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

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF NEW MEXICO
Plaintiff/Appellee,

v.

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

and

PUEBLO OF POJOAQUE, a federally-recognized Indian Tribe,
Intervenor-Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
JAMES A. PARKER, DISTRICT JUDGE
CASE No.: **1:14-cv-695-JAP-SCY**

PUEBLO OF POJOAQUE'S OPENING BRIEF

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Pueblo of Pojoaque certify that there are no parent entities and do not issue stock.

Dated: March 4, 2015

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JURISDICTIONAL STATEMENT

Appellant-Intervenor-Defendant, the Pueblo of Pojoaque (a federally-recognized Indian tribe) (referred to herein as "Pueblo" or "Pojoaque"), joins in the position of Appellant-Defendants, Department of the Interior and Sally Jewell in her official capacity as Secretary of the Department of the Interior (referred to herein as "Federal Defendants" or "DOI"), to argue that the District Court lacks subject matter jurisdiction. Appellee-Plaintiff, State of New Mexico (referred to herein as "State" or "Martinez Administration"), filed its Complaint asserting jurisdiction under 28 U.S.C. §1331 and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702, 706. Aplt. App. at 13, Complaint at p. 2. The State alleges that the matter in controversy arises under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA"); alleges that the United States waived its sovereign immunity under 5 U.S.C. § 702; and alleges that the Federal Defendants' determination that the Pueblo is eligible for Secretarial Procedures under 25 C.F.R. Part 291 is a final agency action that is reviewable by the Court. 5 U.S.C. § 704; 25 C.F.R. § 291.6(b); Aplt App. at 13, Complaint at p. 2. The District Court agreed.

This Appeal arises from an Order granting summary judgment in favor of the State disposing of all parties' claims. Judgment was entered on October 17,

2014 (Aplt. App. at 39-67). Timely Notice of Appeal was filed by the Federal Defendants on December 11, 2014 and by the Pueblo on December 12, 2014, which filings were made within the 60-day time period per Fed.R.App.P. 4(a)(1)(B). Accordingly, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred by ruling that the unconstitutional provision in IGRA abrogating state Eleventh Amendment immunity for lawsuits brought by tribes against recalcitrant states is severable from the remainder of IGRA.
2. Whether the District Court erred by ruling that Congress, in the passage of IGRA, divested DOI of its authority to promulgate regulations pursuant to 25 U.S.C. § 9.
3. Whether the District Court erred by ruling that no gap or ambiguity exists in IGRA following the *Seminole Tribe* decision regarding the remedy(ies) available to tribes confronted by recalcitrant states that assert Eleventh Amendment immunity to avoid the negotiation/mediation structure established by Congress.
4. Whether the District Court erred by ruling that neither the *Chevron* deference nor the Indian Canons of Construction are applicable in

ascertaining the legality of the regulations promulgated by DOI in 25 C.F.R. Part 291.

5. Whether the District Court erred in finding subject matter jurisdiction, ripeness, standing, an effective waiver of the sovereign immunity of the United States, an appealable final agency action under the APA, and/or Article III justiciability.

STATEMENT OF THE CASE

In 1987, the Supreme Court issued its opinion in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987) affirming Indian tribes' sovereign authority to govern gaming activities on Indian lands free of state interference. In 1988, Congress passed IGRA, codifying the *Cabazon* decision and setting forth a structure for Class III gaming (all forms of gaming other than traditional games, bingo and games similar to bingo, and non-banked card games) to be licensed and regulated on terms negotiated between the tribal government and the state government. In 1996, the Supreme Court ruled that in passing IGRA, Congress exceeded its constitutional authority by subjecting states to unconsented lawsuits brought by Indian tribes. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) ("*Seminole Tribe*"). At issue in this appeal is the legality of certain regulations promulgated by the DOI in 25 C.F.R. Part 291, that provide a remedy for tribes such as the Pueblo, who are confronted by recalcitrant states such as the

State of New Mexico, that refuse to consent to the negotiation/mediation process established by Congress when it passed IGRA.

In establishing the mechanism for tribal-state compacts to regulate Class III gaming, Congress knew that states would exploit their power. IGRA was enacted after two centuries of mistrust of states by Indian tribes. *See United States v. Kagama*, 118 U.S. 375, 384, 6 S.Ct. 1109, 1114 (1886) ("They [Indians] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States are often their deadliest enemies"); *Williams v. Lee*, 358 U.S. 217,220, 79 S.Ct. 269, 271 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."). Indeed the body of federal Indian law encompasses many disputes involving attempts by state and local governments to infringe upon rights, privileges, powers and immunities of tribal governments. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332, 103 S.Ct. 2378, 2385 (1983). To guard against the possibility that states might choose not to negotiate, or to negotiate in bad faith, in the realm of Class III gaming, Congress included a complex set of procedures designed to protect tribes from recalcitrant states. 25 U.S.C. § 2710(d)(7); *see also United States v. Spokane Tribe*, 139F.3d 1297, 1298 (9th Cir. 1998) ("Spokane Tribe"). Under IGRA, a tribe may ask the state to negotiate a compact, and upon receiving such a request, the state "shall negotiate

with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). If the tribe believes the state is not negotiating in good faith, it may sue the state in district court. *See* 25 U.S.C. § 2710(d)(7)(A)(i). If the court concludes that the state is not negotiating in good faith, the court shall order the state and tribe to conclude a compact within 60 days. *See* 25 U.S.C. § 2710(d)(7)(B)(iii) and (vii). If those court-ordered negotiations fail, each government submits a "last-best-offer" to a court-appointed Mediator, who chooses the "last-best-offer" that most comports with the terms of IGRA. *See* 25 U.S.C. § 2710(d)(7)(B)(iv). If the State fails to consent to the Mediator's decision, the Secretary establishes procedures that govern the tribe's class III gaming activities in lieu of a tribal/state compact. *See* 25 U.S.C. § 2710(d)(7)(B)(vii).

