the plaintiff to enjoy. Here, the "bargaining chip" is the State's ability to veto tribal gaming, a benefit that Congress specifically intended that the State *not* have. *See infra* pp. 35-36.

burden to support its claim of injury-in-fact with "specific facts," set forth by "affidavit or other evidence." *Lujan*, 504 U.S. at 561 (internal quotation marks and citations omitted). That requirement is particularly important here, where the State alleges that negotiations between the Secretary and the Pueblo of Pojoaque reduce the State's bargaining power with *other* parties. On the record before the district court, New Mexico's claimed injury to its bargaining power was simply too "conjectural or hypothetical" to support standing. *See Lujan*, 504 U.S. at 560.

B. New Mexico is not compelled to participate in mediation.

New Mexico also claims that it suffers "an injury to its sovereign dignity by having to submit to an administrative adjudication at the behest of the Pueblo." Motion for Summary Judgment at 9 (App. 37). This is the basis for standing that two judges of the Fifth Circuit accepted in *Texas*, finding that "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." 497 F.3d at 497.[6]

New Mexico's argument, like the Fifth Circuit's analysis, is wrong because the Secretary's determination that a tribe is eligible to participate in the Part 291 process

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[6] The third judge on the panel opined that the case presented "serious standing and ripeness issues" but did not discuss his analysis of those issues. *Texas*, 497 F.3d at 513 (Dennis, J., dissenting).

does not require a State to "submit" to any exercise of jurisdiction by the courts or the Secretary. A State's "sovereign dignity" interest confers upon it an "immunity from private suits" in the federal courts. *Sossamon v. Texas*, 131 S. Ct. 1651, 1657 (2011); *see Alden v. Maine*, 527 U.S. 706, 715-17 (1999). The Part 291 process does not abrogate that immunity; the Secretary has no power to compel the State to appear. Indeed, the regulations *assume* the State's sovereign dignity, as Part 291 is available only where the State has refused to consent to the jurisdiction of a court.

The counterpart to State sovereignty, however, is the Pueblo's own sovereignty, which is "dependent on, and subordinate to, only the Federal Government, not the State[]." *Cabazon Band*, 480 U.S. at 207. The State only has regulatory authority over Indian gaming to the extent Congress provides, and under IGRA, the Secretary has authority to prescribe gaming procedures without a State's consent. *See* 25 U.S.C. § 2710(d)(7)(B)(vii). Part 291 recognizes that possible statutory outcome by establishing a process in which a tribe and the Secretary are the only essential actors, leaving a State free to maintain its sovereign dignity outside that process.[7] The district

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[7] If a regulation established a similar process for a tribe and the Secretary alone, excluding a State, then the State might claim harm from the Secretary's final decision at the end of that process, but it would suffer no harm from "having to submit to an administrative adjudication." Motion for Summary Judgment at 9 (App. 37). Part 291 cannot cause a State *more* harm than such a hypothetical process by providing a voluntary opportunity for the State to participate.

court recognized this reality and rejected this particular basis for New Mexico's claim of injury. *See* Order at 12 (App. 50).

The Fifth Circuit adopted a different view because it saw the opportunity for a State to participate in the Part 291 process as a "forced choice," in which the State must either sully its dignity by participating or "forfeit its sole opportunity to comment" on the tribe's proposed gaming procedures. 497 F.3d at 497 & n.2; *see also* Compl. ¶ 41 (App. 20). But the precedent that the Fifth Circuit relied on, *Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568 (1985), does not support its analysis. In *Union Carbide*, the Supreme Court considered a statute that required chemical manufacturers to disclose health, safety and environmental data that could then be used by other companies, but provided for binding arbitration to determine the value of that intellectual property. 473 U.S. at 573-75. Because the arbitration provision established the only available process for those chemical manufacturers to protect *their own* intellectual property, the Court held that it forced them "to choose between relinquishing any right to compensation . . . or engaging in unconstitutional adjudication." *Id.* at 582. This case does not present any such choice: If New Mexico declines to participate in the Pueblo's Part 291 process, it does not thereby relinquish any property right or any aspect of its sovereign dignity. Unlike the plaintiffs in *Union Carbide*, the State may opt out of the opportunity to participate and then – if the

Secretary chooses to prescribe gaming procedures – it may protect its interests by challenging the result.

Finally, in this case, there is no "forced choice" because the Secretary is allowing the State to participate in the Part 291 process "under protest." *See* Order at 9 (App. 47). Thus, New Mexico can "protect the State's interests" in that process, *see* Compl. ¶ 41 (App. 20), without any forced acquiescence either to a district court's jurisdiction or to the Secretary's ultimate decision.

C. The Secretary has not yet taken any action that affects New Mexico's concrete interests.

New Mexico's third argument on standing is that the Secretary's eligibility determination causes immediate harm to the State's right under IGRA to negotiate a compact (unless a federal court first finds bad faith). *See* Summary Judgment Motion at 9 (App. 37). New Mexico claims it is injured because, although Part 291 gives it an opportunity to influence the terms on which a tribe may conduct gaming, it believes the compact negotiation process (in which it can exercise an effective veto) would give it greater influence over those terms. The district court accepted this as a basis for standing, holding that New Mexico has a cognizable interest in "preventing mediation between it and the Pueblo of Pojoaque without a federal court first finding New Mexico breached its obligation to negotiate in good faith." Order at 12 (App. 50).

This alleged injury is no more than a "procedural injury *in vacuo*," which is not sufficient to support standing. *See Summers* 555 U.S. at 496. In *Summers*, the Supreme Court held that even when a plaintiff's "procedural right has been accorded by Congress," the plaintiff must still show a "concrete interest that is affected" by the deprivation of that right. *Id.* at 496-97. Here, New Mexico's claimed injury is the loss of a procedural right to a federal court adjudication under Section 2710(d)(7) before the Secretary may prescribe gaming procedures. New Mexico's true interest is not the procedural right itself – indeed, when it had the opportunity to avail itself of that right, the State instead chose to reject it by asserting its sovereign immunity. Rather, the State's concrete interest lies in the terms on which a tribe may (or may not) conduct gaming – for example, the types of gaming allowed or whether the tribe will rely on the State for particular services. The Secretary's eligibility determination alone does not establish such terms or suggest that they are "certainly impending." *Essence, Inc.*, 285 F.3d at 1282.