By promulgating 25 C.F.R. Part 291, DOI intended to effectuate Congressional intent in the wake of *Seminole Tribe*. If a tribe seeking a compact properly notices the state and files a timely lawsuit against the state under IGRA, and the federal court then dismisses that lawsuit based on the lack of an effective waiver of the state's Eleventh Amendment immunity, the tribe can then submit an application to DOI to adopt procedures that will govern the tribe's Class III gaming activities. 25 C.F.R. § 291.4. Upon determining that the application is complete and the tribe is eligible, DOI notifies the state, which may either consult with DOI, or submit a counter-proposal to DOI for its consideration. 25 C.F.R. § 291.7. Of

course, the state also has the option of doing nothing. If the state submits its own proposal, DOI appoints a mediator who will work with the parties for 60 days. 25 C.F.R. § 291.9. If this fails, the tribe and state have to submit their last best offers to the mediator, who then chooses the compact that best comports with federal law. 25 C.F.R. § 291.10. The mediator then notifies the Secretary of the Interior, who takes the mediator's decision into account in approving procedures to govern the tribe's Class III gaming activities in the absence of a tribal-state compact. 25 C.F.R. §291.11. As the District Court duly noted:

> To preserve IGRA's remedial scheme and to mitigate the effects of Seminole Tribe, the Secretary of the Interior adopted regulations which roughly imitate the process that would have taken place had the State not used its sovereign immunity to cause dismissal of the Tribe's bad faith claim in federal court.

October 17 Opinion and Order at pp. 4-5 (emphasis added), Aplt. App. at 42-43.

In the instant appeal, Pojoaque properly notified the State of Pojoaque's intent to negotiate a new or amended compact to govern its Class III gaming activities beyond the June 30, 2015 expiration date of the current compact. October 17, 2014 Opinion and Order at p. 8, Aplt. App. at 46. The negotiations broke down for a number of reasons including but not limited to (i) the Martinez Adinistration's demand that the Pueblo pay a double-digit tax on its gaming revenue despite the Pueblo not asking for exclusivity or any other "meaningful concession" from the State; and (ii) the State's intrusion into and encroachment

upon matters not directly related to the regulation and implementation of IGRA. *See* Complaint filed in *Pueblo of Pojoaque v. New Mexico*, Doc. No. 1, 1:13-cv-01186-JAPKBM (D.N.M. filed Dec. 13, 2013)[1]. The Pueblo brought a timely lawsuit against the State for failure to conclude compact negotiations in good faith. October 17, 2014 Opinion and Order at p.8, Aplt. App. at 46. The State asserted Eleventh Amendment immunity as an affirmative defense, and accordingly, the lawsuit was dismissed. October 17, 2014 Opinion and Order at p.8, Aplt. App. at 46.

The Pueblo subsequently submitted an application to DOI pursuant to 25 C.F.R. Part 291. October 17, 2014 Opinion and Order at p.8, Aplt. App. at 46. DOI (i) concluded that the application was complete and that the Pueblo was eligible for secretarial procedures; (ii) provided formal notice to the State and various state agencies of DOI's initial determination; and (iii) invited the State to consult with DOI or submit its own offer. October 17, 2014 Opinion and Order at p.8, Aplt. App. at 46. Under protest, the State submitted both comments and an alternative proposal. October 17, 2014 Opinion and Order at pp. 8-9, Aplt. App at 46-47.

While the Part 291 process was still underway, the State filed the action below against the Federal Defendants seeking declaratory and injunctive relief to prevent the Secretary from proceeding pursuant to 25 C.F.R. Part 291 and issuing

[1] The District Court expressly references the Complaint in his October 17, 2014 Opinion and Order at p. 8, Aplt. App. at 46.

procedures governing Class III gaming activities for the Pueblo. *See* Complaint, Aplt. App. at 12-22. The State filed a Motion for Preliminary Injunction, which the Court denied because the State failed to establish a substantial likelihood that it would prevail on the merits, but in doing so, the Court entered a scheduling order for the expedited filing of cross-motions for summary judgment. *See* September 11, 2014 Order and Memorandum Opinion and Order.

The District Court allowed the Pueblo to submit an amicus brief in opposition to the State's Motion for Preliminary Injunction. *See* September 10, 2014 Order. Thereafter, the District Court denied the Pueblo's Motion to Intervene as of right, but allowed the Pueblo permissive intervention. *See* September 25, 2014 Order.

On October 17, 2014, the District Court granted summary judgment in favor of the State and denied summary judgment motions filed by the Federal Defendants and the Pueblo. The District Court enjoined the Federal Defendants from proceeding with the issuance or approval of procedures pursuant to 25 C.F.R. Part 291 to govern Class III gaming activities on the Pueblo's Indian lands. Both the Federal Defendants and the Pueblo filed timely appeals and the appeals were consolidated.

The District Court's ruling on cross-motions for summary judgment is reviewable *de novo* by this Court. *Green v. Donahoe*, 760 F.3d 1135, 1146 (10th

Cir. 2014)("We review the district court's grant of summary judgment *de novo* applying the same standards that the district court should have applied.")

SUMMARY OF THE ARGUMENT

Congress did not intend for states to deprive tribes of their sovereign and statutory gaming rights by refusing to consent to the negotiation/mediation scheme established by Congress. The District Court erred by interpreting and applying IGRA to defy Congressional intent and place tribes in the position of being forced to accept whatever deal the state offers. The District Court erred by ruling that DOI lacks the authority to promulgate the Part 291 regulations. Those regulations are necessary to effectuate Congressional intent after *Seminole Tribe*'s ruling that a critical portion of IGRA's remedial provision is unconstitutional. The District Court also erred by refusing to apply the Supreme Court's well-established severance analysis, and then compounded that error further by extending its severance analysis to actually reverse Congressional intent. The District Court ruling leaves the Pueblo in a situation where there is great risk that the State can extort an illegal tax from tribal governmental revenue and/or otherwise deprive the Pueblo of its sovereign and statutory gaming rights.

The Pueblo joins the Opening Brief of the Federal Defendants in this appeal. That brief sets forth legal arguments regarding (i) the DOI's authority to promulgate the Part 291 regulations; (ii) the District Court's errors in finding that

the United States has waived its sovereign immunity; (iii) whether the State has standing, and (iv) whether this matter is ripe for an action under the APA. The Pueblo supports the DOI's reasoning set out in the Opening Brief, and rather than provide duplicative argument to this Court, incorporates that analysis by reference as if fully set forth herein. The Pueblo focuses its argument in this Opening Brief on the severance analysis, or lack thereof, employed by the District Court. More particularly, the severance analysis employed by the District Court leads to an absurd result and reinforces the primary error identified in the Federal Defendants' brief: Congress did not divest the DOI of its authority to promulgate interpretative regulations regarding IGRA.