Even before the Supreme Court reinforced the point in *Summers*, this Court had held that a plaintiff has no standing to challenge an administrative process that has yet to affect its concrete interests. In *Essence, Inc.*, the plaintiff challenged a city ordinance as granting too much discretion to the city to revoke or suspend a business license. *See* 285 F.3d at 1281-82. This Court held that "the *possibility* that the city will suspend or revoke the license . . . unchecked by adequate procedural safeguards," was

insufficient, as "[a]n Article III injury . . . must be more than a possibility." *Id.* at 1282. Similarly, in *U.S. West, Inc. v. FCC*, 173 F.3d 865 (10th Cir. 1999) (table), 1999 WL 147342, a plaintiff sought to challenge an FCC regulation that allowed the FCC to require a bond in some administrative adjudications. The Tenth Circuit held that the plaintiff had not demonstrated "actual injury" or "a sufficient likelihood of injury," because the FCC had never imposed a bond on it. *Id.* at *3. Instead, the plaintiff had "demonstrated only that it might, at some time in the future and under certain conditions, be subjected to an FCC rule with which it disagrees." *Id.* The Court found this "clearly insufficient to establish standing." *Id.* [8]

The same logic applies here. The Secretary's determination that the Pueblo is eligible for the Part 291 process begins an administrative proceeding but does not determine its outcome. The district court held that New Mexico has a cognizable interest in "ensuring that the only way Class III gaming takes place on the Pueblo of Pojoaque's lands is under a negotiated gaming compact," and that the Secretary's eligibility determination would be "connected with the harm to New Mexico's statutory interests under IGRA *if* the Secretary of the Interior adopts regulations permitting the Pueblo to conduct Class III gaming activities." Order at 12, 13 (App.

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[8] *U.S. West* is an unpublished decision that is cited here for its persuasive value. *See* Local Rule 32.1.

50-51) (emphasis added). The court's use of the word "if" shows the weakness in this analysis, because it illustrates that the harm is "conjectural or hypothetical," not "actual or imminent." *Lujan*, 504 U.S. at 560. Even assuming that any gaming procedures the Secretary might ultimately prescribe would harm New Mexico's concrete interest in the terms of such procedures, that interest is not harmed at the preliminary stage of a tribe's proposal to the Secretary.

II. NEW MEXICO'S CLAIM IS NOT RIPE BECAUSE THE SECRETARY HAS NOT PRESCRIBED GAMING PROCEDURES AND MAY NEVER DO SO.

The State's claims are also not justiciable because the Secretary has not yet prescribed any gaming procedures for the Pueblo, and the case is therefore not ripe for review. The doctrine of ripeness "protect[s] . . . agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); *see Reno v. Catholic Social Servs.*, 509 U.S. 43, 57-58 (1993); *Coal. for Sustainable Res. v. U.S. Forest Serv.*, 259 F.3d 1244, 1249 (10th Cir. 2001).

Ripeness is "closely related" to standing in that "each focuses on whether the harm has matured sufficiently to warrant judicial intervention," but in ripeness analysis, the "central focus is on whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1097 (10th Cir. 2006). Even if

this Court were to conclude that New Mexico has suffered some present injury that is a sufficient basis for standing, it may still conclude that the case will not be ripe "until the issues in the case have become more fully developed." *Id.*, 450 F.3d at 1098 (quoting *Morgan v. McCotter*, 365 F.3d 882, 890 (10th Cir. 2004); *see also Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57 n.18 (1993). In evaluating ripeness, this Court considers (1) whether the issues are purely legal; (2) whether the agency action involved is "final agency action"; (3) whether the action has a direct and immediate effect on the plaintiff; and (4) whether resolution of the issues will promote effective agency administration. *Coal. for Sustainable Res.*, 259 F.3d at 1250.

Here, the underlying issues are purely legal, but the dispute is not fit for judicial review because the Secretary has not prescribed (and may choose not to prescribe) gaming procedures for the Pueblo. This central fact is relevant to several of this Court's ripeness criteria. First, Interior does not challenge the district court's holding that the Secretary made a final determination with respect to the Pueblo's eligibility to participate in the Part 291 process. However, New Mexico does not seek review of the Secretary's application of the eligibility criteria; it claims that Part 291 is invalid in its entirety and that the Secretary may not prescribe any gaming procedures under its auspices. The Secretary has not taken any "final agency action" on that issue, and the question of the validity of any such procedures is therefore unripe.

Second, withholding resolution of these issues will promote more effective agency administration. New Mexico proposes judicial review on a piecemeal basis – first, of the Secretary's eligibility determination, and later, presumably, of any final decision the Secretary may reach with respect to gaming procedures. There is no need for the Court to step into these disputes now, because there is a real possibility that New Mexico's will never suffer any harm to its concrete interests. As noted above, the Secretary has received six other applications for Secretarial gaming procedures since it first promulgated Part 291 in 1999, but has never issued procedures for any tribe. One tribal gaming proposal under Part 291 was simply disapproved, and the same result is possible here. The Secretary "should be allowed a first chance to balance the competing interests at stake and choose a course of action," at which point judicial review will be available (if necessary) to resolve all the legal issues that her decision may raise. *Coal. for Sustainable Res.*, 259 F.3d at 1253.

Finally, and most importantly, the actions that the Secretary has taken so far have no "direct and immediate effect" on New Mexico. As discussed above, *see supra* pp. 21-24, any harm to New Mexico depends on "uncertain or contingent future events." *Walker*, 450 F.3d at 1097. The Secretary's eligibility determination will not be "felt in a concrete way" by New Mexico unless and until the Secretary prescribes gaming procedures for the tribe that affect the State's concrete interests. The Fifth Circuit in *Texas* disagreed with this point, holding that Texas "claims present injury

from submission to an invalid agency process, regardless whether the Secretary ultimately allows gaming." 497 F.3d at 499. To reach this conclusion, however, the Fifth Circuit relied on *Abbott Labs.*, in which the regulated parties faced the threat of penalties if they did not participate. *Id.* (citing *Abbott Labs.*, 387 U.S. at 152). Delaying review of Part 291 does not present the same risk, because New Mexico can choose whether or not to participate in the Secretarial Procedures with no threat of penalties either way. Because the State is not required to submit to any agency process or jurisdiction, the Fifth Circuit's ripeness analysis relies on the same error as its standing analysis. *See supra* pp. 18-21.