ARGUMENT

I. The District Court Erred in Stripping the Pueblo of an Effective Remedy Wholly Consistent With Congress' Intent.

a. When a portion of a statute is found to be unconstitutional, the federal courts must apply severance analysis consistent with Congressional intent.

The Supreme Court has a "well established" two-part test for severability analysis. *Alaska Airlines v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 1480 (1987); *National Federation of Independent Business v. Sebelius*, ___U.S.____, 132 S.Ct. 2566 (2012) (dissenting opinion).

First, if the Court holds a statutory provision unconstitutional, it then determines whether the now truncated statute will operate in the manner Congress

intended. If not, the remaining provisions must be invalidated. *Alaska Airlines*, 480 U.S. at 685.[2] In *Alaska Airlines*, the Court clarified that this first inquiry requires more than asking whether "the balance of the legislation is incapable of functioning independently." *Id.* at 684. Even if the remaining provisions will operate in some coherent way, that alone does not save the statute. The "relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685; *see also*, *United States v. Booker*, 543 U.S. 220, 227, 125 S.Ct. 738 (2005) ("[T]wo provisions. . . must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent"); *Minnesota v. Mille Lacs Band of Chippewa*, 526 U.S. 172, 192, 119 S.Ct. 1187, 1199 (1999) (applying severance analysis to Executive Order; abrogation of usufructuary rights not intended unless a portion of Order also removing Indians from lands was valid; "[E]mbodying as it did one coherent policy, [the entire order] is inseverable"); *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 130 S.Ct. 3138, 3161 (2010)(Congress' intent still effectuated with severed provisions).

[2] The District Court reasons that Congress should have stepped up and corrected IGRA in the wake of *Seminole Tribe*, but that has not happened here, and the District Court erred by failing to either strike IGRA down in its entirety or apply severance analysis to find a remedy consistent with Congress' intent. The Court cannot leave the Pueblo in a position where a statute is allowed to be applied in a manner that is completely opposite of the intended result, discussed *infra*.

Second, even if the remaining provisions can operate as Congress designed them to operate, the Court must determine whether Congress would have enacted them standing alone and without the unconstitutional portion. If Congress would not, those provisions, too, must be invalidated. *See Alaska Airlines*, 480 U.S. at 685 ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted"); *Ayote v. Planned Parenthood of Northern New England*, 546 U.S. 320, 330, 126 S.Ct. 961 (2006)("Would the legislature have preferred what is left of its statute to no statute at all"); *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 767, 116 S.Ct. 2374 (1996) (plurality opinion) ("Would Congress still have passed § 10(a) had it known that the remaining provisions were invalid?") (internal quotation marks omitted).

The Ninth Circuit decision in *Spokane Tribe*, applying the above-cited Supreme Court case law to IGRA in the wake of *Seminole Tribe*, succinctly summarized the task that is now before this Court:

> IGRA does contain a severability clause. *See* 25 U.S.C. § 2721, creates a presumption that if one section is found unconstitutional, the rest of the statute remains valid. But that presumption is not conclusive; we must still strike down other portions of the statute if we find strong evidence that Congress did not mean for them to remain in effect without the invalid section. (Citation to *Alaska Airlines* omitted*)*. The question we must ask is this: Would Congress have enacted IGRA had it known it could not give tribes the right to sue states that refuse to negotiate? (Citation to *Alaska Airlines* and to *Board of Natural Resources* omitted*)*. If the answer is yes, then the

> rest of IGRA remains valid. If the answer is no, things become more complicated, as we must then ask which other provisions of IGRA are called into question, and under what circumstances. Figuring out why Congress passed a piece of legislation is hard enough. Figuring out whether it would have passed that legislation in the absence of one of its key provisions is even harder. Yet, figure we must.

Spokane Tribe, 139 F.3d at 1299.

In 1996, the Supreme Court emasculated IGRA's remedial provisions by holding that tribes are constitutionally precluded from bringing suit against recalcitrant states that do not consent to being sued. *See Seminole Tribe*, 517 U.S at 72, 116 S.Ct. at 1131 ("[T]he Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."). Significantly for purposes of this appeal, the Supreme Court did not consider whether the rest of IGRA remains intact. *Id.* at 75 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."). But the Ninth Circuit has expressly reviewed and affirmed the savings construction in the *Seminole Tribe* decision. *See also Spokane Tribe* at 1299 ("The Supreme Court did not consider whether the rest of IGRA survives").

b. Congress intended for tribes to govern gaming activities on Indian lands where states negotiated in bad faith, or failed to negotiate at all.

One need not look beyond the findings section in IGRA to understand that Congress intended for tribes to be able to exercise their sovereign right to govern

gaming activities on Indian lands consistent with the landmark *Cabazon* decision:

> Congress finds that Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2701(5). Congress articulated its policy to effectuate the tribes' rights:

> The purpose of this chapter is—
>
> (1) 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;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
>
> (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702. Notably, nowhere in the Findings or in the Declaration of Policy does Congress recognize any rights of the states, or express that its purpose is to provide states a role in the regulation of Indian gaming. True, Congress established a system for Class III gaming to be licensed and regulated on terms negotiated between the tribal governments and state governments. 25 U.S.C. § 2710(d). To guard against the possibility that states might choose not to negotiate, or to

negotiate in bad faith, Congress included a complex set of procedures designed to protect tribes from these recalcitrant states. *Spokane Tribe* at 1298. Under IGRA, a tribe may ask the state to negotiate a compact, and upon receiving such a request, the state "shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). If the tribe believes the state is not negotiating in good faith, it may sue the state in district court. *See* 25 U.S.C. § 2710(d)(7)(A)(i). The specific structure of the remedy, set forth in 25 U.S.C. § 2710(d)(7) is more fully described in the Statement of the Case, *supra*.