An action may also be considered to have a "direct and immediate effect" if there is some "hardship to the parties of withholding court consideration." *Morgan*, 365 F.3d at 891 (quoting *Abbott Labs.*, 387 U.S. at 149). That inquiry shows that the case is unripe, because there could be no hardship to New Mexico until the Secretary makes a final decision on the Pueblo's request. The district found, without any factual support, that Part 291 creates a "direct and immediate" harm by "encouraging States to compact with Tribes where before they were not." Order at 19 (App. 57). But an agency action is not ripe for review simply because it changes a party's perceived bargaining power. *See Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490-

91 (5th Cir. 1986).[9] Instead, to create a hardship, withholding judicial review must force a party into a "direct and immediate dilemma." *Morgan*, 365 F.3d at 891 (quoting *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995)). That may happen, for example, where a party would have to change its bargaining position or "risk[] substantial future penalties." *Chamber of Commerce of the U.S. v. Reich*, 57 F.3d 1099, 1100-01 (D.C. Cir. 1995). In *Reno*, the Supreme Court contrasted the dilemma of "complying with newly imposed, disadvantageous restrictions [or] risking serious penalties for violation" with the less serious situation in which "no irremediably adverse consequences flowed from requiring a later challenge." 509 U.S. at 57-58 (comparing *Abbott Labs.*, 387 U.S. at 152-53, with *Toilet Goods Ass'n v. Gardner*, 397 U.S. 158, 164 (1967)); *see also Mobil Exploration & Prod., Inc. v. Dep't of Interior*, 180 F.3d 1192, 1203-04 (10th Cir. 1999) (holding that even a subpoena that purports to *require* compliance may not impose a "direct and immediate impact").

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[9] The district court implicitly acknowledged this point when it correctly noted that "the mere possibility of settlement cannot have any bearing" on the question of ripeness. Order at 19 n.8 (App. 57). To the extent the Part 291 process may encourage States and tribes to agree to a compact, it is no different from any other situation in which the parties bargain in the shadow of litigation. An ongoing administrative proceeding may affect the parties' evaluation of their settlement options, but the proceeding itself ordinarily may not be challenged until it concludes.

Here, delaying judicial review until the Secretary makes a final decision does not create a "direct and immediate dilemma" for New Mexico, which can protect both its sovereignty and its concrete interests while the issue ripens. If New Mexico chooses not to participate in the Part 291 process, it will face no penalties or disadvantageous restrictions. It may also participate in the Secretary's process under protest, attempting to influence that process and guarding against the possibility that Part 291 will ultimately be held to be valid. On the other hand, if Part 291 is later held to be invalid, the State will be no worse off than if the Court reached the same result now. The Court should therefore hold that New Mexico's claim is not ripe, and avoid review on the merits unless the Secretary makes a final decision that causes New Mexico some concrete harm.

III. PART 291 IS A VALID EXERCISE OF THE SECRETARY'S AUTHORITY TO FILL AN UNFORESEEN GAP IN IGRA.

If the Court finds that it has jurisdiction to consider the validity of Part 291 at this early stage of the Secretary's process, then it should reverse the decision of the district court and uphold Part 291. The parties agreed below that *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), controls this question. Under *Chevron*, if "Congress has directly spoken to the precise question at issue," or if the "*intent* of Congress is clear," then a reviewing court must effectuate that intent. *Id.* at 842 (emphasis added). In this "*Chevron* step one" inquiry, the court examines "whether Congress had an

intent on the question at issue" by using the traditional tools of statutory interpretation to analyze "the statute's text, purpose, structure, history, and relationship to other statutes." *Hackwell v. United States*, 491 F.3d 1229, 1233 (10th Cir. 2007).

If Congress did not express a clear intent with respect to the precise question at issue, the court must defer to "an agency's construction of the statute which it administers." *Chevron*, 467 U.S. at 842 (also called "*Chevron* step two"). Congress may "explicitly [leave] a gap for the agency to fill," which is construed as "an express delegation of authority to the agency to elucidate a specific provision of the statute." *Id.* at 843-44. But a reviewing court must defer to an agency interpretation even if "the legislative delegation to an agency on a particular question is implicit rather than explicit." *Id.* at 844; *see also United States v. Power Eng. Co.*, 303 F.3d 1232, 1236-37 (10th Cir. 2002). A statute's language must be read "with a view to [its] place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). Therefore, in deciding whether a statute is ambiguous, the court should "look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Negusie v. Holder*, 555 U.S. 511, 518-19 (quoting *Dada v. Mukasey*, 554 U.S. 1, 16 (2008)). Particularly where the agency's interpretation requires "accommodation of conflicting policies," the court "should not disturb it unless it appears from the statute or its legislative history that the

accommodation is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845 (internal quotation marks and citations omitted).

The Supreme Court's decision in *Seminole Tribe* results in a statutory gap because it creates a dilemma in which not all of Congress's statutory commands can be given effect. That gap calls for interpretation by the Secretary, who is charged with the administration of IGRA and the accommodation of any conflicting policies within it. Because the Secretary's interpretation in Part 291 is a reasonable reconciliation of IGRA's divergent aims and requirements, the Court cannot instead adopt New Mexico's interpretation.

A. *Seminole Tribe* revealed an ambiguity in IGRA that Congress did not foresee.

1. When a State asserts immunity from suit, IGRA's statutory processes are ineffective in meeting Congress's stated goals.

In IGRA, Congress designed a complete statutory scheme to effectuate its intent with respect to Indian gaming. Congress proclaimed its policy goal of establishing a basis for Indian gaming. 25 U.S.C. § 2702(1). It imposed a duty upon States, the duty of good faith bargaining with tribes, to advance that policy goal. *Id.* § 2710(d)(3)(A). Congress created a remedy for a State's breach of that duty by allowing the Secretary to prescribe gaming procedures in the event the State would not agree to a compact. *Id.* § 2710(d)(7)(B)(vii). And it established a process through

which the tribe could obtain that remedy – the joint administrative and judicial process described in Section 2710(d)(7)(B).

The district court here, and the Fifth Circuit in *Texas*, focused their *Chevron* analysis solely on the last element of this scheme. They framed the "precise question at issue" as whether Congress intended the tribe to be able to request gaming procedures from the Secretary without first winning a court judgment against the State. *See* Order at 22, 24 (App. 60, 62); *Texas*, 497 F.3d at 501 (relying on the "plain language of IGRA"). That framing limits the statutory inquiry to whether Part 291 conforms to one of the two possible outcomes of a Section 2710(d)(7) lawsuit that Congress directly addressed: Either the district court would find that the State acted in good faith and the tribe must go back to the bargaining table; or the district court would find that the State acted in bad faith and would order the State to negotiate a compact or risk procedures prescribed by the Secretary. Because Part 291 did not conform to either of those two possibilities, the district court reluctantly concluded that it was invalid. *Id.* at 25-26 (App. 63-64).

The unusual factor in this case is that, according to *Seminole Tribe*, States can render Congress's attempted grant of jurisdiction to district courts constitutionally ineffective by asserting their sovereign immunity from suit. This reveals a third possible outcome of a Section 2710(d)(7) lawsuit that Congress did not specifically address, in which the State simply avoids any district court finding by raising an

Eleventh Amendment defense. That possibility raises the "precise question" of statutory interpretation at issue in this case: When a State asserts its sovereign immunity from a tribe's suit, may the Secretary prescribe gaming procedures for the tribe?

Because the district court focused only on IGRA's provisions concerning process, rather than those addressing policies and duties, the district court reluctantly concluded that the State must be able to "sabotage" that process by asserting sovereign immunity. Order at 24 (App. 62). But "in determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation." *Brown & Williamson*, 529 U.S. at 132. Here, the traditional tools of statutory interpretation, including IGRA's language, structure, and legislative history, show that the district court's "plain language" interpretation is contrary to Congress's unambiguously expressed intent.

Text and structure of the statute: The language of IGRA shows that, although Congress gave States leverage over Indian gaming that they would not otherwise have, it did not intend that States could use that leverage to prevent tribes from conducting gaming or to dictate the terms of gaming procedures. Congress made clear in several places in IGRA that it intended tribes to be able to conduct gaming. The primary purpose of IGRA is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency,

and strong tribal governments." 25 U.S.C. § 2702(1). Congress recognized that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands" unless gaming was entirely contrary to a State's public policy. *Id.* § 2701(5); *see Cabazon Band*, 480 U.S. at 207. States may influence Indian gaming to the extent that Congress provides, but Congress's findings of fact and declaration of purpose excluded any mention of State authority over Indian gaming. *See* 25 U.S.C. §§ 2701, 2702. This omission is particularly salient in light of other "cooperative federalism" statutes in which Congress expressly identifies a policy of federal-State partnership. *See, e.g.*, 33 U.S.C. § 1251(b) (Clean Water Act).

Another indication of Congress's intent is found in the structure of the remedial process that Congress believed would be available. Congress provided that States would have the burden of proof to overcome a presumption of bad faith in a tribe's suit against the State. *See* 25 U.S.C. § 2710(d)(7)(B)(ii). While Congress may have preferred tribes and States to reach agreement, *see* Order at 25 (App. 63), if the State refused to rebut a tribe's allegations, then Congress expected a finding of bad faith. Congress reinforced this point through the mandatory language of Section 2710(d)(7)(B)(vii), which provides that the Secretary "shall prescribe" the procedures selected by the mediator that Congress intended the court to have the power to appoint. Whether a State negotiates in good faith, in bad faith, or not at all, Congress drew a map in which all roads lead to some kind of gaming procedures.

Finally, Congress included a severability provision in IGRA. *See* 25 U.S.C. § 2721. Discussed in more detail below at pp. 43-44, the severability provision gives further weight to the conclusion that Congress did not intend to give States the power through litigation to prevent tribes from obtaining gaming procedures.

Legislative history: The legislative history of IGRA supports the conclusion that Congress unambiguously intended tribes to have access to gaming procedures even if a State refused to agree to a compact. Early versions of IGRA constituted "an attempt to meet the concerns of all parties" – including both tribes and States – while "protecting the right of tribes to generate necessary revenue to support tribal government and programs." H.R. Rep. 99-488 at 12 (1986). The mechanism of the tribal-State compact developed during the legislative process as a way for the *tribe* to consent to the *State's* exercise of jurisdiction. Congress recognized that "the consent of tribal governments" is required "before State jurisdiction can be extended to tribal lands," but that tribes may want to take advantage of the States' "expertise to regulate gaming activities and to enforce laws related to gaming." S. Rep. 100-446 at 5. Congress envisioned the tribal-State compact as "the mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land." *Id.* at 6; *see also id.* at 13-14 (in the absence of federal and tribal systems in place to

regulate Class III gaming, "a logical choice is to make use of existing State regulatory systems … through negotiated compacts").[10]

Congress also sought to balance competing State interests in this process, but only on the basis of "equal sovereign[ty]" between States and tribes. *Id.* at 13. The Senate report plainly stated the drafters' intent that "the compact requirement for class III [gaming] not be used as a justification by a State for excluding Indian tribes from such gaming." *Id.* at 13. Congress knew that the requirement of a compact would give States some leverage over tribal gaming, and thus sought to create an effective "incentive for States to negotiate with tribes in good faith." *Id.* at 13. The right of a tribe to sue a State was seen as "the least offensive option" to accomplish this purpose. *Id.* But this legislative history clearly establishes that Congress's foremost goal was to ensure that tribes would have access to gaming procedures, and the specific process it formulated under Section 2710(d)(7) was in aid of that ultimate goal.

The text, structure, and history of IGRA demonstrate that *Seminole Tribe* broke the link between the *result* Congress intended to occur and the *process* by which it

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[10] This focus is reflected in the types of possible compact provisions that Congress identified, including how State civil and criminal laws may apply to Indian gaming, how the State and tribe would allocate enforcement jurisdiction, and any payment the State should receive to defray the costs of Indian gaming regulation. *See* 25 U.S.C. § 2710(d)(3)(C).

expected to achieve it. If the Court gives dispositive effect only to the process, as the district court did, it will undermine Congress's express intent with respect to IGRA's goals, duties, and remedies. The district court's holding is thus completely dependent upon its narrow framing of the *Chevron* issue as a question of process. If the court had asked instead whether Congress intended States to exercise a veto over tribal gaming opportunities, the answer would clearly have been no.