The Senate Report on S. 555, (the basis for IGRA), repeatedly emphasizes Congress' affirmative decision to balance the interests of tribes and other competing interests. *See, e.g.*, S.Rep. No. 100-446, at 1-2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071 ("[T]he issue has been how best to preserve the right of tribes to self-government while, at the same time, to protect both the tribes and the gaming public from unscrupulous persons."); *id.* at 5, 1988 U.S.C.C.A.N. at 3075 ("[T]he Committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments[.]"); *id.* at 6, 1988 U.S.C.C.A.N. at 3076 ("This legislation is intended to provide a means by which tribal and state governments can realize their unique and individual governmental objectives"). In describing the balancing, the report refers specifically to the provision for suing

states:

> Section 11(d)(7) grants a tribe the right to sue a state if compact negotiations are not concluded. This section is the result of the Committee balancing the interests and rights of tribes to engage in gaming against the interests of states in regulating such gaming.... [T]he issue before the Committee was how best to encourage States to deal fairly with tribes as sovereign governments. The Committee elected, as the least offensive option, to grant tribes the right to sue a state if a compact is not negotiated....

Id. at 14, 1988 U.S.C.C.A.N. at 3084 (emphasis added).

> It is the Committee's intent that the compact requirement for class III not be used as a justification by a state for excluding Indian tribes from such gaming or for the protection of other state-licensed gaming enterprises from free market competition with Indian tribes.

Id. at 13, 1988 U.S.C.C.A.N. at 3083. The Committee did not intend that "compacts be used as a subterfuge for imposing state jurisdiction on tribal lands," but instead, chose to apply "the good faith standard as the legal barometer for the state's dealings with tribes in class III gaming negotiations." S. Rep. No. 100-466 at p.14. IGRA's conflict resolution process counterbalanced state authority by limiting a state's ability to deny tribes "any legal right they may now have to engage in class III gaming." *Id*. "This bill should not be construed, however, to require tribes to unilaterally relinquish any other rights, powers, or authority." *Id*. 1988 U.S.C.C.A.N. at 3105 (supplemental remarks of sponsoring Senator Dan Evans (WA)).

Statements on the floor of Congress reinforce the unavoidable conclusion that IGRA cannot be interpreted to enable states to deprive tribes of the sovereign right and authority to govern gaming activities on Indian lands. The Act recognizes Tribal sovereignty and "...does not seek to invade or diminish that sovereignty. 134 Cong. Rec. S12650, (A109) (daily ed. Sept. 15, 1988) (statement of sponsoring Senator Dan Inouye (HI)). Congressman Udall, the Chairman of the House Insular Affairs Committee, the Committee with jurisdiction over Indian affairs at the time, noted while supporting S. 555 that he had opposed earlier versions of the legislation:

> On July 6, I inserted a statement in the Record which set out my position on this issue. I stated that I could not support the unilateral imposition of State jurisdiction over Indian tribal governments … Over the years I have strongly resisted the imposition of State jurisdiction over Indian tribes in this and other areas. This Nation has had a longstanding policy of protecting the rights of Indian tribes to self-government. Most acts of Congress in the last 50 years including in this Congress have been designed to strengthen those governments. The tribal-State compact provision of S. 555 should be viewed in those terms.

134 Cong. Rec. 25376 (Sep. 26, 1988) (statement of Rep. Udall). *See also*, May 4, 1987 letter to Congressman Claude Pepper:

> "One effect of the Court decision is that some tribes are now opposing enactment of any legislation imposing regulations on tribal gaming. … While I can appreciate this change in attitude of the tribes, I still feel that some legislation is desirable to provide needed protection for the tribes, themselves, and the public. As a consequence, I have directed by staff to redraft a bill which recognizes the rights secured to the tribes by the Supreme Court decision and, yet, establishes some Federal standards and regulations to protect the tribes and the public interest. <u>However, I believe that this Federal regulation must be</u>

> accomplished in a manner which is least intrusive upon the right of tribal self-government

(emphasis added). *See* Minimum Internal Control Standards (MICS) for Indian Gaming: Hearing Before the H. Comm. on Res., 109th Cong. 41 (2006) (statement of Frank Ducheneaux, Consultant, Minnesota Indian Gaming Association and Great Plains Indian GAming Association (quoting Letter from Mo Udall, Chairman, House Committee on Interior and Insular Affairs, to Claude Pepper, Chairman, House Rules Committee (May 4, 1987)).

Contrary to the reasoning of the District Court, Congress did not intend that states necessarily have a role in the regulation of Class III gaming. Indeed, Congress contemplated that a state may choose to have no role in such regulation.

> . . . [W]hen a tribe and a state negotiate a compact, there need be no imposition of state jurisdiction whatsoever. Language in the report, such as "the extension of State jurisdiction and the application of state laws" and "relinquishment of rights" must be read in their full context of a compact where a tribe requests and consents to such extension or relinquishment. . . . It is entirely conceivable that a particular state will have no interest in operating any part of the regulatory system needed for a class III Indian gaming activity and there will be no jurisdictional transfer recommended by the particular tribe and state. Congress should expect a reasonable and rational approach to these compacts and not simply a demand that tribes come under a state system.

134 Cong. Rec. S. 12651 (statement of sponsoring Senator Dan Evans (WA)).

> The compacts are not intended to impose de facto state regulation . . . . The bill references the types of provisions that may go into compacts.

> These provisions are not requirements. Some tribes can assume more responsibility than others and it is entirely conceivable that a state may want to defer to tribal regulatory authority and maintain only an oversight role.

134 Cong. Rec. S. 12651 (statement of sponsoring Senator Dan Inouye (HI)).

When the Eleventh Amendment became a concern after IGRA became law, Senator Daniel Inouye, Chair of the Senate Committee on Indian Affairs and one of S. 555's authors, explicitly answered the dispositive question.[3] He explained that Congress would not have passed IGRA in the form it did, had it known that tribes wouldn't be allowed to sue states:

> Because I believe that if we had known at the time we were considering the bill-if we had known that this proposal of tribal state compacts that came from the States and was strongly supported by the States, would later be rendered virtually meaningless by the action of those states which have sought to avoid entering into compacts by asserting the Tenth and Eleventh Amendments to defeat federal court jurisdiction, we would not have gone down this path.