The district court here admitted as much. It stated that *Seminole Tribe* gave the States an ability to "sabotage IGRA's remedial process" that Congress "fail[ed] to anticipate." Order at 24 (App. 62). The Ninth Circuit believed that "Congress meant to guard against this very situation when it created IGRA's interlocking checks and balances," and that it "would not have countenanced [this situation] had it known then what we know now." *Spokane Tribe*, 139 F.3d at 1301, 1302. Two of the judges in *Texas* agreed. *See* 497 F.3d at 512 (King, J., concurring) (arguing that *Seminole Tribe* gave States "the leverage to block gaming on Indian land under IGRA in a manner wholly contrary to Congress's intent"); *id.* at 522 (Dennis, J., dissenting) (finding that Congress "did not intend to allow . . . a situation in which states could refuse to negotiate and thus veto a tribal-state compact"). The only possible conclusion that the traditional tools of statutory construction yield in this case is that, due to *Seminole Tribe*, there is a conflict that Congress did not intend or foresee between IGRA's overriding goals and the particular means that it makes available.

2. Congress did not address the "precise question" of how the Secretary may proceed when a State asserts its sovereign immunity.

The district court, like Judge Jones in *Texas*, saw the conflict within IGRA as irreconcilable, but chose to interpret IGRA to give effect to one specific provision at the expense of other provisions and Congress's chosen purpose. That was legal error. Under *Chevron*, the court should have recognized that Congress did not address the "precise question at issue" – whether a State's assertion of sovereign immunity strips the Secretary of her statutory authority to prescribe gaming procedures.

Courts that have examined potential conflicts within a statute, including conflicts between statutory language and Congress's unambiguously expressed purpose, have held that those conflicts demonstrate an ambiguity that requires agency interpretation. In *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014), the Supreme Court applied the *Chevron* framework to a statute that "does not speak unambiguously to [an] issue" because it "addresses that issue in divergent ways." *Id.* at 2203. Because the "two faces of the statute do not easily cohere with each other," the court found that "internal tension makes possible alternative reasonable constructions." *Id.* If only one interpretation of the statute would give "each clause full effect," then the agency would be compelled to adopt that interpretation. *Id.* at 2207. But when an agency is called upon to "resolve[] statutory tension," the courts are required to defer. *Id.; see also Lorenzo v. Mukasey*, 508 F.3d 1278, 1283 (10th Cir. 2007) (noting that a

conflict between statutory provisions can render the statute ambiguous for *Chevron* purposes); *cf. National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (finding a "fundamental ambiguity" in the "differing mandates" of two different statutes). Although the conflict in *Scialabba* existed on the face of one statutory provision, ambiguity may also arise through tension between separate provisions or through a conflict with the purpose that is identified in the statutory text. "The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U.S. at 132.

A second basis for finding ambiguity in IGRA – similarly grounded in *Seminole Tribe* – is that Congress did not address the entire legal landscape when it fashioned the means by which it sought to achieve IGRA's purposes. As discussed above, Congress believed that a tribe's suit under Section 2710(d)(7) could have only two outcomes – a finding of bad faith, with the possibility of Secretarial gaming procedures as a final remedy, or no such finding. There is no indication that Congress foresaw a situation in which a State rejects its opportunity to demonstrate its good faith by asserting its sovereign immunity, thereby forestalling the judicial remedy that IGRA provides when a state fails to carry that burden. Congress could not have had any specific or unambiguous intent about the Secretary's authority to act in that situation.

The district court identified the apparent tension between Congress's goals and the means Congress provided to achieve those goals. It also recognized the obvious cause of that tension in the unanticipated *Seminole Tribe* decision, which revealed a problem in the administration of IGRA. *See* Order at 24, 26 (App. 62, 64). Under these circumstances, the district court should have applied *Chevron* step two and relied on the agency's interpretation, rather than treating only one aspect of Congress's overall statutory framework as "unambiguous." When the district court attempted to apply the terms of IGRA literally, it produced a result at odds with Congress's intent.

Case law under *Chevron* establishes that a subsequent court decision can reveal ambiguity in a statute. Other than the Fifth Circuit in *Texas*, the United States is aware of only three courts of appeals to have considered this question. All of those decisions pertained to the Coal Act of 1992, 25 U.S.C. §§9701-9722, which established a benefit fund for retired coal workers. The statute provided that the fund could charge premiums to coal operators based on the number of beneficiaries "assigned" to them, and created a system of priority for making such assignments. *See generally Pittston Co. v. United States*, 368 F.3d 385, 390-92 (4th Cir. 2004). The Supreme Court upset this scheme in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), holding that the statutory assignment provision was unconstitutional as applied to certain operators. The responsible federal agency therefore determined that beneficiaries previously

assigned to those operators would be reassigned to other operators, contrary to the text of the statute. *Pittston Co.*, 368 F.3d at 392-93, 401-02.

All three courts of appeals upheld the agency's decision under *Chevron* step two, finding that the *Eastern Enterprises* decision created a statutory gap and that the agency could address that gap by finding a mechanism otherwise consistent with the statute to accomplish Congress's purpose. In *Pittston*, the Fourth Circuit held that "Congress did not contemplate that some members of the 'signatory operators' group could not constitutionally be required to contribute to the [fund]. The situation faced by the Commissioner was thus the kind of 'case unprovided for' that allows her to engage in gap-filling." *Id.* at 403 (citing *Barnhart v. Peabody Coal. Co.*, 537 U.S. 149, 169 (2003)). The court supported this finding with references to legislative history that demonstrated Congress's primary goals in establishing the assignment system. *Id.* at 404-05. The Sixth Circuit agreed with this analysis in *Sidney Coal Co. v. Social Security Administration*, 427 F.3d 336 (6th Cir. 2005), holding that "the Coal Act contains no language as to how the [agency] should have handled the precise question raised by the Eastern Enterprises holding." *Id.* at 346. The court therefore deferred to the agency's interpretation under a *Chevron* step two analysis. *Id.* at 346-50. The Eleventh Circuit adopted the holding of both of these decisions in *U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1288-89 (11th Cir. 2007).

This case falls squarely within the *Pittston* line of cases. Congress clearly attempted to grant the district courts jurisdiction over States for purposes of a Section 2710(d)(7) suit, but was constitutionally unable to do so in a certain set of cases. It did not anticipate this situation nor did it include any language in IGRA that addresses it. In *Texas*, therefore, a majority of the Fifth Circuit panel relied on *Pittston* to find that IGRA is ambiguous in the wake of *Seminole Tribe*. Judge King would have held that "the lack of any provision in [IGRA] addressing the dismissal of an Indian tribe's enforcement suit on sovereign immunity grounds is a statutory gap that is akin to the gap recognized in [*Pittston*]." *Texas*, 497 F.3d at 511 (King, J., concurring). Judge Dennis argued this point in more detail, maintaining that "the ambiguity or gap in the IGRA was created by the Congress when it unintentionally chose and enacted a constitutionally ineffectual tribal remedy." *Id.* at 515 (Dennis, J., dissenting).[11]

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[11] In contrast, Judge Jones believed that "the fact that later-arising circumstances cause a statute not to function as Congress intended does not expand the congressionally-mandated, narrow scope of the agency's power." *Texas*, 497 F.3d at 504. This argument assumes that Congress only delegates to an agency the authority to fill gaps that Congress *intentionally* leaves in a statute. But *Chevron* recognizes that Congress may implicitly delegate to an agency enough authority to fill even the gaps that Congress does not foresee. *See Chevron*, 467 U.S. at 842-44; *Mead*, 533 U.S. at 227-29. Whether Congress did so here is addressed below. *See infra* pp. 45-49.

The district court's error in this case was its refusal to recognize this statutory gap, which permits agency interpretation under *Chevron*. The court held that "Congress wanted the Secretary to implement procedures in one situation, and one situation alone." Order at 24 (App. 62). This is only partially correct: *Of the situations that Congress anticipated*, it intended the Secretary to implement procedures in only one. If a court made a finding of bad faith (and mediation was ineffective), the Secretary could implement procedures, and if a court made a finding of good faith, she could not. But those provisions do not mean that a third scenario – in which the court is powerless to make any finding at all due to the State's own decisions – must be treated as if Congress had a specific outcome in mind. IGRA's silence about this scenario "is not conclusive," because "this is not a case where it is clear that Congress had an intention on the precise question at issue." *Negusie*, 555 U.S. at 518. Before the Secretary promulgated Part 291, both the Eleventh and Ninth Circuits had expressed the view that the Secretary would have *some* authority to provide relief in this unanticipated situation. *See Seminole Tribe*, 11 F.3d at 1029; *Spokane Tribe*, 139 F.3d at 1302.

Congress did consider one precise question that is relevant here: the severability of IGRA's disparate provisions. It provided that if "any section or provision of this chapter . . . is held invalid . . . the remaining sections or provisions of this chapter . . . shall continue in full force and effect." 25 U.S.C. § 2721. Congress

did not have the power to confer jurisdiction on the district courts to adjudicate a State's bad faith without the State's consent, and the provisions of Section 2710(d)(7)(A) and (B)(i)-(iii) describing the courts' jurisdiction and powers therefore cannot be given effect in that situation. But Congress could still constitutionally authorize the Secretary to prescribe gaming procedures, *see Cabazon Band*, 480 U.S. at 207, as it did in Section 2710(d)(7)(B)(vii). The severability clause of IGRA suggests that in the set of cases where IGRA's grant of jurisdiction is invalid, the Court should read Section 2710's grant of authority to the Secretary to operate separately from, rather than to be wholly contingent upon, that grant of jurisdiction. It is more consistent with the severability clause to preserve the Secretary's authority to prescribe gaming procedures, even if that causes some ambiguity with respect to the circumstances in which that is appropriate, than to read that authority out of the statute completely.

B. Part 291 should be upheld as a reasonable exercise of Interior's authority to resolve the ambiguity in IGRA.

Because IGRA itself does not unambiguously prescribe how the Secretary and the Pueblo should proceed when a State asserts its sovereign immunity from a Section 2710(d)(7) suit, that is an issue that should "'be resolved, first and foremost, by the agency.'" *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (quoting *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996)). Here, Interior

resolved that conflict reasonably, by adopting a process as close as possible to the process that Congress expected.

1. Congress intended Interior to resolve any ambiguities within IGRA.

An agency does not need an "express delegation of authority on a particular question" to claim *Chevron* deference for its statutory interpretation. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). "[I]t can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result." *Id.* at 229 (quoting *Chevron*, 467 U.S. at 844).[12] There are two interacting sources of authority that establish that Congress would have intended Interior to address the ambiguity created by *Seminole Tribe*: IGRA itself, which creates a role for the Secretary to play in

[12] Cases and commentators after *Chevron* support the view that the search for a "delegation" stands for a more general presumption that Congress would expect an agency to resolve ambiguities in a statute in the first instance. *See, e.g.,* Justice Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511, 516-17 (proposing that "any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate"); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

facilitating the establishment of Class III gaming procedures, *see* 25 U.S.C § 2710(d)(7)-(8), and the Secretary's so-called "general authority" statutes, *id.* §§ 2, 9.

The Secretary's general authority to implement specific laws relating to Indian affairs is a foundational principle of federal Indian law, dating back to the 1830s. *See Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962). In its current statutory form, that authority permits the Secretary to "prescribe such regulations as [she] may think fit for carrying into effect the various provisions of *any act* relating to Indian affairs." 25 U.S.C. § 9 (emphasis added); *see also id.* § 2 (providing that, "agreeably to such regulations as the President may prescribe," Interior shall "have the management of all Indian affairs"). This broad delegation of authority to Interior establishes the context of "generally conferred authority and other statutory circumstances," *Mead*, 533 U.S. at 229, in which Congress enacted IGRA. This Court and others have recognized the breadth and historical role of the Secretary's general authorities, and have understood that Congress legislates against that background. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 231-32 (1974); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 749-50 (10th Cir. 1987); *United States v. Eberhardt*, 789 F.2d 1354, 1360-61 (9th Cir. 1986); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 665-66 (9th Cir. 1975).