Implementation of Indian Gaming Regulatory Act: Oversight Hearings Before the House Subcommittee on Native American Affairs of the Committee on Natural

[3] The Ninth Circuit looked to the statements of Senator Inouye in its decision to vacate an injunction sought by the United States against the Spokane operation of Class III gaming in the absence of a Tribal-state compact. *Spokane Tribe* 139 F.3d at pp.1300-1301. In doing so, it noted that in the context of severance analysis, the sponsoring Senator's statements are highly relevant: "[W]e seek to determine not what the statute means but whether it would have passed without the invalid provision. For this purpose, it's highly instructive to see how one of the key players in the enactment process views the matter." *Id*. at 1300 n.4.

Resources, 103rd Cong., 1st Sess., Serial No. 103–17, Part 1, at 63 (April 2, 1993)(emphasis added).

> If the courts rule that the Eleventh Amendment would prohibit the tribal governments from suing State officials, then you've got a piece of paper as a law.

Implementation of Indian Gaming Regulatory Act: Hearing Before the Senate Select Committee on Indian Affairs, 102nd Cong., 2d Sess., S. Hrg. 102–660, Part 2, at 58 (March 18, 1992)(emphasis added).

Those federal courts that have looked to the text of IGRA and its legislative intent have concluded, consistent with the Pueblo's position, that Congress did not intend to allow states to deprive tribes of their sovereign and statutory rights by merely hiding behind Eleventh Amendment immunity and refusing to consent to the negotiation/mediation structure implemented by Congress. The most extensive analysis was provided by the Ninth Circuit Appeals Court in its decision to vacate an injunction sought by the United States against the Spokane Tribe's operation of Class III gaming in the absence of a compact. Judge Alex Kozinski, writing for the Ninth Circuit Appeals Court, opined:

> It is quite clear from the structure of the statute that the tribe's right to sue the state is a key part of a carefully-crafted scheme balancing the interests of the tribes and the states. It therefore seems highly unlikely that Congress would have passed one part without the other, leaving the tribes essentially powerless.

Spokane Tribe 139 F.3d at 1300 (emphasis added). The Court of Appeals for the

Ninth Circuit further stated:

> IGRA as passed thus struck a finely-tuned balance between the interests of the states and the tribes. Most likely it would not have been enacted if that balance had tipped conclusively in favor of the states, and without IGRA the states would have no say whatever over Indian gaming. In our case, the Tribe claims it attempted to negotiate in good faith, but that attempt failed because of bad faith on the part of the State. The Tribe thus fulfilled its obligation under IGRA. The Tribe then sued the State, as it was entitled to under the statute, but found it could not continue that suit after *Seminole Tribe.* As far as we can tell on the record before us, nothing now protects the Tribe if the State refuses to bargain in good faith or at all; the State holds all the cards (so to speak). Congress meant to guard against this very situation when it created IGRA's interlocking checks and balances.

Spokane Tribe 139 F.3d at 1301 (emphasis added); *see* also, *Seminole Tribe v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994) (finding that IGRA's class III provisions could stand under traditional severance analysis so long as the procedures remedy was made available to the tribe).

c. The District Court concedes that its ruling defies Congress' intent in the passage of IGRA.

At several junctures in the District Court's analysis, the Court concedes that its ruling defies Congress' intent:

> This Court sympathizes with the Pueblo of Pojoaque's situation. New Mexico's ability to prevent federal court oversight of its behavior during negotiations has essentially left New Mexico in an unassailable position in a process that Congress clearly intended to take place between "equal" sovereigns. S. Rep. 100-446, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3083.

October 17, 2014 Opinion and Order at p.26 (emphasis added). The District

Court even concedes that its interpretation "gives rise to absurd or anomalous results," October 17, 2014 Opinion and Order at p. 26, Aplt. App. at 64 (emphasis added), and that "Pueblo of Pojoaque's choices under IGRA are constrained to its detriment." October 17, 2014 Opinion and Order at p.27, Aplt. App. at 65. The District Court concedes the Supreme Court revealed IGRA was broken when it held in *Seminole Tribe* that Congress lacked the authority to subject states to unconsented lawsuits filed by Indian tribes:

> *Seminole Tribe* seriously weakened Indian tribes' bargaining power under IGRA, because it made unobtainable Tribes' sole remedy for States' bad faith.

October 17, 2014 Opinion and Order at p.5, Aplt. App. at 43 (emphasis added).

> In sum, the Secretarial Procedures prevent tribal gaming from becoming a compact-or-nothing prospect after *Seminole Tribe* by making IGRA's river card, regulations allowing gaming without a compact, available to a Tribe on the flop, before a federal court has ruled on the Tribe's allegations of bad faith. Of course, New Mexico does not like this turn of events: if valid, the regulations prevent New Mexico from using its Eleventh Amendment sovereign immunity as a trump card to force Tribes to negotiate on New Mexico's terms or not conduct gaming at all.

October 17 Opinion and Order at p. 7, Aplt. App. at 45 (emphasis added).

The District Court makes contradictory statements regarding the state's involvement in IGRA that are incorrect. The District Court assumes that an impacted tribe has a viable remedy against the state's recalcitrance. None of the

above-referenced text or legislative history suggests that a state should have a unilateral veto over a tribe's gaming activities. First, the District Court states "It is worth noting that IGRA's compact requirement gives States a right to influence tribal gaming that States would otherwise not be afforded by the U.S. Constitution," citing *Seminole Tribe*. October 17, 2014 Opinion and Order at p.4, Aplt. App. at 42. The Supreme Court in *Seminole Tribe* went on to determine that such factor was irrelevant in its Eleventh Amendment abrogation analysis. 517 U.S. at 59. Second, the District Court states "*Seminole Tribe* seriously weakened Indian tribes' bargaining power under IGRA, because it made unobtainable Tribes' sole remedy for States' bad faith," citing *Spokane Tribe*. October 17, 2014 Opinion and Order at p.4, Aplt. App. at 42. The District Court's reference fails to inform that the Appeals Court in *Spokane Tribe* applied severance analysis to conclude that IGRA cannot survive if suing a state is indeed a tribe's sole remedy, discussed in detail *infra*. Third, the District Court cites to the Senate Report for the proposition that IGRA "does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-state compact." October 17, 2014 Opinion and Order at p. 25, Aplt. App. at 63. But the District Court acknowledges IGRA's remedial provisions, where a State has not asserted Eleventh Amendment immunity, can result in a tribe conducting class III gaming on Indian lands in the absence of a tribal-state compact. 25 U.S.C. §

2710(d)(7)(b)(vii). Indeed, under IGRA, three tribes, the Rincon Band of Luiseño Indians, *see Rincon Band v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010), *cert. denied*, 131 S.Ct. 3055 (2011); the Northern Arapahoe, *see Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308 (10th Cir. 2004); and the Mashantucket Pequot, *see Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990), are doing so now.[4]

d. Applying the law to the record of Congress' intent: if the District Court is correct that DOI lacks the authority to promulgate the 25 C.F.R. Part 291 regulations, then more of IGRA must be severed to allow the Pueblo to proceed with the governance of Class III gaming on its Indian lands.

Application of the well-reasoned two-part guidance of the Supreme Court, set forth in detail in subsection (a) *supra*, compels the Court to allow the Pueblo to govern Class III gaming activities on its Indian lands in the absence of a tribal-state compact. Certainly, the severance of the provisions in IGRA that allow a tribe to sue a state will not result in IGRA operating in the manner Congress intended. The second part of the Supreme Court's well-reasoned guidance on severance, whether Congress would have enacted IGRA without the ability of tribes to sue states, is

[4] The procedures promulgated by the DOI for each of the three tribes are published on the official web page of the Department of the Interior. *See* Rincon Band's procedures at http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026439.pdf. *See* Northern Arapaho Tribe's procedures at http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038581.pdf. *See* Mashantucket Pequot Tribe's procedures at http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026009.pdf.

also clearly resolved in the Pueblo's favor. Congress' opening of the door for states to play a role in what had previously been a purely federal-tribal relationship did not include a Congressional intent to deprive tribes of gaming rights.

The Court is able to and should engage in the two-part severance guidance in a manner consistent with Congress' intent. The District Court looked to the language of IGRA to determine when DOI may promulgate procedures as a question of statutory interpretation and, finding no ambiguity in IGRA's language, concluded that DOI may only proceed with procedures after a judicial finding that the State failed to conclude negotiations in good faith. Although the Pueblo disagrees (for the reasons stated in DOI's Opening Brief and discussed further below), the supposedly unambiguous language of IGRA is looked at differently in the context of severance analysis. See *Spokane Tribe*, 139 F.3d at 1299; footnote 3, *supra*. In the context of severance analysis, the very language that kept the District Court from ruling in favor of DOI can be severed from IGRA in a manner that allows the Part 291 regulations to be upheld. For example, striking those portions of 25 U.S.C. § 2710(d) that would have otherwise required the State's consent to be sued in federal court would create a result that would still provide the State with

the option of concluding a compact while the remedial administrative provisions are pending, yet not allow the State to stop the process:[5]

> (7)
> (A) The United States district courts shall have jurisdiction over—
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and
> (iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).
> (B)
> ***~~(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).~~***
> ***~~(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—~~***
> ***~~(I) a Tribal-State compact has not been entered into under paragraph (3), and~~***
> ***~~(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,~~***
> ***the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.***
> ***~~(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian Tribe [tribe] to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe~~ [2] to conclude such a compact within a 60-day period. In determining in such an action whether a State has***

[5] To facilitate a clean reading, the proposed severed provisions are shown as ***~~bold, italicized and strike-thru~~*** font

> ~~*negotiated in good faith, the court—*~~
> ~~*(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and*~~
> ~~*(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.*~~
> (iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court ~~*issued under clause (iii),*~~ the Indian tribe ~~**and the State**~~ shall ~~*each*~~ submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. ~~*The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.*~~
> ~~*(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).*~~
> (vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).
> (vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—
> (I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and
> (II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

25 U.S.C. § 2710(d)(7)(as severed). The District Court for the Eastern District of Washington severed the entirety of 25 U.S.C. § 2710(d) from IGRA. The

severance analysis was conducted pursuant to litigation concerning the State of Washington and Colville over compact negotiations.

> If this court were to only sever the mandatory language from IGRA, the Tribe would be left without recourse if they are unable to reach agreement with the State. Thus subsection (d) regarding class III gaming is not fully operable without the unconstitutional language. Further, even if subsection (d) were fully operable without the unconstitutional portions, the language of the act and the legislative history indicate State participation and speedy resolution of an impasse were key components of the bill. See; e.g., 25 U.S.C. § 2710(d)(7)(B)(i) (court assistance may be invoked if a compact is not reached within 180 days); Senate Report 100-466, 100th Cong. 2 Sess., reprinted in 1988 U.S.C.C.A.N. 3071, 3076 (the Act "does not contemplate and does not provide for the conduct of class III gaming on Indian lands in the absence of a tribal-state compact."). Therefore the entire subsection (d) regarding class III gaming must be severed from the Act as unconstitutional.

Confederated Tribes of the Colville Reservation v. Washington, 20 Indian Law Reporter 3124, DK# CS-92-0426-WFN (E.D. Wash. June 4, 1993) (emphasis added) (slip. op. attached as Exhibit H to Declaration of Gov. George Rivera, DK# 21-10), Aplt. App. at 28-32.

Concerns regarding the Johnson Act which were raised by the State in the pleadings below are also more easily corrected by severance. 25 U.S.C. § 2710(d)(6) can be carefully severed to read:

> The provisions of section 1175 of title 15 shall not apply to any gaming conducted ~~***under a Tribal-State compact that — (A) is entered***~~ in~~***to under paragraph (3) by***~~ a State in which gambling devices are legal~~***, and (B) is in effect.***~~

25 U.S.C. § 2710(d)(6)(as severed). Courts read IGRA and the Johnson Act together and consistently conclude that the Johnson Act is repealed or exempted from gaming otherwise conducted in compliance with IGRA. *See e.g.*, *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019, 1034 (10th Cir. 2003); *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 717 (10th Cir. 2000); *United States v. Santee Sioux Tribe*, 324 F.3d 607, 611 (8th Cir. 2003); *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1101(9th Cir. 2000); *Diamond Game Enterprises v. Reno*, 230 F.3d 365, 371 (D.C. Cir. 2000).