This Court has given a broad interpretation to the requirement of a predicate "act relating to Indian affairs," 25 U.S.C. § 9, for example by allowing the Secretary to promulgate regulations under her general authorities based only on the United States'

treaty relationship with a tribe. *See Northern Arapahoe Tribe*, 808 F.2d at 750. In *Texas*, Judge Jones rejected Interior's reliance on its general authorities based on the fact that those statutes "do not grant Interior 'a general power to make rules governing Indian conduct,'" but only to "implement 'specific laws.'" 497 F.3d at 510-11 (quoting *Village of Kake*, 369 U.S. at 63). But IGRA easily meets the requirement of an "act" that Interior must "carry[] into effect," 25 U.S.C. § 9, and the administration of that law requires the interpretation of a statutory ambiguity. The Secretary does not claim that Section 9 alone permits her to prescribe Class III gaming regulations, but it does confirm that the Secretary may interpret and fill gaps in IGRA to "carry[] into effect" IGRA's "various provisions." As Judge Dennis correctly recognized in his dissent in *Texas*, *see* 497 F.3d at 514-15, 519-20, those provisions include the tribal rights that IGRA established but that, after *Seminole Tribe*, cannot be vindicated by any effective remedy when a State raises an Eleventh Amendment defense.

The district court here incorrectly relied on a different reason for rejecting Interior's authority to implement Section 2710 through regulation. It believed that Congress "conferred general rulemaking and administrative authority on the National Indian Gaming [Commission] (NIGC), an independent agency within the Department of the Interior." Order at 24 (App. 62) (citing 25 U.S.C. § 2706(b)(10)). The NIGC does have substantial authority under IGRA, particularly over Class II gaming and management contracts. *See* 25 U.S.C. §§ 2706(b)(1)-(4), 2710(b). But the provisions

of Section 2710(d) that pertain to gaming compacts confer authority, either to approve negotiated compacts or to prescribe gaming procedures, only on the Secretary. And Congress had no need to make that authority explicit, as it did for the NIGC, because the Secretary's general authorities already authorized her to promulgate the regulations necessary to effectuate her own role under Section 2710. *See* 25 U.S.C. § 9; *see Chevron*, 467 U.S. at 844. For example, the Secretary (not the NIGC) has also promulgated regulations governing her approval or disapproval of negotiated tribal-state gaming compacts. *See* 25 C.F.R. Part 293.[13]

IGRA's severability clause further supports the conclusion that the Secretary has authority to address the statutory gap created by *Seminole Tribe*. As noted above, that provision states that if "any section or provision of this chapter . . . is held invalid, it is the intent of Congress that the remaining sections of this chapter . . . shall continue in full force and effect." 25 U.S.C. § 2721. *Seminole Tribe* held that the grant of jurisdiction in Section 2710(d)(7)(A) is inoperative in a particular subset of cases – those in which a State has not consented to suit. The only way for the remaining

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[13] In addition, the grant of rulemaking authority to the NIGC ultimately falls under the control of the Secretary of the Interior. The NIGC is an agency within Interior; the Secretary appoints (and may remove) two of the NIGC's three members. "[T]he nominal separation of the two does not change the clear intent of Congress to locate rulemaking and administrative authority under the IGRA with the Secretary of the Interior." *Texas*, 497 F.3d at 521 (Dennis, J., dissenting).

provisions of IGRA to "continue in full force and effect" in that subset of cases, *id.* § 2721, is for the Secretary to "prescribe such regulations" as are necessary "for carrying into effect" those provisions, *id.* § 9. It was therefore within "the intent of Congress" for the Secretary to promulgate regulations that would allow the other provisions of IGRA, notably Section 2710(d)(7)(B)(vii), to continue "in full force and effect."

To be sure, Congress did not expressly delegate the authority to promulgate Part 291 to the Secretary. Of the possible remedies available "if a compact is not negotiated," Congress thought that it had provided the "least offensive option," which would be a sufficient remedy in any situation. S. Rep. 100-446 at 14. That does not mean, however, that Congress envisioned no other acceptable option or that it intended to *withhold* authority from the Secretary to fill any statutory gaps that it had failed to appreciate. As between the courts and the agency, Congress "'would expect the agency to be able to speak with the force of law' with respect to any gaps or ambiguities in the IGRA." *Texas*, 497 F.3d at 521 (Dennis, J., dissenting) (quoting *Mead*, 533 U.S. at 229). The Court must therefore uphold the Secretary's regulations if they constitute a reasonable resolution of the statutory ambiguity.

2. Part 291 is a reasonable exercise of the Secretary's authority.

This Court will consider an agency's action to interpret a statute to be "reasonable" if it is "based on a permissible construction of the statute," and is not

"arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 US. at 843-44. The Court should uphold the agency's interpretation if it is a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," and "one that Congress would have sanctioned." *Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)). The Court makes this judgment based on the statute's "text, structure, and underlying purpose." *Midwest Crane & Rigging, Inc. v. Fed. Motor Carrier Safety Admin.*, 603 F.3d 837, 840 (10th Cir. 2010). This is true even if the Court believes that the agency's method of resolving the statutory ambiguity is not the best possible statutory interpretation. *See Brand X*, 545 U.S. at 980. Part 291 is a reasonable interpretation of IGRA because it maintains the procedure that Congress established when the State consents to court jurisdiction, but establishes a supplemental, very similar procedure to apply in the unanticipated situation in which a State opts not to defend its bargaining activity.

Part 291 is fully consistent with the Secretary's authority to prescribe gaming procedures. IGRA confers that authority "if the State does not consent . . . to a proposed compact submitted by a mediator." 25 U.S.C. § 2710(d)(7)(B)(vii). That predicate is satisfied when a State asserts its sovereign immunity, an act that forecloses the possibility that it might consent to a court-appointed mediator's proposed compact. IGRA provides that in such situations, the Secretary "shall prescribe" gaming procedures that are consistent with several listed criteria. They must be

"consistent with the proposed compact selected by the mediator under clause (iv)," but that prerequisite can be excised in cases eligible for Part 291, because Congress did not constitutionally have the power to require an unconsenting State to participate in court-appointed mediation. *See Pittston*, 368 F.3d at 403-04 (upholding agency's authority to ignore an unconstitutional provision of the assignment process and follow the remaining provisions). The gaming procedures must also be consistent with IGRA and with State law, *see* 25 U.S.C. § 2710(d)(7)(B)(vii)(I)-(II), requirements that the Secretary included in Part 291. *See* 25 C.F.R. §§ 291.8(a), 291.11(b). The Eleventh Circuit in *Seminole Tribe* appeared to anticipate this process, recognizing that the Secretary's authority under Section 2710(d)(7)(B)(vii) is not contingent on the presence of a court-appointed mediator. *See Seminole Tribe*, 11 F.3d at 1016. Part 291 does no more than explain how the Secretary will exercise that authority in a particular subset of cases.