There are perhaps other ways to sever portions of IGRA that are consistent with *Seminole Tribe*. The Pueblo asserts that if severance analysis cannot otherwise be applied in a manner that effectuates Congressional intent; namely, providing the Pueblo an effective remedy against New Mexico's recalcitrance, then the Class III provisions of IGRA in their entirety should be struck down, and the Pueblo should be able to govern gaming activities on its Indian lands without regard to IGRA. This was precisely the legal landscape that existed between the issuance of the *Cabazon* decision in 1987 and the passage of IGRA in 1988.

The District Court limited its severance analysis to only the second question of the two-part guidance of the Supreme Court: whether there is "strong evidence" that Congress would not have allowed IGRA to remain in effect without the

invalidated section. The District Court then summarily dismissed the extensive discussion in *Spokane Tribe,* as *obiter dicta*. October 17, 2014 Opinion and Order at p. 27, Aplt. App. at 65. As noted above, the record in the text of IGRA and the legislative history is strong and compelling. Additionally, the District Court attempts to distinguish *Spokane Tribe* as merely the vacating of a preliminary injunction sought by the United States for the tribe's operation of Class III gaming in the absence of a tribal-state compact. That is a distinction without a difference and does nothing to lessen the persuasive effect of *Spokane Tribe*. The Ninth Circuit found that enforcement action against a tribe that has done everything it is required to do is inappropriate. *Spokane Tribe,* 139 F.3d at 1302. That the Ninth Circuit vacated the injunction and remanded the case for the lower court to consider severance analysis in light of the opinion is significant, because it demonstrates that the District Court below erred in conducting very analysis.

The District Court indirectly addresses the first question of the two-part guidance of the Supreme Court, i.e., whether IGRA can function independently of the abrogation of state Eleventh Amendment immunity, by noting that the United States may bring an action against a recalcitrant state. October 17, 2014 Opinion and Order at p. 28, Aplt. App. at 66. But the District Court concedes that even if such a lawsuit is available, the Pueblo's "choices under IGRA are constrained to its detriment." The Pueblo cannot compel the United States to file a lawsuit against

the State. Congress certainly did not intend for tribes confronted by recalcitrant states to beg the federal government to commit scarce governmental resources to discretionary litigation. Congress intended for the Pueblo to be able to affirmatively seek relief on its own behalf. In contradiction to its own analysis, the District Court suggests that the Part 291 regulation should be struck down because it "puts three seats at a table that Congress only set for two." October 17, 2014 Opinion and Order at p. 25, Aplt. App. at 63. Yet the District Court also suggests that IGRA survives severability by setting the table for a third guest, which may or may not arrive. The Supreme Court makes clear that the analysis is not simply whether IGRA can function independently of the unconstitutional provisions, but whether in doing so, the statute functions in a manner consistent with the intent of Congress. The District Court committed clear error in ending its severance analysis after concluding IGRA can function without the ability of tribes to sue states for failure to conclude compacts in good faith, yet at the same time concluding that IGRA is not operable consistent with Congress' intent.

II. Congress Did Not Divest DOI of its Authority for the Administration of IGRA, Including the Power to Control the "Formulation of Policy and the Making of Rules to Fill any Gap Left, Implicitly or Explicitly, by Congress."

The Pueblo adopts and incorporates by this reference, the analysis in the Federal Defendants' Opening Brief regarding DOI's authority under 25 U.S.C. § 9 to promulgate the Part 291 regulations. At the risk of duplication of argument, the

Pueblo supplements the analysis in this subsection II.

Congress enacted IGRA with full knowledge and awareness that federal law had vested the President, and through the President, the Department of the Interior, with the authority to prescribe interpretive regulations of laws intended to benefit Indian tribes:

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

25 U.S.C. § 9. This statute has been in effect since 1834. The President's authority under 25 U.S.C. § 9 is delegated to the Department of the Interior. Nothing in IGRA divested that authority and/or prevented the President from delegating that authority to the DOI, yet that is effectively the ruling of the District Court.

The District Court reasoned that Congress vested in the National Indian Gaming Commission ("NIGC") the authority to promulgate interpretive regulations, noting 25 U.S.C. § 2706(b)(10)(The Commission "shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter"). October 17, 2014 Opinion and Order at pp. 21-22 and 24, Aplt. App. at 59-60 and 62. It does not follow, however, that by IGRA vesting such authority in the NIGC, Congress intended to divest DOI of its authority under 25 U.S.C. § 9. Both agencies currently have concurrent jurisdiction to issue interpretive regulations of IGRA and have harmoniously exercised that authority.

See e.g. 25 C.F.R. Part 290, Tribal Allocation Plans; 25 C.F.R. Part 292, Gaming on Trust Lands Acquired After October 17, 1988; 25 C.F.R. Part 293, Class III Tribal State Gaming Compact Process; 25 C.F.R. Part 502, Definitions; 25 C.F.R. Part 542, Minimum Internal Control Standards; 25 C.F.R. Part 547, Minimum Technical Standards for Class II Gaming Systems and Equipment; and 25 C.F.R. Parts 580 thru 585, Appeals of Decisions of the NIGC. The District Court's application of *expressio unius est exclusio alterus*, October 17, 2014 Opinion and Order at p. 22, Aplt. App. at 60, is unavailing because here Congress did speak to the issue by prior statute and Congress does not exclude its applicability to IGRA.

Notably, the District Court in its analysis suggesting that Congress only intended for NIGC, and not DOI, to promulgate regulations akin to 25 C.F.R Part 291, concedes that "Congress assigned to the NIGC . . . the responsibility to take reasonable measures to fill this gap", *see* October 17, 2014 Opinion and Order at p. 24. Such analysis is in contradiction to the District Court's analysis that IGRA is unambiguous. Although the District Court opined that IGRA is unambiguous regarding DOI's lack of authority to promulgate the Part 291 regulations, the logical extension of the District Court's discussion regarding NIGC's authority is that similar regulations promulgated by the NIGC should be afforded *Chevron* deference.

Additionally, if the District Court is correct that the NIGC has the authority

to promulgate regulations akin to Part 291, the Court should have stayed the case and allowed for NIGC to consider the issue, and then given deference pursuant to the Doctrine of Primary Jurisdiction. Even where a court has subject matter jurisdiction over a claim, courts have discretion to refer an issue(s) to an administrative agency. *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1376 (10th Cir. 1989). This doctrine is "specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." *Reiter v. Cooper*, 507 U.S. 258, 268, 113 S.Ct. 1213 (1993). The purpose of the doctrine is to "allow agencies to render opinions on issues underlying and related to the cause of action." *Crystal Clear Communications v. Southwest Bell Telephone Co.*, 415 F.3d 1171, 1179 (10th Cir. 2005). The Doctrine of Primary Jurisdiction is "designed to allow an agency to pass on issues within its particular area of expertise before returning jurisdiction to federal district court for final resolution of the case." *Id*. at 1176; *see Williams Pipe Line Co. v Empire Gas Corp.* 76 F.3d 1491, 1496 (10th Cir. 1996) ("[C]ourts apply primary jurisdiction to cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency.").

III. The District Court Erred in Finding that IGRA is Unambiguous as to the Remedy Available to Tribes Confronted by States that Refuse to Consent to the Negotiation/Mediation Structure Established by Congress, and Instead, Assert Eleventh Amendment Immunity.

The Pueblo adopts and incorporates by this reference, the analysis in the Federal Defendants' Opening Brief regarding whether IGRA is unambiguous as to the remedy available to tribes confronted by states that refuse to consent to the negotiation/mediation structure established by Congress, and instead, assert Eleventh Amendment immunity. At the risk of duplication of argument, the Pueblo supplements the analysis in this subsection III.

The Supreme Court's decision in *Seminole Tribe* did not create an ambiguity in IGRA. Rather, the Supreme Court's decision pointed out an ambiguity in IGRA that had always been there since IGRA's inception in 1988. That Congress misunderstood that it could abrogate states' Eleventh Amendment immunity in lawsuits brought by tribes under IGRA, does not mean that Congress intended tribes to be powerless when a state asserts Eleventh Amendment immunity. Such analysis by the District Court is a non sequitur. The District Court's analysis supports a conclusion that Congress intended for the negotiation/mediation remedial scheme to be the remedy available to tribes where the state consents, such as *Rincon Band v. Schwarzenegger*, 602 F.3d at 1026 (state Eleventh Amendment immunity to IGRA lawsuits expressly waived by state statute) or where the state never raises the defense, such as in *Northern Arapaho v. Wyoming*, 389 F.3d 1308.

The District Court's analysis does not support a conclusion that Congress intended for the negotiation/mediation remedial scheme to be the sole remedy for tribes confronted by recalcitrant or non-consenting states.

The District Court acknowledges that two of the three judges in the Fifth Circuit decision, *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007) disagree with its conclusion that IGRA is unambiguous. October 17, 2014 Opinion and Order at p.7, Aplt. App. at 45. The District Court incorrectly avers that *Texas v. United States* is the only Court to address the legality of the Part 291 regulations. In *Santee Sioux Nation v. Norton*, (not reported in F.Supp.2d), 2006 WL 2792734 (D. Neb. 2006), the tribe challenged the Procedures after DOI determined that the scope of available games was severely limiting. In upholding 25 C.F.R. Part 291, the District Court found "[T]here is no doubt that the *Seminole* decision finding Eleventh Amendment state sovereign immunity for the states created a gap in IGRA." Although the Eleventh Circuit opinion in *Seminole Tribe*, 11 F.3d 1016, and the Ninth Circuit opinion in *Spokane Tribe*, 139 F.3d 1297, predate the promulgation of the Part 291 regulations, their analysis clearly allows for IGRA to be interpreted to support DOI's authority to promulgate the Part 291 regulations. Of the twelve[6] federal judges to address the issue, District Court Judge Parker

[6] The District Court in *Texas v. United States* ruled that IGRA was ambiguous and upheld the procedures, but also ruled that the State's lawsuit was not ripe for adjudication. 362 F.Supp.2d 765 (W.D. Tex. 2004). *See also Alabama v. United*

stands alone with Appellate Judge Jones in his conclusion that IGRA is unambiguous as to the remedy available to tribes confronted by states that refuse to consent to the negotiation/mediation structure established by Congress. Even Judge Jones' opinion in the plurality decision of the Fifth Circuit misapplies this basic concept to suggest that the Secretary could not have promulgated 25 C.F.R. Part 291 before the *Seminole Tribe* decision was rendered: "No one contends that the Secretary could have promulgated his alternative Procedures under IGRA before *Seminole Tribe* was decided." 497 F.3d at 500. That is incorrect. The gap filled by 25 C.F.R. Part 291 existed prior to *Seminole Tribe*. The Supreme Court revealed the gap; it did not create it.

CONCLUSION

The regulations promulgated by DOI fill a gap that Congress unknowingly created in the passage of IGRA. Those regulations save the statute from being struck down in whole or in material part. Whether by statutory interpretation applying *Chevron* deference and the Indian Canons of Construction, or by severance analysis, this Court should opine that the Part 291 regulations are lawful. What this Court or any federal court cannot do is allow IGRA to stand in a manner that allows a recalcitrant state to deprive a tribe of its sovereign and statutory rights

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States, 630 F.2d 1320 (S.D. Ala. 2008) (State of Alabama's challenge to Part 291 regulations dismissed because lawsuit was not ripe for adjudication).

to govern gaming activities on Indian lands by refusing to consent to IGRA's negotiation/mediation structure and, instead, hide behind Eleventh Amendment immunity. Such a result places Indian tribes in exactly the opposite position intended by Congress. For this reason and for the other reasons set forth above, and for the reasons set forth in the Federal Defendants' Opening Brief, the Pueblo of Pojoaque respectfully requests that the Judgment of the District Court be vacated and remanded with instructions to dismiss the lawsuit or otherwise advance the litigation in a manner consistent with the ruling of this Appeals Court.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Oral argument is requested because this case presents important and complicated questions of law. The dispositive issue or issues have not been authoritatively decided. The decisional process would be significantly aided by oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served on the Court and opposing counsel via the ECF system on March 4, 2015 and that to my knowledge, all counsel of the record in this case are registered to receive service through that system. I futher certify, that seven copies of the brief will be submitted to the Court via FedEx for delivery within two business days of electronic filing. Service will be made by ECF to the following email addresses:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,868 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Mac 2011 in Times New Roman 14-point font.

Dated: March 4, 2015

/s/ *Scott D. Crowell*
SCOTT D. CROWELL

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

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Dated: March 4, 2015

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