In *Texas*, Judge King would have held that, even though IGRA is ambiguous, the Secretary may not "jettison some of [its] provisions in the cause of gap-filling." 497 F.3d at 512 (King, J., concurring). This is an inaccurate understanding of Part 291, which does not jettison any of the provisions of Section 2710(d)(7). If a State consents to suit under Section 2710(d)(7), as California has (for example), the process may unfold exactly as Congress anticipated. Part 291 provides a supplemental procedure that is available *only* if the tribe faces a situation that Congress did not

address – *i.e.*, that it has followed the Section 2710(d)(7) procedure as far as possible, but a State has asserted a sovereign immunity defense. *See* 25 C.F.R. § 291.3. Judge Dennis concluded that in that situation, Congress "obviously would have adopted at least some alternative form of remedy – and that it likely would have enacted something similar" to Part 291. *Texas*, 497 F.3d at 525 (Dennis, J., dissenting).

Judge Dennis's conclusion is correct because the Part 291 process shares many of the features of the court-ordered process envisioned in Section 2710(d)(7), most notably the opportunity for extensive State participation. Because Congress could not constitutionally require the State to participate in court-ordered mediation, the Secretary chose to establish a voluntary mediation process in Part 291. But if the State does choose to participate, the Secretary must appoint a neutral mediator, just as the district court would do if the State had consented. 25 U.S.C. § 2710(d)(7)(B)(iv)-(v). If the mediator does not lead the State and the tribe to agreement, the mediator will choose the proposal that "best comports with the terms of IGRA," and the State may argue to the mediator that its own proposal represents a good-faith bargaining position. 25 C.F.R. § 291.10(b); *see also* 25 U.S.C. § 2710(d)(3), (d)(7)(B)(iv). The Secretary may then evaluate the mediator's selected proposal using criteria similar to the statutory criteria. *Compare* 25 U.S.C. § 2710(d)(7)(B)(vii)(I)-(II) *with* 25 C.F.R. § 291.11(b)-(c). The Part 291 process for situations in which a State does not consent to suit is so similar to the Section 2710(d)(7) process for consenting States that it is

reasonable to conclude that "Congress would have sanctioned" it. *Chevron*, 467 U.S. at 845.

The process is different, of course, if the State chooses to ignore it entirely. Congress incorrectly believed it had the constitutional authority to compel State participation, so there is no parallel statutory procedure to use as a benchmark for reasonableness in this situation. Instead, the Court must look to the statutory context and intent of IGRA. *Cabazon Band* establishes that States cannot prevent Indian tribes (in most circumstances) from conducting gaming on their reservations. *See* 480 U.S. at 207. In IGRA, Congress provided a way for States to influence that gaming, but its ultimate purpose was to "provide a statutory basis for the operation of gaming by Indian tribes." 25 U.S.C. § 2702(1). Where States choose not to take advantage of the opportunity, but instead to walk away from mediation by asserting their sovereign immunity, the Secretary has chosen to effectuate this purpose by conducting a proceeding that can reach a conclusion even without the State. Under IGRA, that is what the Secretary would do if the State were to walk away from a court-ordered mediator's proposed compact. *See id.* § 2710(d)(7)(B)(vii). It is reasonable to find that she has similar authority when the State walks away from the court mediation process at its outset rather than at its conclusion.

Finally, the Court must give effect to one of the most basic canons of federal law pertaining to statutes enacted to benefit Indians. Such "statutes are to be

construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)). Congress expected that canon to apply to the interpretation of Section 2710, so that IGRA's remedial scheme would operate "in a manner that will be most favorable to tribal interests." S. Rep. 100-446 at 15; *see also Texas*, 497 F.3d at 525 n.3 (Dennis, J., dissenting). Because this is a *Chevron* case, the Court itself is not interpreting ambiguities in IGRA, and instead must consider whether the agency's interpretation resolves those ambiguities reasonably in light of IGRA's text, structure, and purpose. The Indian canon of construction reinforces the reasonableness of the Secretary's interpretation, which is favorable to the Indians because it advances IGRA's purpose of providing a basis for tribal gaming. The Court should recognize that Congress drafted Section 2710(d)(7) to create a way for a tribe to obtain gaming procedures in the face of an intransigent State, and that the anticipated judicial process in Section 2710(d)(7) is not the only possible process that Congress would have deemed acceptable to achieve that goal. The Secretary's interpretation reasonably effectuates that understanding, and it should therefore be upheld.

CONCLUSION

New Mexico's claims will not be justiciable unless and until the Secretary prescribes gaming procedures for the Pueblo under Part 291. Even if those claims

were presently justiciable, they would be without merit because Part 291 is a valid exercise of the Secretary's authority to carry into effect the provisions of IGRA in a particular set of cases that Congress did not foresee. For the foregoing reasons, this Court should reverse the judgment of the district court.

Respectfully submitted,
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ORAL ARGUMENT REQUESTED

The U.S. Department of the Interior requests oral argument in this appeal. This case presents issues of first impression in this Court on which the judges of other federal courts have disagreed, and which have the potential to significantly affect public policy. Oral argument will permit counsel for all parties to assist the Court in understanding these issues and the context in which they arise.

CERTIFICATES

I certify that on March 4, 2015, I am filing the foregoing Opening Brief with the Tenth Circuit via the Court's CM/ECF system. I further certify that, to my knowledge, all counsel of the record in this case are registered to receive service through that system.

I certify that this brief contains 13,738 words, exclusive of front matter and certificates, in a 14-point Garamond font, and that it otherwise meets the requirements of Federal Rule of Appellate Procedure 32.

I certify that all required privacy redactions have been made.

I certify that, within two business days, I will cause to be delivered to the Clerk of the Court seven copies in paper form of this Opening Brief, which will be exact replicas of the electronically filed version.

I certify that, prior to filing, I have scanned this file using System Center Endpoint Protection updated on March 3, 2015, which indicates that it is free of viruses.

/s/ *J. David Gunter II*